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INTERNATIONAL CIVIL AVIATION ORGANIZATION

INTERNATIONAL CONFERENCE ON AIR LAW

(Convention for the Unification of Certain Rules for International Carriage by Air)

Montreal, 10 – 28 May 1999

VOLUME I

MINUTES

1999

MONTREAL **CANADA**

DCW

International Civil Aviation Organization

INTERNATIONAL CONFERENCE

ON AIR LAW

Montreal, 10 – 28 May 1999

VOLUME I

MINUTES

1999

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INTRODUCTION

The International Conference on Air Law which met in Montreal from 10 to 28 May 1999 was held under the auspices of the International Civil Aviation Organization. Previous International Conferences on Air Law were held, *inter alia*, at Rome (1952), The Hague (1955), Guadalajara (1961), Tokyo (1963), The Hague (1970), Guatemala City (1971), Montreal (1971), Rome (1973), Montreal (1975), Montreal (1978), Montreal (1988), Montreal (1991).

The Conference was convened for the purpose of considering the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*, approved by the 30th Session of the ICAO Legal Committee and refined by the Special Group on the Modernization and Consolidation of the "Warsaw System".

History

The 31st Session of the ICAO Assembly, which was held from 19 September to 4 October 1995, directed the ICAO Council to continue its efforts to modernize the "Warsaw System" as expeditiously as possible. In order to facilitate progress on this subject, the ICAO Council decided in November 1995 to establish a Secretariat Study Group with the task of assisting the Legal Bureau of ICAO in developing a mechanism within the framework of ICAO to accelerate the reform of the liability regime established under the Warsaw Convention and other related air law instruments. The Study Group's recommendations called, *inter alia*, for the adoption of a new international legal instrument which would consolidate and modernize the "Warsaw System".

Having considered the matter, the Council decided to refer this subject to the ICAO Legal Committee and requested the Legal Bureau, assisted by the Secretariat Study Group, to present a first draft of the new instrument. It was also decided to appoint a Rapporteur who would review the draft instrument and report thereon to the Legal Committee. On the basis of a draft text developed by the Legal Bureau with the assistance of the Study Group, and taking into account the Rapporteur's Report, the 30th Session of the Legal Committee (28 April to 9 May 1997) reviewed the matter and approved the text for the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*. The Report of the 30th Session of the Legal Committee will be found in Doc 9693-LC/190 (reproduced in Vol. III of these Proceedings).

As the text approved by the Legal Committee had not entirely resolved a number of elements of the draft text to finality, the 152nd Session of the Council decided to establish the Special Group on the Modernization and Consolidation of the "Warsaw System", with a view to complementing the work of the Legal Committee and refining of the draft text, and ensuring that the preparatory work had reached the required level of maturity. The Special Group convened from 14 to 18 April 1998 and approved a refined draft text of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air*.

Action by the ICAO Council

Acting under Resolution A31-15 Appendix B *(Procedure for Approval of Draft Conventions on International Air Law)*, the Council decided in June 1997 to circulate for comment the draft text approved by the 30th Session of the Legal Committee to States and international organizations. Having reviewed the comments on this matter and following the conclusion of the meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System", the Council decided on 3 June 1998 to convene an International Conference of Plenipotentiaries to be held at Montreal from 10 to 28 May 1999, for the purpose of consideration and adoption of the *Draft Convention for the Unification of Certain Rules for International Carriage by Air.*

Documentation

Volume I of this document contains the Minutes of the Plenary Meetings of the Conference, the Minutes of the Commission of the Whole and the Minutes of the "Friends of the Chairman Group".

Volume II contains the working documents of the Conference.

Additional documentation pertaining to the preparatory stages of the Convention, including the reports of the meetings of the Secretariat Study Group and the report of the meeting of the Special Group on the Modernization and Consolidation of the "Warsaw System", is reproduced in Volume III.

The Convention, the Final Act and Resolutions

Following its deliberations, the Conference adopted the text of the *Convention for the Unification of Certain Rules for International Carriage by Air*. The Convention was signed on 28 May 1999 on behalf of the following fifty-two (52) Governments:

Bahamas
Bangladesh
Belgium
Belize
Benin
Bolivia
Burkina Faso
Cambodia
Chile
China
Côte d'Ivoire
Cuba
Czech Republic
Denmark
Dominican Republic
France
Gabon
Germany
Ghana
Greece
Iceland
Italy
Jamaica
Kenya
Kuwait
Lithuania
Madagascar
Malta
Mauritius
Mexico
Monaco
Mozambique
Namibia
Niger
Nigeria
Pakistan
Panama
Poland
Portugal
Saudi Arabia
Senegal
Slovakia
Slovenia
South Africa
Sudan
Swaziland
Switzerland
Togo
Turkey
United Kingdom
United States
Zambia

The Final Act of the Conference was signed on 28 May 1999 at Montreal on behalf of the following one hundred six (106) Governments and one Regional Economic Integration Organisation:

Afghanistan
Algeria
Argentina
Australia
Austria
Azerbaijan
Bahamas
Bahrain
Bangladesh
Belarus
Belgium
Belize
Benin
Bolivia
Botswana
Brazil
Burkina Faso
Cambodia
Cameroon
Canada
Chile
China
Colombia
Côte d'Ivoire
Cuba
Cyprus
Czech Republic
Denmark
Dominican Republic
Egypt
Ethiopia
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France
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India
Indonesia
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Qatar
Romania
Russian Federation
Saudi Arabia
Senegal
Singapore
Slovakia
Slovenia
South Africa
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Sri Lanka
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Turkey
Uganda
Ukraine
United Kingdom
United States
Uruguay
Uzbekistan
Venezuela
Viet Nam
Zambia
Zimbabwe

Holy See, The

European Community (EC)

The Conference also adopted by consensus three Resolutions which are set out in the Final Act.

The texts of the Convention and of the Final Act are reproduced in Volume II of this document*.

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* The text of the Convention will be found at the end of Volume II. It should be noted that DCW Doc. No. 57 does not represent the final text, as minor editorial changes were made to it.

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DCW
27/5/99

INTERNATIONAL CONFERENCE ON AIR LAW
CONFÉRENCE INTERNATIONALE DE DROIT AÉRIEN
CONFERENCIA INTERNACIONAL DE DERECHO AERONAUTICO
МЕЖДУНАРОДНАЯ КОНФЕРЕНЦИЯ ПО ВОЗДУШНОМУ ПРАВУ

Montreal, 10 - 28 May 1999

LIST OF DELEGATES No. 5

CD	-	Chief Delegate
ACD	-	Alternate Chief Delegate
D	-	Delegate
ALT	-	Alternate
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COBS	-	Chief Observer
OBS	-	Observer

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COBS	-	Observador principal
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****(22-28 May)**

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Commission Latino-Américaine de l ' Aviation Civile (CLAC)
Comisión Latinoamericana de Aviación Civil (CLAC)
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Amendments to the list should be notified to the Office of the Chief, Conference and Office Services Section.

Toute modification à la liste devra être notifiée au bureau du chef de la Section des conférences et des services de bureau.

Todas las enmiendas de la lista de delegados deberán entregarse a la oficina del Jefe de la Sección de servicios a las conferencias y oficinas.

О всех изменениях к настоящему списку следует сообщить начальнику Секции обслуживания конференций и помещений.

* Accompanied by spouse or other members of family
* Accompagné de son conjoint ou d' autres membres de sa famille
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INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the First Meeting
(Monday, 10 May 1999, at 1100 hours)

SUBJECTS DISCUSSED

1. Agenda Item 1: Opening of the Conference by the President of the Council

2. Agenda Item 2: Adoption of the Agenda

3. Agenda Item 3: Adoption of the Rules of Procedure

4. Agenda Item 6: Establishment of Credentials Committee

5. Agenda Item 7: Organization of work:

   a) procedure for the consideration of the draft Convention for the Unification of Certain Rules for International Carriage by Air

   b) establishment of the Commission of the Whole and Committees as necessary

6. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

Agenda Item 1: Opening of the Session by the President of the Council

1. The President of the Council, Dr. Assad Kotaite, as Temporary President of the Conference, declared the International Conference on Air Law open and spoke as follows:

"It is my honour and privilege to declare open this International Conference on Air Law. On behalf of the Council and the Secretary General of the International Civil Aviation Organization, I wish to extend to all Delegates and Observers a warm welcome to ICAO's Headquarters.

Almost 70 years ago, in October 1929, air law experts from 31 States gathered in Warsaw, Poland, to adopt what is considered to be one of the most widely adhered-to instruments of private

international law. With tremendous wisdom and foresight, these delegates created a legal framework without which an orderly development of international civil aviation would have been unthinkable. While complete unification of law was neither attainable nor desirable, the Warsaw Convention laid down certain vitally important rules for international carriage by air. It determined the internationally accepted liability rules regarding passengers, baggage and cargo in case of accidents; it set out the requirements as to format and content of air transport documents; and it established ground rules regarding procedure.

International law is a constantly evolving body of norms commonly observed by the members of the international community in their relations with one another. ICAO is constantly involved in this evolution as it relates to civil aviation. Reform and modernization are essential components in this process.

While the Warsaw Convention of 1929 was adopted at a time when international civil aviation was still in its infancy, the present-day aviation industry bears little resemblance to its precursor. Technologically-sophisticated equipment, increased mobility of the passenger, a virtually worldwide operating marketing web, and globalization of air transport operations, are only some of the new phenomena that can be observed at the threshold of the new millennium. These new realities have also made those of us who are involved in the law-making process aware that the rules of law must evolve in accordance with technical, social and commercial developments, and that the modernization of the relevant rules governing these activities becomes an essential challenge for those concerned — governments, industry, and the travelling public. The initial balance of interests between the desire on the part of governments to protect the infant airline industry from undue financial burden and the individual's right to restitution in case of accident has been the subject of discussion and review for a significant period of time. This review has certainly to take adequate account of the fact that the aviation industry has matured. Increased sensitivity towards the legitimate interests of the air transport user requires that the balance of interests should also accommodate the need for a better and swifter resolution of the consequences of an accident.

Over the span of the last 70 years the Warsaw Convention has evolved, for various reasons, into what is commonly referred to as the "Warsaw System", a system of amending Protocols and supplementary instruments, whose complexity and degree of fragmentation has become well-known to all of us. Its complexity has been further extended by additional rules, regulations and industry-based solutions, some of which are regional in nature or scope. The result of these uncoordinated efforts is an increasingly opaque legal framework whose usefulness for the travelling public has become a matter of growing concern, and it is the shared desire of the parties involved that legal certainty and uniformity be restored, while implementing, in a globally-coordinated fashion, the long overdue modernization and consolidation of the system.

I attended for the first time the Tenth Session of the ICAO Legal Committee in 1953 in Rio de Janeiro, Brazil. I also attended the International Conference on Air Law held in 1955 in The Hague which adopted the Protocol amending the Warsaw Convention of 1929. I remember these early days with great emotion as they represented the beginning of my long career at the service of the international civil aviation community.

The subject of modernization and consolidation of the Warsaw System has been on the agenda of ICAO's activities for over four decades. Since the 31st Session of the ICAO Assembly in 1995, the work on this matter has refocused. I would like to pay tribute to the work of the ICAO Secretariat Study Group, whose excellent contributions have played an instrumental role in the development of the

new draft instrument, which is presented to this Conference for consideration. I wish also to express my gratitude to the Rapporteur on the subject "The modernization and consolidation of the Warsaw System", Mr. Vijay Poonoosamy, who represented Mauritius at the 30th Session of the Legal Committee. His detailed study enabled the Legal Committee, convened under the Chairmanship of the distinguished Delegate from Egypt, Dr. Khairy El Hussainy, to further progress the work and to prepare the text of the "Draft Convention for the Unification of Certain Rules for International Carriage by Air" at the end of its Session in May 1997.

You will recall that the draft text approved by the 30th Session of the Legal Committee retained a number of provisions in square brackets, notably, those relating to the liability regime and the availability of the so-called fifth jurisdiction. In consideration of this matter, the Council decided that the text should be further refined in these limited areas, with particular regard to the overall objective of global uniformity. This task of refining the text in some limited areas was carried out through the extraordinary efforts of the "Special Group on the Modernization and Consolidation of the Warsaw System". This body of experts, which met in April of 1998, revealed in a very convincing manner that solutions can be found in an atmosphere of dedicated debate and a spirit of cooperation and compromise.

The Special Group was assisted in its efforts by the members of the Secretariat Study Group and was in a position to draw upon the comments ICAO had received from Contracting States in the course of 1997. As a result, the draft text submitted for your consideration reflects these various contributions and essentially no longer contains any provisions in square brackets. The text presented to you is by no means uncharted territory. It fully encapsulates familiar rules and provisions, the wording of which has accompanied us for several decades. It additionally provides, in certain key areas, a modernized legal framework destined to serve the objectives of the international aviation community in the new millennium. It is the outcome of more than three years of spirited consultations and deliberations in the various bodies of ICAO which were involved in this preparatory process.

The results achieved were carefully reviewed by the 32nd Session of the ICAO Assembly in September/October last year where the decision was made to provide Contracting States in various regions an opportunity to examine the proposed draft Convention in more detail so as to enable them to better clarify their position prior to the Diplomatic Conference. In this context, the Legal Bureau of ICAO conducted a number of regional briefing sessions, which took place between December 1998 and April 1999 in Mexico City, Paris, Dakar, Nairobi, Cairo and Bangkok. These briefings were attended by participants from 105 Contracting States. It has been reported to me that these meetings fully met their objective and that the briefings served as an excellent tool for a better understanding of crucial elements of the Draft Convention. The degree of active participation by Contracting States not only reflected the strong interest in the subject matter but also the desire to support a successful outcome of the Diplomatic Conference.

This Conference is a consolidation of efforts and not primarily innovations and should therefore avoid the polarization of issues. Although there are delicate issues at stake, I would like to invite all of you to work in a spirit of cooperation in order not to leave the situation as it currently exists. We have to provide the world with a revised Convention which will respond to the needs of States, the travelling public, air carriers, and the air transport industry in the third millennium. We should not allow this Conference to fail. The final text of the Convention will be open for signature by States and should be ratified as early as possible in accordance with the legislation of each State. I would, therefore, suggest that the Conference adopt a resolution to this effect.

We want this Conference to succeed. In this regard, many suggestions and proposals have been made to find good solutions to the various difficult and complex ills of the Warsaw System. I would like to remind you of the old and wise "adage": "The best is the enemy of the good", which I will ask you to keep in mind throughout your negotiations, and particularly whenever these negotiations seem to reach an impasse. The overall objective of this Conference should always remain present in your minds.

Let me leave you with a reflection which I expressed in October 1995 in addressing the Institute of Air and Space Law of Leiden University in the Netherlands. Law, in my view, continues to be a "temple of conservatism" as dictated by the rigid concepts of sovereignty and national interest. As an internationalist, I sincerely believe that based on global cooperation by States, we should move toward greater internationalism in an era of globalization.

I thus have no doubt that your proceedings, deliberations and discussions will be inspired by a significant momentum and that you will wisely use this important opportunity. The task ahead of you is one of historic proportions. The entire international aviation community is looking to this Diplomatic Conference with high expectations and I am confident that this Conference will fully reach its objectives.

I wholeheartedly wish you every success in your endeavours."

2. The Secretary General joined the President of the Council in welcoming Delegates to the Conference which, over the course of the coming three weeks, would deal with a subject of the highest importance for the Organization, namely the modernization and consolidation of the Warsaw System. He then introduced the Directors of the different Bureaux at ICAO who were attending this meeting, as well as the other Secretariat members who would be officers of the Conference, and wished Delegates every success in their endeavours.

Agenda Item 2: Adoption of the Agenda

3. The Plenary adopted the provisional agenda in the form presented in DCW Doc No. 1.

Agenda Item 3: Adoption of the Rules of Procedure

4. The Plenary next reviewed and adopted the provisional rules of procedure as presented in DCW Doc No. 2. It was noted, in connection with Rule 27 (Languages), that whereas the rules of procedure of previous air law conferences had been based on four languages of the Organization, for the purposes of this Conference the Arabic language had been added in accordance with the decisions of the Council. As far as simultaneous interpretation was concerned, services in a sixth language, i.e. Chinese, would also be available. For reasons of resources, it was not possible to make full services, particularly as regards translation, available in Chinese, and Rule 27 therefore did not list expressly the Chinese language.

Agenda Item 6: Establishment of Credentials Committee

5. In accordance with Rule 2 (Credentials and Credentials Committee) of its rules of procedure, the Plenary established the Credentials Committee. The Temporary President requested the Delegations of Côte d'Ivoire, Finland, Jordan, Pakistan and Panama to designate one member of their delegations to sit on the Credentials Committee, which would meet as soon as possible after this meeting.

6. At this point the Temporary President informed the meeting that up to that hour, 89 Contracting States, one non-Contracting State and 10 international organizations had registered, the total number of participants being 272.

Agenda Item 7: Organization of work

7. Before turning to the procedural matters relating to the organization of the Conference's work, the Secretary of the Conference expressed his pleasure in seeing this International Conference on Air Law convene in order to deal with the modernization of the Warsaw System, a subject which had been on the agenda of the ICAO Legal Committee for so many years and which was of great importance for the further development of international civil aviation. The Conference had a window of opportunity to modernize and consolidate a system in need of such updating, and it was his hope that it would be possible to seize this opportunity, while at the same time keeping in mind the objective that any instrument which may emerge from the Conference's efforts should be ratifiable. The Secretary of the Conference suggested that the objective of "ratifiability" be kept in mind throughout the proceedings.

8. The Secretary then reviewed the physical arrangements and structuring of the Conference's work, indicating that the function of the Commission of the Whole would be to guide the work of all the subsidiary bodies, except the Credentials Committee which would report directly to the Plenary. If considered necessary or useful, a drafting committee could at an appropriate time be set up, as well as working groups which could be tasked with substantive matters of a controversial or other critical nature, and, in due course, a committee on final clauses, as was often the practice with diplomatic conferences. The drafting committee and working groups would report to the Commission of the Whole. DCW Doc No. 3, setting forth the text of the draft Convention, would be the basic document for consideration by the Conference. Directly related to this document was DCW Doc No. 4, which contained a reference text identifying the modifications made to the original Warsaw Convention and indicating the origin of each such modification.

9. The Plenary established the Commission of the Whole, open to all Delegations in accordance with Rule 5 (1) of its Rules of Procedure. The Temporary President suggested that the Commission of the Whole hold its meetings as public meetings. It was important that international organizations, which had a keen interest in the subject and which represented industry and other partners, be invited to take part in the discussions of the draft Convention.

Agenda Item 9: Consideration of the draft Convention

10. The Temporary President invited Delegations to present general views on the draft Convention reproduced in DCW Doc No. 3, and in particular on Chapter III (Liability of the Carrier and Extent of Compensation for Damage) of the draft.

11. The Delegate of Austria requested clarification as to how the Conference intended to proceed when it came to the question of nuclear damage, suggesting that it would be appropriate for the Commission of the Whole to set up a working group to deal with this issue. The Temporary President concurred that the Commission of the Whole could decide to establish a working group to address the issue raised by the Delegate of Austria as well as other items.

12. The Delegate of Côte d'Ivoire was concerned that the provisions contemplated in Article 20 (Compensation in Case of Death or Injury of Passengers), with limited liability starting at 100 000 Special

Drawing Rights (SDR), could compromise the survival of small carriers. It would be appropriate for the Conference to be able to envisage provisions that should be taken, perhaps in a provisional manner, in order to protect small carriers, so that they could compete with larger carriers and face such liabilities. The Delegate of Côte d'Ivoire was also concerned by the figure of 4 150 SDR contemplated under Article 21 A (Limits of Liability), which would involve great financial risks for small carriers and affect their commercial policies. Were there to be competition between a large and a small carrier, the large carrier, being in a position to reimburse 4 150 SDR, would automatically be chosen by the passenger who would know that the small carrier, in the case of loss of baggage, would have difficulty paying such damages. In States such as Côte d'Ivoire, small carriers already faced difficulties in establishing themselves, be it in terms of operating their networks or in balancing revenue and expenditures. The Delegate of Côte d'Ivoire did not wish to see any discrimination among countries, but highlighted the need for a general text which would take into account the very real concerns of developing countries. The Delegate of Cameroon shared the concerns expressed by Côte d'Ivoire concerning the situation of carriers in developing countries. As a whole, Cameroon fully supported the provisions in the draft Convention, the philosophy of which was to improve the protection of victims of air accidents while bearing in mind the interests of carriers. The Cameroon Delegation would make its contribution over the course of the Conference with a view to arriving at a universally applicable, obligatory Convention.

13. The Delegate of Brazil expressed his Delegation's gratitude to those who, over the past few years, had contributed to bringing a new draft text of the Warsaw Convention before the aviation community convened at this Conference. His Delegation considered the text to be the second most important international legal instrument in the civil aviation field; together with the Chicago Convention, the two documents would constitute the fundamental pillars of the world aeronautical law structure. The new Convention should not, however, be a mere assemblage of a legal text, but an effective instrument for the next century. With this in mind, the Brazilian Delegation wished to see the inclusion of provisions which had been required for some time by the travelling public, one of these being a reference, in Article 16 (Death and Injury of Passengers — Damage to Baggage) to recovery from mental injury, taking into account that the state of health of a person included both physical and mental aspects. The Delegate of Brazil also considered it important to insert, in the last sentence of Article 16, paragraph 1, the word "solely" to qualify "the state of health of the passenger", in order to avoid situations whereby responsibility would be shifted to the passenger and/or his family in providing information on medical history.

14. The Delegate of Singapore considered that the civil aviation industry was at a crossroads at the moment; whereas the issues which had arisen over the years under the Warsaw System and the variety of instruments supplementing the main Convention had been dealt with in an ad hoc fashion, today the international community was gathering to look at a composite instrument which hoped to cover all areas in a single document. Much work had already been done and would assist the Conference in focusing at least on one instrument in addressing many critical areas. Singapore looked at this endeavour with an open mind and would participate constructively in moving the process forward.

15. The Delegate of Argentina fully supported the Organization's initiative towards obtaining a universal, harmonious and realistic instrument to regulate air transport and the reliability of the carrier vis-à-vis the user. Over the coming days and with the support and cooperation of Delegations present, the Argentine Delegation hoped to reach the objectives contemplated within the framework of ICAO and in the light of certain main features of air law such as its international nature, uniformity and dynamism.

16. While welcoming the idea of a conference to modernize, harmonize and consolidate the Warsaw System, the Delegate of Germany indicated that as regards Chapter III and the request put forward by the Temporary President for Delegates' input, Germany could, in general terms, accept the content of the proposed chapter and had no difficulty, in particular, with the two-tier liability system and many other ideas in this context. While some minor points, such as the definition of damage or the problem of jurisdiction, would need discussion, the German Delegation would act in a constructive manner to find a compromise and arrive at a good solution at the end of the Conference.

17. The Delegate of Mauritius commended ICAO and all those who had contributed to bringing the international community to this historic turning point for the seventy year-old Warsaw Convention. To promote the success of this Diplomatic Conference and, even more importantly, ensure that the new Convention did not suffer the fate of the Guatemala City Protocol and Montreal additional protocols, it was urgent — indeed, crucial — that all those participating in this Conference recognize that it would never be possible to meet all the expectations of all the stakeholders. It would be necessary for everyone, individually and collectively, to be willing and able to make the necessary compromises to promote equity, uniformity and the ratification of a new Convention. The Delegation of Mauritius was therefore committed to working with everyone present towards making this Conference a success.

18. The Delegate of Ghana also commended the initiative of the ICAO Secretariat for championing the unification exercise, and recorded his Delegation's profound appreciation to the Legal Committee and the Special Group on the Modernization and Consolidation of the Warsaw System.

19. The Delegate of France expressed his pleasure with the convening of this Conference and with the aim of the unification of international air law, which had been dangerously compromised by the appearance of more than 40 specific liability regimes. It was a tremendous challenge, but also a highly stimulating one, since if the outcome was successful it would define air law for the twenty-first century, a century which would witness tremendous growth in international air transport. In order to be successful in the limited period of time offered to Delegates, the Conference should take into account the numerous in-depth deliberations which had already been carried out by experts, and not revisit what had already been achieved through the work of panels. What was important above all was to consolidate the elements achieved thus far.

20. Highlighting the need for a sense of compromise on sensitive issues, the Delegate of France invited other Delegations to study in greater depth the texts appearing in square brackets, which represented compromises, since greater scrutiny might succeed in solving many of the problems encountered thus far. The French Delegation was ready to fully participate in the deliberations of the Conference, whose success depended not only on obtaining a text, but also on obtaining the greatest possible number of ratifications. Experience proved that previous conferences had arrived at texts which sometimes appeared to be revolutionary but which had not subsequently been ratified by a sufficient number of States, thus contributing to a fragmentation which was detrimental to air law. The only approach to obtaining as many ratifications as possible was to arrive at a balanced text reflecting the interests of different parties. The different States represented at this Conference had varying levels of wealth; whereas some had large, highly respected international carriers representing a large percentage of air commerce, other countries had small carriers who were still developing and who should not be handicapped by the adoption of solutions which were too stringent for them. It would therefore be necessary to achieve a balance among States and between carriers and passengers.

21. The Delegate of Sweden agreed that the outcome of the Conference would be a compromise between States, and in this regard observed that to a compromise there were three features; it should be fair, it should be workable and it should be legal. Only the future could tell what would be fair, but "workable" meant that the parties — i.e. the carriers, consignors and passengers — should be able to use the document, which should relate to the practices of today. Time had overtaken the present version of the Warsaw Convention, especially in relation to questions brought up within Chapter III where there were widespread practices among carriers that went beyond the provisions set out to date. In connection with the legal element, one had to take up the concept of ratifiability. It was important that the final documents be quickly and widely ratified around the world. When determining the legal value of a compromise, one should not look only at the specific text, but also at how it would work within the general legal context. When Governments considered whether to ratify the final product of this Conference, they would determine how it fit within the larger framework of international law.

22. The Delegate of the Czech Republic emphasized the need to accept, as soon as possible, the consolidated text of a new Convention which would reflect the interests of air carriers as well as passengers and which would modernize the Warsaw System, replacing more 40 different regimes of liability. The new document, once established as a world-wide system, would increase the juridical certainty of passengers. The Czech Republic, as well as other Member States of the European Civil Aviation Conference (ECAC), considered the consolidated text as modified by the 30th Session of the Legal Committee, in which the Czech Republic had actively participated, and amended by the ICAO Council, as an adequate basis for the Conference. The Czech Delegation wished to be associated with the DCW documents presented by ECAC States, and believed it was of utmost necessity to arrive at a solution acceptable to all States, trusting that through compromises and negotiations a positive and consistent document would be agreed upon.

23. The Delegate of the United States thanked the President of the ICAO Council, the Secretary General, and the Director of the Legal Bureau, Secretary of the Conference, for their commitment to modernizing the airline liability regime. He also thanked Dr. Kotaite for his comments on ensuring an open meeting. The Delegation of the United States wished to work with everyone present to ensure that all interested parties, including victims groups, had a voice in the important work of ICAO. The United States believed that the work at hand was an important agenda and that the international community's collective airline liability regime should be updated for the needs of the twenty-first century. Adequate and uniform legal protection for passengers were long overdue, and everyone present had a collective interest in ensuring a fair, just and accessible system for seeking compensation for victims' losses.

24. To be successful in these efforts, the Conference would have to begin with the following fundamental principle: Parties to the ICAO Conference would have to move forward, and only forward, from where the Warsaw regime stood today. In an effort to modernize the Warsaw System, the Conference could not roll back existing rights established under international law or other widely established international norms. It would therefore have to build upon the latest and most comprehensive inter-carrier agreements which now had over 120 signatory airlines from a large number of countries representing over 90 per cent of scheduled international air passenger traffic. The inter-carrier agreements removed all caps on passenger liability and provided for an amount of strict liability. Further, the Conference could not in any form back away from any of the beneficial and hard fought-for provisions of Montreal Protocol No. 4, which was now in force and represented the state of law for approximately 40 States. The current draft which the Conference was considering today made a number of changes to Protocol No. 4 which were unnecessary and which could only create confusion in the uniformity of the

very recent modernization of Warsaw cargo standards. Those standards defined the status quo and would have to be maintained to preserve existing international law and established norms.

25. In addition, the United States believed that essential elements of a new agreement must include the following:

— First, an expansion of the four bases of jurisdiction to allow claimants to sue in a fifth jurisdiction; i.e. the State of the passenger's principal and permanent residence. The United States believed this change was a matter of fundamental fairness, ensuring that two victims, similarly situated, had similar access to justice. Work thus far had produced a clear and reasonable standard which, as a number of countries had stated, protected small domestic carriers from additional litigation when the test of sufficient contacts with the jurisdiction were not met. The United States also believed that the doctrine of forum non-convenience would provide discipline against unwarranted forum shopping.

— Second, the Conference would have to ensure that it did not aggravate the current patchwork system of rules. More specifically, it would have to ensure that when a new Convention entered into force, it represented a majority of the world's air traffic and leading aviation markets.

— Third, as had been contemplated in earlier drafts of the Convention, separate recovery from mental injury in the absence of accompanying physical injury would have to be provided for.

— Fourth, the existing burden of proof on carriers would have to be preserved. The United States could not accept the reversal of the burden of proof, putting a burden on plaintiffs as part of a compromise or in exchange for other provisions.

26. The United States recognized that these important goals might prove difficult for the Conference to reach. Indeed, its concerns that consensus on these difficult issues would be elusive had inspired its initial and continuing reluctance to schedule and participate in this Conference. The United States' decision to participate had been based on the very positive input it had received from many countries, indicating their common desire to advance the rights of passengers. It was hoped that there was common will among the Delegates to this Conference to achieve these goals.

27. The Delegation of the United States was prepared to work to develop a comprehensive liability regime that protected and promoted the interests of passengers, carriers and communities for the twenty-first century. But as it did so, the Delegation of the United States had a responsibility to the Conference and a commitment to the United States Senate to provide its best judgement as to whether an agreement in this forum would meet the test of the Senate at home in Washington. It was hoped that other countries would similarly give the Conference the benefit collectively of their judgement as to whether or not what was agreed to would be ratifiable. It was not in the interests of the Conference, of the public, or victims or carriers, or of ICAO, for the Conference to agree on a text which would remain in limbo for year after year, because of its inability to be put in place by domestic ratification procedures.

28. Further general views were deferred to the next meeting, and the meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the Second Meeting
(Monday, 10 May 1999, at 1430 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

1. The Temporary President informed the meeting that up to this hour, 92 Contracting States, one non-Contracting State and 11 international organizations had registered, the total number of participants being 303.

Agenda Item 9: Consideration of the draft Convention

2. The meeting returned to general views on the draft Convention reproduced in DCW Doc No. 3, and in particular Chapter III (Liability of the Carrier and Extent of Compensation for Damage).

3. The Representative of Panama observed that the dynamic nature of aviation and the great changes that had taken place in international air transport since the signing of the Warsaw Convention in 1929 had resulted in a need to change the provisions of the Convention, particularly those related to the limitations of liability of the air carrier. The draft Convention that would be discussed at this Conference provided a legal and economic solution based on balancing the interests of the carrier with those of the users. Furthermore, it had the virtue of ensuring the universality of the system, avoiding a multiplicity of unilateral solutions in the domestic legislation of various countries. As a result, the Government of Panama agreed with the draft Convention, and in particular with the proposed creation of a fifth jurisdiction, as provided for in the current text of Article 27, with the exception of paragraph 3 *bis* appearing in brackets. The Delegate of Panama agreed with Delegations who saw a need to include a reference to mental injury, and expressed his Delegation's agreement with the structure of limits of liability as contained in the draft. His Government believed that air carriers could avoid liability in those cases in which damage or injury to a passenger was due only to the passenger's state of health; Article 16 (Death and Injury of Passengers — Damage to Baggage) should, however, be drafted so as to include the word "solely" as had been the case in earlier drafts.

4. The Delegate of Algeria observed that ICAO was at an important crossroads in its history, with the international community at the threshold of the third millennium which would see rapid changes and a move towards globalization. Cognizant of the need to reach an agreement which would be comprehensive and fair, the Delegate of Algeria observed that the Convention would have to be balanced

and take due consideration of the interests of the passenger on one hand, and of the carriers, whether large or small, on the other. The Convention should also fit in the general framework of international law.

5. The Delegate of Spain expressed his Delegation's willingness to cooperate in every possible way towards the success of the Conference. Spain had come with an open mind, willing to seek an equitable solution to all of the problems facing the Conference. Air law was a universal law and must be uniform. Mention had been made of fairness and balance as fundamental elements of law, and from that perspective Spain sought a peaceful solution to any conflict, an attitude which would have to serve as a focus of the Conference. The Delegate of Spain wished to bring attention to the impact of the possibility that the European Union would become a signatory of the Convention. The Council of the European Union had, in 1997, adopted Council Regulation (EC) No. 20/27 of 9 October 1997 on air carrier liability in the event of accidents; this was an important point if consensus was to be reached guaranteeing the success of the future Convention.

6. The Delegate of Poland brought greetings from Warsaw to all participants of this Conference who had come to improve and consolidate the Warsaw System, a system which was 70 years old. The success of the Warsaw Convention, which had become the most widely accepted private law convention in the world, had been possible because of the spirit of compromise adopted by the participants of the Warsaw Conference. In fact, participants in Warsaw had had to achieve a compromise between different systems prevailing in different States concerning strict liability based on fault, waiving of liability by contractual clauses, limited and unlimited liability, and different concepts regarding jurisdiction. The Warsaw Conference had also reconciled the interests of more developed and less developed aviation countries, as well as the interests of air carriers and of their clients, the travelling public. Since 1929, the world had changed; aviation had developed and the expectations of the public had largely increased. Unfortunately, efforts to improve the Warsaw System through additional protocols had failed and the outstanding problems had become more and more acute, with the need for new solutions increasingly evident. In order to achieve real success, the new system could not abandon the idea of compromise and equilibrium, an idea already endorsed by many speakers. The Delegation of Poland subscribed to those views and would support efforts towards finding fair and balanced compromise solutions likely to be accepted by the international community.

7. The Delegate of Pakistan observed that the Warsaw Convention had encountered some turbulent times but had survived for 70 long years. One must not forget the pioneers who had created the liabilities for carriers and safeguarded the interests of passengers. Pakistan intended to participate actively during the Conference to make the Convention a success. The Delegation of Pakistan wished to see the Montreal Convention as a document of the twenty-first century, both for passengers as well as carriers.

8. Commenting specifically on Chapter III of the draft, the Delegate of Finland believed that it was, generally speaking, well-balanced and took into account the recent developments in the field of air transport as well as the views of the various interest groups. With some minor modifications, the text could well form the basis for a balanced compromise. In opening the Conference, the President of the ICAO Council had stated, quite appropriately, that the best was the enemy of the good. Finland believed that a compromise was indeed needed to ensure the widest possible acceptance for the new Convention. Finland would cooperate in a positive spirit in order to achieve a formula that would meet the challenges of the future.

9. The Delegate of India accepted the need to modernize, consolidate and update the Warsaw System. For this Conference to be successful, the Convention that it produced must be equitable, just and fair. It should take into account the interests of all stakeholders, particularly the passengers and small- and medium-sized airlines. Ensuring this balance of interests was the main reason for everyone to be present here today. Seventy years earlier, a similar issue had faced participants at the Warsaw Conference. They had found a good solution; a solution which had worked well for a long time before events had overtaken it. During the past 70 years, a number of developments had taken place which would have to be taken into account over the coming days. The world had changed in many respects during this period, although in many other ways the situation remained the same. As participants discussed various Articles of the Convention, particularly those relating to the liability regime and establishment of additional jurisdictions, they would need to uphold the spirit of compromise and the common will that other speakers had advocated. The Indian Delegation did not approach this Conference with any sine qua non, but rather with an open mind, hoping to see the emergence of a modernized, consolidated, updated and workable Warsaw System that would safeguard the interests of the various parties.

10. The Delegate of Guinea shared the concerns which had been conveyed at the previous meeting by Côte d'Ivoire regarding the smaller carriers, and trusted that, as had been the case in the past, it would be possible to reach a compromise. Guinea would make its contribution to ensuring the success of the Conference.

11. The Observer from the European Community had a very positive assessment of Chapter III in general. The European Community had legislation in this area and, as was stated in such legislation, was interested in achieving a uniform international regime. However, any erosion in the situation which the EC had established for its citizens would be very difficult for its parliament to accept. This did not mean that the Community could not consider, and probably accept, some of the ideas which would make it possible to have a wide international participation, since many of these matters were interrelated. Article 16 (Death and Injury of Passengers — Damage to Baggage) was of particular importance: mental injury as a concept was acceptable for the vast majority of EC member states; however, further wording would probably have to be developed in that context. Article 20 (Compensation in Case of Death or Injury of Passengers) was very satisfactory as it stood. Articles 21 C (Review of Limits) and 22 A (Freedom to Contract) were important in the sense that if not properly drafted, might lead to erosion of benefits for EC citizens in the future or even at this time. The European Community was determined to work constructively with others at the Conference to achieve a uniform system which could be widely accepted.

12. The Delegate of Canada expressed the hope that the Conference would reach an end that was compatible with the interests of the users of international air transport; it would be necessary to ensure a balance between the interests of the carriers and those of their clients. The Canadian Delegation had noted the concerns expressed in particular by the Delegations of Côte d'Ivoire, India, and Guinea on behalf of their small carriers. This was a concern which Canada shared, having many carriers which fell in that category, carriers that had a reasonable right to expect the equal opportunity and equal treatment cited in the preamble to the Chicago Convention. The Canadian Delegation would therefore be seeking a solution that would ensure a balance in interests in all parties' favour.

13. The Delegate of Japan observed that participants at this Conference assembled with firm determination, committing themselves to modernizing, consolidating and harmonizing the rules for international carriage by air, with its long pending issues, to be solved in a spirit of cooperation, mutual understanding and compromise. Not wishing to repeat the views already offered by other speakers, the

Delegate of Japan highlighted that an inter-carrier agreement with a "no caps on liability" regime in the case of death or injury of passengers was already in place at the initiative of Japanese carriers, and that Article 20 was a reflection of this practice; there should not be any movement away from the present practice already being implemented in Japan. It was Japan's sincere hope that the Conference would be able to produce a good Convention obtained by a consensus, overcoming any discrepancies in the existing views of participants.

14. The Delegate of China observed that the Warsaw Convention, created in 1929, had contributed greatly to the development of international civil aviation, particularly in terms of regulating its operations. However, as had been pointed out by many previous speakers, 70 years had passed since the creation of the Convention, over the course of which many things had changed. It was therefore necessary to introduce amendments to the existing arrangement. Owing to differences in the levels of civil aviation development among States, it would be very important to keep a balance between the interests of carriers and passengers. This was, in his view, a matter of concern upon which the Conference would have to focus its attention. The Chinese Delegation would work together with all other Delegations to make its contribution to the success of the Conference.

15. The Delegate of Kenya believed that when discussing this draft, Delegates should take into consideration the time and thought that had already been invested in it prior to the Conference. Kenya wished to see the draft finalized and was prepared to support all efforts to ensure that a final document which could be ratified by a majority of States within the shortest possible time was produced.

16. The Delegate of Lebanon hoped that the Conference would reach a beneficial outcome for the community of aviation in the world, taking into account the interests of passengers and carriers, and the economic, political and social aspects. He commended the goals which had been highlighted by most of the Delegates, these being fairness, the need to consolidate, and the need to produce a Convention which would be ratifiable by the largest possible number of States. On this basis, the Delegation of Lebanon was prepared to fully cooperate with everyone present to make the Conference a success.

17. The Delegate of Madagascar could only associate himself with all of the positive resolutions expressed today, particularly when speaking about the interests of air carriers, which were for the most part not represented at this Conference. As had already been pointed out, a number of airlines had already established provisions that suited them, giving rise to concerns on the part of other airlines in developing countries. The Delegate of Madagascar was therefore very supportive of suggestions such as those put forward by the Delegate of Canada for taking account of smaller carriers, and hoped that it would be possible to quantify the concessions that would be granted to smaller carriers in developing countries, in particular. Airlines in general, and certainly those in Africa, wished to reduce as much as possible the need to have recourse to the courts, and would above all express an interest in arrangements whereby matters could be settled at the airline level.

18. The Delegate of Saudi Arabia observed that the draft Convention provided the necessary groundwork for participants at this Conference to arrive at an acceptable and just formula for all concerned. His Delegation looked forward to participating with others with a view to reaching solutions that would take into account the interests of all parties concerned and encourage further development and modernization of air transport, allowing this industry to positively contribute to serving society in a safe, organized and economical fashion. The text before the Conference emphasized three major issues, i.e. the responsibility and liability of carriers, the limit of compensation, and the jurisdiction. Previous speakers had offered views regarding the objectives which the Conference was supposed to achieve, and there was

no doubt that Chapter III of the draft lay at the heart of this work. The Delegation of Saudi Arabia would cooperate with all Delegations present.

19. The Observer from the Latin American Association of Air and Space Law indicated that ALADA, a regional organism, had for more than three years been concerned with intensifying its studies through a number of meetings which had reached almost unanimous conclusions. First, ALADA saw a need to establish a formula which would provide for the elimination of limitations on liability. Compensation would only be sought for damages that were provable, and the burden of proof would be on the carrier as indicated in the present draft of Article 20. Recognizing that the complete elimination of limits on liability could give rise to considerable discussion, the Observer from ALADA maintained that if a carrier could exonerate itself in the three specific cases cited in Article 20 and if the damages to be compensated for were limited to those which were provable, it would be possible to avoid situations such as those faced in a number of countries where different interpretations were given to the Warsaw Convention on this question. As regards the question of loss or damage to baggage and cargo, Members of ALADA believed that the possibility of establishing a single figure should be considered, whereby a passenger would receive a fixed amount regardless of the value of the lost or damaged materials. Latin American legal experts had also agreed that mental injury should be included among the kinds of injury to be covered in Article 16 of the Convention, and supported the concept of the "fifth jurisdiction". In the case of Latin America, it had been possible on many occasions to bring the carriers of foreign jurisdictions before the courts simply on the basis of a domicile in the State in question. The main problem concerned the different definitions which could be applied to the term "domicile". Some States believed that a person or an enterprise could only have one domicile, and this was usually where the headquarters of an entity was located. In almost all Latin American countries, persons and companies could have more than one domicile. ALADA could therefore agree with the arguments set out by the United States in DCW Doc No. 12.

20. The Delegate of Indonesia would support every compromise solution arrived at by Delegations and wished to be associated with the concerns already expressed by some Delegations regarding the interests of small carriers.

21. The Observer from the Latin American Civil Aviation Commission reaffirmed LACAC's support for the draft presented by ICAO, and, as a contribution to the discussion, had presented a DCW paper providing the views of LACAC on Articles 16, 20 and 27 of the draft.

22. The Delegate of Yemen believed that the efforts made thus far had produced a balanced Convention that would take into account the interests of both passengers and carriers and allow all countries to participate in international air transport. Interests would therefore have to be balanced so as to guarantee further development of the aviation industry. The Delegate of Yemen emphasized the importance of reaching a consensus on this regime which was based on cooperation in an era where countries were increasingly interdependent, thanks to globalization, technical developments and the use of satellites in the air navigation field.

23. Adding his comments on the draft Convention, the Delegate of Namibia believed that this pithy elaboration of a single instrument detailing uniform rules for liability in international air transport would be to the benefit of all States, especially small States, for the simple reason that it would insulate them from unilateral and de facto amendments of the Warsaw System, amendments whose legality may be highly questionable. With regard to Chapter III of the draft Convention, Namibia was of the opinion that the present draft represented a finely balanced compromise position of the competing interests of

carriers, on the one hand, and the travelling public on the other. Namibia especially welcomed the new cap on strict liability relating to provable damages up to 100 000 Special Drawing Rights (SDRs). Finally, with regard to the potentially contentious issue of fifth jurisdiction, the Namibian Delegation was ready to contribute with an open mind to the search for an equitable and workable compromise, to ensure that the efforts of the coming three weeks' deliberations would result in a speedily ratifiable Convention.

24. The Delegate of Mexico believed it was essential that a fair balance be achieved between the interests of users and carriers; for passengers, there must be a guarantee of fair compensation, and for carriers, there must be feasible conditions for dealing with the results of accidents. Generally speaking, Mexico believed that the document which the Conference would examine was a good draft Convention. It was extremely important that participants at this Conference reach an agreement so as to ensure the subsequent ratification and adoption by the great majority of States and the continuing development of air transport. Mexico would do everything possible to contribute to that success.

25. The Delegate of Ukraine indicated that although he would be presenting some proposals regarding several aspects of the work which lay ahead of the Conference, he did support the underlying theme of the Conference and would take part in the consultative work; Ukraine would do its utmost to ensure that the Convention was made much more user-friendly to the carriers and passengers alike. The Convention would moreover take account of the interests of cargo carriers, and would enhance the overall position of ICAO in the liability regime.

26. The Observer from the International Chamber of Commerce indicated that in its function as the representative organization of the international business community since 1992, the ICC, and in particular its air transport commission, had been involved in commenting on the attempts to update the Warsaw liability system which governed the availability of damages to accident victims in international air transport. The ICC fully supported the achievement of a modern and satisfactory liability regime. In line with this objective, and in keeping with its consultative status in ICAO, the ICC was pleased to share its views on what it considered to be the main points of the ICAO draft Convention.

27. Subject to perhaps more detailed remarks at a later stage, the ICC endorsed the ICAO draft Convention because, in particular:

— ICAO was attempting to achieve global uniformity;

— the creation of unlimited liability was a realistic and logical step;

— the more prominent position of the passenger, based on consumer rights, had been recognized;

— a more coherent system applying also, for instance, to both the contractual and the actual carrier had been drawn up;

— the explicit exclusion of punitive damages was welcome; and

— the non-mandatory provisions on advance payment to be made to passengers, or persons entitled to claim on their behalf, would be supported if such claims were realistic.

28. The Observer from the ICC believed that studies may still be encouraged on some further points such as the requirement of written notice; the option of a fifth jurisdiction where some sort of compromise might be possible; the legal basis for claims exceeding 100 000 SDRs; fault to be proved by the claimant or presumed fault on the part of the carrier; the need for a definition of delay; and the desirability of regulating the phenomenon of over-booking in a world-wide convention as well as liability in the context of code-sharing and franchising arrangements. The ICC's primary aim was to support a framework for airline liability which would be characterized by global uniformity. Although the problem of low limits had been solved to a great extent by both the International Air Transport Association and the European Community, a much-desired uniformity was further away on a global level, and the achievements of IATA and the EC could only be seen as interim measures for a global solution in an ICAO Convention. Consequently, it would be desirable to have the Warsaw Convention replaced by a new uniform instrument prepared at a government level, such as this Conference. The ICC therefore hoped that this historic Conference would be successful in agreeing on a ratifiable new Convention in the spirit of reasonable compromise.

29. The Delegate of Egypt wished to emphasize the fact that the Convention should be just and balanced, taking into account the interests of all, be they advanced or developing countries, passengers or carriers. Egypt was keenly interested in its participation, and would offer detailed comments with respect to Articles 21 and 27, among others. It was hoped that the discussions would result in constructive and positive attitudes that would take into account all interests, especially the parties's concerns for the adverse impacts on medium and small carriers. The Delegate of Egypt wished to place on record his hope that the Conference would agree on a universally acceptable Convention based on practicable solutions, which would take balanced interests into account. That same approach had been adopted in the Legal Committee in elaborating this draft text, despite the pronounced divergencies in views, since the dire alternative would have been to destroy the very foundations of the harmonized and unified regime and therefore let countries apply measures unilaterally to the detriment to all concerned.

30. The Delegate of the Netherlands expressed appreciation for the excellent work which had been done so far regarding the revision of the Warsaw Convention, but observed that a lot of important work remained for this Conference. Several controversial issues had to be dealt with and resolving these issues would require a spirit of compromise on the part of everyone present. The Netherlands considered that a challenge, and aimed, in particular, at an up-to-date and adequate protection of airline passengers, not only regionally but also worldwide through a modernized Warsaw Convention. The Netherlands would actively contribute to the birth of a Convention that would be accepted universally and applied in as many countries as possible.

31. The Delegate of Gambia expressed his State's intention to make the Conference a success. Gambia had come with an open mind to discuss issues in the spirit of compromise. The Gambian Government subscribed to the need to modernize the Warsaw Convention, as speakers before had advocated. Gambia shared the concerns expressed by Côte d'Ivoire, France and Poland. With regard to the issue of mental injury, Gambia shared the views of the United States and China. It was hoped that the Conference would take into consideration the interests of children, women, consumers and all stakeholders.

32. The Delegate of Uganda indicated that as a developing country, Uganda, with its small carriers, looked forward to a unified system which would hopefully bring remedy and protection as appropriate. Uganda came with an open mind and promised to cooperate in all of the deliberations of this Conference.

33. Commenting on the draft Convention, the Delegate of Nigeria observed that the question of Chapter III, especially Articles 16 and 20, was vital to the interests of many Contracting States, in particular the small ones. Nigeria was gladdened, however, by the fact that virtually all speakers had indicated their willingness to strike a balance between the large carriers and the smaller ones, especially those in developing countries such as Nigeria. Thus, the outcome of the Conference, i.e. the Convention, would be one of uniform and fair and equal treatment to all users, allaying the fears expressed by the Delegates of Côte d'Ivoire and others. At this moment Nigeria wished to be associated with the question of compensating for the actual damages suffered, as opposed to the apparent ones, and asked for uniformity and not unilateral applications. It was hoped that the final outcome of the document would be workable and unambiguous for Contracting States to translate and implement. Nigeria was committed to working effectively with other participants at this Conference towards achieving a consensus on the modernization of the Warsaw liability system.

34. There being no further speakers, the Temporary President indicated that the general views which had been offered, in particular with regard to the subject of Chapter III of the Convention, which was the cornerstone of the draft, enabled him to offer some observations summarizing the substantive points. First of all, there was a sincere and strong desire to succeed. Secondly, there was a spirit of cooperation and understanding on the part of everyone to understand the problems faced by others, and this was very important in an international context. Thirdly, emphasis had been placed on the need to produce a fair and balanced text. The Temporary President was aware of the concerns of the small carriers, and believed it would be possible to accommodate their interests. Fourth, emphasis had been placed on producing a text which would not remain a dead letter filed away; the text should be such as to encourage States to ratify the modernization and unification of the Warsaw System as soon as possible. Fifth, in order to attain these results, the Conference would work in a spirit of internationalism; such a spirit prevailed at present, and the Conference should seize this momentum and not allow it to lose force.

11. The Meeting adjourned at 1730 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the Third Meeting
(Tuesday, 11 May 1999, at 1000 hours)

SUBJECTS DISCUSSED

1. Agenda Item 4: Election of the President of the Conference

2. Agenda Item 5: Election of Vice-Presidents of the Conference

SUMMARY OF DISCUSSIONS

Agenda Item 4: Election of the President of the Conference

1. The Temporary President of the Conference, called for nominations for the President of the Conference in accordance with Rule 4 (1) of the Rules of Procedure.

2. The Delegate of Germany proposed Dr. Kenneth Rattray, Chief Delegate of Jamaica who was well known to most delegates present having actively participated in the work of ICAO since 1964 and most recently having been awarded the Edward Warner Award at the 32nd ICAO Assembly. The Delegate of Saudi Arabia seconded the nomination which was further supported by the Delegates of Namibia, Mauritius, Egypt and Yemen.

3. The nomination was approved by acclamation, whereupon the Temporary President declared Dr. Rattray elected and invited him to take the chair.

4. Dr. Rattray thanked the Conference for the honour it had conferred on him and on his country by electing him President of the Conference. He thanked the Delegate of Germany in particular for having presented the nomination and the Delegates of Saudi Arabia, Namibia, Mauritius, Egypt and Yemen for their support. He realized the significance of this Conference, the challenges presented to the international civil aviation community in modernizing the "Warsaw System", and he would spare no effort in seeking to bring the deliberations of the Conference to a successful conclusion.

Agenda Item 5: Election of Vice-Presidents of the Conference

5. Pursuant to Rule 4 (2) of the Rules of Procedures, the President invited nominations for the office of First Vice-President to which the Delegate of Japan nominated Mr. A.J.H. Kjellin, Chief

Delegate of Sweden. The nomination was seconded by the Delegate of Argentina. There being no further nominations, the President declared Mr. Kjellin elected as First Vice-President of the Conference.

6. Mr. Kjellin thanked the Delegates of Japan and Argentina, expressed his gratitude to the Conference for the honour, and accepted the nomination on behalf of his country.

7. The Delegate of Singapore then proposed Mr. A. Mensah, Alternate Chief Delegate of Ghana as Second Vice-President of the Conference.The Delegate of Mexico seconded the nomination and in the absence of any other nomination, the President declared Mr. Mensah elected as Second Vice-President.

8. Mr. Mensah thanked the Delegates of Singapore and Mexico and committed himself to serve the Conference to the best of his ability.

9. The Delegate of Lebanon proposed to nominate as Third Vice-President Mr. R.H.Wang, Chief Delegate of China.The nomination was seconded by the Delegate of New Zealand, and there being no further nominations, the President declared Mr. R.H. Wang elected as Third Vice-President.

10. Mr. Wang thanked the Delegates of Lebanon and New Zealand and would do his utmost to bring about a successful conclusion to the Conference.

11. The Delegate of Slovakia proposed the nomination of Mr. H. Mahfoud, Chief Delegate of the Syrian Arab Republic as Fourth Vice-President to the Conference. The Delegate of Sri Lanka seconded the nomination while the Delegate of Yemen asked to be associated with the nomination. There being no other nominations, the President declared Mr. Mahfoud elected as Fourth Vice-President of the Conference.

12. Mr. Mahfoud accepted the nomination on behalf of his country and expressed his thanks to the Delegates of Slovakia, Sri Lanka and Yemen.

13. Having completed Agenda Item 5, the President declared the Third Plenary Meeting closed and announced the commencement of the First Meeting of the Commission of the Whole.

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the First Meeting
(Tuesday, 11 May 1999, at 1030 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The President expressed how greatly heartened he was with the tremendous spirit of cooperation and agreement displayed by Delegations at the Second Plenary in their general observations regarding DCW Doc No. 3, *Draft Convention for the Unification of Certain Rules for International Carriage by Air*. He hoped that this spirit would continue and intensify as the Conference searched for common objectives and solutions to the issues at hand.

2. In view of the importance to the world community of the task assigned to the Conference, there was no objection to the meetings of the Commission of the Whole being held in public.

3. Turning to DCW Doc No. 3, the President explained that the draft Convention would be considered sequentially. He announced that a Drafting Committee would be established to discuss drafting matters and should the need arise, an independent committee would be set up to review and resolve issues which could not be concluded during discussions in the Commission of the Whole.

4. The Conference proceeded to Chapter 1, Article 1 of the draft Convention, as it was agreed to defer consideration of the Preamble until the text of the provisions had been reviewed.

Article 1

5. The Delegate of Cameroon proposed that the definitions in Article 1 be expanded to include "combined carriage","intermodal carriage" and "multi-modal carriage". The Delegate of Singapore further suggested that the definition of baggage in Article 16, paragraph 4 be moved to Article 1. However, the Delegate of Poland took the view that firstly, the introduction of further definitions should be avoided as the authors of the draft Convention had preserved much of the text from the Warsaw instruments in order to ease the transfer from one system to another and secondly, to avoid lengthy discussions by lawyers in the application of these definitions. The Delegate of Pakistan supported this view

and added that as a general principle of law, when no definition is given of any term, the general meaning attached to the term was commonly used. The Delegate of Canada suggested the Drafting Committee study on an *ad hoc* basis the need to introduce a particular definition.

6. It was agreed that these points should be reviewed by the Drafting Committee. The President then invited observations on Article 2.

Article 2

7. With regard to Article 2, paragraph 1, the Delegate of Canada stated that acceptance of the provisions was linked to Article 48 regarding reservations for the transport of military personnel in State aircraft.

8. The Observer from IATA requested that with respect to Article 2, paragraph 2, the comments in DCW Doc No. 9 be referred to the Drafting Committee for consideration.

9. In light of these comments, it was agreed to refer Article 2 to the Drafting Committee. However, the President requested that restraint be exercised with proposals to amend the text of both Articles 1 and 2 as a widespread consensus on the form of the text had been reached following extensive examination by the Legal Committee, Special Group on the Modernization and Consolidation of the Warsaw System, and the Secretariat Study Group.

Article 3

10. The Delegate of Ukraine proposed the addition of the following text at the end of the first sentence of Article 3, paragraph 2 "... and which certifies the conclusion of a contract of carriage and its conditions, which are used by the carrier only taking into account the requirements of the legislation of the State Party according to the place of registration...", as reflected in DCW Doc No. 15. The reason being that with respect to the information required relating to the carriage of passengers in Article 3, paragraph 1, Article 3, paragraph 2 recognized the technological changes which would allow for other means of preserving the information. In recognizing these other means of preserving the information as indicated in paragraph 1, it should be specified that the information which certified the conclusion of a contract of carriage and its conditions, which was used by the carrier, took into account the requirements of the legislation of the State Party according to the place of registration.

11. This proposal was inappropriate to the Delegate of the United Kingdom. Article 3, paragraph 1 was concerned only with the recording of two pieces of information in a document of carriage. It stipulated the information which was to be delivered to the passenger. Article 3, paragraph 2, recognizing technological developments indicated that this information did not have to be provided in the document of carriage and could be recorded electronically. The existence and validity of the contract of carriage existed independently of these two paragraphs.

12. Commenting on the draft text in DCW Doc No. 15, the Observer from the European Commission questioned whether the legislation of the State Party according to the place of registration would be an appropriate reference. He also felt that the last sentence of Article 3, paragraph 2 placed an obligation, rather than a request, on the carrier to deliver a written statement to the passenger. The Observer from IATA endorsed this comment and suggested that the text "upon request" be inserted at the end of the second sentence of paragraph 2. Nevertheless, the Delegate of the Ukraine believed there was

a need to amend the text in order to take into account the national legislation of States related to the requirements for documents of carriage and to preserve the protection of passengers' rights.

13. The President requested that the Delegates of the Ukraine and the United Kingdom, and any other Delegations which might have concerns or suggestions, meet to resolve this issue.

14. The Delegate of Canada requested that it be clearly stated in the text of paragraph 3.4 that the passenger be given written notice prior to departure to allow the passenger the opportunity to make other arrangements if necessary. The Delegate of Sweden further suggested that written notice should be given prior to check-in to allow the passenger time to take measures to cover liability not covered by the Convention. However, the Delegate of Canada viewed the word "departure" as a generic term and observed that check-in may or may not exist in certain countries, therefore the language used should encapsulate all cases.

15. The Observer from the European Commission proposed that written notice be given "at check-in". The Delegate of Pakistan countered that "notice" in all legal connotations was always prior to any action contemplated to that event, hence written notice should be issued prior to departure. The Delegate of Singapore supported this observation and questioned whether States had faced tremendous difficulties as to when the notice should be given. Furthermore, Article 3, paragraph 5, would resolve this issue.

16. The Delegate of Lebanon stated that notice should be given to passengers in all cases, even if substitutes were used for the delivery of a document of carriage as referred to in Article 3, paragraph 2.

17. The Delegate of France pointed out that Article 3 had been the subject of lengthy discussion at previous meetings and a spirit of compromise had been made between two somewhat contradictory issues, to facilitate the elimination of hard-copy tickets and to promote the use of electronic ticketing in commerce. This could be covered with a reference to Article 3, paragraph 1. The other objective to be preserved was that of the right of the passenger to be duly informed of the conditions of carriage which related to Article 3, paragraph 4. Thus, he supported the Delegate of Lebanon in that there must be a balance between the rights of the carrier to promote the use of modern technology in the issuance of tickets, and protection of the rights of the passenger.

18. The Delegate of Austria questioned the correctness in stating that the Convention "in some cases limits the liability of carriers for death or injury" as it was doubtful whether Article 20 and Article 21 A, paragraph 6 regarding compensation in case of death or injury of passengers actually set a limit of liability.

19. The Delegate of Germany supported this observation and added that with the future ability to purchase air transportation electronically without receiving written proof, the provisions in Article 3, paragraph 4 did not sufficiently account for this possibility and that any other means be allowed which would provide a link to Article 3, paragraph 2. The Observer from the European Commission supported this suggestion.

20. The Delegate of Mauritius further suggested moving the revised Article 3, paragraph 4 to Article 3, paragraph 1 which would then become subject to the contents in Article 3, paragraph 2 in relation to "any other means".

21. With reference to the limits of liability of carriage for death or injury in Article 3, paragraph 4, the Delegate of Poland requested harmonization with the term "bodily injury" in Article 16, paragraph 1.

22. The Delegate of Ghana questioned the use of the word "may" instead of "shall be applicable" at the end of the second line of Article 3, paragraph 4.

23. The Director, Legal Bureau explained that this wording stemmed from the original wording of the Convention. The Convention was only applicable if the point of departure and the point of destination were both situated in State Parties to the Convention. If the point of destination or point of stop-over was situated in a State which was not a State Party to the Convention, then the Convention would not be applicable, as per Article 1 of the Convention. Nevertheless, the Delegate of Ghana felt that this was an ambiguity.

24. The Delegate of Japan requested harmonization of the terms "limitation of liability" at the end of paragraph 3.5 with "limits of liability" in Article 21 c).

25. When considering Article 3, paragraph 4 and the notice regarding the limits of liability, the Observer from IATA requested the Conference to note that there was an absence of clarity and contradictions in the notices currently issued on airline tickets. Taking the concerns of the travelling public into consideration, this particular aspect had to be simplified.

26. In his summation, the President stated that these observations would be referred to the Drafting Committee for consideration, in particular: whether or not it was compatible with the language of Article 16, paragraph 4 to have a reference in Article 3, paragraph 4 to the limits of liability; whether or not in relation to the alternative or substituted means of giving information, itemized in Article 3, paragraph 1, there should be a reference to the document certifying the conclusion of the contract and taking into account the requirements of legislation according to the place of registration; and the attempt in Article 3, paragraph 3 to strike a balance for harmonizing technological developments in electronic ticketing with the need to continue to facilitate the rights of the passenger to be informed.

27. The meeting adjourned at 1235 hours.

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Second Meeting
(Tuesday, 11 May 1999, at 1400 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

Article 3 *(continued)*

1. In resuming discussion of Article 3, paragraph 4, the Delegate of Egypt referred to the proposal put forward by the Delegate of Canada that written notification be given to the passenger prior to departure. He believed that this amendment could cause difficulty in its interpretation and would not serve any purpose for modernization. The original text had first appeared in the Hague Protocol of 1955 and no difficulties had arisen in its interpretation and intent since that time.

2. The Delegate of Algeria pointed out the need to align the Arabic, French and English texts in Article 3, paragraph 4. The Arabic text referred to "the responsibility of carriers", the French text "the liability of the carrier" and the English text "the liability of carriers". As well, the English and Arabic texts referred to the "destruction, or loss of, or damage to baggage" but the French text had omitted "destruction".

3. The Delegate of Cameroon was of the opinion that Article 3 should be left in its present form as no practical difficulties had been posed.

4. The Delegate of Sweden agreed with the comment of the Observer from IATA with respect to Article 3, paragraph 4. There was a need for clarity in the notice regarding the limits of liability so that the passenger would understand what was written in the airway notice.

5. In realizing the need to establish a Drafting Committee, and to ensure adequate representation both geographically and linguistically, the President announced the composition of the Drafting Committee would comprise representatives from the Delegations of Argentina, Brazil, Botswana, Canada, China, Côte d'Ivoire, Cuba, Egypt, France, Germany, India, Lebanon, Japan, Mauritius, Panama, the Russian Federation, Saudi Arabia, Spain, Sweden, the United Republic of Tanzania, the United States

and the United Kingdom. He stated that in referring Article 3 to the Drafting Committee, the substance of that Article would not be disturbed but was to ensure harmonization between the various texts.

Article 4

6. The Delegate of Sri Lanka noted the deletion of the words "with the consent of the consignor", following the words "may" in the first line of Article 4, paragraph 2 which had appeared in the original text of Montreal Protocol No. 4. This made a fundamental change to the original wording and he proposed that it not be modified. However, the Delegate of Singapore indicated that the deletion of the words was intended to facilitate the use of electronic means in this context. The airlines should not have to obtain the consent of the consignor to be able to use electronic means to preserve a record of the consignment.

Article 5

7. The Delegate of the United States reiterated the importance of not changing the established standards under Montreal Protocol No. 4. The introduction of the "nature" of the consignment in paragraph 5 (c) could have a significant impact on the cargo industry. Over forty nations had ratified Montreal Protocol No. 4 which did not require inclusion of the nature of the consignment in the air waybill. This amendment would prevent the unified advancement represented by Montreal Protocol No. 4.

8. As Montreal Protocol No. 4 had entered into force, the Delegate of Egypt considered that its text should not be amended unless absolutely necessary. He also requested that the Arabic wording for the term "receipt" in Articles 5 and 6 be corrected.

9. The Director, Legal Bureau confirmed that the Montreal Protocol No. 4 had entered into force in 1998 and presently had forty-three Parties. When the 30th Session of the Legal Committee discussed the draft text of the Convention, delegates took into account that the Protocol would shortly come into force.

10. The Delegate of Greece reminded the Conference that the introduction of "nature and weight of the consignment" was deemed to be necessary by the Legal Committee in reference to Annex 18 and the transport of dangerous goods.

11. In response to a query by the Delegate of the United Kingdom as to why the words "nature and" were included in the draft text, the Director Legal Bureau replied that the nature of the cargo was considered important information for customs and related authorities.

12. In addressing the issue of the nature of the goods, the Delegate of Canada stated the proposed additional requirement should not be included. In an effort to try to simplify the documentation in the electronic age it was best to eliminate as many compulsory requirements as possible. This should not be construed as a derogation from the obligation arising under Annex 18 in relation to dangerous goods or absolve a person from responsibilities arising under domestic legislation in relation to customs declarations.

13. However, the Delegate of Pakistan indicated that the word "nature" in Article 5 (c) was in the interest of both the consignor and consignee. There were more advantages than disadvantages for its inclusion and its deletion would not be in the interest of both parties. The use of the word "nature" was

to simply give a description of the consignment. The Delegate of Madagascar supported this comment and added as an example that should a consignment be lost and no mention made of the nature of the cargo, the consignor could claim the cargo was more valuable than what had been stated on the air waybill.

14. The Delegate of the United States pointed out that the issue was not disclosure but rather where that disclosure must take place and what instrument required that disclosure. The Convention, being a liability instrument, was not the appropriate place for disclosure; it should be done in a customs form.

15. The Delegate of France associated himself with Delegates of Pakistan and Madagascar. Should any proceedings arise it would be better for the judge to understand the nature of the claims being made. It would allow for clarification of the situation. Additionally, the retention of dangerous goods information within the Convention would not cause redundancy or complicate matters.

16. The Delegate of Egypt associated himself with the Delegates of Pakistan and Madagascar as did the Delegates of Saudi Arabia, China and Côte d'Ivoire.

17. The Observer from the ICC stated that its special committee on air cargo had considered that the provisions in Montreal Protocol No. 4 were sufficient. However, the Observer from the IUAI supported the Delegate of Pakistan; the defence of carriers was assisted by having knowledge of the contents of the cargo.

18. When giving consideration as to whether or not to include "nature" in Article 5 (c), the Delegate of Sri Lanka drew attention to the available defence of the carrier in Article 17.2 (a) with regard to inherent defect, quality or vice of that cargo. The inclusion of "nature" in the air waybill would make it difficult for a carrier to prove an inherent defect, quality or vice of that cargo.

19. The Delegate of Cameroon supported Article 5 (c) as worded, as did the Delegate of Ethiopia. The retention of "nature" in legal proceedings would allow the apportion of the damages in proportion to the damage actually suffered.

20. The President summarized the two arguments put forward: one for the deletion of "nature" based on Montreal Protocol No. 4 and the need to simplify the contents of the air waybill or cargo receipt by the omission of the additional provision; and the other, for its retention as it would not impose an intolerable burden upon the procedures for simplification and the description of the nature of the cargo from the consignor would assist the carrier in discharging its own burden of proof. As part of the intrinsic liability system, a defence existed under Article 17, paragraph 2 to have the burden of proof on the carrier to show that the destruction, loss or damage to the cargo had resulted from the inherent defect, quality or vice of that cargo. Those who argued for its deletion had recognized the importance of this provision, that there should be disclosure of the nature of the cargo, but in some other document.

21. The Delegate of the United States wished to retain the existing provisions of Montreal Protocol No. 4, having just ratified it the previous year. The amendment proposed a broad-sweeping requirement that would extend beyond the shipment of hazardous goods to the shipment of all goods and there would have to be a detailed description of any material shipped, hazardous or not. With the arbitrary and differential implementation of this provision, shipping companies would be required to have fifty to one hundred different types of descriptions of the nature of the goods.

22. The Delegate of Singapore pointed out that Article 10, paragraph 1 was linked to Article 5 (c) in that "The air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo and of the conditions of carriage". In Article 10, paragraph 2 the words "those relating to the nature, quantity, volume and condition of the cargo do not constitute evidence against the carrier" would also have a bearing in the final conclusion. The Delegate of Italy agreed that Article 5 (c) had to be considered in tandem with Article 10 in order to understand the implications of inserting "nature".

23. The Delegate of Poland observed that Article 22 A stated that nothing contained in the Convention should prevent the air carrier from refusing to enter into any contract of carriage or from making regulations which did not conflict with the provisions of the Convention.

24. The President noted that there was agreement with Article 5 (a), (b) and the remainder of (c) without "nature" which would be put in square brackets and be considered together with Article 10. He also indicated that following consultations, the terms of reference for the Drafting Committee had been established which were: "To provide drafting proposals for particular draft Articles referred to it by the Commission or the Review Committee for the purpose of receiving legal, linguistic and editorial clarification or consistency among the various language versions and to report to the Commission of the Whole." With reference to the Review Committee, it would facilitate the work of the Commission to deal with legal issues which might arise in the course of deliberations. It would review the subject of the final clauses and report its recommendations to the Commission of the Whole or Drafting Committee, as appropriate. The Committee would comprise representatives from the Delegations of Algeria, Australia, Canada, Chile, Denmark, Egypt, France, Greece, Italy, Mauritius, Mexico, Namibia, Poland, Senegal, Sri Lanka, Ukraine, the United Kingdom, the United States and Uruguay. Discussions on Article 5 were terminated at this point with further discussion to take place in the Review Committee.

25. In response to the Delegate of Saudi Arabia's request that the composition of the Review Committee reflect geographical representation, the President indicated that all regions would be represented. As well, the Drafting Committee would be confined to matters of a linguistic and editorial nature whereas the Review Committee would be concerned with matters of greater substance.

26. The Delegate of Germany had reservations as to the creation of a second committee; transparency would be lost and more complications might arise. Should a second committee be created it should only be tasked with the discussion of the final clauses. The Delegates of China and Cuba associated themselves with this observation and requested participation on that committee should it be established.

27. The Delegate of Singapore associated himself with the Delegates of Germany and China, and wished to participate on the Review Committee which should be open to any Delegation who wished to participate in order to avoid problems of transparency.

28. The President pointed out that in terms of the procedures to be adopted, there would initially be full discussion within the Commission of the Whole prior to a matter being referred to the Review Committee. The Review Committee would have to take into account the views expressed in the Commission of the Whole with a view to facilitating the work of the Conference. Having named the basic core membership, he invited those Delegates interested to participate in the Committee.

29. The Delegate of Saudi Arabia agreed with the observations of the Delegates of Germany, China and Singapore with regard to the composition of the Review Committee, and noted that there might

be a duplication of work between the two committees. To have an open ended committee for any Delegation to participate in was not sufficient, it had to be acceptable to all parties.

30. The Delegate of Austria associated himself with the Delegate of Germany. It would be best to merge the tasks of the two proposed committees into one. However, he was pleased that subsidiary committees would be open to all interested parties as this was in line with the spirit of the Conference regarding transparency in the Plenary and in public.

31. The Delegate of Pakistan also supported the views of the Delegates of China, Germany, Saudi Arabia and Singapore. There was no need for a Review Committee and secondly, if there was a requirement, the tasks of the committee had to be restricted and the composition needed to be reviewed and reconstituted to get a broader representation.

32. The President observed that no consensus had been reached on the need to establish a separate Review Committee and on the composition of that committee. Discussion of this matter was deferred to the next meeting of the Commission of the Whole.

33. The meeting adjourned at 1655 hours.

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Third Meeting
(Wednesday, 12 May 1999, at 1000 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

1. The President announced with deep regret the tragic death of Mr. Risal Singh, Deputy Director of the Civil Aviation Administration of India, on his way to attend the Conference. Mr. Singh was well known to most Delegates as he had attended the Legal Committee in 1997, and was a member of the Secretariat Working Group on the Modernization of the Warsaw System. A minute of silence was observed in his honour. The President requested the Delegation of India to convey to the Government of India and the family of Mr. Singh deep condolences on his passing and to note with appreciation the significant contribution which he had made in the field of civil aviation particularly in relation to the modernization of the Warsaw System.

Agenda Item 9: Consideration of the draft Convention

Article 6

2. The Observer from IATA requested that DCW Doc No. 9, *Provisions of the ICAO Draft Convention for the Unification of Certain Rules for International Carriage by Air Related to Cargo*, presented by IATA, be referred in its entirety to the Drafting Committee. The President concurred, however recognizing that the Drafting Committee would be concerned with only drafting issues and would make a qualitative judgement on those proposals.

3. The Delegate of the United Kingdom, noting there were substantive issues in DCW Doc No. 9 regarding Article 6, wished to confirm that in referring DCW Doc No. 9 to the Drafting Committee, only those proposals of a truly drafting nature would be referred to that Committee while issues of substance would be addressed in the Commission of the Whole.

4. The Observer from IATA agreed that should there be any substantive issues concerning DCW Doc No. 9 they would be raised in the Commission of the Whole.

5. In response to a question by the Delegate of Saudi Arabia regarding how documents presented by Delegations and international organizations were to be dealt with in the Commission of the Whole, the President indicated that the documents would be noted; however, unless the author of the document raised substantive issues when considering the relevant provision, it would not be considered a proposal to amend the provisions.

6. The Delegate of the Russian Federation pointed out that the absence of translation into Russian of some of the documents to be considered by the Drafting Committee would cause the Russian representative difficulty. The President stated this matter would be examined by the Secretariat to ensure that the understanding of proposals put forward would not disadvantage the Delegation's participation.

Article 7

7. The Delegate of Egypt pointed out that the translations of Articles 7, 8 and 9 required revision and urged the use of a document produced by the Secretariat of the Arab Commission as a reference. Additionally the Arabic text of the heading of Article 6 was worded incorrectly.

8. The President requested that the document produced by the Secretariat of the Arab Commission be presented to the Drafting Committee in order to align the Arabic text.

Article 8

9. The Delegate of Senegal proposed that as Article 8 and Article 3, paragraph 5 contained the same provisions, Article 3 be combined with Article 8 to cover the provisions concerning documentary requirements for the carriage of passengers, luggage and goods. Article 8 would then read "Non-compliance with the provisions of Articles 3 to 7" and the rest of the text would remain unchanged.

10. The Delegate of Singapore pointed out that there might be a need to retain Article 3, paragraph 5 as it also referred to passengers and was linked to the provisions in the previous paragraphs of Article 3, whereas Article 8 specifically referred to documentary requirements.

11. The Delegate of Poland suggested that as all the Articles of Chapter II, with the exception of Article 3, dealt with cargo matters it would be convenient for the reader to make reference to cargo in the titles of Articles 8, 9, 10 and 15. The present titles could cause confusion as they suggested these Articles dealt with all documentary requirements.

12. The observations regarding Article 8 would be referred to the Drafting Committee for consideration.

Article 9

13. The Delegate of Japan requested clarification of the phrase "the person acting on behalf of consignor" in the last sentence of Article 9, paragraph 1. That sentence stipulated that the person acting on behalf of the consignor must also bear the responsibility for the correctness of the air waybill. He questioned whether this person, who was acting on behalf of the consignor, was interpreted to mean the agent who filled out the air waybill as instructed by the consignor, or the agent who actually concluded the contract of carriage with the carrier under the legal authorization by the consignor.

14. The President indicated that the history of this provision had stemmed from a proposal made by the Delegate of the United Kingdom in the Legal Committee. The preceding sentence referred to the consignor being responsible for the correctness of the particulars either by the consignor itself or on its behalf and those provisions would apply where the person acting on behalf of the consignor was also the agent of the carrier.

15. The Delegate of the United Kingdom further elaborated that the last sentence of Article 9, paragraph 1 was included as it bore a relationship to the provisions in Article 9, paragraph 3 which provided the basis upon which the carrier bore responsibility where particulars in statements were inserted either by the carrier or someone acting on behalf of the carrier in the cargo receipt or record. By including the last sentence in Article 9, paragraph 1, in the case where the person acting on behalf of the consignor was also the agent of the carrier, the consignor bore responsibility by virtue of Article 9, paragraph 1 and not the carrier under Article 9, paragraph 3.

Article 10

16. The Delegate of Lebanon suggested that the Drafting Committee consider including in Article 10, paragraph 2 "or a receipt for receiving the cargo". This would align it with Article 4 relating to the consignor receiving an air waybill or cargo receipt and Article 5 relating to the contents of the air waybill.

17. The Delegate of the United States noted that since the "nature" of goods in Article 5 had been put in square brackets, the term "nature" in Article 10, paragraph 2 should also be considered in the same context.

Article 11

18. There were no comments on Article 11.

Article 12

19. The Delegate of the United States noted that the term "or consignor" had been added to those entitled to enforce their rights against the carrier if the cargo had not arrived at the expiration of seven days. This was a deviation from the language of Montreal Protocol No. 4. Carriers had expressed concern that this would create uncertainty on their part as to who was to enforce the rights for the loss of the cargo when it was not delivered. The carrier would be charged with trying to sort out disagreements between the consignor and the consignee.

20. The Delegate of Spain agreed with this observation; there was duality between the consignee and consignor which was unnecessary. The President indicated that "or consignor" would be put in square brackets to be resolved at a later time.

21. The Delegate of Lebanon pointed out that the French text of Article 12, paragraph 3 needed to be aligned with the text of Article 16, paragraph 3.

22. The Delegate of the Ukraine pointed out the need to align the Russian translation of Article 12, paragraph 3 in DCW Doc Nos. 3 and 4.

23. The observations on Article 12 would be referred to the Drafting Committee.

Article 13

24. There were no comments on Article 13.

Article 14

25. The Delegate of Greece suggested there was a correlation between Articles 12, 13 and 14 and that they should be considered together. There were provisions in Article 14 which should not be considered independently especially when referring to the rights of the consignee and those of the consignor. The issue was whether the rights which arose in relation to the delivery of the cargo as against the carrier in Article 12 were affected by the relations between the consignor and the consignee, or the derivative rights of other parties from the consignor and consignee.

26. This observation would be referred to the Drafting Committee.

Article 15

27. The Delegate of Canada suggested that in the French text, the last word in the first paragraph of Article 15 "agents" be amended to read "préposé".

28. The Delegate of Germany questioned whether the word "damage" in Article 15, paragraph 1, second sentence included costs for fines and if not, perhaps "damages and expenses" could be introduced. The President replied that with regard to "damage", the question of expenses was left to national law, or the jurisdiction within which the issue was being determined and therefore expenses were not dealt with separately in the draft Convention. However, the Delegate of Singapore pointed out that in most contexts "damage" would cover expenses.

29. The Delegate of Senegal observed that the penultimate line of Article 15, paragraph 1 read "irregularities in information" when it should read "imprecision in information".

30. The comments on Article 15 would be referred to the Drafting Committee.

Article 16

31. The Delegate of Sweden referred to DCW Doc No. 10, presented by Norway and Sweden, which proposed the words "or mental" be introduced in the first sentence of Article 16, paragraph 1. The text would then read "The carrier is liable for damage sustained in the case of death or bodily or mental injury of a passenger...". The objective being that the passenger would have the right to compensation for mental injuries that they had suffered in case of an accident. This right should apply whether or not the passenger also suffered a bodily injury. All relevant agreements on other means of transportation included mental injury, hence air passengers should be entitled to the same protection in relation to damages as passengers who used other modes of transport.

32. The Delegate of Chile fully supported this proposal as did the Observer from LACAC. It was not possible to divide human beings up into purely physical or mental elements.

33. However, the Delegate of Germany opposed the proposal as it might open the wording of this text to misuse. The problem of mental injury was more of a practical rather than a legal problem. In the EC regulations the English version was worded "bodily injury", the French version "lésion corporelle", which included mental injury. The German wording included "injured or otherwise harmed health wise". Only the English version of the text needed to be amended in order to cover both elements.

34. The Observer from ALADA supported the proposal by the Delegate of Sweden. Its inclusion would respond to both the legal and humanitarian elements and should be taken into account in the defence of the rights of the consumer.

35. The Delegate of Denmark also endorsed the proposal by Sweden and agreed with the points expressed by the Delegate of Chile. Mental injury could indeed be as serious as bodily injury. A passenger would always have to prove that he or she had been mentally injured because of the accident.

36. The Delegate of France confirmed that "lesion corporelle" did indeed cover both physical and mental injury, there was always coverage of the problem as a whole. He had no objection to this proposal and supported the proposal by the Delegate of Germany that appropriate wording be found in English to cover both aspects.

37. The Delegate of the United Kingdom supported the arguments put forward by the Delegates of Sweden and Chile. One could not sensibly distinguish between passengers who had suffered solely a physical injury from those who had suffered solely a mental injury. He pointed out that in a decision taken and overruled by a New South Wales Court of Appeal, the court held that "where interpretations of an international convention differ, the courts are to give effect to the intention of the signatories. In the court's opinion, when the Convention was drafted, the terms "bodily injury" or "lesion corporelle" were not intended to include purely psychological injuries." In view of that interpretation it was important that words be included to ensure that mental injury would be considered independently.

38. The Delegate of the Dominican Republic also supported the inclusion of mental injury. Passengers' rights had to be protected and there was no legal or ethical reason to deny this.

39. The President, in his summation, noted that although linguistically the wording had to be improved, there was a need to have a reference in the Convention to the nature of the injury which would include both physical as well as mental injury, having regard to the indivisibility of the nature of the injuries sustained and the difficulty to explain why physical injury was covered but serious mental injury was not. This would essentially be a matter for the Drafting Committee to find the appropriate wording. However, as pointed out by the Delegate of the United Kingdom, it was important that the wording embody the notion that mental injury would be covered so that the decision made in the New South Wales case would be invalidated.

40. The meeting adjourned at 1250 hours.

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Fourth Meeting
(Wednesday, 12 May 1999, at 1400 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

Article 16 (continued)

1. The Delegate of Saudi Arabia pointed out that the Arabic text for "bodily" injury could be interpreted as meaning both mental and physical injury. However, from a practical standpoint, how could it be proven that a passenger was afflicted with mental injury prior to embarking an aircraft? Thus, in principle his Delegation could not accept the Swedish proposal to expressly introduce mental injury. A word had to be found in English that would include both mental and physical injury.

2. The Observer from the IUAI welcomed the abolition of artificial limits on liability but supported the deletion of "mental injury". Fear of flying was a well recognized phenomenon without significant parallel in other modes of transport and could be easily construed by sympathetic medical opinion as an injury. The existence, or otherwise, of mental injury was very difficult to prove, giving rise to the possibility of fraud and expensive protracted litigation. The cost of claims could be considerable and this would be a new and additional cost, since under the present Warsaw system, such claims were excluded in some of the most expensive jurisdictions. This could have a significant impact on the cost of insurance. With respect to the inclusion of mental injury in other Conventions, as mentioned at the previous Commission of the Whole, the 1980 Berne Convention of International Carriage by Rail included strict liability for personal injury and specifically included mental injury in that definition. However, it was important to note that the Berne Convention contained limited liability without any provision, such as wilful misconduct, to permit that limit to be broken. Similarly, the 1974 Athens Convention on the Carriage of Passengers by Sea contained a limited liability provision imposed in respect of personal injury, without specific reference to mental injury. However there was a wilful misconduct provision which permited unlimited liability to be given. Consequently, there was difficulty in drawing a parallel between the proposed introduction of unlimited liability without proof of misconduct in the draft Convention versus one with no method of breaking the limit of liability and the other with a wilful misconduct provision.

3. The Delegate of Austria supported the French term for bodily injury in Article 16, paragraph 1. However, he reserved his position regarding the introduction of 'mental injury' in the English version as it was an extremely vague concept that could lead to abuse in the unlimited compensation of passengers in case of injury. It was necessary to have a clear understanding of what the concept of mental injury meant in practical terms and its limits. The vagueness of the notion of mental injury could be interpreted in many different ways by various domestic jurisdictions, with the issue of the fifth jurisdiction having a major role.

4. The Delegate of China pointed out that although it was difficult to define the scope of mental injuries, they were often associated with the occurrence of physical injury. The draft Convention had expanded the liabilities of carriers and the limits were higher. Thus it would be feasible to expand the scope of liability of carriers even further by adopting the concept of mental injury. To balance the interest of the carrier and the passenger, he suggested consideration be given to the following wording: "bodily injury and/or mental injury resulting directly from the bodily injury". The Delegates of Cameroon and Egypt shared these views.

5. The Delegate of Madagascar did not support the introduction of "mental injury". This was not to be construed as a retrograde concept. The carriers and industry as a whole wished to quickly resolve any litigation ensuing from an accident. The inclusion of mental injury would not lend itself to facilitating the job of the airline nor should modernization assume the proliferation of any forms of recourse against the airlines. However, as a compromise the French "lésion corporelle" would be accepted.

6. The Delegate of Panama supported the inclusion of the term "mental injury" in the interest of total compensation for injury.

7. The Delegate of Singapore observed that looking at the issue in a slightly broader context, personal injury claims also resulted from other means of transport. He questioned whether injury resulting in relation to aircraft accidents was so special to merit mental injury as an independent head. Nervous shock was not considered as a separate issue. In terms of evidence, there was merit in leaving "bodily injury" which would allow for mental injury in cases where the mental injury claim, accompanied by physical injury, manifested in physical injury. The issue of strict liability also had to be dealt with in that one would have to prove how this particular injury arose out of the accident.

8. The Delegate of Pakistan proposed the moot point involved was the word "bodily" prefixed to injury. He pointed out that "injury" in legal terms meant damage caused, and damage, whether mental or bodily, was in-built in the word "injury". This term had also been used in Article 19 "when by reason of death or injury of a passenger", and Articles 16 and 19 were interrelated. Article 16 created the right whereas Article 19 provided an exoneration. Therefore, if "bodily" was removed from Article 16, as in Article 19, it would cover both types of injury. A simple reference to injury without being prefixed by the word "bodily" would enable the courts to determine the issue without being confined necessarily to the nature of the injury, be it bodily, mental or any other kind of injury. This would be consistent with the language used in Article 19.

9. The Delegate of India supported the recommendation of the Special Group on the Modernization and Consolidation of the Warsaw System to delete the term "mental injury". Severe mental injury would generally manifest in a physical form and would be adequately covered by "bodily injury". Non-severe mental injury would have to be proven by the claimant which could increase litigation and abuse of the system.

10. The Delegate of Italy proposed the use of the term "personal injury" which had been used previously. However, she endorsed the proposal put forward by the Delegate of China which would link mental injuries to bodily injuries.

11. The Delegate of Ukraine supported the text as outlined in DCW Doc No. 3, to delete the words "or mental". In judging the legislation of many States, bodily injury would include mental injury.

12. The Delegate of Ethiopia had reservations accepting the inclusion of "mental injury" as it would be difficult to prove or disprove injury. It could also promote unlawful enrichment by opening litigation against the carrier thereby increasing the economic burden on the carrier.

13. The Delegate of Norway, as co-author of DCW Doc No. 10, fully supported the inclusion of the concept of mental injury in Article 16, firstly for clarity of terms. Bodily injury did not have a universal definition and would lead to different interpretations of the Convention in different States. This had been shown by jurisprudence on the present Convention and also by discussions at the Conference. The present draft did not promote unification of legal rules and the essential terms of the Convention were open to different interpretations that could substantially affect the victim's claim. Secondly, the terms of the Convention would be interpreted according to the applicable law of the case. Thus, the pertinent issue would be how the term "bodily injury" would be interpreted in the legal system of the applicable foreign law. Thirdly, would be to ensure equal treatment for all victims. The potential lack of remedy for mental injury under the Convention would discriminate between victims, especially children who ran a higher risk of mental injury due to their lack of ability to cope with traumatic events for no other reason than their lack of years. Fourthly, in the interest of modernization, the carrier should bear the risk of mental damage. He agreed entirely with the Delegate of Chile who stated it would be difficult to explain to the international community why mental injury should be exempted from the carrier's liability. It was important to note that the burden of proof as to whether or not a person had indeed suffered a mental injury was the responsibility of the passenger and this would not impose an additional burden on the carrier.

14. The Delegate of Korea reserved his position concerning the inclusion of mental injury in the Convention. Without any doubt mental injury connected with the physical injury should be compensated. However, whether or not it should be recognized independently should be left to each State Party's legal system to decide.

15. The Delegate of Mauritius pointed out that the issue of mental injury had been extensively discussed in previous meetings and that the deletion of mental injury was part of a compromise package on Chapter III by the Special Group. The reasons he put forward as to why mental injury should be deleted were: the potential abuse of the subjective and open-ended term "mental injury"; the draft Convention currently provided for strict liability in the first tier and no limit in the second tier; the draft Convention did not seek to exclude genuine claims for compensation; the need to have due regard to the case law on the interpretation of bodily injury and the need to avoid litigation; the difficulty in disproving a claim of mental injury; and mental injuries associated with bodily injuries would not be excluded. However, he suggested that confirmation be given that the term "bodily injury" did not exclude mental injury which resulted from, or was associated with, bodily injury.

16. The Delegate of Lebanon supported the inclusion of the term "mental injury". The courts would have to decide whether mental injury was directly related to bodily injury resulting from an accident and the burden of proof remained the responsibility of the passenger.

17. The Observer from the EC supported the wording proposed by the Delegate of Germany. A concept which would exclude mental injury would not be acceptable.

18. The Delegate of Namibia fully supported the proposal co-sponsored by Sweden and Norway. As a matter of policy and law it was inconceivable that in the interest of modernization one could justify a differentiation between aviation accident victims solely on the basis of the type of injury they had suffered despite the fact that both types of injury resulted from the same accident. The claimant would have to prove his mental condition and that it resulted from an aviation accident. Medical evidence would have to be submitted in any claim associated with this particular injury. However, as a matter of law, having particular regard to constitutional guarantees of non-discrimination on the basis of *inter alia* status, it would be highly questionable whether the differentiation between mental and bodily injury would be constitutionally permissible in a number of jurisdictions.

19. The Delegate of Bahrain took the view that in adding mental injury, a clear definition of that notion had to be included to avoid contradictions and conflicts in the interpretation of the text.

20. The Delegate of Algeria supported the view that mental injury not be included in the text. Although its inclusion had its merits, it would be an extremely complicated notion to define from a legal point of view. It would be difficult to find a mechanism that would be applicable to the definition and evaluation of compensation on the basis of ascertaining the mental fitness of the passenger.

21. The Delegate of New Zealand had reservations regarding the proposal to include mental injury. Pure mental injury should be compensated for, but he preferred the term "personal injury".

22. The Delegate of Colombia endorsed the proposal to include "mental injury" and to insert in the same paragraph following "accident" the words "or incident" as incidents could also cause bodily or mental injury.

23. The Delegate of Senegal was in favour of retaining the present text, but in a spirit of compromise would support the Delegate of China's proposal to link mental injury to bodily injury.

24. The Delegate of the United Arab Emirates supported the text as written. However, to reach a compromise, should it be deemed appropriate to include "mental injury" in the text, then this notion and concept should be qualified and should refer to a mental injury that resulted in a bodily injury that was caused by the negligence or misconduct of the carrier.

25. The Delegate of Sweden was pleased to note that none of the Delegates had spoken for total exclusion of mental injuries. There was a consensus that mental injuries should be compensable, but with differing views on whether all or just some forms of mental injury should be compensated. However, there was no logical link in having only mental injuries linked to bodily injuries, there may not be a link. With reference to the question of how to prove mental state of health, the carriers did not ask for proof of bodily state of health prior to embarkation, it was not in their interest. They did not have to prove the extent of injury or damage. The burden of proof rested with the passenger. He thought excellent solutions had been proposed such as the Delegate of Pakistan's suggestion to delete "bodily" and just maintain "injury" with an explanation as to how it should be interpreted and leave it with the courts. The other solution would be the use of "personal injury" which existed in relevant treaties applicable to transportation. He referred to the rail and sea conventions which were introducing strict unlimited liability systems. These systems would be fully compatible, if not better, than the draft Convention for air carriage.

26. The Delegate of Switzerland also supported the Swedish proposal. The health of a person consisted of both mental and physical elements. Therefore it was logical that air carriers compensated passengers whenever one of these two elements was impaired due to an aircraft accident, only to the extent that damage was proven by the passenger.

27. The Delegate of Yemen associated himself with the Delegate of Egypt, to maintain the term "bodily injury" with mental injury to be considered by national legislation so as to avoid unjustified claims.

28. The Delegate of Finland supported the proposal by the Delegate of Sweden. It would not be right to deny compensation due to the vagueness of the notion of mental injury and fears that it would lead to costly litigation. The claimant would have to prove mental injury and its link to the accident.

29. The Delegate of the Holy See pointed out that the stance of his Delegation was in line with the third preamble of DCW Doc No. 3 to protect the interests of the consumers in international carriage by air and the need for equitable compensation based on the principle of restitution. He endorsed the inclusion of "mental"with "bodily injury" If it were not included, there might not be any grounds for proceedings. He proposed "bodily" be included in Article 19 so as to obviate any ambiguity in court interpretation and that a solution could perhaps be found in the third clause of the preamble regarding restitution.

30. The Observer from IATA concluded it would not be appropriate to include mental injury as a separate compensable injury for which damages may be awarded. He cited the United States Supreme Court decision in the case Eastern Airlines versus Floyd in 1991 in which mental injury unaccompanied by bodily injury of passengers was not compensable under Article 17 of the Warsaw Convention. The United States Supreme Court judgement noted that "Recovery for mental distress, traditionally has been subject to a high degree of proof, both in this country and others", even though the claims rose out of an Article 17 accident - an engine flame-out. The Court did not address and left open the question of whether mental injury accompanied by and attended upon bodily injury was compensable under Article 17. He argued that expert studies indicated that approximately one-half the passengers on any given flight experienced fear of flying and any untoward event during flight could potentially cause mental injury to such passengers. Claims for mental injury alone were rare due to the current wording of Article 17. However, if mental injury were included as a separate compensable of Article 17, this would lead to escalated claims and would be highly prejudicial to the interests of air carriers and ultimately passengers themselves as the incidence of claims would result in costly litigation or more costly settlements to avoid litigation. Insurance costs for airlines would increase resulting in corresponding passenger fare increases. However, if it were agreed that mental injury be specifically actionable, the burden of proof should be on the claimant.

31. The Delegate of Canada observed that although it was unthinkable not to compensate a person for physical and mental damages they had suffered, to the extent that they were real damages, the unfortunate situation was the regime of no-fault and unlimited liability which created a potential for abuse. Difficult situations would arise in relation to the question of evidence. There were also two types of mental damage: one temporary in which damages would arise from something frightful that had happened on board the aircraft; and a second type in which psychological disorders might arise. In order to avoid issues of abuse of the system, mental injury should be something of a lasting nature although not necessarily permanent in nature. The Drafting Committee should be tasked with separating the different types of

mental injury; in dealing with accidents or events; and whether "solely" should be included in the last sentence of Article 16, paragraph 1.

32. The Delegate of Uzbekistan pointed out that the Russian term "injury to health" encompassed both mental and physical injury. Consequently when in court, medical evidence would be adduced indicating the nexus between an accident and the direct injury to the health of the passenger.

33. The Delegate of Spain supported the proposal by the Delegates of Sweden and Norway. However, the French term for "bodily injury" would be considered broad enough to include mental injury. Nevertheless, to ensure full acceptance of mental injury, it should be considered in relation to the final wording of the 5th jurisdiction as the question of full compensation was involved which included both human and economic elements.

34. The Delegate of Oman supported consideration of the Convention as a whole in order to strike a balance between its different clauses.

35. The President, in his summation, noted the importance Delegates placed upon this question within the overall context of a package which had been so carefully discussed over several years. There was no insensitivity to the need in certain circumstances to ensure that compensation takes place in relation to certain types of mental injury. However, there was great concern expressed regarding the possibilities for abuse which could arise from an express reference to mental injury as an independent head. In seeking solutions it had been suggested that depending upon the text used, for example the French term, an interpretation in some jurisdictions would allow the possibility of recovery in respect of mental injury. Although in other jurisdictions, with a particular reference to the case of New South Wales, a different interpretation had been arrived at. It had been equally suggested that there was a need to link the question of mental injury to bodily injury so that the need to seek redress for mental injury would only arise when the mental injury was associated with bodily injury. It was also pointed out that passengers which are subject to a common incident might find themselves able to recover compensation even though they had suffered no bodily injury, notwithstanding that the consequences of the incident might equally give rise to equally serious mental injury. It was suggested that difficulties might be avoided by: simply removing "bodily" and retaining only "injury"; that it be referred to as "personal injury"; or to link the question of "bodily injury" with "mental injury". It was evident that there was a need for further consultations within a group such as the Friends of the Chairman, under the Chairmanship of the President of the Conference. Those consultation would continue as the Conference proceeded to examine the other relevant elements of Article 16. All suggestions would be welcome, thus it would be an open-ended group.

36. The meeting adjourned at 1700 hours.

INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the Fourth Meeting
(Thursday, 13 May 1999, at 1000 hours)

SUBJECTS DISCUSSED

1. Agenda Item 8: Report of the Credentials Committee

SUMMARY OF DISCUSSIONS

Agenda Item 8: Report of the Credentials Committee

1. At the invitation of the President of the Conference, the Chairman of the Credentials Committee gave a report of the Credentials Committee, indicating that as of 1700 hours on 12 May 1999, 103 Contracting States, 1 non-Contracting State and 11 international organizations had registered at the Conference. Credentials had been submitted by 80 Contracting States, 1 non-Contracting State and 11 international organizations. The Committee recommended that, pursuant to Rule 3 of the Rules of Procedure, pending receipt of their credentials, all delegations registered be permitted to participate in the work of the Conference.

2. The Report of the Credentials Committee was approved by the Plenary.

3. Having completed Agenda Item 8, the President declared the Fourth Plenary Meeting closed and announced the commencement of the Fifth Meeting of the Commission of the Whole to continue the work of the Conference.

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Fifth Meeting
(Thursday, 13 May 1999, at 1030 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

Article 16 (continued)

1. The Delegate of Australia stated that although it was an Australian court in which an interpretation of the language of the Warsaw Convention precluded the imposition of liability under Article 17 for damages based on a claim of mental injury exclusive of physical injury, the Municipal legislation implementing the Warsaw Convention referred expressly to personal rather than bodily injury and compelled Australian courts to consider such claims under, and exclusively in accordance with the terms of the Warsaw Convention as amended at The Hague, and specifically in accordance with the authentic text, in that case, the French language. On that basis, the Supreme Court of New South Wales was further bound to be guided in its interpretation of the law by the intentions of the drafters of the provisions of the Convention in 1929 and not by the way in which the same issues might have come to be used, understood and interpreted in Australia today. While Australian courts were quite prepared to recognize and compensate mental injury as a type of bodily injury, they could not do so in cases arising under the Warsaw Convention as it had been made abundantly clear that this was not the intent of the drafters of the Convention in 1929. In reaching this conclusion the New South Wales court turned to, and relied upon, the encyclopaedic analysis of the 1991 decision of the Supreme Court of the United States in the case of Eastern Airlines versus Floyd. Significantly in the unanimous decision of the United States Supreme Court which found that the language of Article 17 did not permit recovery for pure mental injuries and could find no contemporary French legislative provisions or judicial decisions nor any legal commentary from the period indicating the term "lésion corporelle" embraced mental injury. The use of that term was deliberately consistent with the primary purpose of the Contracting Parties to the Convention, to limit the liability of air carriers in order to foster the growth of a then fledgling commercial aviation industry. He stressed that it was absolutely essential that the language of the text adopted not be ambiguous in order that courts not conclude that the drafters' intention of this issue was to exclude altogether liability for mental injury of any kind.

2. The Delegate of Norway, in referring to DCW Doc No. 11, proposed the deletion of the last sentence of Article 16, paragraph 1, regarding the provision that the carrier was not liable to the extent that a death or injury resulted from the state of health of the passenger. In the present draft the carrier's liability covered accidents taking place on board the aircraft, whereas the Guatemala City Protocol extended the basis of liability to cover events that took place on board the aircraft. The basis of liability was now narrower than the Warsaw Convention as amended by the Guatemala City Protocol. If the reservation concerning the state of health of the passenger was retained, the carrier would be given a double concession detrimental to the interest of the passenger and contrary to the spirit of modernization and improved consumer protection as presented in the draft preamble to the Convention. The state of health of the passenger was not a relevant issue when determining the carrier's liability under Article 16. The effect of the proposed amendment would be to ensure equal treatment to all passengers in the determination of the liability of the carrier irrespective of any pre-existing state of health. It would remove the issue of the passenger's state of health, regarding liability, from the jurisdiction of the domestic courts. The effect would be to make the carrier liable for the full extent of the damage suffered by the passenger provided that the damage was caused by an accident under the terms of the Convention. The carrier would be *prima facie* liable for the full injury sustained by the passenger, notwithstanding that the damage actually suffered was greater than that which a person would have suffered due to a pre-existing condition. The proposed amendment would not affect the application of other provisions of the Convention or principles of law which may restrict the liability of the carrier or the amount of damage recoverable. Alternatively he proposed the reintroduction in the last line of the word "solely" before the words "from the state of health of the passenger".

3. The Delegates of Denmark, Dominican Republic, the Kingdom of the Netherlands, Spain, Switzerland and the United Kingdom supported the arguments and proposals put forward by the Delegate of Norway.

4. The Delegate of Finland also supported the proposal by the Delegate of Norway. He believed that the text of Article 16, paragraph 1 was detrimental to passengers as it now referred to accidents and not events. Limiting passengers' rights to compensation by retaining the health clause would not be equitable.

5. The Delegate of Singapore observed that there needed to be a balance of interests between passengers, airlines and governments. One would have to see in a particular case how much the airline was responsible and based on that its liability. The Delegate of Indonesia supported this view.

6. The Delegate of France, although appreciative of the excellent arguments put forward by the Delegate of Norway, preferred a compromise solution, as suggested by the Delegate of Singapore, which would protect the legitimate and necessary interests of the passengers and the interests of carriers.

7. The Delegate of Greece also supported the proposal by the Delegate of Norway as the system of liability being contemplated in the current draft Convention was a mixed regime and an exoneration clause was not appropriate.

8. The Delegate of Mauritius supported Article 16, paragraph 1 as written and reminded the Conference that the word "solely" did not appear in the draft because of the very same compromise package which had led to the draft Chapter III. The objective of the new draft was to compensate damage caused by the carrier moreover, Article 23 of the draft Convention clearly stipulated that non-compensatory damages were simply not recoverable.

9. The Delegate of the United States endorsed the views expressed by the Delegates of Norway and Sweden. If the text of the last sentence was to be included then the term "solely" should be reintroduced in the sentence. He disagreed that the text, as written, was necessary to create a balance between the interests of carriers and passengers. Carriers took the view that the current wording of the last sentence would lead to protracted litigation over the comparative state of health of the passenger. The cost of litigating these matters would exceed any lessening in the size of the judgments that resulted therefrom and the airlines would be better off without this language. The insertion of the words "to the extent that" and the deletion of the word "solely" which was introduced by the Special Group was not viewed as a compromise solution as he believed no compromise had been reached.

10. The Delegate of Austria stressed the importance of a balance being struck between the consumer and the air transport industry and therefore advocated retaining the last sentence in Article 16, paragraph 1. The Delegates of China, Egypt and Yemen supported this view.

11. The Delegate of Lebanon also supported the retention of the last sentence of Article 16, paragraph 1. It should be left to the tribunals to decide the relationship between the medical status of the passenger and the cause of the accident.

12. The Observer from IUAI noted that the contributory negligence principle would be an extremely unusual proposition in the context of an "egg shell skull" issue where there was strict liability. The only requirement for compensation was an unexpected external event, or accident which triggered a latent illness in a passenger. The carrier would then effectively be obliged to become the medical health insurer of the passenger during the course of carriage by air. He felt this would not import all the elements of balance so desired.

13. The Observer from IATA pointed out that as over 50 per cent of IATA members were government owned or controlled, the question of balance became even more important for those airlines in which their governments had a direct stake. For the first time in over seventy years the concept of unlimited liability was being generally accepted. However, the interest of the airline had to be taken into account. Although the motivation behind the proposal was understood and was for the best of intentions, the issue had to be viewed in perspective.

14. The Delegate of Sri Lanka endorsed the position to retain the last sentence of Article 16, paragraph 1. The cost of lengthy litigation should not be the deciding factor as to whether the sentence should be retained. It was necessary to provide a mechanism in the Convention whereby the outcome would be equitable compensation.

15. The Delegate of Saudi Arabia also supported the retention of the text and introduced a slight improvement in the Arabic text to align it with the English text.

16. The Delegate of Sweden endorsed the need for a balance, however balance should be made in Article 20 between the carriers and all passengers. The present draft would provide poor protection for the sick and disabled and would not be in the best interests of international law. The notion contained in the draft Convention did not exist in any other convention on transport liability, nor in any convention on civil liability of any kind. The inter-carrier agreement to which many IATA members were party to entailed unlimited liability without the notion contained in Article 16. To delete the last sentence of Article 16 would bring the draft Convention back in line with the original Warsaw Convention and jurisprudence under that agreement could then be taken into account.

17. The Delegate of Chile pointed out that as Article 16, paragraph 1 referred to an accident, he endorsed the proposal put forward by Norway.

18. The Delegate of Mexico endorsed the retention of paragraph 1 of Article 16 with the addition of the word "solely".

19. The President noted that the differences emerging in relation to the text would require consultations. There was equally strong support for both the deletion and retention of the last sentence. There also was support to reintroduce the text as formulated by the Legal Committee, to use the word "solely".

20. The Delegates of Afghanistan, Azerbaijan Cameroon and Mongolia aligned themselves with the position expressed by the Delegate of Singapore.

21. The Delegate of Côte d'Ivoire advocated a compromise solution by retaining the sentence and introducing the word "solely".

22. The Delegate of Tunisia proposed that the text be retained as proposed in the draft as it struck a balance between the carriers and passengers and that there was a case of exoneration for the carriers in this regime.

23. The Delegate of Pakistan fully supported the proposal put forward by the Delegates of Norway and Sweden. He believed that the last two lines of Article 16 were superfluous to the scheme of the whole Convention which was to strike a balance between the carrier and the passengers' interests. Article 19 - Exoneration, provided an inbuilt defence for the carrier. There was no reason to have an explicit provision in Article 16 for the safety or defence of the air carrier, by having "however, the carrier is not liable". This provision needed to be deleted as sufficient balance had already been created by having a general clause of exoneration.

24. The Delegate of Canada pointed out that in Canada when trying to establish whether a person was liable or not there had to be proof of fault or negligence and damage and to co-link the causality between the fault and the damage. The first sentence of Article 16 took care of the issue of fault and causality. The final clause, as currently drafted, stated that the carrier would not be liable when the damage or injury resulted from the state of health of the passenger. This was in concordance with one of the basic principles found in the preamble to the Convention; that the passenger should be compensated for the losses actually suffered and not compensated for losses more than actually suffered. Thus he was in favour of retaining the final clause with the compromise solution of adding the word "solely".

25. The Delegates of Argentina, Brazil, Cuba, Kenya, the Russian Federation, Senegal, New Zealand and Viet Nam also supported the retention of Article 16, paragraph 1with the addition of the word "solely".

26. The Delegate of Colombia supported the retention of Article 16, paragraph 1 with the addition of the word "or incident" after "accident" in the third line, and the addition of "solely" or "exclusively" at the end of the sentence following "health of the passenger".

27. The Delegates of the Republic of Korea and the Syrian Arab Republic supported the retention of the last sentence of the paragraph as it preserved the interest of all parties and it struck a balance between the differing views.

28. The Delegate of Poland suggested that if the word "solely" was added in the last sentence then " to the extent" should be deleted as it would be inconsistent with the word "solely".

29. The Delegate of the United Arab Emirates proposed the deletion of the last sentence and the addition of "without prejudice to the provisions of Article 19".

30. The Delegate of Namibia proposed the deletion of this clause as the objective of this clause could be more adequately achieved by resorting to the basic exoneration clause of Article 19.

31. The Delegates of Ethiopia and Guinea supported the retention of the sentence as worded. It balanced the interest of the passenger and the carrier and avoided unnecessary litigation.

32. The Observer from the IUAI pointed out that firstly, it was not possible contractually to limit liability below that which was imposed by the Convention, much as contained in Article 22. Secondly, if the word "solely" was introduced it would destroy any compromise as injuries caused solely by existing disabilities were very rare and would not arise.

33. The President, in his summary of the meeting, noted that there had been interesting and equally convincing arguments for both the retention and deletion of the sentence as well as retention of the sentence with the introduction of the word "solely". In dealing with the overall question as to how to balance the interests of the passengers and those of the carrier and the overall public interest, it would not be entirely appropriate to deal with this particular sentence in isolation. All suggestions would be discussed in the Friends of the Chairman's Group. He noted the reference made to Article 19 which dealt with exoneration, however, he felt that this clause was not formulated in contemplation of this situation, but in its classical sense, dealt with the exculpation from liability and was rarely related to questions which arose in relation to fault. Article 16, paragraph 1 imposed a strict liability up to a certain limit in relation to a fault whereas Article 19 dealt with the circumstances in which that liability might be ameliorated or tempered or exonerated as the fault is the fault of the passenger arising from the negligence or other act or omission to that extent. It would not be clear as to whether or not that exoneration could be appropriately applied to circumstances which arose from the health of the passenger which may not at all be attributable to the fault of the passenger but arise from normal circumstances of life.

34. The meeting adjourned at 1250 hours.

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Sixth Meeting
(Friday, 14 May 1999, at 1000 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Article 16, paragraphs 2-4, Articles 17, 18, 19 and 20

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. Having completed consideration of Article 16 *(Death and Injury of Passengers — Damage to Baggage)*, paragraph 1, of Chapter III *(Liability of the Carrier and Extent of Compensation for Damage)* during its previous meeting, the Commission of the Whole now examined the remaining paragraphs of that Article.

2. To a point raised by the Delegate of the United States, the Chairman confirmed that the decision reached regarding usage of the term "to the extent" in paragraph 1 would also be applied to **paragraph 2 of Article 16**, as well as to paragraph 2 of Article 17.

3. Recalling that Article IV of the 1971 Guatemala City Protocol containing the phrase "in the course of any of the operations of embarking or disembarking" had encompassed both checked and unchecked baggage, the Delegate of China questioned the appropriateness of retaining that phrase in the current draft of Article 16, paragraph 2, given that the scope of that Article was now restricted to checked baggage. She suggested that the phrase "during any period within which the baggage was in the charge of the carrier" currently appearing in the paragraph might serve as a catch-all. This was noted for referral to the Drafting Committee.

4. In supporting the amendment to Article 16 suggested by the 30th Session of the Legal Committee (LC/30) whereby strict liability would apply in the case of damage to checked baggage and liability based on fault would apply in the case of damage to unchecked baggage, the Delegate of Lebanon maintained that, as a matter of principle, the carrier should not be liable for damage to unchecked baggage as the latter would be in the custody of the passenger. The only exception would be if the damage resulted from its fault, whether through negligence, an act or omission, or from the fault of its servants or agents. He suggested that the last sentence of paragraph 2 accordingly be revised to refer to the servants or agents

of the carrier. This suggestion, supported by the Delegate of Saudi Arabia, was likewise noted for referral to the Drafting Committee. Also referred to the Drafting Committee was a point raised by the Delegate of Ukraine regarding the translation into Russian of the term "in the charge of the carrier" appearing at the end of the first sentence of paragraph 2.

5. In drawing attention to the comments made by his organization in DCW Doc No. 28 on, *inter alia*, Article 16, the Observer from the International Union of Aviation Insurers (IUAI) suggested that, for greater precision and clarity, the term "fault" be replaced with the expression "negligence or wrongful act or omission" in paragraph 2 and wherever else that term appeared in the draft Convention. He contended that reference to the term "fault" was somewhat contradictory and misleading. In noting that paragraph 1 stated that "... the carrier is not liable *to the extent* ...", whereas paragraph 2 of both Article 16 and Article 17 stated that "the carrier is not liable *if and to the extent* ...", the Observer from IUAI indicated that the matter required clarification. He favoured the latter wording as being more precise and advocated that it be adopted throughout the draft Convention. It was agreed to refer these suggestions to the Drafting Group.

6. Also referred to the Drafting Group were points raised by the Delegates of the United States, Ukraine and Canada regarding, respectively, the substitution of the word "event" for the word "occurrence" in **paragraph 1 of Article 17 *(Damage to Cargo)***, a change introduced by LC/30; the translation into Russian of the term "in the charge of the carrier" appearing at the end of the first sentence of **paragraph 3** of that Article; and the translation into French of the terms "inland waterway", "airport" and "event" in **paragraph 4**.

7. While noting that several Delegates had previously indicated their unwillingness to alter any provisions of the draft Convention which were based on Montreal Protocol No. 4, including Article 17, the Observer from the International Air Transport Association (IATA) had several amendments to suggest, as documented in DCW Doc No. 9, paragraphs 19 to 22. Two were of a substantive nature, but to the extent that they were non-controversial, he recommended them for adoption. The first amendment related to **paragraph 4**, which appeared to differentiate between carriage by land performed within an airport perimeter, which would be covered by the draft Convention, and carriage extending beyond the perimeter, which would not. The Observer from IATA noted that at a number of airports there was no space available within the perimeter for construction of warehouses and that it was sometimes essential to transfer cargo by road to warehouses situated nearby but not technically on airport property. IATA was suggesting that consideration be given to whether that distinction should be maintained, particularly given the fact that paragraph 3 of Article 17 indicated that the term "carriage by air" was generally intended to comprise the period in which the cargo "is in the charge of the carrier". It proposed the deletion of the phrase "performed outside an airport" from the first sentence of paragraph 4.

8. IATA was also suggesting, in paragraph 21 of its paper, the deletion of the limitation specified in the last sentence of paragraph 4 that carriage by another mode of transport was covered by the draft Convention only if it were "substitute[d]" and only if it were performed "without the consent of the consignor". This was in light of the prevalence of intermodal transport arrangements offered by the air transport industry, which sometimes were offered with the consent of the consignor, sometimes were unknown to the consignor and sometimes might vary depending on the day of the week the shipment happened to be transported or other such factors. Being of the view that shippers who tendered cargo to an air carrier for transport would typically understand that the draft Convention would apply to such carriage, IATA favoured extending the purview of the draft Convention to all such carriage as being in the interest of clarity and consistency. Thus, in the last sentence of paragraph 4, IATA proposed inserting

the words "elects to provide" in lieu of the current wording "without the consent of the consignor, substitutes".

9. Averring that the first of the suggestions put forward by the Observer from IATA was essentially a drafting matter, the Chairman indicated that it would be referred to the Drafting Group, together with other drafting suggestions made in DCW Doc No. 9.

10. Commenting on **Article 18 *(Delay)***, the Representative of China contended that, while some States might have national laws which contained a definition of the term "delay" and jurisprudence on which an interpretation of that term might be based, the lack of a standard definition could lead to a multiplicity of interpretations. In order to ensure uniformity in its interpretation, she suggested that the definition proposed by LC/30 *(cf.* Article 18, paragraph 2, of the draft Convention given in Attachment D to Doc 9693-LC/190) but subsequently deleted by the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW) be retained in the draft Convention. That definition, which LC/30 had left in square brackets pending a final decision on its inclusion by the Diplomatic Conference, read as follows: "[2. For the purpose of this Convention, delay means the failure to carry passengers or deliver baggage or cargo to their immediate or final destination within the time which it would be reasonable to expect from a diligent carrier to do so, having regard to all the relevant circumstances.]".

11. The Chairman indicated that, in view of the difficulty of finding precise language which would cover all circumstances which could be characterized as "delay", a pragmatic approach had been taken to the problem, it being decided that it was preferable to leave the term "delay" without a definition. While LC/30 had indeed provided for a definition, the words used in that definition would themselves be subject to interpretation. Questions would arise as to what a "diligent carrier" was, what constituted the "reasonable" time within which the carriage was to be effected and what were the "relevant circumstances", *inter alia*. Furthermore, it would be extraordinarily difficult to arrive at a definition given the jurisprudence in the area. There was also the widely held view that, whenever it was exceptionally difficult to formulate a definition of a term, it was better not to have one, as it would only provide a signpost for evasion. It was considerations such as these which had led the SGMW to conclude that it would be better not to have a definition of the term "delay" in the draft Convention and to leave the matter to be determined by the courts on a case-by-case basis.

12. Endorsing the Chairman's comments, the Chairman of the Drafting Committee noted that a considerable amount of work had been undertaken in order to determine whether or not the term "delay" could be given any kind of a definitive definition. Recalling that in the learned work by Prof. Dr. Elmar Maria Giemulla, Dr. iur. Ronald Schmid and Dr. P. Nikolai Ehlers on the Warsaw Convention (Kluwer Law International: The Hague, 1997) it was indicated that what was delay would vary from case to case and circumstance to circumstance, he maintained that it would be an impossible task to develop a short, precise definition of that term within the context of the draft Convention. The general wording of Article 18 was intended to provide sufficient signposts.

13. The Delegate of Australia stressed the need for consistency in the language used in the draft Convention, noting that the phrase "all measures that could reasonably be required" was used in Article 18, whereas the phrase "all necessary measures" was used in Article 20, paragraph (a). It was agreed to refer this question to the Drafting Committee.

14. In suggesting that the word "shall" be replaced with the word "may" throughout **Article 19 *(Exoneration)***, the Delegate of Sweden asserted that the existing wording would not give courts sufficient leeway in deciding upon exoneration for contributory fault and would negatively impact the fairness of their judgements. He recalled that other instruments of the "Warsaw System" used the word "may".

15. The Observer from the International Law Association (ILA) clarified that it had been an intentional act of the 1971 Guatemala City Diplomatic Conference to substitute the word "shall" for the wording used in the Warsaw Convention and The Hague Protocol, taken in light of the fact that few States were familiar with the principle of exoneration for contributory negligence. It represented an effort to extend the unification of law to take into account contributory negligence.

16. It was agreed to return to this issue later.

17. The Delegate of Namibia contended that the current wording of Article 19 seemed only to address the contributory negligence of the claimant or the accident victim, with no exoneration being offered to third parties, a matter which the Diplomatic Conference might wish to look into. Furthermore, Article 19, unlike Article 20 *(Compensation in Case of Death or Injury of Passengers)*, did not make it sufficiently clear that the available defence of exoneration applied only in relation to the second tier of liability so as to preserve the integrity of the strict liability régime governing the first tier. He maintained that Article 19 needed to be redrafted to remove all doubt.

18. In agreeing that Article 19 lacked clarity, for the reasons given in DCW Doc No. 28, the Observer from IUAI supported its proposed redrafting.

19. A point raised by the Delegate of Canada regarding the substitution of the phrase "négligence ou un autre acte ou omission préjudiciable" for the term "faute" used in Article VII of the Guatemala City Protocol — an unnecessary, non-substantive change, in the Delegate's view — was referred to the Drafting Committee.

20. In highlighting his State's special interest in **Article 20 *(Compensation in Case of Death or Injury of Passengers)***, the Delegate of Japan recalled that it was the initiative taken in November 1992 by Japanese air carriers to amend their respective Conditions of Carriage so as to waive liability limits for passenger injury or death in international carriage by air which had led to the conclusion, in October 1995, of the *IATA Intercarrier Agreement on Passenger Liability*, which contained the same waiver. The underlying principle of the Japanese Initiative and the IATA Agreement, that passengers who suffer as a result of an aviation accident should be adequately compensated, had now been incorporated into the draft Convention, after much in-depth consideration by LC/30 and SGMW in conjunction with Articles 16 *(Death and Injury of Passengers — Damage to Baggage)* and 27 *(Jurisdiction)*. A concerted effort had been made to balance the interests of air carriers and passengers. The Delegate of Japan thus advocated the acceptance of the concept of compensation embodied in Article 20 without any change in the language used.

21. Noting that the Third Preambular Clause to the draft Convention recognized the "importance of ensuring protection of the interests of consumers in international carriage by air", the Observer from IUAI contended that Article 20, as presently drafted, did not indicate in a sufficiently clear manner to whom compensation was due. It also gave rise to the possibility that not only natural persons and the heirs of victims but also subrogated organizations might be entitled to claim compensation. He questioned if Article 20 were entirely in accordance with the spirit of the draft Convention. The Observer

from IUAI recalled that the *IATA Intercarrier Agreement on Passenger Liability* contained an exclusion of liability in relation to other than natural persons.

22. The Observer from the Latin American Civil Aviation Commission (LACAC) indicated that LACAC shared that position, being of the view that the Article as currently drafted would promote ratification of the new Convention [*cf.* paragraph 5 b) of DCW Doc No. 14]. He requested that this position be taken into account by the Drafting Committee.

23. To a query by the Delegate of Poland, the Observer from IATA clarified that the Article applied only to that portion of the damages in excess of 100 000 SDRs. He confirmed that, in the case of the *IATA Intercarrier Agreement on Passenger Liability*, defences were available to air carriers only for that portion of the damages exceeding 100 000 SDRs.

24. The Observer from the European Community (EC) noted that one element which was missing from Article 20 was that consideration should be given to the actual damage sustained, regardless of the size of the claim. The Observer from IUAI concurred.

25. The Delegate of Côte d'Ivoire then introduced DCW Doc No. 21 presented by 53 African Contracting States and setting forth a proposal for a three-tier liability régime. Under that régime, the carrier would be liable in the first tier for claims of up to 100 000 SDRs on the basis of strict liability; for claims exceeding that amount and up to a second tier of 500 000 SDRs, the liability of the carrier would be based on the principle of presumptive liability, *i.e.* the carrier would have the defence of non-negligence; for claims in excess of the second tier of 500 000 SDRs, the liability of the carrier would be based on fault with unlimited liability. The burden of proof shifted to the claimant seeking compensation under the third tier. The Delegate of Côte d'Ivoire affirmed that this proposed régime would provide the broadest guarantee of effective compensation in 98 per cent of all cases. He recalled that it had been retained by LC/30 as one of three possible liability régimes — an indication that it was worthy of consideration by the Diplomatic Conference in its effort to find a satisfactory compromise. The Delegate of Côte d'Ivoire emphasized the need to bear in mind the interests, not of small States, but of small air carriers, on the understanding that large States could also have small air carriers operating in their territory.

26. As a co-sponsor of DCW Doc No. 21, the Delegate of Cameroon fully supported the proposals contained therein. While accepting the first tier of the two-tier liability régime embodied in Article 20 of the draft Convention, he maintained that the second tier of unlimited liability requiring the carrier to bear the burden of proof would have a significant impact on insurance premiums. It could even, in some cases, lead to the ruin of those small air carriers which were already in a precarious financial situation. The Delegate of Cameroon averred that the said second tier was not in accordance with Assembly Resolution A32-17: *Consolidated statement of continuing ICAO policies in the air transport field*. He recalled from that the Second Preambular Clause of the Resolution's Introduction that it was "one of the purposes of ICAO to support principles and arrangements in order that international air transport services may be established on the basis of equality of opportunity, sound and economic operation, mutual respect of the rights of States and taking into account the general interest". The Delegate of Cameroon asserted that the second tier of the liability régime embodied in Article 20 would make it difficult to attain that objective. On the other hand, the three-tier régime proposed by the 53 African Contracting States represented a fair balance between the interests of consumers and air carriers and guaranteed equitable and adequate compensation while ensuring the survival of air carriers regardless of their size.

27. The Delegate of Saudi Arabia voiced support for the proposal by the said African Contracting States, as did the Delegate of Kenya, a co-sponsor of DCW Doc No. 21. The latter maintained that Article 20 in its current form would be detrimental to small- and medium-sized air carriers. While agreeing on the right of consumers to maximum protection, she asserted that one should not lose sight of the interests of air carriers, whose survival must be ensured. Article 20 in its present form exposed air carriers, particularly small air carriers, to the possibility of payment of compensation of such magnitude that their very existence would be threatened. The Delegate of Kenya indicated that, in order to arrive at a balanced solution, her State would support the introduction of a three-tier liability régime which would, on the one hand, protect the interests of consumers and, on the other hand, safeguard the interests of air carriers.

28. In expressing satisfaction with Article 20 in its present form, the Delegate of Germany observed that the proposed liability régime constituted a realistic approach, especially when viewed against the backdrop of the *IATA Intercarrier Agreement on Passenger Liability* and the EC Regulation No. 2027/97. Contending, however, that the wording of the second line might give rise to the false interpretation that a minimum payment of 100 000 SDRs would be made in compensation, rather than a payment commensurate to the damage sustained, he suggested that it be redrafted, taking into account Article 3 of the said Regulation.

29. Noting that his Association had worked intensively on the modernization of the "Warsaw System" and had studied the liability régime proposed in Article 20 extensively, the Observer from the Latin American Association of Air and Space Law (ALADA) highlighted ALADA's concern that it lacked consistency. He averred that if Article 20 were adopted in its present form, with one tier being based on strict and limited liability and the other on subjective and unlimited liability, it would be subject to legal challenges on very solid grounds. Noting that the current limits of liability under the "Warsaw System" had become virtually a dead letter as a result of judgements rendered in many Latin American States, the Observer from ALADA underscored the need to establish a liability régime which was consistent with the limits of liability set forth in Article 20 with the burden of proof on the air carrier. He suggested that, in the case of baggage and cargo it might be better to establish a fixed amount for which the air carrier would be liable rather than to set liability limits. This would reflect the practice followed in many Latin American States in interpreting the existing "Warsaw System". The Observer from ALADA indicated that, in the view of his Association, it would be necessary to eliminate limits of liability in the field of air transport in order to modernize the "Warsaw System". In noting that liability régimes in other fields set no limits, he maintained that such unlimited liability would lead to a decrease and not an increase in air carriers' insurance premiums as it would spur competition among insurance brokers.

30. Referring to DCW Doc No. 18, the Delegate of India outlined the concerns of his Delegation regarding the proposed liability régime. One concern was the erosion of the limits of liability established under the Warsaw Convention and The Hague Protocol to a level which was low in comparison to the current cost of living and income levels. Another was that, since the fault of the air carrier was presumed under the régime, the claimant might not receive compensation if the carrier were able to prove that it was not at fault. A third concern was that the claimant might not receive the maximum amount of compensation specified in the "Warsaw System" instruments. As existing provisions obviously did not favour claimants, it was necessary to amend the current régime. The Indian Delegation's proposal therefore fully supported the first tier of the liability régime set forth in Article 20, with strict liability up to an increased limit of 100 000 SDRs. The Delegate of India noted that it was even willing to further improve its provisions by making it absolute liability so that every claimant would get a standard

compensation of 100 000 SDRs irrespective of his financial status. This would simplify the implementation of the compensation system and make it uniform, with no discrimination among claimants.

31. Agreeing with other speakers that the second tier of the liability régime of Article 20 would be detrimental to the very survival of small- and medium-sized air carriers, the Delegate of India indicated that, in the view of his Delegation, in making the liability unlimited, the criteria used should be wilful misconduct on the part of the air carrier with the burden of proof on the claimant. His Delegation's proposals would balance the interests of both claimants and air carriers and were consistent with the comment made by the Observer from ILA.

32. The Delegate of China endorsed these proposals. Observing that just as States were at varying levels of economic development, so too were the air carriers operating out of their territory, he underscored that, while certain air carriers would be in a position to pay out large sums as compensation, those in developing States would find it extremely difficult to make such payments. He drew attention to the Third and Fourth Preambular Clauses of the draft Convention, which recognized the "importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution" and reaffirmed the "desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo".

33. The Delegate of Pakistan drew attention to paragraph 5.1 of DCW Doc No. 6 [Background information on the Special Drawing Right (SDR)] presented by the Secretariat, in which it was indicated that, in order to obtain the 1998 equivalent of one SDR at its 1975 value, it would be necessary to increase the 1975 liability limit by a factor of 2.78. In supporting a two-tier liability régime, he advocated a first tier based on strict liability, with a limit of 100 000 SDRs (equivalent to US $78 000) and a second tier for claims exceeding 100 000 SDRs up to 500 000 SDRs (the amount proposed by the African Contracting States) also based on strict liability, with the burden of proof on the claimant. He maintained that such a two-tier system would ensure a better balance of interests, especially as it would exonerate small air carriers from unlimited liability.

34. In strongly supporting the views expressed by the Delegate of Japan and in endorsing the comments made by the Delegate of Germany and the Observer from LACAC, the Delegate of Chile underscored that Article 20 constituted a delicately balanced compromise reached after extensive study in many fora. He cautioned that any change to the second tier would upset that balance of interests.

35. The Delegate of Viet Nam indicated that, in light of the need for the modernization of the Warsaw Convention's liability régime to balance the interests of consumers with those of the air transport industry so that the latter could survive and develop, especially in developing States, her Delegation was proposing, in DCW Doc No. 24, that the first tier should be a régime of presumed fault liability up to 100 000 SDRs and that the second tier should be a régime of proven fault liability without numerical limits with the burden of proof on the passenger. The fault of the air carrier should include its neglect.

36. Noting that the liability régime set forth in Article 20 was based on that of the Guatemala City Protocol of 1971 and the Montreal Protocols Nos. 3 and 4 of 1975 and that it was also contained in other international air law instruments, the Delegate of Greece maintained that it should be retained. If, however, it was considered necessary to review that Article in light of the proposal made by the 53 African Contracting States, then that Article should be considered in conjunction with Article 16 *(Death and Injury*

of Passengers — Damage to Baggage). He underscored that Article 20 could not be changed without changing Article 16.

37. As a co-sponsor of DCW Doc No. 21, the Delegate of Egypt supported the said proposal by African Contracting States, affirming that it would protect the interests of small- and medium-sized air carriers and limit the insurance premiums paid by them. He contended that the fact that Article 20 was based on a provision of the *IATA Intercarrier Agreement on Passenger Liability* was insufficient justification for its acceptance as IATA's membership comprised air carriers and not States. Similarly, the existence of a similar provision in the EC Regulation was not a valid justification as it applied only to States in the European region.

38. While noting that his State could accept Article 20 in its current form, the Delegate of France indicated that close attention would be paid to the other proposals put forward. He cautioned that the present wording of Article 20 might create the mistaken impression that the amount specified, 100 000 SDRs, was to be considered as a minimum level of compensation available instead of as a ceiling. The Delegate of France suggested that, in reviewing the Article, the Drafting Committee take into account the wording used in EC Regulation 2027/97. The Delegate of Tunisia supported this proposal. He also indicated his support for the proposal contained in DCW Doc No. 21, of which he was a co-sponsor.

39. The Delegates of Denmark and the Netherlands supported the existing wording of Article 20, with the latter endorsing the comments made by the Delegates of Germany, Japan and Chile and the Observer from LACAC, *inter alia.*

40. In favouring the current wording of Article 20, the Delegate of the United Kingdom underscored that it was not the air carriers themselves but their insurance companies which would make the compensation payments. Thus it was not a question of small- and medium-sized air carriers not being in a position to pay damages in the order envisaged in Article 20 or of their being bankrupted by making such payments but rather of their being able to afford the insurance premiums, which were considerably less than the amounts paid in compensation. In noting that there were a large number of small air carriers which operated in States such as the United Kingdom and were exposed to the same market forces as small air carriers elsewhere, he averred that it was not necessary to make a separate case for such air carriers.

41. The Delegate of Namibia indicated that his support, as a co-sponsor, of the proposals set forth in DCW Doc No. 21 was strengthened by the fact that approximately half of the air carriers members of IATA were either State-owned or -operated and that the majority of such air carriers were from developing States. The operations of such air carriers were very closely linked to the tourism industry of the States concerned, an industry which was rapidly becoming the backbone of the States' national economies. The liability régime set forth in Article 20, with the possibility of unlimited liability with the burden of proof on the air carrier, would thus place a very heavy burden on operators. In comparing that two-tier régime with the three-tier régime proposed by the African Contracting States, the Delegate of Namibia underscored that, while the third tier provided for unlimited liability, the burden of proof was on the claimant — equitably so, in his view. He recommended the proposed three-tier régime as a compromise solution.

42. The Delegate of Oman expressed concern that the increased insurance premiums payable by air carriers as a result of the adoption of a régime which provided for unlimited liability would be passed on to consumers in the form of higher-priced tickets. Consumers, the potential accident victims, and not the air carriers, would ultimately pay the price for a régime which was purportedly to protect their

interests. He indicated that the Commission should closely examine the proposals presented by the African Contracting States and by India and, in so doing, should take into account the comments made by the Delegate of Pakistan regarding the effect of inflation on the purchasing power of SDRs.

43. Voicing support for Article 20 in its present form, the Delegate of the United States averred that it reflected the current international standard as established by, and within, the European Union, Japan and the *IATA Intercarrier Agreement on Passenger Liability*, which he understood to represent over 90 per cent of international air traffic. With many conventions having been concluded to codify existing standards of international law, it was not to be contemplated that a new convention would be concluded to defeat a modern and appropriate current standard of international law.

44. A point raised by the Delegate of Ukraine regarding the translation into Russian of the word "arising" appearing in the first line of Article 20 was referred to the Drafting Committee, as was a point raised by the Delegate of Saudi Arabia regarding the omission, from the Arabic text, of the expression "for each passenger" appearing in the second line of the English text. Further consideration of Article 20 was deferred to the next Meeting.

45. The Meeting adjourned at 1300 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Seventh Meeting
(Friday, 14 May 1999, at 1430 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Articles 20 and 21A

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Commission resumed consideration of **Article 20** ***(Compensation in Case of Death or Injury of Passengers)*** of Chapter III *(Liability of the Carrier and Extent of Compensation for Damage)*.

2. Observing that the critical aspect of the "Warsaw System" during the past seventy years had been its liability régime, the Delegate of Mauritius indicated that this had become even more evident throughout the various stages of the effort to modernize that system, un-unified. Chapter III of the draft Convention, and in particular, Article 20, had been, was and would remain the critical part of the Diplomatic Conference's work. He noted that what the Diplomatic Conference was seeking to develop was a universally effective "cure" for the ageing "Warsaw System" which comprised consolidation, uniformity, ratifiability and equity. In this common search for such a "cure", it was necessary to be sensitive to the possible negative impact of Article 20 on small air carriers, as expressed by the Delegate of Côte d'Ivoire during the previous meeting. Referring to the general part of DCW Doc No. 28, the Delegate of Mauritius noted that it was the view of the International Union of Aviation Insurers (IUAI) that "The cost of insurance will, in the long run, be determined by the degree of exposure to risk and the level of claims paid. In the shorter term, other forces within the market affect aviation insurance rates, but the long-term trend inevitably will reflect the degree of exposure and level of claims. The 1998 draft, like its predecessor, is likely to increase the volume of claims and to increase the level of damage awards." He indicated that the Diplomatic Conference should also be sensitive to the Preamble to the draft Convention, which, in its fifth and fourth clauses, respectively, called for "an equitable balance of interests" and for the "orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo".

3. Emphasizing that Article 20 represented a formidable development with respect to liability, the Delegate of Mauritius noted that it entailed moving from a system of limitation of liability on the basis of presumed fault, breakable only upon proof by the plaintiff of wilful misconduct or gross negligence of an air carrier, to one where the air carrier would be subject to strict liability up to approximately US $140 000 under the first tier and to unlimited liability on the basis of presumed fault under the second tier. Those were two formidable universal changes which were being proposed in Article 20.

4. It was also necessary to be very sensitive to the concerns expressed by those who supported the draft Convention; to the drafting history of Article 20; and to the various national, regional or industry initiatives which, although they did not, and indeed, could not, represent the requisite global solution being sought, nevertheless represented unavoidable benchmarks. In addition, the Third Preambular Clause recognized "the importance of ensuring protection of the interests of consumers". The Delegate of Mauritius emphasized that, while the Diplomatic Conference would not be able to meet all of the expectations of all of the stakeholders, it should always remain willing and able to make the necessary compromises to find the "cure" which all present were trying to find. He thus suggested that Delegates consider, with open minds, the papers presented by the 53 African Contracting States, India and Viet Nam (DCW Docs Nos. 21, 18 and 24) and take into account all of the views expressed on this subject with a view to developing the necessary compromise on the contents of Chapter III in the knowledge that the global success that all had worked so hard to achieve was dependent thereon.

5. In voicing support for the three-tier liability régime proposed in DCW Doc No. 21, a paper of which he was a co-sponsor, the Delegate of Uganda endorsed the comments made by the Delegates of Côte d'Ivoire, Kenya and Mauritius. The Delegate of Yemen also spoke in favour of that proposal.

6. Underscoring the importance of the issue of compensation as a pillar of the draft Convention, the Delegate of Singapore observed, on the basis of the various proposals made and views expressed, that there were three main elements to be considered in trying to solve the difficult questions of equity which that issue gave rise to: the burden of proof; substantiation by the passenger of the amount claimed in compensation; and the defences available to air carriers. Highlighting the difficulties involved in proving fault in aviation accidents, as well as the costs, he argued against imposing the burden of proof on the passenger, advocating instead its imposition on the air carrier, as in Article 20. The Delegate of Singapore averred that the air carrier would have few problems in presenting the proof required to waive its liability under that Article. While considering the proposed liability régime to be an equitable one, he emphasized that it was necessary for the passenger to prove in court the extent of the damage which he sustained. Not every passenger would receive as compensation under the first tier the maximum allowable amount of 100 000 SDRs. The Delegate of Singapore maintained that if the said three elements were given due weight, it would be possible to create a durable liability régime.

7. In favouring Article 20 in its present form, the Delegate of Italy underscored that it was the result of compromises reached in other fora on the basis of the same concerns which were being raised during the current meeting. It should also be taken into account that that the liability régime embodied in Article 20 was already being implemented in several regions of the world, by some States as well as by some air carriers members of the International Air Transport Association (IATA). In emphasizing that Article 20 should not be considered in isolation but as part of a package which also included Article 16 *(Death and Injury of Passengers — Damage to Baggage)*, Article 22A *(Freedom to Contract)* and Article 27 *(Jurisdiction)*. She expressed confidence that, when those Articles were examined as a whole, a solution would be found which would meet the real concerns of the international community and would solve the problem of fragmentation encountered with the existing "Warsaw System". The Delegate of Italy

supported the proposal by the Delegate of France (*cf.* DCW-Min. COW/6, paragraph 38) to refer Article 20 to the Drafting Committee for consideration to resolve potential problems in interpretation, taking into account the wording used in EC Regulation 2027/97.

8. In likewise supporting Article 20, the Delegate of Lithuania observed that both large and small air carriers from different States had signed the *IATA Intercarrier Agreement on Passenger Liability*.

9. The Delegate of Finland also endorsed Article 20, although he concurred with other speakers that its drafting could be improved upon. While agreeing on the need to give due weight to the concerns expressed and to view the liability régime established by the Convention as a whole, he underscored that the Article was, in his opinion, a codification of the *status quo* as regards the vast majority of international air transport and, more importantly, that it struck a fair balance between the interests of consumers and air carriers.

10. The Delegate of Kuwait suggested, as a compromise solution based on the current text of Article 20 and EC Regulation 2027/97, that the proposed two-tier liability régime be retained while allowing air carriers to adopt a third tier, subject to notice being given to consumers in their travel documents.

11. The Delegate of Lesotho stressed that Chapter III constituted the very core of the draft Convention, namely, the interests of the consumer, which had to be balanced with those of the primary player, the air carrier. He indicated that, to gain a proper perspective and ultimately achieve a solution to the different views expressed, the Diplomatic Conference should consider Articles 16 *(Death and Injury of Passengers — Damage to Baggage)*, 20 *(Compensation in Case of Death or Injury of Passengers)*, 22A *(Freedom to Contract)*, 23 *(Basis of Claims)* and 27 *(Jurisdiction)* as a package.

12. The Delegate of Lebanon indicated that, in order to evaluate the importance of the three main proposals made and their consequences, it was necessary to compare them with the liability régime of the existing "Warsaw System". While it was true that the Diplomatic Conference was endeavouring to further develop that régime, it could not go too far as the repercussions for air carriers, particularly small- and medium-sized ones, were, as yet, unknown. He viewed the limit of liability of 100 000 SDRs specified in each of the three proposals to be a major gain for the consumer and noted that the proposals also offered the possibility of unlimited liability when the air carrier was at fault or could not prove that it had taken all necessary measures to avoid the damage. Highlighting the difficulty which placing the burden of proof on the air carrier had given rise to in the past, the Delegate of Lebanon recalled that the Guatemala City Protocol of 1971 had established an unbreakable limit of liability, one which could not be exceeded even in case of acts or omissions by the air carrier done with the intent to cause damage or recklessly and with the knowledge that damage would probably result. Having taken these factors into account, he supported the proposal by the African Contracting States as being a compromise solution.

13. Although favouring the present wording of Article 20, the Delegate of Poland indicated that if, to make the draft Convention more widely acceptable or for some other reason, the Diplomatic Conference were to adopt the proposed three-tier liability régime, then it would be necessary to define the kind of fault referred to in the third tier.

14. As a co-sponsor of DCW Doc No 21, the Delegate of Ethiopia supported the compromise solution which the proposal for a three-tier liability régime constituted, particularly as it offered a continuation of the principle of limited liability. He strongly opposed the principle of unlimited liability,

citing the need to protect the interests of the weaker air carriers. It was for governments to protect the interests of consumers and to also take into consideration the financial implications of any liability régime adopted.

15. In expressing the support of his Delegation for Article 20 as it was presently drafted, the Delegate of Canada indicated that it was desirous of being sensitive to the concerns voiced and anxious to find solutions to those concerns. It was not keen to see solutions which would lead to a fragmentation of régimes as that was what the Diplomatic Conference was trying to cure. Having observed that the main concern was a financial one, namely, that a catastrophic accident entailing substantial compensation payments would destroy small air carriers, he had consulted the representatives of Air Canada, Canadian Airlines and Air Transat forming part of his Delegation and representing, respectively, large-, medium- and small-sized air carriers, and had ascertained that they had no difficulties with the liability régime embodied in Article 20. The Delegate of Canada thus failed to see where the problems referred to by other speakers lay. He queried whether it was the payment of insurance premiums which was giving rise to difficulties or possibly the decision by air carriers not to carry insurance. Recalling that the socio-economic analysis of air carrier liability limits carried out in 1995/1996 by ICAO in coordination with IATA had concluded that if air carriers were to pass on any increase in insurance premiums resulting from higher limits of liability to consumers, it would entail an increase in fares of less than US $2 per round trip (*cf.* paragraph 21 of AT-WP/1769 attached to DCW Doc No. 30). That was a small sum of money in comparison with the average price of a ticket for international travel, US $600. In averring that that additional cost would not deter consumers from travelling, the Delegate of Canada emphasized that it was a small price to pay for the benefits to be derived under Article 20: the avoidance of lengthy litigation proceedings; of loss of time of air carrier personnel in defending liability limits; of the costs factored in by insurance companies; and of bad publicity for the air carrier resulting from damage awards perceived to be insufficient, as well as for the tourism industry of the State of the operator. The Delegate of Canada underscored the desirability of a very simplified liability régime in view of the fact that it would govern claims arising from the day-to-day operations of air carriers and not just those arising from air crashes, which statistics showed to be rare occurrences. In thus advocating the acceptance of Article 20 in its present form, he maintained that it struck a balance between the rights of consumers and those of air carriers. Furthermore, it would contribute to giving air carriers a better public image and would tend to contain insurance costs.

16. Responding to comments made regarding DCW Doc No. 21, the Delegate of Côte d'Ivoire affirmed that the proposed three-tier liability régime did not conflict with Article 16 *(Death and Injury of Passengers — Damage to Baggage)* and that it in no way changed the underlying principles of the régime envisaged in Article 20. Rather, it simply introduced an intermediate level of compensation. He observed that the first and second tiers of the liability régime proposed by Viet Nam in DCW Doc No. 24 corresponded to the second and third tiers, respectively, of that proposed by the African Contracting States. Noting that several speakers had cited existing agreements as justification for retaining Article 20 in its current form, the Delegate of Côte d'Ivoire averred that it was necessary for the Diplomatic Conference to decide whether it wanted a new, uniform liability régime which would strike a balance between the régimes embodied in the "Warsaw System" instruments, the *IATA Intercarrier Agreement on Passenger Liability*, the rules and regulations governing air transport in certain regions of the world and the national laws of each of ICAO's 185 Contracting States or a pre-existing régime. Averring that the purpose of the Diplomatic Conference was to modernize the "Warsaw System" in a spirit of equity, as well as of compromise, he emphasized that any proposal moving in that direction deserved consideration.

17. The Delegate of the Syrian Arab Republic endorsed the proposal by the African Contracting States, maintaining that it struck a balance between competing interests through its introduction of a third tier.

18. In summarizing the exhaustive discussion which had taken place regarding Article 20, just one element within the framework of a package which would have to be resolved, the Chairman indicated that a large measure of support had been expressed for Article 20 in its present form. That Article was based on the premise that the principle of strict liability would apply for claims of up to 100 000 SDRs but that, for claims in excess of that amount, the air carrier would not be liable if it could show that it had taken all necessary measures to avoid the damage or that it was impossible or that such damage was solely due to the negligence or wrongful act or omission of a third party. In the course of the Commission's deliberations, the *raison d'être* for the current wording of Article 20 had been elaborated upon and various proposals had been made. The Chairman noted that they all had in common a perception that, in striking that delicate balance between the interests of the consumer, the interest of the air carrier, and the need to ensure that there was certainty, predictability and, as far as possible, uniformity in the system, it was necessary to achieve a text which could command widespread and substantial support — if possible, consensus — so that it would indeed be ratifiable. There was also the common perception that it was necessary to bring order out of chaos by eliminating the present systems, which were singularly lacking in uniformity, making it almost impossible to determine which system applied at any given time.

19. The Chairman indicated that there was a common thread running through the proposals made by the 53 African Contracting States, India and Viet Nam in DCW Doc Nos. 21, 18 and 24, respectively, namely, that they all subscribed to the principle of unlimited liability. That in itself was a significant common ground on which the Commission must seek to build. Against that background, questions arose as to what circumstances and what burden of proof would be required in order to arrive at a situation which would give rise to unlimited liability.

20. The Chairman noted that another area of common ground was that there ought to be at least a first tier in which the limit of liability would be fixed at 100 000 SDRs. In relation to that limit of liability of 100 000 SDRs, Article 20 and the proposals by the African Contracting States and India all subscribed to strict liability. There was a slight departure from that in the proposal by Viet Nam as it referred to a régime of presumed fault liability, although it was not clear to the Chairman if that represented a significant difference. It was his hope that, having regard to what appeared to be the overwhelming support for a first tier of up to 100 000 SDRs without proof of fault, *i.e.* strict liability, the Commission could galvanize a consensus around that as the beginning of the process for striking a consensus on the package as a whole.

21. The Chairman noted that Article 20 was based on the premise that for claims exceeding 100 000 SDRs there would be unlimited liability with the burden of the proof being on the carrier. The conditions under which that liability could be avoided were enumerated in paragraphs (a), (b) and (c) of that Article. Under the proposal made by the African Contracting States, there would be an intermediate level between 100 000 SDRs and unlimited liability which would be fixed at 500 000 SDRs and which would be based on presumptive liability. The air carrier would be able to rebut that presumption of fault by showing, for example, that it had not been negligent. The third tier envisaged under that proposal for claims exceeding 500 000 SDRs was based on the principle of fault or neglect of the air carrier or its servant acting within the scope of its employment. Under the proposal made by India, over and above the principle of strict liability of up to 100 000 SDRs there would be unlimited liability provided that it was proven that the damage resulted from an act or omission of the air carrier done with the intent to cause

damage or recklessly and with the knowledge that damage would result — a "wilful default" situation. The proposal made by Viet Nam comprised unlimited liability beyond 100 000 SDRs but based upon the principle of fault, the burden of proof resting on the consumer. It was expressly provided that the fault of the air carrier would include its neglect.

22. There seemed to be a shared concern on the need to modernize the "Warsaw System" by recognizing that the victims of aviation accidents or incidents must be enabled to bring proceedings which would avoid the complex legal issues and the costs of litigation. The first tier sought to address that issue in the recognition of the fact that a substantial number of claims would fall within that particular category. The common acceptance in all of the proposals made of the principle of unlimited liability seemed recognition of the principle that a consumer should be able to recover for compensable damage. The only issues which arose were how that was to be proved and on whom the burden of proof would lie. It was the opinion of the Chairman that, in most situations, the theoretical distinction as to on whom the burden of proof would lie was more imaginary than real as it was the normal procedure after an aviation accident for evidence to be presented that the consumer was on board the aircraft and that an accident occurred involving that aircraft. If an accident took place, it was not for the consumer to explain the reason for its occurrence, *res ipsa loquitur*. Thus the evidential burden would automatically shift to the air carrier to show why the accident occurred and that it did not occur through its fault or negligence. The Chairman indicated that the Commission ought to be able to find a way in which it was possible to recognize the need to compensate the victims of aviation accidents or incidents, as the case may be, to facilitate the insurability of those risks by making their coverage more predictable and to recognize the legitimacy of circumstances in which it might be possible to assert, through the presentation of evidence, that it was through the wrongful act or negligence of the consumer that a particular accident or incident occurred. In his view, the proposals before the Commission had a large degree of commonality and had elements on which support, and hopefully, consensus, could be galvanized. In the context of the concerns expressed regarding the legitimate interest, particularly of small developing States or small air carriers, some of the proposals which had been made might result in an accommodation being reached without detriment to the claims of those who might wish to assert claims of a higher numerical limit, as the case may be, in circumstances in which it could be established that it was, in fact, the fault of the carrier. The Chairman considered that these issues, although obviously of great complexity, should not be insurmountable. However, in determining whether they would be insurmountable, he did not consider it appropriate to consider Article 20 in isolation from the rest of the important part of the text which dealt essentially with the whole principle of liability, as well as with other important elements discussed the previous day relating to the health of the passenger, mental injury, etc.

23. Recalling the concerns expressed regarding Article 27 *(Jurisdiction)* and "forum shopping", the Chairman indicated that compromises would be needed on all sides to arrive at an acceptable text. He suggested that perhaps in the course of the consultations which would take place in the Friends of the Chairman's Group the varying important elements of the various proposals made could be brought together so as to have a total package which could given some integrity to the system, alleviating the concerns of many while recognizing that it was more important to bring order out of chaos, to modernize the "Warsaw System" on a more predictable basis and to have a greater degree of uniformity. Although unable to arrive at some position which would represent the ideal solution, the Commission would arrive at one which would be far better than the current situation and which would therefore advance the cause of international civil aviation. The Chairman made that statement in the hope that the Commission would look at the situation realistically as it was a matter which had been examined for a considerable period of time. He reiterated that the Commission should be wary that the best was the enemy of the good.

24. On behalf of Member States of the Arab Civil Aviation Commission (ACAC), the Delegate of Saudi Arabia presented DCW Doc No. 29 proposing a three-tier liability régime comprising: a first tier for claims up to 100 000 SDRs on the basis of strict liability; a second tier for claims exceeding 100 000 SDRs up to an amount ranging from 250 000 SDRs to 400 000 SDRs with the burden of proof on the carrier; and a third tier for claims in excess of 400 000 SDRs on the basis of unlimited liability with the burden of proof on the plaintiff. It was understood that this proposal would be taken into account.

25. The Chairman indicated that the various drafting points raised during the discussion of Article 20 would be referred to the Drafting Committee.

26. In then introducing the proposal to amend **Article 21A *(Limits of Liability)*** presented by 53 African Contracting States in DCW Doc No. 22, the Delegate of Egypt recalled the comment made by the Chairman during the previous meeting (COW/6) regarding the difficulty of formulating a general definition of the term "delay" which would cover all circumstances. Following a lengthy debate of that issue by the 30th Session of the Legal Committee (LC/30), the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW) had considered the matter, only to decide to exclude a definition given the practical difficulties which implementation of a definition would give rise to. The SGMW had also concluded that no set amount should be fixed for damages occasioned by delay; rather, such amounts should be determined on a case-by-case basis. To fix such an amount would cause difficulties given that most air carriers entered into marketing arrangements such as codesharing. The 53 African Contracting States considered that a link should be made between Article 18 *(Delay)* and Article 21A. They proposed the deletion of paragraph 1 of Article 21A and the deletion of the reference made to "delay" in paragraphs 2, 3 and 4. Paragraph 5 should also be aligned. They further proposed that the limit of liability in the case of destruction, loss or damage of baggage should be limited to 735 SDRs per passenger.

27. In supporting the proposed deletion of paragraph 1, the Delegate of France averred that there was no valid reason to set a limit of liability in respect of delay in the carriage of passengers. Indeed, such a limit might be incorrectly interpreted by courts as being a forfeit to be imposed on the air carrier and the amount specified might not be commensurate to the damage sustained by the passenger. He emphasized that the deletion of paragraph 1 would not negate compensation for delay as the air carrier would remain liable therefor under Article 18. The Delegate of France indicated that, if the prevailing view of the Commission were to retain paragraph 1, then the limit of liability specified therein should be 4 150 SDRs, the amount stipulated in Additional Protocol No. 3.

28. The Delegates of China also supported the deletion of paragraph 1.

29. The Delegate of the United Kingdom averred that it was a misconception to believe that some advantage might be gained from the deletion of paragraph 1 for the benefit of air carriers, noting that the latter would remain liable under Article 18 *(Delay)* for damage occasioned by delay. He questioned whether the African Contracting States, in advocating no liability limit, were also advocating unlimited liability for passenger delay, a position which appeared to contradict the concerns expressed earlier regarding the financial resources of small air carriers.

30. The Delegate of Egypt indicated that the co-sponsors of DCW Doc No. 22 had not made any comparisons between Articles 18 and 21A in drafting the proposal. Their intention had been to codify the various provisions of the "Warsaw System" instruments in such a manner that no limit of liability would be retained in the case of passenger delay. Maintaining that the proposal met practical realities, he noted that it had gained the acceptance of air carriers.

31. Responding to a query by the Delegate of Norway, the Director of the Legal Bureau (D/LEB) clarified that paragraph 2 related to both checked and unchecked baggage, pursuant to paragraph 4 of Article 16 *(Death and Injury of Passengers — Damage to Baggage)*.

32. Referring to paragraph 3 of Article 21A, the Delegate of Singapore spoke in favour of using the limit of liability of 17 SDRs for the destruction, loss, damage or delay in the carriage of cargo, the amount specified in Montreal Protocol No. 4.

33. For his part, the Delegate of Germany questioned the sufficiency of the limits of liability specified in paragraphs 2 and 3, noting that the suggested limits were taken from instruments which were now almost twenty-five years old and that, in the intervening years, the value of the SDR had decreased. In his view, the retention of such limits did not constitute a modernization of the "Warsaw System".

34. In recognizing the concern that the establishment of a limit of liability for passenger delay might result in higher compensation payments than if there were no limit specified and the only consideration would be the extent of the damage sustained, the Delegate of the United States indicated that, in a spirit of cooperation and in the interest of assisting his African colleagues, he would not oppose the deletion of paragraph 1 and the reference to delay in the carriage of baggage made in paragraph 2 if the consensus was that those changes were desirable. He would, however, oppose the deletion of the reference to delay in the carriage of cargo made in paragraph 3, contending that the interests of air carriers would be better served by its retention. Drawing attention to paragraph 5, the Delegate of the United States voiced strong opposition to the re-establishment of the concept of wilful misconduct as a basis for breaking the limits of liability for the carriage of cargo, underscoring that it was a departure from Montreal Protocol No. 4. In light of that Protocol's recent entry into force and the legitimacy of the deal struck with the cargo carrier industry in developing the Protocol, he recommended most strongly that the concept of "wilful misconduct" not be re-established.

35. The Delegate of France shared the view expressed by the Delegate of the United States with regard to paragraphs 2 and 3 of Article 21A.

36. Points raised by the Delegate of Lebanon concerning the title of Article 21A and the translation into French and Arabic of the term "supplementary sum" used in paragraphs 2 and 3 of that Article were referred to the Drafting Committee, as were points raised by the Delegate of Canada concerning use of the words "dépenses" and "plaignant" in paragraph 6 and by the Delegate of Mongolia concerning the use, throughout the draft Convention, of the full term "Special Drawing Rights" instead of its acronym "SDR". Further discussion of Article 21A was deferred to the next meeting.

37. The Meeting adjourned at 1720 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Eighth Meeting
(Monday, 17 May 1999, at 1000 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Article 21A-D, Articles 22, 22A, 23, 24, 25, 26 and 27

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Commission resumed consideration of **Article 21A *(Limits of Liability)*** of Chapter III *(Liability of the Carrier and Extent of Compensation for Damage)*.

2. The Observer from the International Air Transport Association (IATA) underscored that, whereas Montreal Protocol No. 4 had introduced unbreakable limits of liability for the carriage of cargo, **paragraph 3** of the current draft reintroduced limits which could be broken if it were proved, pursuant to **paragraph 5**, that the damage had "resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result". He emphasized that dedicated cargo carriers and air carriers with a significant cargo business were very much opposed to the change proposed in paragraph 3 of Article 21A and were working very hard to maintain the *status quo* in the form of the *Measures to implement the IATA Intercarrier Agreement on Passenger Liability* and Montreal Protocol No. 4. The Observer from IATA indicated that, from a carrier's perspective, there was nothing in the current draft which improved upon the said Protocol while there was an enormous step backwards in terms of liability. Reverting to breakable limits would foster needless litigation over whose insurer should pay for any claim in excess of the new limit. The Observer from IATA noted that, during consultations the previous week with representatives from the International Federation of Freight Forwarders (FIATA), he had been informed that their federation was among those which favoured unbreakable limits. Thus IATA joined the Delegates of France and the United States (*cf.* DCW-Min. COW/7, paragraphs 34 and 35) in urging the retention of unbreakable limits in conformity with Montreal Protocol No. 4.

3. Recalling the previous meeting's discussion regarding the proposal made by 53 African Contracting States in DCW Doc No. 22 to delete paragraph 1 of Article 21A, the Delegate of the United Kingdom indicated that he would have no difficulty in accepting the resultant unlimited liability for damage

caused by delay in the carriage of passengers if that was what had been intended by the proponents. If, on the other hand, in the course of developing the consensus package referred to earlier by the Chairman, a decision were made to retain paragraph 1, he would suggest that the proposed limit of liability be increased to 12 000 SDRs to keep pace with inflation. Similarly, the limits of liability cited in paragraphs 2 and 3 for damage caused by delay in the carriage of baggage and cargo should be increased to 3 000 SDRs and 50 SDRs, respectively. In supporting paragraph 5 in the form presented, the Delegate of the United Kingdom indicated that it would be unconscionable for an air carrier to be able to take refuge in an unbreakable liability limit if the damage were a result of an intentional or reckless act or omission on its part. The Delegates of Sweden, Norway, Finland, the Netherlands and Germany endorsed these comments.

4. In advocating unbreakable liability limits for paragraph 3, the Delegate of Japan noted that, as the number of States which had ratified Montreal Protocol No. 4 had increased, it had become a well-established practice within the international air cargo industry to make liability limits unbreakable. In commenting on paragraph 1, he affirmed that the proposed liability limit for passenger delay should be retained as the existing limit under the "Warsaw System" had not adversely affected the interests of consumers and its removal would entail serious repercussions for air carriers in terms of potential litigation costs and damage awards.

5. The Delegate of Singapore agreed that the deletion of paragraph 1 would have the serious and, in his view, unintended consequence of creating a régime of unlimited liability for passenger delay. He spoke in favour of the limits proposed in paragraphs 2 and 3 for baggage and cargo.

6. Speaking on behalf of the 53 African Contracting States which had proposed the deletion of paragraph 1, the Delegate of Mauritius expressed confidence that the necessary compromise which would address their real concerns would be found in the Friends of the Chairman's Group. He indicated that the said African Contracting States supported the comments made by the Delegates of the United States (*cf.* DCW-Min. COW/7, paragraph 34) and Japan and the Observer from IATA regarding paragraph 5 and reintroduction of the unbreakable limits of liability for cargo established under Montreal Protocol No. 4.

7. The Delegate of Canada cautioned against any wholesale increases in the limits of liability proposed in Article 21A, even if based on the inflation factor. He averred that such matters should be studied on a case-by-case basis and in a pragmatic manner. It was desirable to retain a degree of flexibility with regard to liability for damage occasioned by delay as the extent of such damage had to be proved — often a difficult task. In speaking against any change in the liability limit of 17 SDRs for cargo specified in paragraph 3, the Delegate of Canada noted that that limit was in accordance with current practice and appeared to be acceptable to both shippers and cargo carriers. Adequate insurance was available in the case where the value of the cargo exceeded 17 SDRs/kg. He also opposed breakable liability limits for cargo, averring that they would merely give rise to litigation.

8. The Chairman underscored that provision was made in Article 21C for a review of the limits of liability prescribed in, *inter alia*, Article 21A, in the context of the inflation factor.

9. Maintaining that the proposed liability limit of 17 SDRs for cargo was appropriate, the Delegate of New Zealand joined the Delegate of Canada in cautioning against any change thereto. She supported the comments made by the Delegate of Mauritius and other speakers regarding the reintroduction in paragraph 5 of unbreakable limits in accordance with Montreal Protocol No. 4.

10. The Delegate of Switzerland spoke in favour of the principles embodied in Article 21A.

11. Emphasizing that it would be unreasonable to afford an air carrier which had acted negligently or recklessly the same treatment as one which had acted in accordance with the rules and regulations, the Delegate of Lebanon supported the retention of breakable liability limits in paragraph 5.

12. The Delegate of Austria opposed deleting paragraph 1 on passenger delay given its place in the consensus package mentioned by the Chairman and its role in ensuring a well-balanced liability régime.

13. Points raised by the Delegate of Oman regarding insertion of a reference to Article 18 *(Delay)* in paragraphs 2 and 3 and alignment of the title of Article 21A with its contents were referred to the Drafting Committee. The Chairman indicated that the other issues highlighted in the discussion would be considered by the Friends of the Chairman's Group in the overall context of the consensus package.

14. **Article 21B *(Conversion of Monetary Units)*** was then reviewed and accepted without comment.

15. Observing that, while **paragraph 1 of Article 21C *(Review of Limits)*** enabled the Depositary, ICAO, to adjust the prescribed limits of liability if the inflation factor exceeded 10 per cent, the size of the adjustment was not specified, the Delegate of Japan suggested that the Drafting Committee be asked to determine an appropriate sum for such an adjustment.

16. While considering the adjustment mechanism outlined in Article 21C to be very useful, the Delegate of the United States contended that it had one significant shortfall: the first review would only take place at the end of the fifth year following the date of entry into force of the Convention. As it could not be foreseen how long it would take for the Convention to come into force, he suggested that the first occasion for adjusting the liability limits for inflation should be at the time of entry into force of the Convention and that it should be based on the inflation factor which corresponded to the accumulated rate of inflation from the date on which the Convention was opened for signature to the date on which it entered into force. This would ensure the currency of the Convention when it came into force.

17. In sharing the concern that many years might elapse before the Convention entered into force, the Delegate of Egypt suggested that the first review of its liability limits take place at the end of the fifth year following the date on which the Convention was opened for signature and not the date of entry into force as proposed in Article 21C, paragraph 1.

18. In presenting DCW Doc No. 19, the Delegate of India indicated that, while his Delegation agreed on the need to provide for periodic reviews of the limits of liability, it found the proposed mechanism to be unacceptable. It proposed that Conferences of the Parties to the new Convention be convened every six years after the date of entry into force of the Convention to review the limits. Such Conferences could coincide with the triennial ICAO Assemblies to avoid additional expenditures. The Conferences would review the liability limits by reference to an inflation factor which corresponded to the accumulated rate of inflation since the previous revision or, in the first instance, since the date of entry into force of the Convention. The revised liability limits would be applicable to a State Party or its airlines only if it accepted the same.

19. While not opposing the proposed mechanism for raising limits of liability at five-year intervals in accordance with the accumulated rate of inflation, the Delegate of Viet Nam averred that the mechanism should enable all States Parties to participate in the revision of the liability limits and should reflect the world's economic development. To that end, her Delegation proposed, in DCW Doc No. 25, that the revised limits not come into effect unless ratified by the majority of States Parties and that the revised limits be applicable to the ratifying States Parties and their airlines only.

20. The Delegate of Singapore agreed that States Parties to the Convention should be involved in the review of its liability limits and agree to the revisions before becoming bound by them.

21. The Delegate of the United Kingdom underscored that the most important aspects of Article 21C was that the review was mechanical and of general application, thus ensuring a uniform system. He asserted that, as the proposals made in DCW Doc Nos. 19 and 25 would apply only to some States, they would lead to a continuing fragmentation of the system which the Diplomatic Conference was working so hard to put in place on a uniform basis.

22. Noting that there was general agreement on the need for a principle of revision of the liability limits, the Chairman indicated that it would be left to the Friends of the Chairman's Group to consider how that need could be accommodated.

23. **Article 21D *(Stipulation on Limits)*** was then reviewed and accepted without comment.

24. A suggestion made by the Observer from IATA that the last line of **Article 22 *(Invalidity of Contractual Provisions)*** be amended to indicate that the carriage, and not the contract, remained subject to the provisions of the Convention was referred to the Drafting Committee.

25. In commenting on **Article 22A *(Freedom to Contract)***, which stipulated that "Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents ...", the Delegate of Switzerland drew attention to the September 1998 accident involving Swissair Flight 111. All 229 people on board had died when the plane crashed into the sea near Halifax, Nova Scotia, Canada while en route from New York to Geneva. Although the cause of the crash had not yet been determined by the Canadian Aircraft Accident Investigation Board, Swissair had immediately started making voluntary advance payments of 15 000 SDRs per passenger to the families of the victims requesting financial support. According to information which he had received from the air carrier the previous week, a total of 163 families of victims had requested such advance payments, *i.e.* 75 per cent of the families had felt the need for immediate financial support. Swissair had subsequently offered 100 000 SDRs to the families of victims, with 65 families of the 215 victims having accepted that sum as an interim solution. Further discussions and litigation would be needed to find definite solutions. At present, some eight months after the crash, one single case had been settled. A second case was, however, very close to being settled. The Delegate of Switzerland underscored that the settlement of claims was a very complicated matter for all concerned given the complex technical issues involved and the inability, in some cases, to provide evidence as to their cause. Families of victims, the air carriers and their insurers were all in a difficult situation as the basis for their negotiations was unclear. While the accident to which he was referring was just one of a number of cases, the fact that 75 per cent of the families of victims had requested advance payments seemed to be a clear signal that there existed a need therefor. Advance payments were not solely for the benefit of passengers — it was also in the interest of the air carrier to provide immediate financial support in case of death or injury of passengers.

26. In thanking the Delegate of Switzerland for this information and for his elaboration of the humanitarian considerations which had motivated Swissair in making advance payments to the families of victims, the Chairman affirmed that his comments highlighted the appropriateness of the provisions contained in Article 22A.

27. A point raised by the Delegate of Singapore regarding the use of the term "regulations", normally associated with State action, was referred to the Drafting Committee.

28. The Observer from the European Community (EC) averred that the fact that three-quarters of the victims' families had been in need of advance payments in the case of Swissair Flight 111 made it clear that such payments should not be left to the goodwill of the air carrier but should be made mandatory in the Convention, as it was in the EC Regulation. Air carriers should make arrangements with their insurers beforehand so that such funds were automatically available whenever the need arose. He noted that, in his experience, most insurance companies readily entered into such arrangements. The Delegates of Germany, the United Kingdom, Italy, the Netherlands, Saudi Arabia, Austria and Pakistan shared these views, with the Delegate of Germany indicating that he would provide the Commission with a revised draft text for Article 22A.

29. Observing that the present wording of Article 22A did not prevent air carriers from making advance payments, the Chairman indicated that national laws could mandate such payments which would then not be inconsistent with the provisions of the Convention.

30. The Observer from the International Union of Aviation Insurers (IUAI) emphasized that insurers knew that, as a matter of good practice, advance payments assisted in the quick and efficient settlement of claims. The difficulties which insurers had encountered following implementation of the EC Regulation, which placed various definitions and difficulties in the way of an easy satisfaction of that need for advance payments, had caused insurers considerable concern. He underscored that it was not in the interest of air carriers or insurers to delay or to be mean-spirited or ill-equipped in dealing with such matters. It was not a question of goodwill on the part of insurers — rather, it was part of their obligation to air carriers and to the travelling public. The Observer from IUAI highlighted that the advance payments made in the case of Swissair Flight 111 had been far in excess of the amounts mandated by the EC Regulation and had been made voluntarily by Swissair entirely with the cooperation and assistance of its insurers.

31. In supporting the comments made by the Delegate of Switzerland regarding the humanitarian need for compensation which was not only fair but rapid, the Delegate of Spain spoke in favour of making advance payments mandatory.

32. The Delegate of France affirmed that Article 22A should encompass the possibility of national legislation which would make advance payments mandatory.

33. Noting that, as a matter of practice, air carriers and their insurers did make advance payments in relevant circumstances, the Delegate of Mauritius averred that a mandatory provision might give rise to significant practical difficulties. He therefore supported the current wording of Article 22A, subject only to review by the Drafting Committee of the point raised by the Delegate of Singapore.

34. The Delegate of Côte d'Ivoire underscored that the complexity and cumbersome nature of the procedure for the settlement of claims arising from aircraft accidents had, in some parts of the world,

resulted in no compensation being made, even years after the accidents had occurred. He thus deemed it appropriate to make advance payments mandatory, either by amending Article 22A to that effect or by stipulating in that Article that such payments were mandatory if required by the air carrier's national law.

35. In agreeing on the need for mandatory advance payments, the Delegate of Pakistan suggested that it be the subject of a new Article 22B instead of an amendment to Article 22A.

36. The Delegate of Singapore spoke in favour of making reference in Article 22A to the requirement for mandatory advance payments under national legislation in light of the flexibility which that would give States. It would also avoid the question of the magnitude of such payments.

37. Noting that making advance payments mandatory would give rise to the need to specify a minimum payment, the Delegate of Namibia indicated that the Friends of the Chairman's Group should also consider that element in its deliberations.

38. The Delegate of Ghana suggested that the mandatory advance payment be a fixed percentage of the liability limit of 100 000 SDRs specified in Article 20 *(Compensation in Case of Death or Injury of Passengers)*.

39. The Chairman indicated that this issue would be considered by the Friends of the Chairman's Group in light of the comments made.

40. **Article 23** ***(Basis of Claims)*** was then reviewed and accepted, subject to consideration by the Drafting Committee of a point raised by the Delegate of Panama regarding the translation into Spanish of the word "punitive".

41. A point raised by the Delegate of the United Kingdom regarding the implications of the use of non-gender specific language in **Article 24** ***(Servants, Agents — Aggregation of Claims)*** was referred to the Drafting Committee, as was a point raised by the Delegate of Canada regarding the use of the word "agent" in the French text thereof.

42. During the ensuing review of **Article 25** ***(Timely Notice of Complaints)***, the Delegate of Lebanon suggested that the first line of **paragraph 2** be revised to refer to partial loss of checked baggage or cargo. The Chairman indicated that the Drafting Committee would consider whether the term "damage" covered both total and partial loss.

43. **Article 26** ***(Death of Person Liable)*** was reviewed and accepted without comment.

44. Drawing attention to DCW Doc No. 33 presented by his Delegation, the Delegate of France voiced strong opposition to the proposed creation, in **Article 27** ***(Jurisdiction)***, of a fifth jurisdiction, namely, the place of the passenger's principal and permanent residence, on three grounds: that such a jurisdiction was not really necessary to protect passengers; that its use would have unfortunate consequences for the development of international air transport; and that granting it would create a regrettable precedent in the development of contemporary law. With regard to the first ground, he maintained that the four jurisdictions currently available to plaintiffs under Article 27 of the Warsaw Convention had proven to be to everyone's satisfaction and covered the vast majority of cases. Even proponents of the fifth jurisdiction conceded that that jurisdiction would only come into play in a very limited number of cases. The Representative of France further noted that the level of compensation in

those States advocating the fifth jurisdiction was quite satisfactory, with payments averaging between US $2 million to US $2.5 million per deceased victim being made in instances where air carriers had waived the liability limits of the Warsaw Convention. It was thus logical that air carriers, including the largest of them, were not calling for the creation of the fifth jurisdiction even though they had already accepted the principle of unlimited liability. That IATA did not advocate the establishment of such a jurisdiction in DCW Doc No. 9 was significant — an indication that it was not a requirement of world air transport.

45. The Delegate of France asserted that the creation of such a jurisdiction might even be detrimental to passengers. As indicated by IUAI in DCW Doc No. 28, there would inevitably be an increase in compensation paid as a result of systematic "forum shopping", and consequently, a substantial increase in insurance premiums, as well as higher ticket prices. As a further aggravation, passengers from low compensation States, by sharing the risk exposure of air carriers, would be subsidizing passengers from high compensation States. In addition, the creation of the fifth jurisdiction would render it easier to reject claims submitted by foreign citizens against air carriers of high compensation States on the basis of legal means such as the principle of *forum non conveniens*, elaborated upon in DCW Doc No. 27 presented by the United States. According to that principle, such claims could be rejected on the grounds that a competent court existed under the fifth jurisdiction in the claimant's country of origin. The Delegate of France underscored that, while having paid more as a result of the new system, many consumers could find themselves in the paradoxical situation of receiving less compensation than they would at present. He contended that the Diplomatic Conference should seek to improve the lot of consumers through the elimination of liability limits in Article 20 *(Compensation in Case of Death or Injury of Passengers)* rather than through the creation of the fifth jurisdiction. The Delegate of France, noting that the proposed liability régime would lead to a substantial medium-term increase in insurance premiums and in the financial risks taken by the air carriers, cautioned against further aggravating that prospect by creating the fifth jurisdiction.

46. Expounding on the second reason for his opposition, the Delegate of France averred that the fifth jurisdiction would lead to the situation where nationals of high compensation States would systematically bring claims against air carriers in their respective States, as would foreign citizens who were not excluded by legal means such as the principle of *forum non conveniens*. A sharp increase in compensation worldwide could only result therefrom, with an attendant increase in insurance premiums and ticket prices. The financial reserves of air carriers could be affected where the insurance companies' guarantee did not come into play. In emphasizing that the increase in costs associated with the creation of the fifth jurisdiction would not be favourable to the growth of international air transport, he noted that it could even seriously hamper it by jeopardizing air carriers with modest resources at their disposal. This would run counter to one of ICAO's fundamental objectives, as embodied in a recommendation by the World Wide Air Transport Conference on International Air Transport Regulation: Present and Future (Montreal, 23 November - 6 December 1994) which recognized "that within the framework of the [Chicago] Convention Contracting States ... share a fundamental objective of participation through reliable and sustained involvement in the international air transport system" and "that any change in approach to international air transport regulation should have due regard to the objective of participation and to ... 5) the disparate levels of economic development amongst States ..." [*cf.* Doc 9644 AT Conf/4, Agenda Item 4, First Preambular Clause, paragraphs f) and g); p. 56-57].

47. Underscoring that the concept of a "principal and permanent residence" was a new category in international law, the Delegate of France noted that previously reference had been made to "domicile or permanent residence", as in, *inter alia*, Article XII of the Guatemala City Protocol. The legal

consequences of using the new term could not be foreseen. He expressed concern that the present wording of paragraph 2 of Article 27 would make the nationality of the plaintiff a decisive factor in the acceptance or dismissal of a case and would ultimately create a jurisdictional privilege. While other conditions were stipulated in paragraph 2, they were very vague and broad in application and could relate to such diverse things as charter operations, codesharing, alliances or commercial agreements. The Delegate of France, contending that the courts would interpret the term used in sub-paragraph (c) "in which that carrier conducts its business" on the basis of the nationality of the plaintiff, averred that that would be a step backwards for contemporary law. Article 4 of the Protocol supplementary to The Hague Convention of 1 February 1971 on recognition and enforcement of foreign civil and commercial judgements set forth grounds for competence which were not acceptable at the international level, including the claimant's nationality, the latter's domicile or habitual residence, or a commercial activity ("doing business"). Those three grounds for competence should have less and less place in the development of law, contrary to what was proposed in paragraph 2. In a more general way, the conventional system rejected the jurisdictional privileges which would result in the international extension of domestic law. The Delegate of France noted that the 1968 *Brussels Convention on jurisdiction and the enforcement of judgements in civil and commercial matters* between Member States of the European Union and the 1996 Lugano Convention for the EFTA States excluded fifth jurisdiction mechanisms. No precedent to the contrary could be drawn from the Guatemala City Protocol as it had not entered into force. Averring that the establishment of the fifth jurisdiction could set a dangerous precedent in other areas not related to international air law, he maintained that, rather than advancing the unification and internationalization of law with a view to ensuring the identical treatment of persons under a single worldwide legal system, the result would be the further fragmentation of international law. This danger had been generally recognized, including by States which favoured the creation of the fifth jurisdiction in international air law but which elsewhere, such as in the current negotiations on the draft global convention on court competence, invoked the said Supplementary Protocol to The Hague Convention so that the criteria of nationality, residence and business activity were taken into consideration less and less.

48. Emphasizing that the proposed fifth jurisdiction was not desired by air transport professionals and was not conducive to its growth, the Delegate of France asserted that it would thus be less favourable than expected for passengers. He recalled that, in a spirit of compromise, a safeguard had been introduced into Article 27 in the form of square-bracketed paragraph 3 *bis*, which would enable States not wishing to subscribe to it to opt out. The Delegate of France reserved the right to propose amendments to that Article.

49. The Delegates of Madagascar, India, Lebanon, Saudi Arabia, Lesotho, Cameroon, Korea, China and Gabon endorsed these views.

50. In introducing DCW Doc No. 23 presented by 53 African Contracting States, the Delegate of Madagascar underscored the expectation of those States that a balance would be struck between the interests of developing and developed States. It was their hope that that expectation would be transformed into reality particularly in the case of Article 27. He noted that paragraph 2 introducing the concept of the fifth jurisdiction gave rise to major concerns, especially when taking into account the régime of unlimited liability. As indicated by the Delegate of France, there was no agreement within the international aviation community concerning the establishment of such a jurisdiction, just as there was no agreement concerning the related concept of domicile. The Delegate of Madagascar asserted that the existing four jurisdictions had proven to be satisfactory in dealing with cases brought to court thus far. While recognizing that the Guatemala City Protocol had provided for a fifth jurisdiction, he emphasized that that had been in the context of unbreakable liability limits. It was not, therefore, a convincing

argument for the inclusion of a fifth jurisdiction in the draft Convention, which departed substantially from the concept of such unbreakable limits. In underscoring that any broadening of jurisdictional choices would lead, over the long term, to hikes in air carriers' insurance premiums, he noted that the air carriers of African Contracting States were already the most heavily penalized in terms of insurance costs. Those States did not wish a fifth jurisdiction which would give rise to frivolous litigation. Another reason for their opposition was that the court of the proposed fifth jurisdiction would not be concerned only with the calculation of a passenger's claim but also with issues related to assessment of fault, contributory negligence and other matters arising under Article 20 *(Compensation in Case of Death or Injury of Passengers).*

51. The Delegate of Japan supported the introduction of the fifth jurisdiction in light of the need to promote the interests of consumers, a major objective of the current effort to modernize the "Warsaw System". He affirmed that the addition of the proposed fifth jurisdiction was vital.

52. Drawing attention to DCW Doc No. 31 presented by his Delegation, the Delegate of Colombia indicated that it also favoured the incorporation of the fifth jurisdiction, subject, however, to the exclusion of square-bracketed paragraph 3 *bis*. This approach coincided with the consensus expressed at the Third Meeting of the Group of Experts on political, economic and legal air transport matters held in Argentina from 23 to 25 March 1999, as well as with the proposal of the Latin American Civil Aviation Commission (LACAC) [*cf.* DCW Doc No. 14, paragraph 5 a)] and many other States. The Delegate of Colombia underscored that, with the fifth jurisdiction, a passenger could claim compensation in the State in which his principal and permanent residence was located, thus avoiding the high costs involved in travel, accommodation, etc., if the case were heard elsewhere. He affirmed that the best court was the one where the claimant lived.

53. In also advocating the creation of the fifth jurisdiction in paragraph 2 without square-bracketed paragraph 3 *bis*, the Delegate of Panama emphasized that that jurisdiction would benefit passengers of all nationalities by enabling them to submit claims in the State in which their principal and permanent residences were located. He contended that paragraph 3 *bis* would weaken the draft Convention.

54. Referring to DCW Doc No. 20 presented by his Delegation, the Delegate of India emphasized that the liability régime envisaged in Article 20 (*Compensation in Case of Death or Injury of Passengers)* and the fifth jurisdiction contemplated in Article 27 were intrinsically linked. He asserted that, taken together, the provisions regarding unlimited liability and fifth jurisdiction would have far-reaching implications for small- and medium-sized air carriers, especially those of the developing world, which would be extremely serious from the point of view of logistics as well as of financial costs. Thus it might not be possible for the Indian Delegation to accept the fifth jurisdiction as proposed. It was, however, favourably inclined to support square-bracketed paragraph 3 *bis* proposed by France.

55. In expressing the view of the Member States of the Arab Civil Aviation Commission (ACAC) as set forth in DCW Doc No. 29, the Delegate of Lebanon affirmed that there was no justification for creating the fifth jurisdiction as proposed in paragraph 2 of Article 27 when the Diplomatic Conference was working towards the establishment of a régime comprising unlimited liability so as to afford equal opportunity to all passengers and to strike a balance between their interests and the interests of air carriers. He reiterated that the Guatemala City Protocol had provided for a fifth jurisdiction in the context of a régime of limited, and not unlimited, liability. The ACAC Member States supported the views of the Delegates of France, the African Contracting States and India.

56. As a co-sponsor of DCW Doc No. 29, the Delegate of Saudi Arabia fully endorsed these comments. He averred, moreover, that the other four jurisdictions were sufficient to protect the interests of both passengers and air carriers. Expanding the jurisdictions to encompass the fifth jurisdiction would complicate, and not facilitate, the legal proceedings for the passengers as well as the air carriers. The Delegate of Saudi Arabia reiterated that there was a global trend to exclude the fifth jurisdiction in international instruments.

57. In addition to supporting DCW Doc No. 23 of which they were co-sponsors, the Delegates of Lesotho, Cameroon and Gabon supported the positions of France and ACAC Member States. The Delegate of Cameroon, noting that square-bracketed paragraph 3 *bis* was already square-bracketed, averred that the inclusion of the fifth jurisdiction would only weaken the consensus which was being sought and jeopardize the adoption, signature and subsequent ratification of the draft Convention.

58. The Delegate of Norway indicated that, although her Delegation had initially shared the concerns expressed by the Delegate of France, the African Contracting States, ACAC Member States and others, it now found the proposal for the creation of the fifth jurisdiction to be acceptable, including the conditions therefor stipulated in paragraph 2, sub-paragraphs (a) to (c). It was of the opinion that the interests of the air carriers would be sufficiently protected under Article 27. The Norwegian Delegation did not, however, support the inclusion of square-bracketed paragraph 3 *bis*, being of the view that it would seriously undermine the uniform nature and strength of the draft Convention.

59. In speaking against the proposed establishment of the fifth jurisdiction, the Delegate of Korea maintained that the existing four jurisdictions were sufficient to cover all claims. He expressed concern that a large number of legal actions would be brought before the court where the passenger had his principal and permanent residence, with the strong possibility of protective awards in favour of the national concerned. While the fifth jurisdiction might be acceptable in the local courts of some Contracting States on an exceptional basis, there was no justification for it to be accorded equal status to the four other long-standing jurisdictions.

60. The Delegate of Singapore indicated that, in developing a final package, the Friends of the Chairman's Group should take into account two points: the need to achieve consensus, an important objective of the Diplomatic Conference; and the need to protect the interests of the passenger. With regard to the last point, he noted that, while concern had been expressed that litigation might drift to certain high compensation States with an attendant increase in costs, passengers might, for a variety of reasons, find it easier to litigate in their own States. Another issue to be considered was the level of compensation. In affirming that the local court might be in the best position to strike a balance between the interests of the air carrier and those of the passenger in determining a level of compensation which was commensurate to the extent of the damage sustained, the Delegate of Singapore contended that a passenger might find it difficult to present the requisite evidence to a foreign court and to obtain adequate compensation.

61. The Delegate of the United States failed to understand the opposition to the proposed creation of the fifth jurisdiction. Noting the general agreement that such a jurisdiction would only apply in a small number of cases, he queried how such few cases could have the major impact which had been described. The United States felt strongly about this issue regardless of the number of cases involving fifth jurisdiction as it had seen the plight of the survivors of aviation crashes when they were in bereavement, their lives devastated by a horrible event, and some were compelled, under those circumstances, to undertake litigation in a distant place that had little or nothing to do with their way of life, with how their financial plans were arranged, or with any of their reasonable expectations as to what life would bring

them. This caused a great deal of harm to the people affected. The United States thus considered that the creation of the fifth jurisdiction was necessary in order to protect passengers. To the question raised regarding the fairness of exposing air carriers to the fifth jurisdiction, the Delegate of the United States indicated that much work had been done by the Secretariat Study Group, the 30th Session of the Legal Committee (LC/30) and the Special Group on the Modernization and Consolidation of the "Warsaw System" (SGMW) to make it fair. He noted, in this regard, that two of the four existing jurisdictions were based on the location of the carrier and not on where the accident occurred or where the ticket was purchased, if that was of relevance. The Delegate of the United States thus failed to comprehend the unfairness of having a single jurisdiction based on the principal and permanent residence of the passenger.

62. While noting that "forum shopping" had been cited as something to be avoided, the Delegate of the United States, referring to paragraph 3 of DCW Doc No. 12 presented by his Delegation, asserted that, in his State at least, the establishment of the fifth jurisdiction could lead to less "forum shopping", with more non-US residents electing to sue in their "home court" than in the United States. Also citing DCW Doc No. 27 on *forum non conveniens* presented by his Delegation, he questioned how that principle could give rise to such differing views, being considered both bad and good because it reduced "forum shopping". In accordance with that principle, a case would be dismissed if it were brought in an inconvenient forum to the parties for no good reason. It was the view of his Delegation, as well as of aviation defence lawyers and aviation plaintiffs' lawyers with whom he had spoken, that the number of cases which would be brought to the United States by the fifth jurisdiction would be offset by the number of cases which would be dismissed on the grounds of *forum non conveniens*, due to the existence of a "home court" convenient forum for the "forum shopping" plaintiff. The Delegate of the United States questioned how, if that were the case, and given the small number of instances in which recourse would be made to the fifth jurisdiction, insurance rates would increase, as had been argued by previous speakers. He noted, on the basis of his discussions with representatives of the insurance industry, that aviation insurance rates had been dropping for the past several years. Air carriers which had signed the *IATA Intercarrier Agreement on Passenger Liability* (and the related agreement for its implementation) and accepted unlimited liability had renegotiated their insurance rates and had seen them lowered. This was perhaps a reflection of the current state of supply and demand in the insurance industry. Averring that the issue of insurance rates was largely overblown, the Delegate of the United States recalled that air carriers serving his State were already subject to insurance exposure based upon court judgements dealing with wilful misconduct, the number of which was increasing around the world. As air carriers which served high compensation States were already paying insurance rates commensurate to the liability limits, those rates should not be at all affected by the establishment of the fifth jurisdiction.

63. The Delegate of the United States noted that a number of protections for small air carriers had been built in the provision for that jurisdiction — a matter which seemed to have been overlooked in the present debate. Much progress had been made since the adoption of earlier Protocols regarding the minimum contacts which would be required for a small carrier to be compelled to defend a lawsuit in another State. Paragraph 2, sub-paragraph (c), represented a carefully negotiated compromise on that issue and reflected the fundamental fairness which the United States considered was required to address the concerns of small air carriers. The Delegate of the United States noted that if a small air carrier did not conduct its business in his State — and many did not —, if they did not operate an aircraft to his State or have their code carried on an aircraft which touched his State, the fifth jurisdiction provision would not bring them into a US court even if they were carrying a passenger whose ticket bore the code of a US air carrier and crashed. This constituted substantial protection for small carriers. Not only did air carriers have to have either their code or their aircraft touch his State, they also had to have a place of business in his State, either through which they conducted their business directly or through which their codeshared

partner conducted its business. That was significant protection for small carriers who had nothing to do with operations to a State involved with a fifth jurisdiction determination.

64. To the assertion made that the fifth jurisdiction was bad because it was based on the nationality of the claimant, the Delegate of the United States noted that the present wording of paragraph 2 negotiated in the forum of the SGMW referred not to the domicile of the passenger but to his principal and permanent residence, what the passenger called "home". He underscored that the notion was not that a passenger should be able to sue in the place of his nationality but rather that he should be able to sue in his homeland, which was presumably where his estate and insurance plans were made, where his family was located, etc.

65. In summary, the Delegate of the United States affirmed that the fifth jurisdiction was essential. Underscoring that it was vital to provide fundamental fairness to passengers, he indicated that, in the view of the United States, the current draft of Article 27 without square-bracketed paragraph 3 *bis* represented a fair balance between the legitimate interests of passengers and those of all air carriers, including smaller ones.

66. The Chairman indicated that it was quite clear that the issues which had been raised in relation to Article 27 could not be seen in isolation and that they had to be considered in the context of the Convention as a whole in order to achieve that delicate balance between the need to protect the interest of passengers with those of air carriers and the general public. In particular, the issues raised in Article 27, notably the fifth jurisdiction, had to be seen with reference to the liability issues which arose under Article 20 *(Compensation in Case of Death or Injury of Passengers)*. The formulation contained in paragraph 2 of Article 27 raised a number of critical factors which required further in-depth examination, including "forum shopping", *forum non conveniens* and the recognition of foreign judgements. The Commission must also remain sensitive to the issue of insurance. He noted that the present discussion had enabled all those delicate issues to be placed in the context of a search for solutions within the framework of a consensus package. The Chairman expressed the hope that it would be possible to deepen consultations both bilaterally and within the Friends of the Chairman's Group, whose composition he then announced, as follows: the Chairman and Vice-Chairman; Delegates having presented proposals; two representatives from each of the regional groups; and a core group of Delegates representing Australia, Cameroon, Canada, Chile, China, Egypt, France, Ghana, India, Japan, Lebanon, Mauritius, New Zealand, Pakistan, the Russian Federation, Saudi Arabia, Singapore, Slovenia, Sri Lanka, Sweden, the Syrian Arab Republic, Switzerland, Tunisia, the United Kingdom, the United States, Uruguay and Viet Nam. He underscored that the Group was open-ended and that all interested were free to attend its meetings.

67. The Meeting adjourned at 1330 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

"FRIENDS OF THE CHAIRMAN" GROUP

Minutes of the First Meeting
(Monday, 17 May 1999, at 1430 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Article 16, paragraph 1, and Article 20

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. In indicating that the deliberations of the Group would initially focus on the issues arising in relation to Chapter III *(Liability of the Carrier and Extent of Compensation for Damage)*, the Chairman reiterated that those issues could not be considered in isolation from each other and that ultimately they had to be regarded as part of a package. He underscored that an attempt had been made in the draft text of the Convention, particularly in Chapter III, to seek a balance between the interests of the passengers *i.e.* the users of international air transportation, the carriers, and the general public, to ensure that a great measure of equity would emerge which would command widespread and substantial support and which would enable a greater degree of uniformity and ratifiability.

2. The Chairman recalled that in the larger forum of the Commission of the Whole, consideration has been given to **Article 16** ***(Death and Injury of Passengers — Damage to Baggage)***, which dealt with the question of death and injury of passengers, particularly the system of liability which would arise thereunder, as well as the question of destruction or loss of, or damage to, checked baggage. The main issue to have arisen which necessitated some accommodation was firstly the issue raised in paragraph 1 relating to the question of mental injury, in particular, the issue raised in its last sentence of whether the carrier might escape liability to the extent that the death or injury resulted from the state of health of the passenger. The deliberations of the Commission of the Whole seemed to indicate that there was still no general consensus, even in jurisprudence, as to the extent to which the "Warsaw System" recognized liability for damage in respect of mental injury. At the time of the establishment of the Warsaw Convention in 1929, it had seemed that most of the jurisprudence of most of the countries had not yet recognized liability for mental injury and certainly mental injury independent of its connection with some form of bodily injury. Although jurisprudence had, in fact, progressed so that in the domestic jurisdictions of many countries there was an acceptance of liability for mental injury, it could be said, on the basis of the drafting history of the Warsaw Convention and the outcome of some Court cases, that, at that time, pure psychological injury had not been contemplated. The reality was that today, in many domestic jurisdictions, there was indeed liability arising in respect of mental injury. At the same time,

what the Conference was striving to attain was a degree of certainty and uniformity. Thus whatever position the Conference arrived at with regard to the issue of mental injury, its intentions regarding the scope of liability must be made clear in the "travaux préparatoires" of the Conference for the future interpretation of the Convention. The appropriate language would then have to be found. It seemed to the Chairman, however, that the issue of mental injury could not be considered in isolation from the overall balance of factors which were to be found within the draft Convention as a whole. In a sense, the Warsaw Convention was unique. The draft Convention continued to be unique in the sense that, on the one hand, it was necessary for a particular system of liability to be established — there seemed to be general agreement that there would be strict liability up to 100 000 Special Drawing Rights (SDRs); on the other hand, unlike domestic jurisdictions, there was a statutory bar for bringing actions arising under the Convention if such actions were not brought within a two-year period. Furthermore, the Convention provided for actions to be barred, whether they were brought under the Convention itself or under some other provision in some respect of either contract or tort. Thus the draft Convention was, in a sense, designed to provide a kind of exclusive remedy in respect of damage sustained in relation to death or injury which took place on board an aircraft or during the process of embarking or disembarking.

3. The Chairman recalled that a number of suggestions had been made during the discussion of Article 16, paragraph 1, in the Plenary and the Commission of the Whole. Firstly, it had been suggested that it should continue to be confined to death or bodily injury. Others had suggested that that provision be extended to indicate, in very clear language, that it would include bodily injury and any mental injury resulting therefrom. Thus mental injury which was associated with bodily injury would be expressly covered. The suggestion had also been made that it was not necessary to qualify the reference to injury by the word "bodily"; it would be sufficient to refer simply to "injury". It had also been suggested that a qualification could be made on the term "mental injury", in the sense of mental injury which had adverse effects on health. Some concern had been expressed as to whether any form of mental injury, however small, should be at all accommodated, even if it were associated with bodily injury. Delegates were concerned with whether or not the mental injury had to be significant or serious to be recoverable. There had therefore been reference to mental injury which significantly impaired the health of the passenger. Finally, there had been the suggestion that the term "personal injury" be used on the basis that the jurisprudence in some countries had indicated that a reference to "personal injury" would be wide enough to cover certain forms of mental injury.

4. As a matter of substance, the Chairman had the impression from the discussions in the Commission of the Whole that there would be an agreement for some forms of mental injury to be covered. That was to say that no one excluded the right to compensation in respect of mental injury, provided that the safeguards were sufficient to ensure that mental injury *per se*, e.g. fear and matters of that kind, unrelated to some form of bodily injury, would not be covered. If such were the case, the Chairman would therefore ask the question: Did the concept of bodily injury and any mental injury resulting therefrom serve to accommodate in wide measure the kind of understanding which could be reached in this matter, bearing in mind that the Conference was crafting and designing a system of liability with all kinds of balances, which was not pure, and which was essentially *sui generis* in nature? In noting that the formulation of Article 16, paragraph 1, was not ideal, he queried if it would be acceptable within the framework of an overall package. The Chairman averred that it would at least move the process forward in terms of trying to design a system as it had an overall balance of factors, strict liability on the one hand and other issues on the other hand.

5. The Delegate of France spoke in favour of the Chairman's proposal.

6. The Delegate of the United States noted that, in the jurisprudence of his country, the term "bodily injury" was already interpreted as including mental injury that accompanied or was associated with bodily injury. He indicated that, if the only progress which the Conference were able to make would be to refer to mental injury resulting from bodily injury, then that might, in fact, be a step backwards from where the state of American jurisprudence on mental injury was to begin with. Even if the provision adequately reflected American jurisprudence, it would probably lead to litigation. If those were the two options, the Delegate of the United States would prefer to leave bodily injury alone and establish legislative history to the effect that no intention had been manifested by having considered mental injury to change the existing jurisprudence on what was or was not included in the term "bodily injury".

7. The Chairman concurred that general jurisprudence had moved in the direction of a purely domestic sense and that compensation was being awarded for mental injury sometimes unassociated with bodily injury. He noted, however, that in the light of the "travaux préparatoires" of the Warsaw Convention, interpretations had not been consistent, and contended that in the case Eastern Airlines versus Floyd (1991), the US Supreme Court had left unanswered the question of whether or not mental injury associated with bodily injury could be covered.

8. The Delegate of the United States indicated that the US Supreme Court had bypassed that issue in Eastern Airlines versus Floyd (1991) as being one which it did not have to address. It had, however, been addressed by a variety of lesser courts and had not arisen to a Supreme Court decision. The general prevailing attitude in the Courts interpreting the Warsaw Convention in the United States was that mental injury associated with bodily injury had generally been recoverable in cases coming under the Warsaw Convention.

9. Noting that mental injury associated with bodily injury was covered under the term "bodily injury" under the interpretation of that term given by the Egyptian Courts, the Delegate of Egypt indicated that he had no difficulty with the intent behind the use of that term in the Warsaw Convention. He suggested that, to solve the problem at hand, the record of the proceedings of the Conference reflect that the term "bodily injury" covered mental injury associated with bodily injury. That would show the intent behind that term and would give a unified meaning to it, covering mental injury associated with bodily injury, as was currently the case in the Courts under the common law system and the civil law system.

10. The Delegate of the Russian Federation indicated that, from the point of view of its legislation the Russian Federation did not have a problem with including both bodily and mental injury as components of liability. Under the new aviation code of his State, reference was made in this context to anything which jeopardized the health of the passenger. That single term "health" was used in view of the difficulty of separating the body from the psyche. The Delegate of the Russian Federation thus proposed that reference be made in Article 16, paragraph 1, of the new Convention to "damages to health", averring that it would reflect the views expressed as the term "health" encompassed both bodily and mental injury.

11. Recalling the discussion which had taken place in the Plenary on this subject, the Delegate of Chile suggested that the best solution would be to refer to "mental injury which had an adverse effect on health". He underscored that a mere reference to bodily injury and to mental injury associated with bodily injury excluded some possible indemnities, particularly mental injury which was not associated with bodily injury. His proposal reflected the views of many Delegates that mental injury should not be excluded from the new Convention. Furthermore, the term "adverse effect" could be qualified as being "significant" or "important", which would restrict the scope of liability to the maximum extent possible. The Delegate of Chile affirmed that a larger number of States would ratify the Convention if his suggested wording were adopted.

12. The Delegate of the United Kingdom stressed the need to move forward from indemnification for bodily injury and for mental injury associated with bodily injury — injuries which could be recoverable anyway, on the basis of recent cases — to the point where there would be indemnification for mental injury alone. He supported the proposal made by the Delegate of Chile as a means of avoiding any frivolous claims which might arise in that connection.

13. Averring that it would be to no avail to make a reference in the new Convention to mental injury without clarifying the meaning of that term, the Delegate of Saudi Arabia also favoured the said proposal.

14. In supporting the concept underlying the proposal by the Delegate of Chile, the Delegate of Sweden contended that the initial suggestion to refer to bodily injury and mental injury associated therewith did not take into account the problem of fraudulent and frivolous cases mentioned by a number of Delegates. He cited, as an example of the latter, a claim for the fright experienced by a passenger during air turbulence. Highlighting the similarity between the proposal put forward by the Delegate of Chile and that put forward by the Delegate of the Russian Federation, and emphasizing that use of the term "health" would obviate the need to refer to bodily or mental injury, the Delegate of Sweden advocated adoption of the proposal by the Delegate of the Russian Federation.

15. The Delegate of New Zealand concurred with previous speakers that damages for pure mental injury should be recoverable. In emphasizing the need to restrict the number of frivolous claims filed, he spoke in favour of both the Chilean and Russian proposals to the extent that reference to injury to health would assist in limiting such claims.

16. In lending his support to the Chilean proposal, the Delegate of Switzerland underscored that pure mental injury and not only mental injury associated with bodily injury should be recoverable.

17. The Delegate of Viet Nam endorsed the proposal put forward by the Delegate of the Russian Federation, noting that the national legislation of his State also made use of a definition of "health". He averred that damage to health should encompass both bodily injury and mental injury associated with bodily injury.

18. The Delegate of Canada noted that, while the Chilean proposal went a certain way, and a long way, to meeting the concerns of his State, it did not meet those concerns completely. In his view, the excessively general language of the proposal had a real potential for abuse, abuse which his State could not condone. Contending that even the addition of the qualifier "serious" was insufficient to tighten the wording of the proposal, the Delegate of Canada suggested the use of a more objective qualifier such as "long-term". It would then be clear that to be recoverable the damage sustained would have to have long-term effects on health. It could not be something which was "serious" for five minutes, such as fright.

19. The Delegate of the United States expressed concern that the existing American case law on what was covered under bodily injury should not be affected by anything that was added by the Group to paragraph 1 of Article 16. He queried whether the additional language being considered would swallow up mental injuries associated with bodily injuries which might already be recoverable in the United States and which might be rendered non-recoverable by the suggested qualifications or whether the Group was addressing two separate issues — bodily injury as currently interpreted and whatever new formulation the Group was discussing. The Delegate of the United States requested clarification as to whether these were two separate issues or whether one would overcome the other.

20. While noting that he was not in a position to answer that question immediately, the Chairman indicated that, in his view, if bodily injury now included mental injury associated with bodily injury, and the if intention was to cover some elements of mental injury not associated with bodily injury but which impaired the health of the passenger, then it would be necessary to clearly reflect that intention in the records of the proceedings. He observed that what the Courts had done was to try and understand the intention of the Contracting Parties in the development of a given Convention, for the purpose of interpretation. They had resorted to using what they described as "a purposeful interpretation" to give effect to the intention. It was therefore necessary for the Group to be very clear in its own intention and to have it duly reflected in both the language of Article 16, paragraph 1, and in the record of the proceedings.

21. The Chairman indicated that it was his understanding that the Chilean proposal related to mental injury with adverse effects on health. The concern expressed by the Delegate of the United States could be met by a provision which would indicate that it was something which did not derogate from whatever the term "bodily injury" might mean but which was additional to that which was intended. That, together with a record which indicated what the intention was, would address the particular problem which had been raised. It was, however, necessary to be careful in the choice of language to ensure that that would be the case.

22. The Observer from the International Union of Aviation Insurers (IUAI) observed that there was a World Health Organization (WHO) definition of this issue which required "recognizable mental illness", a term which was fairly well defined in WHO terminology. It effectively meant something more than mere fright, something which could be diagnosed as an illness.

23. The Delegate of Australia noted that, while the view expressed by the Chairman might not necessarily have been that of his Delegation, he had made the point very well that what the Courts had struggled with when they had looked at the Warsaw Convention in the context of an injury was the setting aside of their own jurisprudence with a view to taking account of what was intended by the Warsaw Convention in 1929, and by the Eastern Airlines versus Floyd (1991) decision. He noted that, to a certain extent, that had been a difficult process in jurisdictions in Australia: while on the one hand there had been a clear recognition that certain kinds of injuries would be recognizable and recoverable under domestic jurisprudence, jurisdictions were prevented from going that far in the resolution of cases under the Warsaw Convention because they were obliged to follow the precedent set by the Warsaw Convention records as well. Thus the language of the draft Convention should, in the first instance, put matters beyond doubt; to the extent that it did not, then, as the Chairman had just indicated, the records of the proceedings should make it clear what was and what was not encompassed by Article 16, paragraph 1.

24. The Delegate of Australia cautioned against using "recognizable mental illness" as a criterion as it would give recognition to medical definitions of psychological and emotional injuries which were far narrower than most Courts currently involved in such matters would necessarily bind themselves to. He averred that while it might be useful to look into it, it would probably be a far narrower notion than what seemed to be on the minds of most Delegates.

25. The Delegates of Slovenia and Lebanon voiced support for the Chilean proposal, with the latter underscoring that it was possible for a passenger to sustain mental injury which was not associated with bodily injury. In order to avoid an endless number of claims for compensation for such mental injury, it would be necessary to qualify it as being "grave".

26. As a compromise solution which would avoid abuse of the kind referred to by the Delegate of Canada, the Delegate of Singapore suggested that reference be made in Article 16, paragraph 1, to "mental injury which substantially impairs a person's health". This suggestion was supported by the Delegate of Japan.

27. The Delegate of the Syrian Arab Republic noted that, as bodily injury encompassed mental injury in his State's jurisprudence, he had no difficulty with the current wording of the provision. In light of the concerns raised, however, he supported the Chilean proposal as being a satisfactory compromise.

28. The Delegate of Egypt expressed reservations regarding use of the term "recognizable mental injury", noting that it was unclear when such an injury might be recognizable and when it might not be; it was also unclear who was to determine that the mental injury sustained was "recognizable". The term would therefore have to be defined. In requesting clarification regarding the Chilean proposal, the Delegate of Egypt indicated that he would also have reservations in the case where the reference made in that proposal to "mental injury" was to mental injury not associated with bodily injury.

29. The Chairman clarified that the suggestion made by the Delegate of Singapore took into account the observation made by the Delegate of Chile that in order to deal with safeguards in relation to minor complaints, for example, it would be necessary to ensure that the mental injury significantly or substantially impaired the health of the passenger. It remained to be determined whether a consensus could be promoted around the Singaporean proposal that Article 16, paragraph 1, be amended to refer to "mental injury which substantially impairs a person's health". He noted that in all domestic jurisdictions there was a problem in relation to accident cases where the doctors determined the nature or degree of disability arising from accidents. The Group would thus not be able to find the perfect answer. It needed to recognize two things: firstly, that bodily injury would be covered; and secondly, that mental injury which arose from bodily injury would equally be covered and that any mental injury *per se* would have to substantially impair the health of the passenger for it to be recoverable. The Chairman underscored that the Group was attempting to deal with a unique régime, taking into account all passenger-related considerations. It was not trying to approximate, or make it equivalent to, any régime which existed in domestic jurisdiction. The draft Convention had its own régime of liability, different from domestic jurisdiction; it had its own limitations as to the time within which an action could be brought and its own defences. It was different. Thus the Group could not rely upon the fact that domestic jurisdictions might well provide for a wider range of recoverability for damage incurred in an accident on the ground in a motor vehicle, for instance, for the purpose of saying that the Group must try to reach that in the new Convention. Not all domestic jurisdictions contained such limitations — their underlying principles were quite different.

30. The Delegate of the United Kingdom indicated that the problem with adding some form of qualification to the term "mental injury", either by saying that it was "long- term" or "substantial", was that it would have an effect on the way in which bodily injury was construed at the moment where it also included mental injury. He averred that that would be a step backwards, noting that some passengers who were currently able to recover damages for mental injury associated with bodily injury where the mental injury was not substantial would, from the entry into force of the new Convention, lose that right of recoverability. It thus seemed to him that to get around that, and to be able to recognize mental injury as a stand-alone injury, a separate definition would be required. The Delegate of the United Kingdom suggested that Article 16, paragraph 1, refer to both bodily and/or mental injury, with a new paragraph being added along the following lines: "In this Article, the term 'mental injury' in a case where there is no accompanying bodily injury means a mental injury which has a substantial adverse effect on health.". In that way, not only would bodily injury be left alone to be construed as including the mental injury which it now included, but also mental injury would be added as a stand-alone injury, provided that it had a substantial effect on health.

31. The Chairman clarified that the Delegate of the United Kingdom was suggesting that, by defining mental injury which was independent of bodily injury, it would be possible to retain bodily injury with its interpretation of mental injury which arose therefrom. It would then be possible to confine, rather than define, the mental injury *per se*, to circumstances in which it had a substantial effect on pure mental health or

substantial effects on health. Indicating that he did not perceive any divergences of substance arising in this regard, the Chairman observed that the Group had now almost begun a process of recognizing the following: that bodily injury would be covered; that bodily injury which resulted in mental injury would be covered; but that mental injury *per se* would only be covered where it had a substantial adverse effect on health. If there were agreement on that, then the Group could refer the text of Article 16, paragraph 1, to the Drafting Committee for refinement. He reiterated that it would not be possible to find a perfect solution. One additional thing that it was necessary for the Group to do was to make sure that the records of the proceedings clearly indicated what it was that the Group had agreed to; that would be vital in enabling an understanding as to what it was that the language which was being used was intended to cover; it could not be left to the Courts to subsequently interpret the text of Article 16, paragraph 1, independently of the Conference's "travaux préparatoires".

32. Recalling his earlier comments (*cf.* paragraph 14), the Delegate of Sweden indicated that he now had second thoughts regarding the addition of the qualifier "substantial". Observing that the purpose behind that addition was to protect carriers against fraudulent and frivolous claims, he indicated that the same end could be achieved through adoption of the Chilean proposal. He noted that pure fear would not constitute an injury; for something to be considered an injury, it would have to have an adverse effect on health. The Delegate of Sweden expressed concern that the addition of a qualifier such as "substantial" would only create new problems and give rise to litigation. He thus favoured the Chilean proposal which, in his view, would address the points raised.

33. The Chairman noted that there was a legitimate concern regarding claims which were either deemed to be insignificant or to be outside the purview of the proposed régime. In observing that the word "substantial" might have a different connotation from the word "significant", he indicated that it meant, essentially, that there must be some important manifestation of injury. "Substantial" might signify that the passenger would have to establish that the injury of which he complained was not insignificant, and therefore, that it was significant. The Chairman underscored that the burden of proof would rest with the passenger and not with the carrier. The principle of strict liability did not mean that any passenger could simply come in and say "I was in an aircraft accident and I have significant or substantial injury or mental injury.". The passenger making that assertion for the purpose of claiming damage would have to produce the evidence to show that the impact on his health was significant. It was a question of causation and quantification of damage. In averring that the Group need not be too fearful of using words of that kind with which the Courts grappled every day on the basis of the evidence presented, the Chairman emphasized that that was the only way that it could be dealt with - on the basis of the evidence.

34. Noting that he had, since the beginning of the meeting, tended to accept the Chilean proposal, being desirous of providing compensation to those passengers who had, as a result of an accident, sustained mental injuries which had seriously affected their health, the Delegate of Cameroon enquired how the Group could establish the boundary between mental injury which existed before an accident and a mental injury which resulted from an accident and which had a significant effect on health. He cited the case of a pre-existing mental injury which was further aggravated by an accident. In seeking clarification regarding the proposed wording of Article 16, paragraph 1, the Delegate of Cameroon indicated his complete agreement with the existing wording of the Convention as, in his view, the term "bodily injury" included both physical and mental injury.

35. The Chairman observed that, while many States recognized that bodily injury included mental injury, equally many States, in their interpretation of the Warsaw Convention in the light of its drafting history, had indicated that they did not. What the Group wished to achieve was a certain measure of uniformity as it went forward with the new Convention. He noted that the issue of a pre-existing conditions of mental injury

which might be aggravated or affected in some way by an accident would be covered by the last sentence of Article 16, paragraph 1, which indicated that "... the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger". The Group could consider that issue later in its deliberations of that sentence.

36. To a query by the Delegate of Australia, the Chairman clarified that the word "health" would include mental health.

37. The Chairman noted that there was certainly an emerging consensus that bodily injury would be covered, that bodily injury which resulted in mental injury would be covered, and that mental injury independent of bodily injury would be covered only where it resulted in a substantial or significant impairment of the health of the passenger. If the Group could agree on that, then it could be referred to the Drafting Committee. The resulting text would then be considered by the Commission of the Whole on the basis of the record of the understanding reached by the Group and thereafter, by the Plenary.

38. The Delegate of the Russian Federation indicated that, while he found the wording of both the Chilean and Singaporean proposals to be acceptable, there was something wrong with their underlying logic. He averred that it was incorrect from the legal, philosophical and possibly even the medical point of view to imply that mental injury could harm physical health, which encompassed both mental and bodily health. In his view, it was sufficient to refer to "injury to health". That wording was sufficiently broad in scope and comprehensible to meet concerns expressed. The Delegate of the Russian Federation also asserted that such wording would facilitate the work of the Courts which would have to examine their respective national legislations in considering the concept of passenger injury.

39. The Chairman noted this statement, indicating that there was a certain logic in it. He underscored, however, that what the Group was attempting to do was to ensure that the language used in Article 16, paragraph 1, would indeed address the concerns which had been expressed and that, quite often in attempting to do that, language had to be used which, to the pure logician, might appear to be unnecessary. In order to accommodate the concerns expressed, it was necessary to use language which would allay all fears, real or imaginary, which might exist. The Chairman thus hoped that, in the light of what appeared to be general agreement on this subject, the Group would record what the main elements of its understanding were and would ask the drafting committee to come up with a text in accordance with that understanding which would thereafter be submitted to the Commission of the Whole and the Plenary.

40. The Chairman then drew attention to the last sentence of Article 16, paragraph 1, dealing with the extent of the liability of the carrier where death or injury resulted from the state of health of the passenger. He recalled that different views had been expressed, with some Delegates supporting the text in its present form and others suggesting that the word "solely" be inserted in the sentence so that the carrier would not be liable for death or injury which resulted "solely" from the state of health of the passenger. In that connection, some drafting issues had arisen concerning the retention of the phrase "to the extent that" if the word "solely" were used. It appeared that that phrase might well be deleted. It was the Chairman's impression that in dealing with pre-existing conditions of the passenger, an attempt was being made to accommodate the interests of the carrier. The question which arose was the liability of the carrier. In the circumstances in which the carrier would not be liable, to the extent that the death or injury resulted from the state of health of the passenger, there would be a sort of contributory situation in which an apportionment would be made. The Chairman indicated that, while quite a lot of support had been expressed for the introduction of the word "solely", there had equally been those wished to retain the text in its present form. It was his feeling that the Group's search for solutions might involve it in a certain amount of compromise.

41. The Delegate of Sweden wished to record his Delegation's view that the last sentence should be excluded to preserve the liability régime currently in force under the Warsaw Convention. That was what carriers were dealing with at the moment and that was what they were doing well with. He noted that the proposal by the Legal Committee already introduced a defence in the sense that carriers could defend themselves when damage was solely caused by the death or injury of the passenger, averring that that struck a fair balance. It could at least be viewed as a step backwards from the present situation. To take it further backwards as the draft text under consideration did would not promote the modernization of the "Warsaw System" which the Conference was engaged in.

42. In recalling the discussion of Article 16, paragraph 1, in the Commission of the Whole, the Delegate of Mauritius noted that the argument in favour of either removing the last sentence thereof or retaining it was to be seen in the context of mental injury being excluded as an independent head of claim. He would have thought that, as the Group was now working towards inserting that new head of claim, those Delegates which had wished to remove that sentence would, by way of compromise, reconsider, so that, as a matter of fairness to all of the parties concerned, passengers would be compensated for injuries suffered at the hands of the carrier. In that context, the Delegate of Mauritius would certainly commend to the Group the retention of the language appearing in the last sentence of paragraph 1.

43. While mindful of the excellent observations made by the Delegate of Sweden and other Delegates, the Delegate of Singapore contended that the principle of apportionment would serve as a fair criterion. He observed that in all jurisprudence it was accepted that each side should be liable to the extent that it was responsible for the damage sustained. That was the same basic principle as was being applied in the present case. It so happened, in this context, that the passenger happened to have some other bodily condition which made him more prone to have his injury increase in some other form. He would have thought that that would not be ascribed to the carrier. The other problem which had arisen was whether the insertion of the word "solely" would discourage carriers or would place more restrictions in terms of passengers who were unwell. While perhaps something which might be unintended, it might nonetheless come about. It seemed to his Delegation, on the basis these considerations, that the point made by the Delegate of Mauritius certainly had important merit in the sense that apportionment would probably serve the interests of both sides.

44. The Chairman observed that what the Group was faced with at the moment was trying to ensure that the carrier was provided with a measure of relief from liability which arose partly because of the pre-existing condition of the health of the passenger. He used the expression "partly because of" as the text in its present form used the phrase "to the extent that". Thus the passenger who suffered death or injury "partly because of" a pre-existing condition would only recover "to the extent that" that pre-existing condition had not been aggravated or affected by the accident itself. The said phrase therefore served to provide that balance. The insertion of the word "solely" would mean that it would be necessary for the carrier to continue to be responsible for the death or injury of the passenger even in circumstances in which such death or injury might not have occurred but for the state of health of the passenger. The passenger would not be without his remedy, but the extent of that remedy, *i.e.* the extent to which the passenger would be able to recover, would be ameliorated or adjusted by reference to some determination of this kind. Those seemed to be the choices that were available to the Group. While aware of the suggestion that the last sentence of Article 16, paragraph 1, could be deleted, the Chairman stressed the need to examine it in the context of the new régime which had been inserted as a whole. It was not the old régime that the Group was dealing with; rather, it was a completely new régime. The Chairman thus posed the question of whether the Group could live with the text in its present form, in the context of the advance which the Group had just made in relation to mental injury.

45. The Delegate of France voiced his full agreement with the Chairman's proposal, emphasizing that it was equitable.

46. The Delegate of the United Kingdom expressed difficulty with the option of retaining the last sentence of Article 16, paragraph 1, in its present form, averring that, once the new Convention was in force, there would be cases where people who previously could have recovered damages would not be able to do so in the future, either at all, or partly, even though they had no blame attached to them whatsoever. He recalled, in this regard, Article 19 *(Exoneration)* which dealt with the blameworthiness of the passenger as a contributory factor towards his injuries. The Delegate of the United Kingdom thus preferred the deletion of the whole sentence as he did not wish the position of the injured passenger to be made worse than it was at present as a result of the conclusion of the new Convention. In his opinion, the position on mental injury had already been compromised in the way that the Group had sought to find a way forward to limit the area where mental injury on its own was recoverable, following the Chairman's earlier conclusions. It seems to the Delegate of the United Kingdom that a compromise in relation to the last sentence was in fact to remove the words "to the extent that" and to reinsert the word "solely". It did seem to him, however, that that ought to be a compromise.

47. It appeared to the Chairman that, as the Group had looked at this overall package where it attempted to balance the interests of the passenger and the carrier, it had been able to find a mechanism in the first sentence of Article 16, paragraph 1, which actually recognized the need to deal with the injuries suffered by the passenger even in circumstances where that was related to mental injury which was unassociated with bodily injury. The last sentence of that paragraph addressed the case where the death or injury of the passenger was attributable to some extent to the state of his health in the context of the rather *sui generis* régime that the Group was creating. Noting that that was an issue which was not amenable to a perfect solution, the Chairman queried whether, in the hope of arriving at common ground and of reaching a consensus, it might not be possible to recognize the equity of the last sentence of Article 16, paragraph 1, which attempted to say essentially that the passenger would still be able to recover damages except to the extent that the injury was attributable to his own state of health.

48. The Delegate of the United States agreed with the comments made by the Delegate of the United Kingdom, likewise preferring the deletion of the last sentence from Article 16, paragraph 1, He noted that the issue of balance in that paragraph had been extensively addressed by the Legal Committee in the context of the words "event" and "accident". The equitable balance which had been struck between the interests of passengers and carriers was that the word "accident" be used rather than the word "event" which strongly favoured the carriers' interests. The balance that was thus struck was that there was reference to bodily or mental injury and to the carriers not being liable if the death or injury resulted solely from the state of health of the passenger. Averring that that was an equitable and fair balance between the interests of passengers and carriers, the Delegate of the United States suggested that the Group revert to the language used by the Legal Committee subject to the Group's improvements with regard to mental injury; to the retention of the word "accident"; and to the retention of the last sentence with the insertion of the word "solely" in place of the phrase "to the extent that".

49. The Delegate of Sri Lanka indicated that it was his understanding, from the manner in which the Chairman had summarized the consensus of the Group in respect of mental injury, and his subsequent answer to the clarification sought by the Delegate of Cameroon, that the carrier would have the defence of the state of health of the passenger, and an addition of mental injury on a stand-alone basis, provided that that defence was available to the carrier. In light of the fact that the Group had proceeded to the second sentence of Article 16, paragraph 1, on the basis that that defence of the state of health of the passenger would be retained for the carrier, it was his view that that second sentence should not be deleted.

50. The Delegate of Lebanon proposed that the last sentence of Article 16, paragraph 1, be retained with a clarification that what was being referred to therein was the pre-existing state of health of the passenger.

51. Recalling the adage that the road to hell was paved with good intentions, the Delegate of France indicated that he was rather perplexed by the comments made by the Delegates of the United Kingdom and the United States that retention of the last sentence of Article 16, paragraph 1, would constitute a step backwards. He did not believe that the context was different; the Group was now working in a context of unlimited liability and had just agreed by consensus on a definition of damages that was somewhat broader than before as it encompassed mental injury which was not closely associated with bodily injury. The Delegate of France averred that the Convention now under preparation would come closer to the common law on liability if the last sentence were deleted. It would place the carrier in an impossible position if, as suggested, that sentence were retained, with the phrase "to the extent that" being deleted and the word "solely" being inserted in its place: how could it be proved that death or injury resulted only from the state of health of the passenger, especially in the case of mental injury? That would not be fair. With the sentence in its present form, it was a classic case of seeking a causal relationship. Judges and Courts all over the world were used to that. It was the carrier which bore the burden of proof that the injury sustained had not resulted just from the accident but that it had been caused in part by the health of the passenger. The sentence as it now stood was a balanced text because it made reparation proportionate to the damage resulting from the accident, whether it be a new injury or an aggravation of an earlier injury. Judges had the expertise to weigh the original state of health of the passenger and the result of the aggravation of that health. The Delegate of France contended that, if the Group were to follow suggestion made by the Delegate of the United Kingdom, then it might find itself in a situation where the carrier would have to pay more in damages than it might otherwise have to, which was unfair. In such a case the carrier and its legal advisers would probably invoke Article 19 *(Exoneration)*, which would have the effect of making the passenger liable for the state of his health. That would be incorrect as the passenger's state of health had nothing to do with fault. What argument could be made? that the passenger should not have travelled because of the state of his health or that he should have indicated beforehand what situations might cause health problems for him, for example, in the case of an asthmatic, a ventilation problem over the middle of the North Atlantic. Similarly, a passenger with a heart condition had to take certain precautions. That would only complicate matters and displace the cases. The French Delegation was of the view that it was not necessarily a matter of principle. It was not opposed to a consensus. The French Delegation considered it to be a serious issue to which attention must be paid, because it wished to protect the passenger and to avoid setting up procedures which would actually undermine the objectives which the Group was seeking to achieve.

52. To illustrate his concern over the current wording of the last sentence of Article 16, paragraph 1, the Delegate of Sweden cited the case of a passenger with osteoporosis sitting in an aisle seat on board an aircraft whose leg was hit by a passing trolley. Whereas a passenger in good health might only have sustained a bruise, the leg of the passenger with osteoporosis was badly damaged and required amputation. Under the present text, the passenger whose leg was amputated might be awarded the same amount of damages (e.g. $20) as a passenger who only sustained a bruise. It was for that reason that he had difficulties with the current wording. It was a matter of principle, to some extent. Some legal systems applied the principle of apportionment while others did not. Noting that the old "Warsaw System" did not, the Delegate of Sweden averred that it would be a setback for passengers if the Group were to incorporate that principle into the new liability régime. As the deliberations on the issue of mental injury had shown, Delegates had had two totally different and opposite positions when they had come to the Conference. He was not sure that the members of the Group could not find a compromise solution to the issue now under discussion instead of maintaining their opposing positions of apportionment or non-apportionment — even if such a solution might be a setback for the passengers in terms of the present liability régime of the "Warsaw System".

53. The Chairman was not sure that he would agree with the Delegate of Sweden about the $20 being comparable in relation to the apportionment. If he were the Judge, he would come to a completely different conclusion. He would have to consider the extent of the injury sustained and make the apportionment in relation to the damage suffered. So the $20 award referred to might be wholly inadequate in terms of the damage suffered under the circumstances cited.

54. The Delegate of Pakistan maintained that the last sentence of Article 16, paragraph 1, was not in line with the context of the Article, according to which "The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only ...". The last sentence ("However, the carrier is not liable ...") did not befit the scheme of the Article. He thus suggested, as a moderate solution to the problem, that the phrase "Save as provided in Article 19" be added at the beginning of Article 16, paragraph 1; that the word "only" be deleted from the Article; and that in Article 19, the words "or health" be added after the word "omission". Then when Article 16 and Article 19 were read together, there would be a balance between rights and obligations.

55. The Chairman noted that the suggestion which had been made was that, since Article 19 dealt with exoneration and contributory negligence, the state of health of the passenger which would result in the exoneration of the carrier to the extent that it contributed to the damage ought to find a logical place in Article 19. He was not quite sure that the proposal changed the substance of the issue under consideration, being of the opinion that the result would be the same whether reference thereto were made in the present text of Article 16, paragraph 1, or not. There might be logic in making such a reference in Article 19. If it were a solution which disposed of the substance of the issue, then of course it would become a drafting solution.

56. The Delegate of Cameroon indicated that, since a compromise had just been reached that pure mental injury was recoverable, he would be in favour of retaining the existing text of the last sentence of Article 16, paragraph 1. He supported the comments made by the Delegate of France in that regard.

57. The Delegate of Saudi Arabia favoured retaining Article 16, paragraph 1, in its present form, subject to the slight amendment to the last sentence thereof proposed by the Delegate of Lebanon. Observing that the proposal by the Delegate of Pakistan might have some merit in terms of facilitating the understanding of Article 16 and Article 19 and of ensuring that they were consistent and coherent, he averred that it warranted consideration by the Drafting Committee.

58. The Delegate of Canada had no preference as to whether this principle, whenever the Group was able to develop it, appeared in Article 16 or Article 19. That a passenger's state of health was not a matter of negligence might, however, be an indication that it should be addressed in Article 16. Referring to the example cited by the Delegate of Sweden, he noted that, as the injury had not resulted "solely" from the state of health of the passenger but also from the action of the flight attendant who had been pushing the trolley, the passenger would be clearly compensated. In disagreeing with another comment that accidents usually involved third parties and that there would consequently never be an occasion to use the "solely" from the state of health of the passenger defence, the Delegate of Canada highlighted the case where a passenger who suddenly felt faint fell down the stairs while disembarking from an aircraft and injured himself. That was one case where an accident had occurred but where, at the same time, it had resulted solely from the state of health of the passenger. Observing that, in that case, the word "solely" had its use, he indicated that the Canadian Delegation would be favourable to retaining the last sentence of Article 16, paragraph 1, while at the same time removing the phrase "to the extent that" and replacing it with the word "solely". With regard to the comment made that paragraph 1 referred to the pre-existing state of health of the passenger, the Delegate of Canada,

while considering that concept to be correct, found it a difficult one from an evidentiary point of view. He queried whether it was not just one of those matters which was handled normally in the course of presenting a case in Court, where the evidence was adduced.

59. The Delegate of Egypt endorsed the Chairman's proposal that the last sentence of Article 16, paragraph 1, be retained in its present form for the reasons cited by the Chairman and the Delegate of France.

60. The Chairman noted that what the Group was attempting to do was to determine what would be an equitable balance of interests, particularly in the context of the last sentence of Article 16, paragraph 1. That sentence, in its present form, did not preclude the recovery by a passenger of a certain amount of damages where that passenger had died or suffered injury. What it attempted to do was to recognize that a passenger's state of health might be a contributory factor in his injury. If he understood it correctly, the phrase "to the extent that" did no more than recognize that where the state of health of the passenger was a contributory factor, to that extent the damages which were recoverable would take into account the contribution made by that state of health to the intensity of the injury suffered, but without relieving the carrier from its liability for damage to the extent that the carrier's own actions would have contributed to that intensity of injury. The phrase thus took into account the contributions made by both the passenger and the carrier for the purpose of the apportionment of liability and the apportionment of damages. It was that balance which was being sought. Paragraph 1 of Article 16 was not intended to deprive the passenger of damages as such; rather, it did no more than recognize that there would be circumstances in which the extent of injury would not have been so great had it not been for the state of health of the passenger. There would obviously be difficult issues of proof arising in a practical case. That was something which the Chairman himself had grown accustomed to dealing with. It was a matter of evidence; a judgement would be rendered on the basis of that evidence as to whether or not someone in an ordinary, proper state of health would have suffered as much damage under the circumstances. It was also to be seen in the context of a mode of transportation which had an intrinsic nature in itself. Flying by air was not like walking along the road or even driving in a car. Notwithstanding the so-called maturity which was proclaimed to have been reached in the aviation industry, the reality was that carriage by air still had its own peculiar characteristics. Therefore in one sense what that phrase attempted to do was to recognize that there was something which was inherent in the kind of exposure which would arise as a result of air transportation. It was in that context that the equity of the situation was being addressed. The Chairman did not believe that the Group would achieve a perfect system which might well approximate all of the situations which arose in domestic jurisdictions on land, if only for the reason that the régime which was being developed was not the régime which existed on land. It was a fundamentally different régime. So notwithstanding the validity of all of the arguments which had been expressed on both sides of the divide, the Chairman was of the opinion that the Group would have to come to a pragmatic solution of a package which recognized these things. He urged the Group to recognize that in the overall context and to find the accommodation which would allow it to live with the text of the last sentence of Article 16, paragraph 1, in its present form. That was as much as the Group could do at this stage in his view.

61. The Group accordingly agreed to retain the present wording of the last sentence of Article 16, paragraph 1, on the understanding that the state of health of a passenger would merely be taken into account insofar as the intensity of the injury was concerned.

62. In then drawing attention to **Article 20** ***(Compensation in Case of Death or Injury of Passengers)***, the Chairman emphasized the need to also bear in mind the provisions contained in Article 27 *(Jurisdiction)*. Averring, on the basis of the concerns expressed, that those two Articles were very much related, he expressed the hope that the Group would be able to find a solution which recognized that they could coexist provided they were in proper balance. In elaborating on Article 20, the Chairman noted that Article 20

began on the basis that, in respect of liability which exceeded 100 000 SDRs, the onus of proof was on the carrier. However, when that Article was read in conjunction with Article 16 *(Death and Injury of Passengers — Damage to Baggage)*, it became clear that for liability up to 100 000 SDRs there was a principle of strict liability, subject to the causation issues which had been discussed earlier.

63. The first question that arose with regard to the formulation of Article 20, quite apart from certain drafting issues which had been referred to the Drafting Committee, was a matter perhaps of some substance and was the following: Could a passenger who claimed for recovery of, say, 300 000 SDRs, assert that up to 100 000 SDRs there was a principle of strict liability, and that it was only above that amount that the carrier was required to prove what was specified in paragraphs (a) to (c) — or was it indivisible? The Chairman's own view was that the matter could not be divided in that way. It was necessary to decide on the value of the claim. If one wished to prevent excessive claims from being made, claims which were unrelated to a true assessment of the injury sustained, then it was necessary to stipulate that if insufficient justification of the claim were provided, then the claimant would not be able to recover the full 100 000 SDRs. The 100 000 SDRs was related to the claim which could be made and not to the claim which could be proved. Thus if a claim for 300 000 SDRs were made, then the principle which would apply would be that if the carrier proved that what was contained in paragraphs (a), (b) and (c), then in those circumstances it was not possible for the passenger to fall back upon an assertion that "I could have succeeded up to 100 000 SDRs without these things being available." The Chairman averred that it was necessary to choose. This gave some integrity to the system so that exorbitant claims would not be made on the basis that the principle of strict liability applied. He did not know if that was the common understanding of Article 20. It seemed to the Chairman that a claim could not be divided into two parts, with the passenger saying "I have made a claim for 300 000 SDRs, but the onus of proof is strict in relation to up to 100 000 SDRs and after that ..." because the injury was one and indivisible. The claim could not be fragmented in that way. The Chairman wanted to know if the Group could come to some understanding of that issue as he had great difficulty in following any suggestion made that a claim could be divided up, with the passenger saying "Well, although my claim is in excess of 100 000 SDRs, this is the injury I am asserting — I can now fall back and all I need to do is to show that I suffered some injury.". He stressed that that was a very important understanding to reach, although he anticipated that the Courts would have great difficulty in understanding the system.

64. The Delegate of the United States underscored that the Chairman's elaboration was most decidedly not how his Delegation had interpreted Article 20. It was not how the *IATA Intercarrier Agreement on Passenger Liability* functioned and he suspected that it was not how the EU Regulation functioned. Indeed, his Delegation's understanding of how the régime operated was that the portion of any claim up to 100 000 SDRs was governed by the principle of strict liability and that for the portion above 100 000 SDRs the carrier retained the defence of having taken all reasonable measures. However, the carrier had, in fact, in the IATA system upon which the new Convention was based, waived that defence for amounts up to 100 000 SDRs.

65. The Chairman stressed the need for some clear drafting and understanding to arrive at that conclusion. In reading Article 16, paragraph 1, the conclusion would be reached that it was the accident which caused the death or injury of the passenger. Then issues of causation would be dealt with in a divisive pattern. He had no problem with the interpretation, except that there was a certain lack of logic in it. However, if that was the intention of the compromise, then the Group needed to say so and to give a clear understanding of it. The Chairman wished to be quite clear in his own mind that the intention was that in an action which was brought for damages in excess of 100 000 SDRs, it was still possible to recover up to 100 000 SDRs, even though in fact the carrier had been able to show the defences which were available under paragraphs (a) to (c)

of Article 20. He wished this to be quite clear in the record of the proceedings. If there were a common understanding of that, the Chairman would have no problem with it.

66. While of the view that the point was not explicitly dealt with, the Delegate of Singapore indicated that the interpretation given by the Chairman appeared to be the most eminent and reasonable one for the simple reason that if the claim was 100 000 SDRs and below, it was sensible that the principle of strict liability would apply. Beyond that amount, it seemed to his Delegation that, if the interpretation was that passenger pocketed the first 100 000 SDRs and litigated for any sum in excess of that amount, then the whole situation became ridiculous as the passenger would always win. If that kind of position were to be adopted, it would have to be clearly understood and spelled out.

67. The Director of the Legal Bureau (D/LEB) clarified that in the Secretariat Study Group, as well as in the Legal Committee and in the Special Group on the Modernization and Consolidation of the "Warsaw System", the intention had clearly been to have in the first tier, *i.e.* up to 100 000 SDRs, a régime of strict liability which should apply regardless of how large the total claim was. The régime in the second tier, a régime of presumed fault with the burden of proof on the carrier and with the defences which were spelled out in Article 20, should apply for any portion of a claim above 100 000 SDRs. The reason why that had been done was essentially that if the same régime were given to the entire claim, then it would depend on the amount of the total claim whether a régime of strict liability would apply to the whole claim *i.e.* for claims up to 100 000 SDRs, or whether a régime of fault liability would apply *i.e.* for claims above 100 000 SDRs. If the same régime were applied to the entire claim, it would make a difference of how large the claim was, as to what régime would apply. It was for that reason that the Secretariat Study Group, and later the Special Group, had opted for the two-tier régime with a difference between strict liability and fault liability.

68. As an illustration of the application of the European Community regulation, the Observer from the European Community (EC) offered the following: if a passenger made a claim for 300 000 SDRs but could only justify damages of 75 000 SDRs, then the passenger would only be granted compensation for that 75 000 SDRs. He would receive that compensation because it came under the principle of strict liability. If the person could justify a claim for 130 000 SDRs, he would receive 100 000 SDRs and the carrier could then defend itself against the claim for 30 000 SDRs. He emphasized that, in each and every case, if the claim were under the 100 000 SDRs limit or if the total claim were more, if the carrier were not responsible, then it could seek redress. That was true for both the amount under strict liability and the amount beyond strict liability. Thus, in a sense, if the carrier were not responsible, it would serve its purpose if the passenger's claim were more than 100 000 SDRs as the carrier would then have the possibility of putting their defence on the table right away, and could, on that basis, then seek redress. To a point raised by the Chairman, the Observer from the EC clarified that the redress which the carrier would receive would not be only for the amount in excess of 100 000 SDRs. To an additional query by the Chairman as to whether an carrier in the EC system be able to a negative liability for the entire claim where the claim is in excess of 100 000 SDRs, he indicated that the carrier had strict liability vis-à-vis the passenger, but still had the possibility of seeking redress against whoever the guilty part might be.

69. The Chairman then queried whether the defence available to the carrier under paragraph (c) of Article 20, whereby if the damage were due solely to the negligence or other wrongful act or omission of a third party it would be able to escape liability, would negate the claim of the passenger? The Observer from the EC underscored that that was not for the strict liability portion. The carrier had first to pay compensation for that part of the claim governed by the principle of strict liability. If a third party had caused the accident, then the carrier would have to try to seek redress from that party.

70. Referring to paragraphs (a) and (b) regarding the carrier having taken all necessary measures to avoid the damage, the Chairman enquired whether the damage could be segregated into portions. In other words, how was damage which could be regarded as an integrated whole dealt with? He cited, as an example, a claim for damages by a passenger who had lost a limb as a result of an accident. The Chairman sought clarification regarding the defence available to the carrier where the claim for damages was in excess of 100 000 SDRs.

71. The Observer from the EC noted that, for the first 100 000 SDRs, any justified damage below that amount would be covered by the carrier. If the carrier were entirely responsible for the accident and there was no third party which was responsible, then the carrier was still obliged to pay that sum.

72. The Chairman wished to clarify in his own mind the extent to which the principle of strict liability applied, that was to say, that in all circumstances, irrespective of the quantum of the claim, as long as damage up to 100 000 SDRs could be proved in those circumstances, notwithstanding that the claim was in excess of 100 000 SDRs, the carrier would be under a rule of strict liability. Only in so far as it was an amount in excess of 100 000 SDRs would the carrier be able to have recourse to the defences available. Those defences would, however, only serve to relieve the carrier of liability in excess of 100 000 SDRs. He queried whether that was how the system worked in the EC.

73. The Observer from the EC noted that the defences would relieve the carrier of liability. If there were a guilty third party, then the carrier could seek redress from that third party, also for the amount below 100 000 SDRs.

74. Indicating that that was understood, the Chairman noted that he had just wished to get the issue in focus. He was not expressing a view one way or the other. The explanations provided might well affect the drafting of the provision.

75. The Delegate from the United States drew attention to Article 31 *(Right of Recourse against Third Parties)* of the draft Convention which did basically the same thing: it guaranteed the carrier the right of recourse against any other person so that the so-called strict liability for the 100 000 SDRs was between the carrier and the passenger. Between the carrier and some other tortfeasor, Article 31 guaranteed the carrier the full ability to recover everything to which it was entitled from the other joint tortfeasor. Of course, the other *caveat* on the collection of the 100 000 SDRs in the first place was that there must have been an accident. The claimant had to prove that there had been an accident, that there had been an injury and the extent of that injury. The Delegate of the United States underscored that Article 19 *(Exoneration)* was not limited by Article 20.

76. Noting that Article 19 dealt with contributory negligence, which could be the contributory negligence of the passenger, the Chairman queried whether that defence was available in relation to a claim not exceeding 100 000 SDRs.

77. In affirming that it was, the Delegate of Sweden noted that otherwise a passenger could intentionally injure himself and receive compensation for that injury, which was not the purpose of the Convention.

78. The Delegate of Pakistan observed that strict liability was a compensation, whereas the second-tier liability was a claim. It was necessary, first of all, to differentiate between the compensation and the claim. Secondly, the compensation had been put subject to the condition as prescribed , which in fact should have been

a *proviso*. Instead of having "however", it should have been a *proviso*, "provided that the carrier is not liable ...". So again that had been put to a test against the claimant, which was in fact a compensation which he considered ran counter to the scheme of things.

79. In summarizing the views expressed, the Chairman indicated that it was the Group's understanding that Article 20 contemplated that for claims which did not exceed 100 000 SDRs, the principle of strict liability applied. For claims which exceeded 100 000 SDRs, the principle of strict liability applied to the extent of 100 000 SDRs. And that in so far as the carrier could prove the defences which were available under Article 20, paragraphs (a) to c) — certainly in paragraph (b) at any rate — that those defences would only be applicable to the excess beyond 100 000 SDRs. The Chairman wished to have a common understanding of what was recorded so that the same argument did not arise when the matter came before the Courts; otherwise, the interpretation which would be given by the Courts would not give effect to the Group's common understanding.

80. The Delegate of Singapore noted that Article 19 by itself was not subject to any other provision. It did not stipulate that the 100 000 SDRs liability limit was to be placed in different categories; if the intention were otherwise, then the text might have to be modified. Under that Article, the carrier could be wholly or partly exonerated from liability. It was difficult to say that the expression "wholly or partly" referred to amounts above 100 000 SDRs.

81. The Chairman indicated that it was his understanding of the explanation given by the Observer from the EC that, under their system, the defences which were available under Article 19 of the new Convention dealing with exoneration or contributory negligence were also available in terms of claims which did not exceed 100 000 SDRs. That was what he had understood the Delegate of the United States to have said. Thus notwithstanding the principle of strict liability, in the sense that all the claimant needed to prove was that he had been in the aircraft and that an accident had occurred, it being unnecessary for him to prove that the carrier had been at fault, there was the principle of exoneration from liability in whole or in part by virtue of the negligence of the claimant, which was a defence available to the carrier. In a sense, the description of strict liability was perhaps not quite as pure as the Group might have thought, as there were at least some conditions which would arise. The Chairman considered the purpose was not to depart from that but just to achieve the clearest understanding that the régime was going to enable the recovery for damages up to 100 000 SDRs, whatever the quantum of the claim might be. Provided that a claimant could prove damages of up to 100 000 SDRs, he could do so on the basis of strict liability. In those cases where the claim was in excess of 100 000 SDRs, the defences available to the carrier under Article 19 as between the carrier and the claimant would not relieve the carrier from paying the proven damages up to 100 000 SDRs. The Chairman just wanted to make sure that that was the understanding that the Group was basing its work on in trying to modernize and simplify procedures under the new Convention so that if there were any drafting required to clarify that position the Group could see that it was done. It was first necessary for the Group to record what it wished to do in terms of its understanding, and its report would reflect that. In that way, those who would, in future, have the awesome task of interpreting the Convention would have no misunderstandings and would be under no illusions as to what was intended by its drafters.

82. Averring that some clarification might be necessary, the Delegate of New Zealand recalled that the Chairman of the Special Group in which he had been a participant might wish to confirm that the *IATA Intercarrier Agreement on Passenger Liability* was the basic document that it had considered in the context of drafting or proposing a new liability régime. He recalled that that document clearly stated in its operative text that the defence of contributory negligence was available from the first SDR. Somehow that might not be clear in the drafting of the document that was before the Group. Whether it was the intention to allow that

defence from the first SDR was a matter of principle that needed to be decided. The other defences, the proof by the carrier that it had not been at fault, only came into play at the 100 000 SDRs mark. That was only to serve as an interpretation of the *IATA Intercarrier Agreement on Passenger Liability* to the extent that it had been relied upon by the Special Group.

83. The Chairman considered that, after this general discussion, there had been a convergence of views that, whatever might be the lack of purity in the concepts which had emerged, this compromise was based on the *IATA Intercarrier Agreement on Passenger Liability* and that the understanding as to its true intention and meaning could be appropriately recorded so that the Group could ensure that it was reflected in the appropriate draft.

84. The Meeting adjourned at 1730 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

"FRIENDS OF THE CHAIRMAN" GROUP

Minutes of the Second Meeting
(Tuesday, 18 May 1999, at 1130 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Article 20

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Group resumed consideration of **Article 20** ***(Compensation in Case of Death or Injury of Passengers)*** of Chapter III *(Liability of the Carrier and Extent of Compensation for Damage)* of the draft Convention as set forth in DCW Doc No. 3. The Chairman, in clarifying certain issues relating to the application of the strict liability rule to claims of up to 100 000 SDRs, including claims in excess of that amount, recalled that, when the matter had been discussed in the Commission of the Whole, a number of proposals had been made in relation to the limits of liability and the system of liability. He noted that there had been five sets of proposals: the proposal to retain the text in its present form so as to create simply a two-tier system of liability; the proposal presented by 53 African Contracting States in DCW Doc No.21 for the introduction of a three-tier system of liability with strict liability up to 100 000 SDRs for the first tier, for the second tier in excess of 100 000 SDRs and up to 500 000 SDRs, liability based upon the presumption of fault, but with the carrier having the defence of non-negligence, and for claims in excess of 500 000 SDRs, a third tier, with liability based on fault without any numerical limit; the proposal presented by the Delegation of India in DCW Doc No. 18 for the establishment of a two-tier system of liability, with strict liability up to a limit of 100 000 SDRs for the first tier, and above that limit, a second tier with unlimited liability but under circumstances in which it was proved that the damage resulted from wilful misconduct, *i.e.* intentionally or recklessly and with knowledge that damage would probably result; the proposal presented by the Delegation of Viet Nam in DCW Doc No.24 for a two-tier system of liability in which the first tier would be based on the presumption of fault with a limit of liability of 100 000 SDRs and the second tier, without any numerical limits of liability, would be based upon fault with the burden of proof resting on the passenger; and the proposal presented by the Delegation of Pakistan for a system of liability having a second tier up to 500 000 SDRs with the burden of proof resting on the passenger. In the discussion which had taken place on this matter, it had been clear that it was necessary, in order to arrive at some consensus, to be able to bring together the main elements of what appeared to be agreement and to see the extent to which divergencies of points of view might be bridged.

2. The Chairman observed that all of the proposals had common elements. One such common element was a first tier based on strict liability up to 100 000 SDRs, as in the proposals by the 53 African Contracting States and the Delegation of India. He contended that the nuance in the proposal by the Delegation of Viet Nam which was based upon presumption of fault might be, in a practical sense, more imaginary than real. The Chairman recalled that, during the deliberations of the Commission of the Whole, he had indicated that where there was a system of presumption of fault in an aviation accident, the burden of proof would fall on the carrier. He hoped, having regard for the widespread support for breaking new ground with regard to strict liability as a way forward for unifying the rules relating to the "Warsaw System", that the Group could come to some common agreement that there would be a first tier in respect of which liability would be strict. The Chairman urged the Group to galvanize consensus around that as a first component of the system of liability which it would create and recommend to the Commission of the Whole and the Plenary. He hoped that that was possible as, in his view, there was overwhelming support for moving in that direction, for all of the reasons which had been advanced. It would greatly facilitate the recovery of damages in genuine cases; in the overwhelming majority of cases it would assist the insurability of claims while not, in his opinion, imposing a disproportionate burden on the carrier. The Chairman queried whether the Group could begin with that as a first element of what could be the building blocks of consensus on that issue. He underscored that the Group faced the formidable challenge of achieving at various levels substantial uniformity in the régime which it was devising. Any system which it developed would obviously not satisfy the ideal requirements of any State if there were to be a system which would command universal support. The Chairman had thought that the Group would begin with the building blocks of the system of liability in order to forge a consensus. It was in that respect that he urged the Delegate of Pakistan, among others, to see if he could find the way to enable the Group to move forward in the first building block of strict liability, in the knowledge that the efforts which had been made over the years to try to find a solution to problems encountered with the "Warsaw System" had largely been bedevilled by two things: by the unrealistic limits which were the heritage of the Warsaw Convention, having regard to changes which had subsequently taken place; and by the absence, in any circumstances save in respect of wilful default, of unlimited liability and the problems which that had given rise to in many jurisdictions which used various means, creative in many respects, to be able to get around the limits of liability specified in the Convention. What the Group was attempting to do was to see whether it could have a greater degree of predictability and certainty so that passengers would not be even more than they currently were the victims of the uncertainties of a judicial system which might be unable to offer any predictability as to results, certain that carriers would be able to organize their activities and insurance on a basis which would also bring a greater degree of certainty.

3. The Delegate of Viet Nam indicated that, while the proposal made in DCW Doc No.24 was convenient in terms of his State's civil aviation law, his Delegation could accept strict liability of up to 100 000 SDRs for the first tier in order to achieve a consensus.

4. The Delegate of Lebanon then drew attention to DCW Doc No.29, in which the Member States of the Arab Civil Aviation Commission (ACAC) proposed, *inter alia*, a first tier based on strict liability up to 100 000 SDRs. He underscored that the ACAC Member States supported the position of the 53 African Contracting States with regard to the second and third tiers.

5. The Chairman hoped that, in light of the comments which had just been made, the Group could live with a position in which there would be a first tier based on strict liability up to 100 000 SDRs. If that was the case, and it appeared to be so, then the Group would need to begin examining the other building blocks of consensus. He noted, in respect of all the proposals which had been submitted, that there was equally common ground that there would be circumstances in which there would be unlimited liability. Thus the Group

would start with two common elements in constructing a consensus: the first element which the Group seemed to have forged in terms of the first tier; and the second element which related to the question of liability beyond the first tier, even if there were intermediate tiers to be created in order to reach that consensus. In that regard, there was the proposal by the 53 African Contracting States set forth in DCW Doc No. 21. The Chairman noted that it had been suggested, and supported by ACAC and many others, that what the Group needed to do was to look at the levels of compensation for the purpose of determining the liability rules which would apply. If he understood correctly, the proposal by the 53 African Contracting States involved recognition that, in so far as claims exceeded a certain amount beyond 100 000 SDRs in a second tier, there needed to be a greater element of burden-sharing. That was to say, the principle of liability which would apply would not immediately be a principle of unlimited liability; rather, it would be based upon a presumption of fault in which the carrier would be able to escape liability by virtue of the defence of non-negligence. Recalling that the figure of 500 000 SDRs had been suggested, the Chairman indicated that perhaps the Group ought to examine that figure to see whether or not a consensus could be galvanized within a three-tier system around an appropriate figure. It seemed to the Chairman that if the threshold for the second tier were established at an appropriate level which would command a greater degree of support, then it might well be that the Group would be able to devise a system based on three tiers with the knowledge that the following third tier would be based on unlimited liability. He said that while also bearing in mind his own experience in terms of the practical application of a second tier principle based on presumption of fault. As a practitioner, the Chairman found that, in any system which was based on presumption of fault, once the claimant had indeed established that he had been involved in an accident, then the burden of proof would indeed shift because accidents did not happen — they were caused. Therefore, those who were in control of the equipment were deemed to have the burden of proof. That was the normal jurisprudential principle which applied. The Chairman was not sure if, by introducing the second tier, the Group would be imposing any greater burden on the carrier. It would, however, send a message to the carrier and to all others concerned that the system of liability with a first tier of up to 100 000 SDRs did take care of a substantial number of claims; for those who wished to go beyond that amount, there was at least the possibility of the carrier's being able to raise defences, albeit the threshold of proof might be higher. The Chairman queried whether it might be useful for the Group to see if it might be able to construct the second building block around an appropriate figure which would be in keeping with the African proposal but not necessarily containing the figure cited in that proposal. Was it possible for the Group to reach agreement on that as it moved to the principle of unlimited liability? Was there or was there not room for that intermediate approach? He asked that in light of the discussion which had taken place in the Commission of the Whole, when the overwhelming majority of Delegates had come around to accepting the principle of strict liability up to a certain threshold. In a way, the Group was faced with trying to begin to devise what that threshold should be. The draft text of Article 20 contained in DCW Doc No. 3 put the threshold at 100 000 SDRs. The African proposal put the threshold beyond the second tier. The fundamental thing was, however, that if the Conference succeeded in reaching a stage of unlimited liability, it would be a quantum leap in the modernization of the "Warsaw System". Therefore, the possibility of having an intermediate step was a matter which was worthy of careful examination.

6. In seeking clarification regarding the various proposals made, the Delegate of Singapore queried whether the only restriction which would apply to the first tier of 100 000 SDRs as proposed by the 53 African Contracting State would be that it would be subject to Article 19 *(Exoneration)*. He also wondered how the system would operate. If a claim were made for $1 million, for example, would it be subject to the second tier where the burden of proof was on the passenger? or would it operate in some other way? Would it be necessary to have a different category of proof for each tier of liability? The Delegate of Singapore wondered whether, if there were difficulty in terms of seeing how such a system would operate, whether there would not be some merit in trying to have a simpler two-tier system. The question was how would the system

operate. Did one go on the basis of seeing where the burden of proof lay, depending on what one ultimately claimed or what one ultimately recovered? If problems were going to arise in that regard, then perhaps the Group might want to think along the lines of trying to make liability easier by having a two-tier system.

7. Recalling that that was the issue which the Group had discussed, clarified, and reached consensus on during the previous day's meeting, the Chairman noted that, in the case of a claim which exceeded 100 000 SDRs, the claimant would still be able to recover up to 100 000 SDRs on the basis of strict liability, even if there were three tiers. The second tier proposal would be that the presumption of fault would apply, but with the carrier being able to rebut that presumption. Article 19 *(Exoneration)* would also apply, as it applied throughout the entire system of liability. The third tier would be based upon proven negligence on the part of the air carrier. The Chairman, while recognizing that the greater the number of tiers which were introduced, the more intricate would be the practical nature of how cases would be presented and accepted, considered that the knowledge that the first 100 000 SDRs would remain on a strict liability basis and not be subject to the vagaries of the carrier's ability/inability to prove the defences outlined in Article 20, paragraphs (a) to (c), would be a protective mechanism which would give certainty to that aspect of it. The second element to be decided by the Group was whether or not the carrier had discharged the onus of proof which was on it in relation to the questions of presumption of fault. The other would be a little more restricted because it was based upon taking all necessary measures to avoid the damage or the impossibility of taking such measures, which were defined in the Convention itself. He averred that there would be a practical way of dealing with the issue.

8. The Delegate of the United Kingdom indicated that his Delegation was very pleased to support the Chairman's first building block of strict liability up to 100 000 SDRs and wished to build on the proposal just made by the Delegate of Singapore for a simplified two-tier system. Recalling that the proposal made by the Secretariat in DCW Doc No. 3 was for a two-tier system, he suggested that that should perhaps be the starting of the Group's considerations, noting that that system had support in Europe, North and South America and Japan. The Delegate of the United Kingdom queried why, if it were so easy for the burden of proof to revert from the passenger to the carrier, was it at all necessary to have two separate tiers: one with the burden of proof on the passenger and the other, with the burden of proof on the carrier. He contended that it would surely be simpler to have a single tier with the burden of proof on the carrier, as proposed by the Secretariat.

9. The Chairman then provided the following example in order to clarify points raised by the Delegate of Singapore: if a claimant sought to recover, say, 400 000 SDRs for damage which he asserted he had suffered, then under a three-tier system he would begin to adduce evidence as to the damage sustained. Referring to the final paragraph of DCW Doc No. 21, he noted that the 53 African Contracting States were proposing that Article 20 be amended so that the carrier would not be liable for damage arising under Article 16, paragraph 1, which exceeded 100 000 SDRs if the carrier proved that it and its servants or agents had taken all measures which could reasonably be required to avoid the damage or that it was impossible for them to take such measures. In relation to claims above 500 000 SDRs, it would be based on the fault of the carrier without a numerical limit of liability with the burden of proof on the passenger. If the Chairman understood the African proposal correctly, then in accordance with sub-paragraph 2 of that final paragraph, "The liability of the carrier above an amount of 500 000 SDRs shall be subject to proof that the damage sustained by the passenger was due to the fault or neglect of the carrier or its servants or agents acting within the scope of employment.". It might be that that formulation was, in fact, placing the burden of proof on the passenger for claims in excess of 500 000 SDRs — it was a different régime. Where the threshold issues of proof lay would thus be known, namely, that up to 100 000 SDRs, it was strict liability; that in excess of

100 000 SDRs and up to 500 000 SDRs, the proof was on the carrier; and that above 500 000 SDRs, the proof was on the passenger. That was how the Chairman read the African proposal. The proposal itself would define the various thresholds, as well as on whom would lie the particular burden of proof. He invited the co-sponsors of the African proposal contained in DCW Doc No. 21 to indicate if he had properly interpreted their proposal.

10. In affirming that he had, the Delegate of Cameroon indicated that the reference made in the African proposal to a first tier for claims of a maximum of 100 000 SDRs was one based on strict liability. A second tier for claims in excess of 100 000 SDRs to 500 000 SDRs was based on presumed liability, with the carrier being able to exonerate itself by proving non-negligence. A third tier for claims in excess of 500 000 SDRs had the burden of proof resting on the passenger.

11. The Delegate of the United States indicated that a hypothetical situation might help the Group grasp the problem. As he understood the African proposal, if a claimant claimed 600 000 SDRs, then proved that there had been an accident, that he had been damaged thereby and the quantum of the damages, then he was entitled to 100 000 SDRs, regardless of what the carrier could prove other than Article 19 *(Exoneration)*. For the amount of the 600 000 SDRs, between 100 000 SDRs and 500 000 SDRs, he was entitled to that portion unless the carrier met its burden of proof that it had taken all reasonable measures to avoid the damage. For the extra portion above 500 000 SDRs, the claimant was only entitled to recover if he could prove that the carrier had been at fault or negligent. Based on that understanding, the Delegate of the United States wished to associate himself with the comment made by the Delegate of the United Kingdom that the Group had a proposal before it which had widespread support in the form of DCW Doc No. 3 presented by the Secretariat. He failed to understand what would be achieved by adopting a three-tier system of liability. The Delegate of the United States also wished to associate himself with the comment made by the Delegate of Singapore as to how that would work when a claim was filed for 600 000 SDRs. While noting that the judge would deal with the first 100 000 SDRs, he queried how would it be explained to the jury that one rule applied to one portion of the claim and another rule, to another portion. He further queried whether it would make any difference to the jury when that was explained.

12. The Chairman queried how it could be explained to a jury deliberating on a case for a claim in excess of 100 000 SDRs that, in spite of the fact that the evidence established no fault on the part of the carrier, the carrier would nonetheless be liable for up to 100 000 SDRs. He noted that the Group was dealing with a practical matter, because the same issue arose regardless of how the evidence was produced. The Chairman averred that fences were being constructed which would provide a degree of certainty in recovery of damages up to certain limits. That was the design of the system in his opinion. While agreeing that a three-tier system of liability might be more difficult to explain, he contended that questions would always arise whenever there was a system which was predicated upon different tiers and systems of liability, be it one or two, and a claim made thereunder exceeded the liability limit of the first tier. The same facts and the same evidence arose from the claim. Although the evidence might establish the invalidity of the claim above 100 000 SDRs, that evidence in and of itself might establish some element which was not based on fault. What the Group was trying to do essentially was simply to introduce a system which allowed for certainty of recovery of damages up to a certain amount. For those claims up to that amount there would be no problem. For those claims in excess of that amount, as a practical matter, a claimant would still be able to recover up to that amount unless the carrier were exonerated of liability under Article 19. Thus the greater the number of tiers, the more complications of a practical nature there would be. The Chairman considered that intrinsic in the system of tiers were the problems which were bound to arise in relation to claims in excess of the liability limit of the first tier, as different régimes would apply. Although a claimant asserted a claim in excess of the liability limit of the first tier, he would still be able to recover up to that limit, notwithstanding the fact that he might be able to prove, or that the carrier might be able to prove, that which was required of the carrier above the 100 000 SDRs.

13. Emphasizing his Delegation's desire to adopt the best approach to the matter at hand so as to ensure the success of the Diplomatic Conference, the Delegate of Chile indicated that, after having listened to the views expressed by other Delegations and having voiced its own views, it was now willing to compromise. He noted, however, that despite its best efforts to try to ascertain the advantages of a three-tier system, the Chilean Delegation could find no such advantages. It would appear to be simpler and more expeditious, and therefore more beneficial to the consumer — a viewpoint always to be taken into consideration — to have a two-tier system. His Delegation agreed with the Chairman that the greater the number of tiers, even though they were of a practical nature, the greater the complexity of the system. The Delegate of Chile recalled that there was also agreement within the Group regarding the last tier, whether called the second or third tier, being based on unlimited liability. The Chilean Delegation was thus not at all convinced that it would be beneficial to have an intermediate tier. The key feature of the "Warsaw System" was the introduction of liability limits. However, such a system of liability limits did not appear to be sufficiently modern for the coming century. There was already a guarantee of strict liability up to 100 000 SDRs and of presumed liability above that amount. To make the system of liability even more complicated would be the end of the system. Article 20 as proposed in DCW Doc No. 3 and supported by Europe, the whole of the Americas and Japan was a balanced text resulting from the efforts of many people.

14. The Delegate of Sweden wished to be associated with the comments made by the Delegates of Singapore, the United Kingdom, the United States and Chile on the question of simplicity. He averred that a three-tier system would be very difficult for the victim, who would have to consider how to present his case, which evidence to present, and how the shift of burden of proof would work in relation to how the Court would assess the evidence. It was not just a question of applying different burdens of proof in different systems of liability, but of how the actual shifts of liability systems would also influence how the Court viewed the evidence and the case presented. Noting that the present draft text of Article 20 contained in DCW Doc No. 3 was a codification of the system which was currently in place in relation to a large number of carriers, the Delegate of Sweden averred that it would be hard to explain to politicians why the Conference wished to change that. He emphasized that, in his view, the two-tier system in the present Secretariat draft was necessary to uphold the protection of the passengers, especially in light of the conclusions reached by the Chairman during the previous meeting regarding Article 16 *(Death and Injury of Passengers — Damage to Baggage)*.

15. The Delegate of Ghana, one of the co-sponsors of DCW Doc No. 21, underscored that the proposal by the 53 African Contracting States was very logical and left no ambiguities regarding the application of the various tiers which were being proposed. The African proposal seemed to establish a buffer for the transition from strict liability to unlimited liability. Furthermore, it created a mechanism on the basis of already established premises to ensure that there would never be abuse on either side to any party. The Delegate of Ghana averred that if the Group were to look beyond what was being proposed in the Secretariat's draft text and look objectively at the African proposal, then it would be able to find some accommodation for the Secretariat's proposal, subject to various adjustments to the thresholds which had been put forward in DCW Doc No. 21. He emphasized that the latter needed to be given a second look.

16. In strongly supporting the views expressed by the Delegate of Sweden and other Delegates, the Delegate of Japan averred that it would be unrealistic to expect the passenger to bear the burden of proof. Given the sophistication of aviation technology, it would be almost impossible for the passenger to prove that an accident had been the result of the negligence, wrongful act or omission of the carrier. For that reason, he and his Delegation were not in a position to accept a three-tier system of liability. They were of the opinion that the Group's discussion should have as its starting point the two-tier system of liability as set forth in DCW Doc No. 3.

17. While agreeing with the Delegate of Ghana that the African proposal was clearly set out, the Delegate of Canada indicated that how exactly it would play out in a piece of litigation was not quite so clear. That, of course, might depend to a large extent on each individual's personal experience as litigation was carried out in many different ways in many different States. It was something on which Delegates would have to focus individually and determine whether or not the proposal could fly in their respective States and what they could do to make it more acceptable to each Delegate's State. Thus while the Delegate of Canada had no difficulty understanding the African proposal, he still had some problems regarding its implementation in his State. What he was more concerned about, however, was the theory behind that proposal. He and his Delegation were, of course, prepared to show some flexibility on this issue. They preferred the Secretariat's draft text presented in DCW Doc No. 3 which had been worked out in various meetings in light of its simplicity. As the Delegate of Canada had indicated during a meeting of the Plenary, he and his Delegation were interested in learning what was at the root of the concerns of the African and Arab States. They were of the opinion that it might be a question of insurance costs. If that were the case, they would need to have a clear idea of the exact nature of the problem. The Delegate of Canada underscored that his Delegation would not promote a system of liability which would be counter to ICAO's key objective, which was to set aviation safety as the prime concern of the Organization. He and his Delegation would be concerned if the Conference adopted a Convention which referred to liability limits of 500 000 SDRs or 1 million SDRs as such figures tended to form a pole of attraction in negotiations for settlement of a claim. They did not think that the Conference wished to signal to the world that such large sums of money were available if the claimant advanced his cause hard enough. They favoured instead a liability limit of about 100 000 SDRs. If a claimant wished to claim a higher amount, he would have to justify it, or at least get involved in disproving the carrier's non-liability. If it were signalled in an international convention such as the one under consideration that huge sums of money were available for compensation for damage, then passengers would litigate for those sums. The Delegate of Canada and his Delegation were not sure whether that was the appropriate signal to send. They were concerned about that aspect of the African proposal.

18. The Chairman emphasized that Chapter III had to be viewed as a package and that there were other issues which would have to be considered in the package as a whole, including the issue of jurisdiction addressed in Article 27. That was a matter of significance in the sense that if the Group dealt with Article 20 in a satisfactory manner, then the concerns which had been expressed about forum shopping might be significantly alleviated.

19. Another point which the Chairman wished to stress was related to Article 19 *(Exoneration)*, which allowed for the carrier to prove that the damage had been caused by the negligence or other wrongful act or omission of the person claiming compensation. That Article applied to all tiers of a system of liability. In particular, the defence available thereunder would continue to be available even in a three-tier system of liability. Thus although the African proposal was based upon a presumption of fault, what the carrier had to prove in order to escape liability was not simply a burden discharged by showing that it had taken all reasonable measures to avoid the damage or that it had been impossible for it to take such measures; the carrier had equally to prove that the cause of the damage had been the negligence or other wrongful act or omission of the person claiming compensation. In a sense, that applied to all of the kinds of limits which were applicable within the system of liability. It was a very complex matter. What the Group was attempting to find was what it was that the third tier offered which would provide for a greater degree of comfort level in accepting a system of liability and in dealing with the fears that in a two-tier system of liability the transition to unlimited liability was too quick. The Chairman was not saying that the fears were founded or unfounded. He was of the opinion, however, that that was the fear, that in a two-tier system of liability, there was an immediate change from a system of strict liability up to a maximum of 100 000 SDRs to a system of unlimited liability in the context of whatever jurisdictions the Group would establish as having competencies. Those were the unspoken issues which were behind all of these questions. Once the Group had established the first threshold, that

particular problem would come up. The Chairman was making these observations in order to place in context some of the concerns, spoken or unspoken, relating to this issue.

20. The Delegate of Pakistan indicated that his Delegation had no difficulty in accepting the first tier of the Secretariat's proposed system of liability which, by general consensus, would appear to have a limit of 100 000 SDRs. Indeed, it had no problems with the two-tier system of liability as a whole. However, the Pakistani Delegation wished to propose capping the second tier at some 500 000 SDRs, an amount which could be varied. On the basis of the discussion, it found that there was consensus on two matters: that there be a fixed first tier of strict liability; and that the second tier be based on unlimited liability. Thus the Pakistani Delegation accepted what had been put forward by the Secretariat in DCW Doc No. 3, having examined all the various proposals in the respective juxtapositions.

21. The Delegate of Switzerland considered that the two-tier and three-tier systems of liability under discussion were both viable solutions. In deciding on which system to adopt, the Group would have to examine them from a practical point of view. He was of the opinion that the two-tier system of liability was much simpler, much clearer, and that it provided for a good level of compensation. The Delegate of Switzerland noted, however, that even if a two-tier system of liability were adopted where the carrier could prove that it had not committed any fault or been negligent, it was still for the passenger to prove the extent of the damage sustained.

22. The Delegate of China observed that the substance of the current discussion of two- and three-tier systems of liability reflected the varying levels of civil aviation of the different States. Recalling the Chairman's comment that the African proposal for a three-tier system of liability had been motivated by the rapid transition from strict liability up to a limit of 100 000 SDRs to unlimited liability, he emphasized that, in addition to considering the interests of consumers, the Group should also consider the protection of carriers to ensure their survival and development. ICAO was a large family. Its established policies must be conducive to the healthy and orderly development of international civil aviation. What was orderly and healthy development? That meant that the policies should be conducive to the development of civil aviation in States in different regions so that the public would be provided with convenient services. At the same time, protection should be offered to the public. While the Chinese Delegation was willing to consider a system of liability involving any number of tiers, the general purpose of any discussion was to ensure that the interests of both developed and developing States were taken into account. In recalling that China had dozens of carriers, the Delegate of China noted that, whether big or small, they were weak in comparison with those of developed States. They had, however, contributed to the economic development of China and to tourism. The Chinese Government was adopting various measures to encourage the development of carriers as that was conducive to the opening up of China and to the promotion of tourism in China. If the established limits of liability were related to those of certain regions, perhaps that would not be beneficial to the development of carriers. The Group should thus avoid going to extremes. In addition, in establishing a new system of liability it should consider potential problems. The Delegate of China hoped that, regardless of which system the Group ultimately selected, it would still give careful consideration to the proposal for a three-tier system of liability. Although such a system might give rise to problems in the future, it still had merit. The purpose of the Conference was not to seek only a simple system of liability.

23. In noting that a number of issues had been raised in relation to a three-tier system of liability, the Chairman observed that some of them had been of a practical nature while others had concerned the need to have an intermediate tier which would assist in preventing excessive claims from being put forward in the knowledge that, in any event, 100 000 SDRs would be recovered in compensation for damage. The Chairman considered that it was also a practical problem. He underscored that the second tier of the three-tier system of liability proposed by the 53 African Contracting States did not impose any additional burden on either the

passenger or the carrier in relation to the burden of proof which was now contained in Article 20. The African proposal was fashioned on the basis that the burden of proof would be on the carrier up to and including the second tier. To that extent, there was common ground between the second tier and what was contained in Article 20 in that two-tier system of liability. The draft text of that Article proposed by the 53 African Contracting States provided that the carrier would not be liable for damage arising under paragraph 1 of Article 16 which exceeded 100 000 SDRs if the carrier proved it and its servants or agents had taken all measures that could reasonably be required to avoid the damage or that it had been impossible for them to take such measures. Thus in the construction of the second tier of the three-tier system, the proof elements were the same as what was contained in the two-tier system. The point of departure was that, under the African proposal, the burden of proof in the third tier was placed on the passenger. If the Chairman understood correctly, the reasoning behind that was that those passengers who sustained damage of a very high order were likely to be numerically small but able to mobilize the kind of resources which might be required in order to mount an appropriate litigation action to sustain a claim of that kind. He then queried whether in the three-tier system of liability, even in a case for a claim exceeding 500 000 SDRs, the passenger would still be able to recover up to 500 000 SDRs unless the carrier were able to discharge its burden of proof that it had taken all reasonable measures, etc., which was identical to what was now contained in Article 20 in a two-tier system. Hence it would only be for claims above that threshold that the passenger would have to prove the liability of the carrier. Noting that the Group might not have specified the right figure, he posed the question in another context: If an appropriate figure were established for the second tier *i.e.* 500 000 SDRs or some other figure — did it offer any prospect of solution to this question within the framework of a three-tier system of liability? He asked this in the context of the fifth jurisdiction, noting that the determination of an appropriate figure might contain the seed of a compromise which would put to rest some of the concerns raised in relation to the fifth jurisdiction. The Chairman did not consider that those issues could be dealt with in isolation. He wished to ascertain whether it was possible to forge a movement towards a consensus for a three-tier system of liability which recognized an appropriate level for the second tier, based upon proof by the carrier in circumstances identical to the second tier in Article 20 of the draft text before the Group, with the knowledge that if the appropriate figure were established, then an overwhelming majority of all cases would be covered with only a few being left out of the net in circumstances in which two things might happen: that those few would be better able to discharge the burden of proof on the passenger; and that, in any event, up to that threshold - not 100 000 SDRs now but whatever suitable figure might be established — the passenger would still be able to recover on the basis that the burden of proof was on the carrier, in much the same way as the Group had already indicated, that up to 100 000 SDRs, strict liability applied. Thus although the claim might be for 1 million SDRs, the claimant would still be able to recover up to that figure at which the carrier had been unable to discharge its own burden of proof. Thereafter, it might be that the concerns which had been expressed by many Delegates regarding forum shopping and other issues relating to the fifth jurisdiction would be an important part of the compromise in that context.

24. In raising the question of the concept of burden of proof, the Delegate of Pakistan noted that, in the Anglo-Saxon law which was practised in his region, the burden of proof was *ab initio* on the person who wished the Court to accept his claim. It was thus an accepted position, a doctrine, that the burden of proof fell squarely on the person who wished the Court to believe a particular claim; it never shifted to the defendant. Many kinds of defences were always available to the defendant, irrespective of whether it was provided in a particular law or not. It was the inherent right of defence of a party to offer whatever defences it could. In underscoring that the Convention under discussion did not constitute supranational legislation, the Delegate of Pakistan recalled that pursuant to Article 27 *(Jurisdiction)*, an action for damages was to be tried in the respective Courts of the States concerned. The basic law which was applicable in a State concerned would govern and the rule of evidence would be applicable according to the conditions and the legislation of the State. This gave rise to another question: Did the burden of proof rest on the carrier, given that it was not the carrier

which would be bringing an action but the passenger who had sustained an injury? It was the latter who would be bringing an action and the burden of proof would always lie squarely on him to prove that he had suffered damages under the Anglo-Saxon system, whether they came under the first-, second- or third-tier. It was for the carrier to offer a defence. The Pakistani Delegation thus viewed the argument that the burden of proof should be on the carrier as being immaterial. The issue of the burden of proof had to be considered in the context of Article 27. Furthermore, any package considered by the Group should encompass jurisdiction. The Delegate of Pakistan was of the opinion that the fifth jurisdiction was always available to the passenger irrespective of whether that form of fifth jurisdiction was provided for.

25. The Chairman observed that it was quite true that, in domestic jurisdictions, the system of evidence which was required and the burden of proof would be provided for under national legislation. However, if the draft Convention were adopted, then its provisions would have to be applied in relation to this question. The provisions contained in Article 23 *(Basis of Claims)* made it clear that an action which was brought for damages, however founded, whether under the new Convention or in contract or tort or otherwise, could only be brought subject to the conditions and such limits of liability as were set out in the Convention. There was indeed jurisprudence which suggested that it was exclusive. It was not possible to get around the provisions of the Convention regarding the burden of proof, etc., by bringing an action in tort or by attempting to bring an action outside the Convention, if one were a party to the Convention — it would be expected that every party, in order to implement the Convention, would introduce domestic legislation which would be applicable in its Courts. Thus whereas it was quite true that in most jurisdictions the burden of proof would lie on those who asserted claims, when the new Convention was adopted its rules would apply so as to modify whatever might be the system in domestic legislation in terms of claims which were brought under the Convention, even claims which were brought outside of the Convention, insofar as they were based on damage sustained in the carriage of passengers, which would be covered by the Convention. Thus although it was true, that would be the effect of what Article 23 was attempting to require States to do in terms of their obligations under the Convention itself.

26. The Delegate of the United Kingdom sought clarification as to what significant benefits could be derived from the three-tier system of liability set forth in DCW Doc No. 21 if the *res ipsa loquitur* legal principle discussed earlier so readily applied. If, as indicated, the burden of proof would be readily shifted from the passenger to the carrier in a serious accident case which could give rise to damages of a significant amount, what real protection was there for carriers under a three-tier system of liability as opposed to under the simple two-tier system of liability which had been put forward in Article 20 of DCW Doc No. 3? The Delegate of the United Kingdom also queried whether the carriers' insurers would not, in any event, take that principle into account, thus leading to no significant or real benefit for those carriers. He further queried whether it was not the case that, in having a three-tier system of liability, there was not so much a protective buffer for the small-and medium-sized carriers as a target sum which could be aimed for, and would that not make the position worse for such carriers from African States or other developing States.

27. In offering his interpretation of Article 20 of the draft Convention, the Delegate of Cameroon noted the reference made in the Preamble to that Convention to the need for equitable compensation based on the principle of restitution. The Conference thus wished to protect both the interests of the passengers and the interests of the carriers. It was his view, however, that Article 20 did not take into consideration the carriers' interests, given that, in the first tier up to 100 000 SDRs, carriers were under a strict liability régime and had no means of being exonerated from liability. There were no defences to be raised against that liability. Under the second tier, the burden of proof still rested with the carrier who had to show that all necessary measures had been taken to avoid the damage and that it had not been at fault or negligent. The Delegate of Cameroon thus contended that there was an imbalance in Article 20, with the passengers being slightly over-protected and

the carriers' interests apparently not being taken into consideration at all. He noted that the African proposal, of which he was a co-sponsor, would introduce an element of moderation in the second tier, inasmuch as in that second tier the passenger did have some means of recourse. The Group should take that into account in considering the various papers presented on this subject.

28. In stressing the importance of determining what the real difference was between the two-tier system of liability set forth in Article 20 of DCW Doc No. 3 and the three-tier system of liability which was proposed in DCW Doc No. 21, the Observer from the European Community (EC) noted that whenever an accident occurred, there would be several claims for damages below the limit of 500 000 SDRs or whatever suitable limit were established, as well as several claims for damages above that amount. Normally, the smaller claims would be settled first. If the carrier assumed liability by not contesting, or if the carrier could not prove that it had taken all necessary measures to avoid the damage, then the question arose as to what more would the passengers claiming amounts exceeding the limit need to prove, in particular since the burden of proof tended to shift when there was such an accident. There was always a link between smaller and larger planes, which basically meant that the same situation would arise. If the carrier could prove that it had taken all necessary measures to avoid the damage, then it would have also defended itself against claims exceeding the liability limits. If it could not, then such claims would nearly have made the proof — the proof was already there. If there were some other difference between the two systems, it would be necessary to make it known; otherwise some Delegates would still advocate a three-tier system of liability while others would question the need for such a complicated system when the text setting forth the two-tier system was easier to understand.

29. The Observer from the EC noted that there was a second difference between what was proposed in Article 20 of the draft Convention and what was proposed by the 53 African Contracting States in DCW Doc No. 21: Article 20, paragraph (a), stipulated that the carrier was to prove that it had taken all necessary measures to avoid the damage — something which, from a legal point of view, might be extremely difficult, if not impossible, to prove; the African proposal, on the other hand, called for the carrier to prove that it had taken "all measures that could reasonably be required". Observing that there was thus at least a difference in degree between what was proposed in DCW Doc No. 21 and what was contained in Article 20 of DCW Doc No. 3, he queried whether or not that was an intended difference which, in a sense, took the interests of the carrier into consideration more than the interests of the passenger.

30. The Delegate of India indicated that, in his Delegation's view, the main elements of the package were burden of proof in the second tier of the liability régime and the fifth jurisdiction. He recalled, in this regard, the strong concern which his Delegation had already expressed about the simultaneous provisions of burden of proof on the carrier and the fifth jurisdiction. In noting that the Indian Delegation agreed with the general view that the two-tier system of liability would be easier to implement than the three-tier system of liability, the Delegate of India underscored that it wished the burden of proof to be on the claimant. However, as a matter of compromise, his Delegation was ready to agree to a three-tier system of liability as had been proposed, provided that there were no provision for the fifth jurisdiction. The various elements of the package would thus be as follows: first tier of strict liability up to 100 000 SDRs; second tier of presumed fault liability with burden of proof on the carrier — the figures could be determined separately, as mentioned earlier that day, the third tier of liability above the amount specified for the second tier, with no numerical limit of liability and the burden of proof being on the claimant *i.e.* the claimant must prove wilful default on the part of the carrier; and removal of the fifth jurisdiction.

31. The Delegate of Australia contended that, if the Conference's objective was simply to update the Warsaw Convention of 1929, then the limit of liability under a first tier based on strict liability should probably be considerably in excess of the 100 000 SDRs specified in Article 20 of the draft Convention. In

so saying, he wished to note that Australian legislation provided for a strict liability limit of up to 260 000 SDRs and for international carriers flying to Australia to be also subject to that amount. The Delegate of Australia had viewed Article 20 as perhaps being a compromise for his State in that, while providing for a lower liability limit of 100 000 SDRs, it would give Australian passengers access to a second, unlimited tier, which could perhaps be seen as a benefit. He emphasized that it was not the national environments that the Conference was trying to work within. It was, in fact, trying to develop an international solution. The Delegate of Australia was thus very concerned about some of the issues raised by the Delegate of Canada. He recalled the comment made by the Delegate of the United Kingdom on the need to understand the differences between a two-tier and a three-tier system. From the point of view of the Delegate of Australia, it would be good if the Conference were to adopt a two-tier system of liability which had a first tier based on strict liability with a limit of 260 000 SDRs, and above that, a second tier with unlimited liability. He recognized, however, that that might not necessarily be an internationally-acceptable solution and therefore solicited more intensive comments from the States putting forward the various proposals as to what their respective benefits were. The Delegate of Australia averred that, until a common understanding were reached as to what those benefits were, it would be very difficult for the Group to subsequently agree to what might, in the long term, be a revised Article 20. With regard to the query by the Observer from the EC regarding the different phraseology used in Article 20 as set forth in DCW Doc No. 3 and in DCW Doc No. 21, he recalled the explanation provided during a meeting of the Commission of the Whole when he had raised that issue that the words referred to were reflected in Article 18 *(Delay)* and Article 20. It had been suggested that there needed to be a marrying of those two concepts so as to ensure consistency in the language used in the draft Convention.

32. The Delegate of Switzerland contended that the adoption of a three-tier system of liability would result in enormous practical problems. In querying how a passenger could prove the fault of the carrier as called for under the third tier, he underscored that aviation was a highly technical matter. It was well-known that it took a very long time for the causes of accidents to be determined and yet Article 29 *(Limitation of Actions)* of the draft Convention set a two-year limit in which to bring an action. Thus in the view of the Delegate of Switzerland, the possibility for a passenger to prove the fault of a carrier was highly theoretical. That being the case, it was no longer a matter of unlimited liability.

33. The Delegate of Sri Lanka averred that the proposed three-tier system of liability would not address the concerns of small-sized carriers more than the two-tier system of liability would. In practice, if a claim were for more than 500 000 SDRs, the claimant, in addition to having to prove the extent of the damage sustained, would have to establish that the damage was due to the fault or negligence of the carrier. The carrier would be able to rebut that by proving either that it had taken all necessary measures to avoid the damage or that it had been impossible for it to do so. If the carrier succeeded in establishing that, the passenger would be awarded 100 000 SDRs in compensation and no more. With regard to a claim for less than 500 000 SDRs, the carrier could make the same defence and if it succeeded, the passenger would receive only 100 000 SDRs. Under the African proposal, the defences available to the carrier were that it had taken all measures which could reasonably be required to avoid the damage or that it had been impossible for it to do so. However, in accordance with Article 20, paragraph (c), of the Secretariat's draft text, there was an additional defence available to the carrier, namely that the damage was solely due to the negligence or other wrongful act or omission of a third party. It was the opinion of the Delegate of Sri Lanka that the Secretariat's draft text was much more favourable to small-sized carriers than the proposed three-tier system of liability.

34. The Chairman having deferred further discussion to the next Meeting, the Meeting adjourned at 1300 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

NINTH MEETING OF THE COMMISSION OF THE WHOLE

(Wednesday, 19 May 1999, at 1000 hours)

President: Dr. K. Rattray

Agenda Item No. 9: Consideration of the draft Convention

1. In presenting the above Report, documented in DCW Doc No. 35, the President indicated that the paper was for the information of the Conference to ensure that all Delegations would be kept informed of the Group's deliberations in a transparent manner; it was not intended to represent a definitive position on all the issues which the "Friends of the Chairman" Group had discussed at its first and second meetings. He added that the Group had proceeded on the basis of recognizing that solutions would essentially be within the framework of a package and in that context the issues which had been posed by Articles 16, 20 and 27 would have to be resolved.

2. The President then elaborated on the Group's review of draft Article 16, paragraph 1 and Article 20. He further suggested that there would also be an opportunity for the Commission of the Whole to make observations concerning the fifth jurisdiction in Article 27. With regard to paragraph 1.3, he stated that the Group had believed that the three elements listed therein would address the need to recognize the growing jurisprudence in domestic jurisdictions of recognizing mental injury, and at the same time to recognize the peculiarities of air transport and the fact that a unique regime was being built which was nonexistent in domestic jurisdictions such as for land transportation.

3. With respect to Article 20, the President recalled that a number of proposals had been made in several working papers related to a three-tier system, and he noted that the "Friends of the Chairman" Group had shown an extraordinary spirit in trying to resolve those questions. He was particularly grateful to those Delegations that had made proposals, but who were also willing, in the search for solutions, to subordinate and even to withdraw their own proposals in the hope of arriving at a common position. In commenting that the Group had not reached any conclusions with regard to Article 20, the President indicated that it was essential to strike a proper balance which would give predictability in terms, on the one hand, of the ability of the passenger or the claimant to be able to successfully assert a claim, and, on the other hand, the ability of the carrier in appropriate circumstances to be able to rely upon the defences which would be available, the proof of which would be on the carrier. He also did not believe that those issues could be resolved in isolation, especially from the standpoint of the issue of the fifth jurisdiction in draft Article 27, which the Group had yet to consider.

4. The Delegate of Singapore, in complimenting the President on the process which he had initiated at this meeting, voiced his appreciation for an excellent summary report of the first and second meeting of the "Friends of the Chairman" Group. Referring to paragraph 1.3 of the report and the three

elements which had been identified therein, he recalled that his Delegation had suggested to the Group that the third element should be amended to read "mental injury which has substantially impaired the health of the passenger", a wording which would be less ambiguous than that contained in the paragraph. The President acknowledged that such a suggestion had been made to the Group, and indicated that the question of mental injury which significantly impaired or substantially impaired the health of the passenger was indeed one of the suggested formulations. On a further point regarding the three elements in paragraph 1.3, the Delegate of Singapore informed the Committee that a group of Asian States had been briefed earlier on the discussions of the "Friends of the Chairman" Group, and had requested that he relay their position to the Commission of the Whole that the second element should read along the lines "mental injury arising from bodily injury". The President noted the suggestions and stated that they would be referred to the Drafting Committee.

5. The Delegate of the United Kingdom thought that the proposal concerning the second element put forward by the Delegate of Singapore could have a substantial, different effect from the proposal contained in paragraph 1.3 in terms of how a mental injury would flow from a bodily injury from an horrific accident. Accordingly, he wished to place on record his belief that the second element as framed in DCW Doc. No. 35 was the appropriate version.

6. In associating himself with the views of the Delegate of Singapore, the Delegate of China was of the opinion that the second element as drafted in paragraph 1.3 was vague and should be expressed in clearer terms, i.e. that mental injury resulted from bodily injury. The Delegate of Egypt believed that it would be more appropriate to indicate that mental injury was associated with and resulted from a bodily injury. With regard to the third element in paragraph 1.3, he suggested that it should refer to a "permanent" mental injury which had a significant adverse effect on the health of the passenger.

7. The Delegate of Namibia echoed the previous speakers in complimenting the "Friends of the Chairman" Group for the progress it had made, especially in respect to Article 16. With regard to paragraph 1.5 of the report, he sought clarification concerning the Group's confirmation of the understanding that draft Article 19 would also be applicable in the first tier of liability. In that connection, he understood that strict liability was a form of liability where the requirement of fault in any shape or form on the part of any of the parties was not an issue and the liability of the defendant was to be strictly presumed with no defences available to the defendant. In his view, the moment it was said that the defence of exoneration, as defined in the draft Article 19, was available to the regime of strict liability, then as a matter of law, conceptually, and also in the real world of practice, the entire notion of strict liability would basically be refuted. He wondered therefore what the full implication would be for the claimants. Secondly, it was his understanding that the notion of having a first tier where strict liability applied was to bring about a complete measure of certainty where quick advance payments, for instance in terms of draft Article 22 A, would be made by the carrier to the victims of an air accident.

8. The Delegate of Namibia continued his comments by stating that the moment the strict liability regime was subjected to up to 100 000 SDRs and also to the available defence of exoneration under Article 19, he had difficulty seeing how any carrier and its insurance company would make use of the possibility of advance payments. He suggested that this would lead to lengthy litigation where the carrier would have to establish whether, at a later stage, there would not be the possibility of a person being contributorily negligent as a way for the carrier to reduce its own liability. He wondered therefore whether this would actually achieve the exact opposite result to the original intent of the proposal, and

was, in his view, a contradiction in terminology. He also believed that there should be a consistency between the defences available under Article 19 and those under Article 20 which was not applicable to the first tier, which was subject to the strict liability regime. By saying that Article 19 also applied to the first tier, it was clear that there should be consistency between the two types of available defences. In his opinion, as a matter of policy or law, there was no justification for that type of approach. He believed therefore that this matter should be reconsidered so that the integrity of the strict liability regime and the certainty which it brought in relation to advance payments would be preserved.

9. Further to the comments made by the Delegate of Namibia, the Delegate of Sweden remarked that, if there was not a limit of 100 000 SDR, it would be possible for a passenger to board an aeroplane and intentionally cause himself or herself damage in such a way that it would be counted as an accident, and then to recover money from the airline as a compensation for that intentional act.

10. In noting the observations, the President stated that the issues raised by the Delegate of Namibia had indeed been examined by the Legal Committee, the Special Group on the Modernization and Consolidation of the "Warsaw System" and by the Secretariat. He added that it had also been discussed in the "Friends of the Chairman" Group and clarifications had been sought in precisely the same terms as stated by the Delegate of Namibia. The President explained that the understanding of the Group as to the relationship between Article 19 and the provisions contained in Article 20 and Article 16 were on the basis that there was a certain measure of assumption of risk by the passenger in respect of his or her own acts which contributed wholly or partly for the damage which had been sustained. The onus of proof would be on the carrier and not on the passenger, and that was seen as an integral part of the entire system which would lead the way firstly to making it easier for the passenger to establish a claim and also to open up the possibility within the context of the package for the acceptance of unlimited liability. The President acknowledged the comments of the Delegate of Namibia which, in jurisprudential terms, might have substantial validity. However, in terms of the practical negotiations of what the Conference was attempting to achieve in arriving at a proposal which would command the widespread and substantial support required for a package, there was a sense of creating a regime which was *sui generis* having within it, elements which, taken in isolation, might raise even more difficult problems for the jurisprudential purity of the document, but nonetheless would satisfy the ultimate objective of ensuring that a balance would be achieved.

11. The Delegate of India also congratulated the President for the excellent and precise presentation he had made on the first and second meetings of the "Friends of the Chairman" Group. He indicated that it was difficult for his Delegation to agree to any inclusion of the concept of mental injury as presented, and India was of the considered opinion that a situation did not exist today to introduce the new concept of mental injury independent of bodily injury, as there was no way it could be measured or quantified. The only injury that could be recognized at present was bodily injury, and mental injury would necessarily have to be an outcome of that bodily injury. This then raised the question as to how mental injury could be measured without straying into the realm of conjectures and guesses. Therefore, it was something intangible and not quantifiable and to that extent, could not be implemented.

12. The Delegate of Saudi Arabia joined the previous speakers in congratulating the President for his summary report on the first two meetings of the "Friends of the Chairman" Group. He noted, however, that the report had not mentioned the proposals submitted in DCW Doc No. 29 by the Member States of the Arab Civil Aviation Commission regarding Articles 20 and 27. It was his hope, therefore,

that the paper would be taken into account by the Conference and would constitute a reference for those wishing to ascertain the position of various regional groups. While he acknowledged that the summary report had not elaborated on all the relevant working papers in detail, the President drew attention to paragraph 2.1 which indicated that the Group had reviewed the various proposals contained in DCW Doc Nos. 18, 21, 24 and 29 as well as the proposal made by Pakistan.

13. Responding to the President's invitation during his introduction of DCW Doc No. 35 to make any observations in relation to the fifth jurisdiction in Article 27, the Delegate of the United States stated that, as far as his Delegation was concerned, the fifth jurisdiction must be equally accessible as the other four jurisdictions.

14. The Delegate of Egypt thought that the fifth jurisdiction would undermine the efforts of the carriers and would place an additional burden on them. He pointed out that many aircraft could carry upwards of 400 passengers, and often those passengers were of many different nationalities. In the case of an accident, a carrier could be subjected to appear before many courts in different jurisdictions, thereby complicating the matter further in the aviation industry, especially since it was envisaged that new future large aircraft types could carry up to 600 passengers. Therefore his Delegation, as a member of the 53 African Contracting States and of the Arab Civil Aviation Commission, fully agreed with the positions that the fifth jurisdiction was not needed.

15. The Delegate of Côte d'Ivoire stated that his Delegation welcomed the excellent spirit of compromise reigning over the Conference, especially in the "Friends of the Chairman" Group which testified to the willingness of all the Delegates to achieve a document that would be a consensus document, one that would again unify the regulations governing international air transport. In the quest for a compromise, his Delegation sought clarification concerning the statement made by the Delegate of the United States, in respect of Article 27. He recalled that, at the previous meeting of the Commission of the Whole, the Delegate of the United States had indicated that if an aircraft operated by an airline either on its own behalf or in code-sharing arrangements with another airline did not land in the United States in the course of its journey, the fifth jurisdiction would not apply.

16. In response to the Delegate of Côte d'Ivoire, the Delegate of the United States drew attention to draft Article 27, para 2 b) which indicated that in respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of Article 27 or in the territory of a State party to or from which the carrier actually or contractually operated service for the carriage by air. He also noted that subparagraphs a), b) and c) were connected by the word "and", which meant that they were cumulative and would all apply. He interpreted "contractually operated" as indicated in subparagraph b) to mean an aeroplane, most likely one of a partner carrier, would land or take off in one of the States parties carrying a passenger or passengers whose tickets showed the code of the contractual carrier, bringing it into the fifth jurisdiction. The Delegate of the United States illustrated his point with a hypothetical situation involving a United States airline flying from New York to Paris. Although the only code that airline bore on tickets for the New York-Paris segment was its own, it had a code-sharing arrangement with a carrier from Côte d'Ivoire, whereby the latter flew from Paris to Côte d'Ivoire and carried on that segment a passenger ticketed for the segment on the US airline. If something unfortunate happened on the Paris-Côte d'Ivoire segment, the Côte d'Ivoire carrier would not be subjected to jurisdiction in the United States based on the fifth jurisdiction. The alternate hypothetical situation would, he suggested, involve the same facts but with one alteration, being that the Côte d'Ivoire

code was carried on a ticket for the Paris-US sector on an actual US carrier. In that circumstance, the Côte d'Ivoire carrier contractually operated service to the United States, and it would then be covered by the fifth jurisdiction.

17. Responding to a request for further clarification by the President, the Delegate of the United States went on to say that, supposing the passenger referred to above had his or her principal and permanent residence in the United States, then Article 27, subparagraph 2 a) would have been met. Had the Côte d'Ivoire carrier, or another carrier, that carried or was attempting to carry that passenger from Paris to Côte d'Ivoire conducted business through leased premises in the United States, the requirement of Article 27, para 2 c) would also have been met. However, had the carrier in question not actually, or contractually, operated services to or from the United States, it therefore had not met the requirement prescribed in Article 27, para 2 b). In that hypothetical situation, the carrier had not met all three conditions and the fifth jurisdiction would not apply, hence the carrier could not be sued in the United States except possibly under one of the other four jurisdictions.

18. With reference to draft Article 27, the Delegate of Sweden recalled that reference had been made to the possibility of provisions on *forum non conveniens* and his Delegation welcomed any such wording that would enable States presently applying that principle to continue doing so. However, he advised against any attempt to make that a standard provision for all States. It had been proposed, through lengthy discussions in other fora, that it should be a standard requirement applicable to all States, although no conclusions had been reached at this point in time. He stated that *forum non conveniens* was unknown to most civil law countries and a number of States had firm instructions on such a position.

19. In expressing his appreciation to the Delegate of the United States for explaining a confusing point, the Delegate of Côte d'Ivoire thought that it was interesting that the point had been made that subparagraphs 2 a), b) and c) of Article 27 were cumulative. Also referring to the fifth jurisdiction in Article 27, the Delegate of Ghana indicated that he had sought advice from his State's national airline with a view to understanding exactly how an African airline conducting a segment of carrying passengers from the United States to Africa, and whether within a regional context, would be affected by the fifth jurisdiction. Following the explanation offered by the Delegate of the United States, the Delegate of Ghana wondered whether any judge without an aviation law and/or an air transport background would be able to interpret the fifth jurisdiction. In that connection, he suggested that simple and easily applicable articles only should be formulated.

20. The Observer from the International Union of Aviation Insurers (IUAI) made reference to DCW Doc No. 28 which explained his Union's general position on the fifth jurisdiction and the particular costs that would accrue to those States not operating to the most expensive jurisdictions. In his view, the draft was fairly clear, but it was unclear as to whether it was intended that there be a reference to a code-sharing relationship. He pointed out that the Guadalajara Convention had defined a contractual carrier as a carrier issuing a contract for carriage over the lines of another. Therefore, in relation to Article 27, paragraph 2 b), a contractual carrier could easily be understood by a judge as being a carrier that issued a ticket for carriage, for example, on one occasion only, i.e from Abidjan, Côte d'Ivoire, via Paris to New York and return. That would, in his view, make that carrier a contractual carrier, for the purposes of this definition. If the carrier then leased premises in the United States, it would, on the face of it, come within the definition of Article 27, paragraph 2 c), even though the carrier had not had a code-share relationship with a US carrier. This was, he suggested, part drafting and part substantive issue,

and it would be more appropriate for the "Friends of the Chairman" Group to debate the issue. He added that it had not seemed to him to represent the spirit of the submission by the Representative of the United States.

21. In view of the hour, the President summarized the discussion thus far by indicating that the proposals presented in respect of Article 16, paragraph 1 and Article 20 would be referred to the Drafting Committee and the meeting adjourned at 1155 hours.

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INTERNATIONAL CONFERENCE ON AIR LAW

"FRIENDS OF THE CHAIRMAN" GROUP

Minutes of the Third Meeting
(Wednesday, 19 May 1999, at 1130 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Article 27

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. Referring to the Ninth Meeting of the Commission of the Whole which had taken place earlier that day, the Chairman emphasized the importance of its consideration of DCW Doc No. 35, a summary report of the First and Second Meetings of the "Friends of the Chairman" Group as a means of communicating to the wider constituency the progress being made in the Group's work. He had been slightly disappointed, however, that the consensus which the Group had reached regarding Article 16 *(Death and Injury of Passengers — Damage to Baggage)* had been the subject of some expressions of reservation. Nevertheless, it was not his intention to reopen discussion of that Article 16. The Group would instead proceed on the basis of the consensus which it had reached in the hope that that consensus would be faithfully reflected in the Drafting Committee's refined text of Article 16.

2. In stressing the importance of presenting progress reports to the Commission of the Whole, the Chairman expressed the hope that the Group would have formulated the draft text of a consensus package in time for it to be considered during the Commission's next Meeting on Friday, 21 May 1999.

3. On the understanding that informal consultations were continuing with regard the Article 20 *(Compensation in Case of Death or Injury of Passengers)* and the question of the number of tiers the new system of liability should have, the Group commenced an in-depth consideration of **Article 27** ***(Jurisdiction)***. That Article had been referred to in the Group's previous discussion of Article 20, with it having been recognized that the resolution of the issue of compensation was intricately bound up with the issue of jurisdiction.

4. In then elaborating on the intent, scope and conditions of application of Article 27, the Chairman noted that the Article was intended to identify the bases on which jurisdiction might be invoked in the territory of one of the States Parties, *i.e.*, the Courts which would have jurisdiction to determine an action for damages under the Convention. Paragraph 1 of that Article outlined the four established bases of jurisdiction: the Court of the domicile of the carrier; the Court of its principal place of business; the Court where it had a place of business through which a contract had been made; and the Court at the place of

destination. That Chairman noted, from all of the discussions which had taken place, that no view had been expressed that those fora to which an action for damages could be brought at the option of the plaintiff would not be appropriate.

5. Recalling that the provisions contained in paragraph 2 of Article 27 had also been the subject of some intensive discussion, the Chairman indicated that it had not been possible to arrive at consensus given the divergent views of those Delegates who contended that the existing four bases of jurisdiction were already adequate to cover the substantial majority, if not all, of the cases, and that there was therefore no demonstrable need for an additional fifth jurisdiction and of those Delegates who contended that there would be a residual set of passengers for whom there must be the right to resort to that additional fifth jurisdiction in order to enable justice to be done in all circumstances. He noted that the concerns which had been expressed regarding the fifth jurisdiction had their origins in the belief that there would be a tendency to resort to that jurisdiction which, to use a neutral term, was a "home base", and the fear that the consequences of that might well be a predisposition for there to be excessive claims. An attempt had been made in paragraph 2 to circumscribe the conditions under which such a fifth jurisdiction could be invoked, and it was necessary to examine those conditions with great care in order to determine whether or not, if it were to be an acceptable basis, they were adequate to provide protection against the fears which had been expressed. As in most of the issues raised during the Group's discussions, it was not sufficient to deal with fears which were real — it was necessary to provide comfort levels even in respect of fears which sometimes were purely imaginary. The Chairman invited the Group to give particular consideration to the conditions laid down in sub-paragraphs (a) to (c) of paragraph 2 in order to determine if a fifth jurisdiction would be an acceptable way forward in the context of whatever arrangements were appropriate for Article 20 and to clarify those conditions so as to provide the necessary relief for the fears expressed.

6. With reference to the concerns voiced regarding forum shopping , the Chairman noted that plaintiffs would almost instinctively resort to a "home base" forum, even in circumstances in which the critical connecting links between the passenger, the accident and the injury might be such that that forum could be regarded as an inconvenient forum for, *inter alia*, the following reasons: the evidence to be produced might reside far beyond and outside that forum; there might be no link sufficiently connecting the passenger and the forum except for the link of the principal residence; insofar as it might be asserted that the claim had been caused by an act of the manufacturer - that manufacturer and the evidence to be produced from that manufacturer might reside wholly outside that forum. It was therefore important for the Group to examine actual cases to determine how the provisions of paragraph 2 would work. The Chairman indicated that it had been quite useful for the Group to have heard the illustrations given during that morning's meeting of the Commission of the Whole, as well as to have found out whether or not the fears expressed were being resolved. Thus one of the issues which the Group needed to consider was whether or not the concept of *forum non conveniens*, known to some jurisdictions but probably not precisely known to other jurisdictions in the same form, might be codified as part of the elements to be incorporated into Article 27 so that the Court seized of the case would not be able to exercise its jurisdiction in circumstances in which it would be inconvenient or would create formidable difficulties, having regard to the connecting links of the case. Another possibility would be to consider that issue in terms of whether or not the first four bases of jurisdiction could be regarded as a primary basis of jurisdiction and therefore to consider whether, if the passenger resorted to a fifth jurisdiction, he would have to demonstrate that it would be highly inconvenient and disadvantageous for him to resort to the existing four jurisdictions — the reverse side of *forum non conveniens*. The passenger would claim in such an instance that he could not resort to those four jurisdictions as he could demonstrate to the Court that it would be highly inconvenient and disadvantageous for him to do that and that they were therefore not appropriate jurisdictions, having regard to the facts of the case. The Court seized of the matter would then have that as a parameter for making the determination as to whether or not it would assume jurisdiction. This

was a more positive side of *forum non conveniens*. It would at least start off on the assumption that another jurisdiction was needed as the other four jurisdictions created formidable difficulties which would make it inconvenient to resort to them.

7. The Chairman indicated that the above approaches would enable the Group, if it were possible, to formulate either one or the other or both, in the form of a codification which would then leave open the fifth jurisdiction as an option but would pass a certain burden onto the plaintiff who wished to invoke it to be able to show why it was that it was necessary to resort to that jurisdiction in order that justice might be done. He only put these as ideas as he believed that they might serve to deal with the fears expressed, whether real or imaginary, that there would be a tendency, or an almost automatic action, to resort to the "home base" as it would likely be more favourable to the plaintiff and that excessive claims would be made. The Chairman only made those observations as he believed that there were possibilities which could well accommodate a fifth jurisdiction if they dealt with the fears which had been expressed while leaving open a jurisdiction which could be invoked.

8. Recalling the hypothetical situation involving a United States airline flying from New York to Paris raised by the Delegate of the United States during that morning's meeting of the Commission of the Whole, the Delegate of Sri Lanka indicated that it was clear that all of the three conditions outlined in paragraph 2, sub-paragraphs (a) to (c), of Article 27 must be present to invoke the fifth jurisdiction. Furthermore, it was clear that the fifth jurisdiction was confined to damages resulting from the death and injury of passengers. His Delegation was thus of the view that the services contemplated in paragraph 2 must logically be confined to the carriage of passengers by air. That would mean that in a situation such as the one referred to by the Delegate of the United States, the contracting carrier should be involved in the carriage of passengers to and from the United States. A mere cargo operation to the United States would not suffice to invoke jurisdiction against the contracting carrier in the United States. A carrier which had confined its operations to cargo operations to and from a particular jurisdiction could not be said to have realized that it would be liable in that jurisdiction for the carriage of passengers which it undertook as well. The Sri Lankan Delegation therefore proposed substituting the phrase "carriage by air" appearing in Article 27, paragraph 2, sub-paragraphs (b) and (c), and in paragraph 3 with the phrase "carriage of passengers by air".

9. In affirming his Delegation's desire to assist in finding a mutually-acceptable solution to the issue of the fifth jurisdiction, the Delegate of France highlighted DCW Doc No. 33 which presented its comments on the introduction in paragraph 2 of Article 27 of the notion of a fifth jurisdiction. In paragraph III a) of that paper it was indicated how the notion of the passenger's "principal and permanent residence" and the application conditions relating to the carrier's services and business were vague and imprecise despite the efforts which had been made, which led to fears that an additional jurisdiction was being established which was based solely on the plaintiff's nationality, contrary to the most recent trends in contemporary international law. Having pointed out the dangers of this situation, the French Delegation wished to propose some changes to the drafting of Article 27. These changes were to be considered in addition to the good ideas put forward by the Chairman with regard how to address the issue of the fifth jurisdiction, views which the French Delegation fully supported.

10. The Delegate of France, then presented three proposed amendments to Article 27 (*cf.* DCW Doc No. 36) which corresponded to the following ideas: limiting the risk that the possible acceptance of a fifth jurisdiction would serve as a precedent; ensuring that the defendant was effectively present in the territory of the fifth jurisdiction; and giving an objective content which was specific, precise and universal to the notion of the passenger's "principal and permanent residence".

11. To reflect the first idea, the French Delegation proposed the insertion of the phrase "**,having regard to the specific characteristics of air transport**" in the second line of paragraph 2 after the words "in paragraph 1 of this Article or" and before the words "in the territory of a State Party".

12. The second amendment consisted of taking precautions with regard to the actual nature of the defendant's presence in the territory of the fifth jurisdiction and avoiding situations where small-and medium-sized carriers providing services under agreements with another carrier but having no real presence in the territory of the fifth jurisdiction would be brought before it. Noting from the discussion which had taken place in the Commission of the Whole that morning that the interpretation of sub-paragraphs (b) and (c) of paragraph 2 was no easy matter, The Delegate of France gave, as a further illustration thereof, the following example of an American passenger who boarded a plane in Bangui and flew to Oslo with a stopover in Paris. It was to be assumed that that passenger had bought his ticket from an African airline which had no real presence in the United States but which was bound by commercial agreements with Air France, which did operate services to the United States and which did have a presence in that country. If there were an accident while the carrier was en route from Bangui to Paris, then, according to the French Delegation's interpretation of the existing text, the African airline which had commercial agreements with Air France could, under sub-paragraphs (b) and (c), be brought before the Courts in the fifth jurisdiction, namely, the United States. The comment made by the Delegate of Sri Lanka on other aspects of the interpretation of the provisions of paragraph 2 was recalled in this context. The French Delegation thus proposed the deletion of the existing text of paragraph 2, sub-paragraph (b), and paragraph 3. There would be a new sub-paragraph (a), which would read "in which at the time of the accident the passenger has his or her principal and permanent residence **and to which or from which the carrier operates air transport services and in which it conducts its business from premises which it leases or owns**.".

13. The third amendment involved a definition of "principal and permanent residence" which would give that notion an objective, specific and precise content, thereby enabling the Group to base the fifth jurisdiction on the plaintiff's actual residence and not on his or her nationality. The French Delegation was of the opinion that a precise content was indispensable since Courts could not be left the task of determining the competence of jurisdictions (which they would certainly do in a divergent fashion). A precise content was also needed to unify the law, an important objective of the new Convention. The Convention must be free of ambiguity in that regard. On the understanding that paragraph 3 would be deleted as it dealt with commercial arrangements and no longer served any purpose, the French Delegation proposed a new paragraph 3 which would read along the following lines: "For the purposes of paragraph 2, the expression 'principal and permanent residence' shall mean: either the passenger's principal place of abode during the twelve months immediately preceding the accident; or the principal place of abode of the passenger's spouse or minor children or, if the passenger is a minor, of his or her parents, during the twelve months immediately preceding the accident; or the passenger's place of employment at the time of the accident; or, if the passenger is an official of a State Party serving in another State, whether a State Party or not, the headquarters of the authority to which that official reports.". The rest of Article 27 would remain unchanged. In offering a clarification with regard to the second part of the above four-part definition, the Delegate of France noted that the reference to the "principal place of abode ... during the twelve months immediately preceding the accident" did not necessarily mean a continuous presence for a twelve-month period. It was a question of having resided principally in that place of abode.

14. It was the hope of the French Delegation that the other Delegations which were also desirous that the notions of residence and protecting small carriers should be better taken into account would be in a position to accept the proposed amendments and show flexibility in an effort to make the Conference a success.

15. On the understanding that DCW Doc No. 36 containing the above proposal by the Delegation of France would be available in the course of the Group's meeting that afternoon and could be examined more carefully at that time, the Chairman adjourned the present meeting at 1200 hours.

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INTERNATIONAL CONFERENCE ON AIR LAW

"FRIENDS OF THE CHAIRMAN" GROUP

Minutes of the Fourth Meeting
(Wednesday, 19 May 1999, at 1400 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Chapter III, Articles 20 and 27

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Group resumed consideration of **Article 27** ***(Jurisdiction)*** **of Chapter III** ***(Liability of the Carrier and Extent of Compensation for Damage)*** of the draft Convention as set forth in DCW Doc No. 3. It was understood that DCW Doc No. 36 containing the amendments to that Article proposed by the Delegation of France during the previous meeting would be distributed during the course of the present meeting.

2. Noting the concern expressed by the French Delegation that the fifth jurisdiction not be based on the plaintiff's nationality, the Delegate of the United States recalled that the issue had been discussed at great length in the Special Group on the Modernization and Consolidation of the "Warsaw System" in an effort to find some reasonable accommodation. He indicated that, on the one hand, there had been an American notion, memorialized in prior instruments, of "domicile" of the passenger while, on the other hand, there had been the French concept of *domicile*, which was also reflected in prior instruments. It had been apparent to all Members of the Special Group that the use of those terms in the identical location had been producing a non-uniform result. They had thus worked diligently to try to find a suitable formulation of words which was not based on nationality and which would bridge the gap between "domicile" and *domicile*. With great good will on both sides, the Special Group had come up with "principal and permanent residence", considered by both sides at the time to be a reasonable compromise, although not an ideal solution from their respective perspectives. In the view of the Delegate of the United States, that formulation was still a reasonable compromise. At the same time, he and other Members of his Delegation had listened to other suggestions from their French colleagues during a number of discussions which had taken place prior to the Conference. In understanding their concerns regarding the precedential impact of incorporating a fifth jurisdiction into the new Convention, and in the interest of finding a way forward, they did not object to the proposed insertion of the phrase ", having regard to the specific characteristics of air transport" in the second line of paragraph 2 of Article 27 after the words "in paragraph 1 of this Article or" and before the words "in the territory of a State Party". The Delegate of the United States noted that, while the hypothetical case cited by the French

Delegation had not been dissimilar to the one which he had raised earlier during the Ninth Meeting of the Commission of the Whole, the French Delegation had reached what was from its perspective, an unfavourable outcome compared to the one which he had reached in his hypothetical case. In recognizing the linguistic difficulties which Article 27 posed, the Delegate of the United States noted that, while the text had been carefully and painstakingly negotiated in the Special Group, it took a certain familiarity with the subject matter to understand it. Recalling a discussion which he had had earlier that day with a colleague from the Delegation of Lesotho regarding ways and means of providing clarity, especially for Judges who were not aviation regulatory experts, he noted that the conclusion which they had reached, and which they now proposed to the Group, was that the latter put together a series of hypothetical cases to illustrate how paragraph 2, sub-paragraph (a), would work in practical terms and include them in the "travaux préparatoires" of the Conference. The Delegate of the United States averred that that would be of great assistance to Courts, probably more so than if the Group were to spend several days trying to perfect the language of sub-paragraph (a). Recalling the adage that a picture was worth a thousand words, he averred that such hypothetical cases could also be worth a thousand words, as recent discussions had demonstrated. The provision of a concrete example(s) would put the provision's language into perspective and would enable a better understanding thereof. That was more effective than spending a week redrafting the provision in a way which all would agree was clear. The Delegate of the United States indicated that his Delegation would be pleased to assist the Secretariat if it was their desire to develop such hypothetical cases.

3. Recalling the concerns expressed by the French Delegation regarding paragraph 2, sub-paragraphs (b) and (c), and the notion of a carrier having a presence in a country as a result of a code-sharing relationship, both in terms of operating to the country that way, or in terms of having a business office there, the Delegate of the United States elaborated on the drafting history of those provisions. Observing that sub-paragraphs (b) and (c) had also been the subject of lengthy consideration in the Secretariat Study Group and in the Special Group, he indicated that those bodies had started with the notion that it was not fair to capture a carrier which did not have a "suitable presence" in the country in which it had been captured and brought to Court. That broad concept having been accepted by all Members, the question had been how to put it down on paper in a way that was fair and did not leave any loopholes. It had been suggested that it be put in a somewhat simpler fashion, that if the carrier flew an aircraft to a certain location and had a serious office there, then that was a sufficiently "suitable presence" in the country for it to be fair for that carrier to be sued there. In his view, that was the position of the French Delegation.

4. A rather large loophole had been perceived, however. In noting that it was now the era of code-sharing alliances, the Delegate of the United States observed that such alliances were a very clever carrier invention, a way for a carrier to deal with the nationality requirements which existed in bilateral air transport agreements and the aviation régime which currently prevailed. Under the bilateral air transport agreements, the carriers exercised their respective State's rights. There was thus a notion of carrier nationality. If two carriers of different nationalities merged, however, they would lose a nationality. As it was not possible to have a multinational airline merger, the code-sharing alliance had been invented. When a code-sharing alliance was approved and given anti-trust immunity, the two carriers involved were allowed to function as if they were a single carrier for operational and anti-trust purposes. That development was causing carriers involved in such arrangements to rationalize their operations in ways which had hitherto not been possible. The Delegate of the United States noted, in this context, that at least one American carrier had had, for some time, an immunized alliance arrangement with a particular European carrier. The carriers' working relationship was very close and they had decided, for good business reasons, that it did not make sense for the two of them to maintain places of business in Europe and in the United States. Consequently, the European carrier was closing its business offices in the United States, with its business henceforth being conducted in the United States through

the offices of its American alliance partner. Furthermore, the American carrier was closing its business offices in Europe, with its business in Europe being conducted by its European alliance partner. Both carriers had substantial transatlantic operations with their own aircraft. Yet if one were to say that the carrier had to actually operate its aircraft to the country in question, and conduct its business out of offices in that country, then the two alliance partners to which he was referring — and which were, perhaps, setting a trend — would have substantial flight operations in and out of both Europe and the United States but would not be captured by a fifth jurisdiction on the opposite side of the Atlantic from where they were based. That was the huge loophole with which the Secretariat Study Group and the Special Group had been confronted. It had led to the reference being made in sub-paragraph (c) to a carrier's conducting its business from the premises of another carrier with which it had a commercial agreement. It was also the reason for the reference in sub-paragraph (b) to the actual or contractual operation of services. Those provisions were intended to close the loophole and to recognize modern business practices. The Delegate of the United States thus had great difficulty with the French proposal, which would reopen the loophole.

5. The Chairman queried whether, in terms of the example given and of the current text of paragraph 3, which referred to the concept of the "commercial agreement" relating to the provision or marketing of joint services for carriage by air, both carriers were individually and collectively liable for the joint service. The Delegate of the United States clarified that the expression "provision or marketing of their joint services" had been designed basically to deal with the code-sharing alliance situation, as well as to recognize that the aviation industry was rapidly moving, globalizing and evolving. He noted that, while code-sharing alliances had been the order of the day when the new Convention had been drafted, in in ten years time, such alliances might have become obsolete and been replaced by some form of joint provision or marketing of services as yet undreamt of. Thus Article 27 had been drafted in such a way as to capture code-sharing alliances while retaining a sufficient degree of flexibility to capture whatever joint business operations might evolve. In addressing more specifically the question raised regarding joint or several liability, the Delegate of the United States drew attention to Chapter V *(Carriage by Air Performed by a Person other than the Contracting Carrier)*, where reference was made to the respective liabilities of actual carriers and contractual carriers. He highlighted, in particular, Article 34 *(Respective Liability of Contracting and Actual Carriers)*, which basically explained who was liable in a typical code-sharing operation. The Delegate of the United States averred that the use of the term "joint services" in paragraph 3 of Article 27 had not been intended to imply anything beyond what was provided for in Chapter V, namely, that the carriers had joint and several liability in all respects for all things which they did collectively. He underscored that that was not, however, the state of the law, at least in his jurisdiction, notwithstanding the carriers' immunized alliance relationship.

6. The Chairman wondered whether the current wording of Article 27, at least of paragraph 2, sub-paragraph (c) thereof, would cause future difficulties. He noted that one interpretation could be that the contractual carrier was operating to the country concerned by virtue of the joint services and that the contractual carrier (or the person who was under the code-sharing alliance) would be exposed to liability as a carrier for the purposes of the Warsaw Convention by virtue of that arrangement. He noted that code-sharing alliances had been designed essentially as a marketing tool and no more. Such alliances provided carriers with the opportunity to expand the scope of their respective marketing arrangements. By virtue of the code-sharing, carriers could indicate that they were providing a seamless web of services — although they were not — through areas which were served on different sectors by different carriers. Under the standard code-sharing agreement, the operating authority of the carrier which did not actually conduct services in that sector must exist, even though it was not the actual carrier on the sector. It was in light of some of the concerns expressed that the Chairman had queried whether code-sharing was covered by Article 27. Did sub-paragraph (c) ("in

which that carrier conducts its business of carriage by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement"), when read in conjunction with the definition of "commercial agreement" given in paragraph 3 ("an agreement, other than an agency agreement, made between carriers and relating to the provision or marketing of their joint services for carriage by air"), essentially mean that, by virtue of operating joint services, a carrier could be deemed to be carrying on business by air within the territory? That was the issue which the Chairman had raised as it had not been quite clear in his own mind. The explanation provided by the Delegate of the United States had quite correctly indicated that Article 27 took into account the realities of the aviation industry regarding the provision or marketing of services by carriers through cooperative agreements. The Chairman was not sure, however, how well that sat with the liability provisions regarding the contractual carrier and the actual carrier. It seemed to him that the acts of the contracting carrier were deemed to be the acts of the actual carrier, and vice-versa.

7. In thanking the French Delegation for their helpful contribution to this difficult question, the Delegate of the United Kingdom queried whether its proposed amendments entailed the deletion of square-bracketed paragraph 3 *bis* of Article 27. The Chairman indicated that this would be clarified when DCW Doc No. 36 was tabled for consideration.

8. In light of the discussions and the proposals made by the Delegates of Sri Lanka, the United States and France, the Delegate of Pakistan proposed the following text for paragraph 2 of Article 27, a text which he hoped would clarify matters and would be acceptable to the Group: "In respect of damage resulting from the death or injury of a passenger, the action may be brought before one of the Courts mentioned in paragraph 1 of this Article or in the territory of a State Party in which at the time of the accident the passenger has his or her **residence provided that** the carrier actually or contractually operates **passenger** services for the carriage by air **and the** carrier conducts its business of carriage by air from premises leased or owned by the carrier itself." Thus sub-paragraphs (a), (b) and (c) of paragraph 2 would no longer exist and square-bracketed paragraph 3 *bis* would be excluded.

9. The Chairman observed that this proposal involved the combination of sub-paragraphs (a) and (b) and the deletion of sub-paragraph (c), with the consequence that paragraph 3 containing a definition of "commercial agreement" would also be deleted. It also entailed the deletion of square-bracketed paragraph 3 bis. He noted that the Delegate of Pakistan had also introduced the concept of where the passenger had his residence, with no qualifications as to whether it was a principal and permanent one. It was the Chairman's impression that the Group was attempting to clearly determine the scope of application of the fifth jurisdiction. The proposal made by the Delegate of Pakistan with relation to sub-paragraph (c) served as an example. It was intended to avoid the many arrangements which carriers now found useful, convenient or expedient in order to promote their own activities, bearing in mind that the consequences of those arrangements were still a bit unclear. That was one aspect to be considered.

10. In summarizing the various proposals made, the Chairman recalled that, pursuant to the first amendment proposed by the French Delegation, which he understood to be acceptable to the United States Delegation, Article 27 would apply "having regard to the specific characteristics of air transport". Such characteristics were among the relevant factors which would have to be taken into account in the application of the fifth jurisdiction.

11. The Chairman observed that the proposal made by the Delegate of Pakistan was substantially similar to the second amendment proposed by the French Delegation, whereby sub-paragraph (b) of paragraph 2 would be deleted and replaced by a provision which would read as follows: "in which at the time of the

accident the passenger has his or her principal and permanent residence and to which or from which the carrier operates air transport services and in which it conducts its business from premises which it leases or owns". That formulation was designed to reflect two elements: one contained in sub-paragraph (a) of paragraph 2 that the passenger had his or her permanent residence; and a second element relating to the presence of the carrier in the jurisdiction on the basis that the carrier operated air transport services and conducted its business from that jurisdiction. The Chairman was using general terms to avoid using some of the terms given. While some of the nuances of the methodology for the conducts of business were not particularized, the substance of the issue was that the carrier would, in fact, be operating air transport services to that jurisdiction in which it was proposed to exercise jurisdiction for liability under the Convention.

12. The Delegate of the United States had then addressed the issue of how to cover the developments which were taking place in the aviation industry in respect of code-sharing. A discussion had ensued regarding the implications of code-sharing in terms of the operation of joint services as particularized in the current text of the new Convention and of the liability of the small carrier which code-shared with another carrier but which never physically operated in the jurisdiction. The Chairman was attempting to identify the fear expressed regarding the fifth jurisdiction. If he correctly understood the proposal made by the French Delegation, it was intended to avoid such a situation.

13. While the Delegate of the United Kingdom could understand the reasoning behind the French Delegation's proposal regarding "residence" — whether or not he agreed with all of the details regarding that term — and its proposal to effectively merge sub-paragraphs (b) and (c) and deal only with operations without any reference to the commercial agreement, he had difficulty with its proposed insertion, in the second line of paragraph 2, of the phrase ", having regard to the specific characteristics of air transport". It was unclear to him what role that wording played in paragraph 2 and the way in which it determined whether or not a fifth jurisdiction would or would not be available. Did it mean that Courts were to have regard to the "special characteristics of air transport" before determining whether or not the fifth jurisdiction should be available? If that was the case, how was a Court to determine whether or not such a jurisdiction should be available? In seeking clarification regarding the purpose of that proposed phrase, the Delegate of the United Kingdom contended that it resembled a preambular provision and that it might not therefore be appropriate to include it in Article 27. Recalling that the French proposal had been put forward for reasons of precedent, presence and precision, he emphasized that it should be made plain that, although the notion of the fifth jurisdiction was to be introduced in Article 27, it was specific to air transport and should not be regarded as a precedent for other Conventions, particularly those dealing with air transport. The Delegate of the United Kingdom considered that it would be more appropriate for such an indication to appear in the body of the "travaux préparatoires" rather than in the body of the Convention.

14. Recognizing the difficulty of discussing such sensitive issues without a written text, the Delegate of France apologized, on behalf of his Delegation, for the fact that DCW Doc No. 36 had not been distributed when its proposals had been presented. To the question raised regarding the inclusion of the phrase ", having regard to the specific characteristics of air transport" in the body of the Convention, he asserted that all Members were cognizant of the fact that paragraph 2 of Article 27 was of critical importance. It was quite innovative. The French Delegation considered it important that the idea which it was tying in with the fifth jurisdiction be seen as being something exceptional and that it should be so seen in the body of the Convention. To the question of the effect which the proposed amendment to the second line of paragraph 2 would have on the scope of the Courts' jurisdictional competence, the Delegate of France, averring that such an issue was not of the utmost importance, indicated that it would be covered by the proposals for the definitions of the presence of the carrier and the residence of the passenger. The proposed new phrase was designed to assist Courts in determining their jurisdictional competence.

15. The Delegate of Ghana supported the retention of the fifth jurisdiction if it lent itself to substantial clarity and a definitive scope of invocation. He was encouraged by the Group's frank discussion as it was in pursuit of a final accommodation for the fifth jurisdiction to ensure a win-win situation for all. He maintained that once the Group had before it the texts of the various proposals made it would be able to reach the right solution to this problem. The Delegate of Ghana affirmed that, as long as the Group sailed over this stumbling block, the Conference would be a success.

16. The Chairman noted that the Group had, in its deliberations, tried to determine how the fifth jurisdiction might become a widely-accepted basis of jurisdiction. In that context, the question of *forum non conveniens* had been discussed . In concurring with the Delegate of France that the inclusion of the phrase ", having regard to the specific characteristics of air transport" in the second line of paragraph 2 of Article 27 might be a relevant factor which the Courts would take into account in the determination of whether a forum were appropriate or not, he queried whether it would not be useful for the Group to provide expressly that in determining jurisdictional competence, the forum decided upon would be a convenient one for the resolution of the issues which would come before it. The Chairman equated this with trying to attain universal application of the principle of *forum non conveniens* as an important principle in the interpretation of the new Convention. He noted that, in most of the existing jurisdictions, a forum would have to make that determination. It was not a determination which could be made *in vacuo*. The forum would do so ", having regard to the specific characteristics of air transport", which the Group was trying to support, and all of the other relevant factors which would arise in making that determination. Although it was true that it was a principle which was applied widely, the issue itself would be very much uppermost in the minds of the Judges which had to make that determination and would be codified into a universal principle for application in relation to liability jurisdictional issues arising under the Convention.

17. The Delegate of Australia suggested (*cf.* DCW Doc No. 40) that Article 27 might be made subject to a provision along the following lines: that the Court would need to be satisfied that in all the circumstances, it was manifestly unfair to permit the matter to be heard and decided in that jurisdiction and that there existed another jurisdiction in which the matter might properly, and with a view to the interests of all the parties, more fairly and conveniently be heard and decided, in which case the Court might dismiss the matter.

18. The Chairman understood the proposal to be a conditioned precedent to the exercise of jurisdiction by the Court under paragraph 2 of Article 27 whereby the Court must be satisfied that in all the circumstances it would be manifestly unfair to permit the matter to be heard and decided in that jurisdiction and that there existed another jurisdiction in which the matter might properly, and with a view to the interests of all the parties, more fairly and conveniently be heard and decided. The substance of the proposal was that a resort to the fifth jurisdiction would place a responsibility on the plaintiff to satisfy the Court on two counts: that there was not another jurisdiction in which the matter might properly, and with a view to the interests of all the parties, more fairly and conveniently be heard and decided; and that it would not be manifestly unfair in all the circumstances for the matter to be heard and decided in that jurisdiction. It dealt essentially with the fact that a resort to the fifth jurisdiction itself would require satisfying certain prior conditions which contained both the positive and negative sides of *forum non conveniens*.

19. In underscoring the usefulness of the Australian proposal in progressing the Group's debate on the fifth jurisdiction, the Delegate of Canada observed that, while the doctrine of *forum non conveniens* might have been elaborated originally in common law jurisdictions, it was now spreading throughout the world and was taken into account in modern Civil Codes, such as the new Quebec Civil Code. In emphasizing that

that doctrine was entirely compatible with civil law systems, he averred that the Group should not hesitate to use it in an international context. The Delegate of Canada was thus of the opinion that the Australian proposal, perhaps in a simplified formulation, merited careful consideration by the Group. The Delegate of Saudi Arabia concurred.

20. To a comment by the Delegate of Switzerland that the principle of *forum non conveniens* was relatively unknown in his country, as well as in other European countries, the Chairman indicated that that was a convincing reason for ensuring uniformity in the principle's application by enshrining it in the new Convention.

21. The Delegate of the United States underscored that his Delegation was unalterably opposed to any provision which would create a higher hurdle for the application of the fifth jurisdiction than would be applicable to the other four jurisdictions. Indicating that he was somewhat puzzled by the direction which the debate had taken, he noted that DCW Doc No. 27 presented by his Delegation described the doctrine of *forum non conveniens* as it was currently applied in the Courts of the United States to the existing four jurisdictions and as it would be applied to a fifth, sixth, seventh or eighth jurisdiction, if such jurisdictions were created. The Delegate of the United States noted that the doctrine of *forum non conveniens* would be applied to all five jurisdictions in his country whether the Group prescribed that or not. It seemed to him that that should provide substantial comfort to those concerned about judgements in his jurisdiction. The Delegate of the United States was concerned not only about not creating a higher hurdle for the application of the fifth jurisdiction than existed for the other four jurisdictions but also about the ratifiability of the new Convention. As has already been noted, there were jurisdictions which did not apply, understand or perhaps even desire *forum non conveniens*. He was concerned that, by proposing to impose such an alien concept on such jurisdictions, it would make it more difficult for them to accept the result. The Delegate of the United States was also concerned that, in attempting to codify on paper a doctrine which already existed in his country, the Group would do it in a way which would alter the jurisprudence which was already applicable in the United States and that such an alteration would be found to be obnoxious to the process which the Group had to follow.

22. The Delegate of the United States thus suggested that, to provide some measure of comfort to those concerned about the level of judgements in his jurisdiction and perhaps to others where *forum non conveniens* or similar doctrines which perhaps did not bear that precise name were applicable and to avoid any concern that by having the fifth jurisdiction, some Court would conclude that the *forum non conveniens* doctrine should not be applied, paragraph 4 of Article 27 ("Questions of procedure shall be governed by the law of the Court seised of the case.") should be amended by adding the phrase "including the doctrine of *forum non conveniens* or other similar doctrines". If any Delegate had such a similar doctrine that had a name, it could be included in that provision. The Delegate of the United States hoped that with his proposed amendment a certain degree of comfort might be gained without, as in the adage, throwing away the baby with the bathwater.

23. Recalling the comments made by the Delegate of Australia, the Chairman noted that it remained to be determined whether or not the principle of *forum non conveniens,* as formulated, would only be applicable to the fifth jurisdiction. One side of the coin was that it might be appropriate to codify the rather general provision in relation to the entire jurisdictional issue. To the point raised by the Delegate of the United States that the imposition of that alien concept — a term which he found strange — might pose jurisdictional problems, the Chairman emphasized that the Group was involved in the process of seeking uniformity. It therefore seemed inadmissible to devise a special scheme of liability predicated on the fact that ultimately adjustments would have to be made in domestic jurisdictions. He emphasized the need to decide whether or not, in the search for predictability and uniformity, it was necessary to forge those bridges of

understanding which would be required. It was a difficult matter, as all Delegates, in their search for common solutions, would be faced with the question of how to modify their respective domestic legislation. Recognizing, as he did, that in some jurisdictions the concept of *forum non conveniens* might not exist in a particular form, as well as that many of the elements of the Convention relating to the burden of proof, what was required to be proved and the limits of liability also did not exist in the domestic legislation of many countries, the Chairman indicated that it would be necessary to make adjustments to such legislation in order to achieve uniformity. He therefore appealed to the Group to search for solutions which were commonly acceptable, even in the knowledge that they might entail adjustments to domestic jurisdictions.

24. In expressing satisfaction that the French proposal had openly referred to the protection of small-sized carriers, the Delegate of Cameroon observed that such carriers were the most concerned about many of the notions set forth in the new Convention. Underscoring that it had been a big step forward to take the interests of small-sized carriers into consideration, he averred that their interests should always be borne in mind in presenting proposals. Referring to the Australian proposal, he then queried whether it would be useful to the passenger seeking redress if the fifth jurisdiction were only applicable if the four existing jurisdictions could not be applied.

25. Replying in the negative, the Delegate of Australia indicated that the Chairman had correctly framed the proposition. There were currently four optional jurisdictions referred to in the draft Convention, with a fifth jurisdiction having been introduced — a source of some controversy, as it was deemed by some to involve an element of unfairness. The Australian proposal was intended to introduce into the process by which any Court considered the appropriateness of any jurisdiction the issues of whether or not in all the circumstances the jurisdiction selected was fair and whether or not there was an alternative jurisdiction among the five which was fairer. A decision was to be made on that basis. Indicating that he was not sure that the determination of jurisdiction would be regarded as merely a procedural question for a Court to decide, the Delegate of Australia noted that it could have some fairly profound substantive considerations. It was thus his opinion that treating preliminary jurisdiction questions as procedure — although in many respects they were procedural matters — could be determinative. He thus averred that it would be more effective to see such a notion in the language of the provision itself. With reference to the term *forum non conveniens*, the Delegate of Australia indicated that he would be surprised if any Court anywhere in the world which had an option to exercise jurisdiction would not be expected to exercise considerations of fairness and equity in deciding whether or not to assert that jurisdiction. He would also have thought that in grafting a provision of this kind to the language of the proposal would be quite consistent with current judicial practice in many countries around the world.

26. In emphasizing that it would be very difficult to harmonize the principle of the *forum non conveniens* with his country's legal system, the Delegate of Chile averred that several Latin American countries would have similar problems. He queried how a Court was to decide, with absolute certainly, that there was no other jurisdiction in which the matter might be properly heard and decided and that it would not be unfair to litigate in that forum. Who was to provide the proof, the claimant? In further querying whether the other party in the case, the carrier, would also be able to present its own evidence, the Delegate of Chile underscored that such issues would have to be decided upon before the Group reached a final decision regarding the fifth jurisdiction.

27. The Chairman clarified that *forum non conveniens* applied in the jurisdictions and that it was a preliminary issue which had to be decided upon before a case could even begin.

28. The Delegate of Singapore queried whether, in trying to work out a compromise, a formulation could be chosen which incorporated the ideas contained in the Australian proposal, as well as a reference to *forum non conveniens* so as to address the problem mentioned by the Delegate of the United States. In that way, the idea of the most convenient forum would be included without adversely affecting the doctrine of *forum non conveniens*. In observing that there would be no preliminary issue to be decided upon in those countries which did not recognize that doctrine, the Delegate of Singapore averred that in most legal systems a Court would be extremely uncomfortable in trying to exercise jurisdiction where the presentation of evidence was problematic and would find some other means to decline jurisdiction. He voiced agreement with the comments made by the Delegate of Australia in that regard.

29. As an additional means of finding a compromise, the Delegate of Singapore proposed (*cf.* DCW Doc No. 38) that a new paragraph 5 be added to Article 27 along the following lines: "The principle of jurisdiction applied in paragraph 2 of this Article shall be treated as one special to the area of carriage by air and shall not be used as a precedent in relation to other areas." He underscored that that new paragraph would address the concerns raised by the Delegate of France regarding precedent-related risks which might arise from having a fifth jurisdiction mechanism in the new Convention.

30. The Delegate of Sweden indicated that his Delegation would be willing to consider including in the provision some of the essence of the principle of *forum non conveniens* in such a way as to accommodate the fears of certain countries, as previously suggested by the Chairman. He contended, however, that the current draft text encompassed that principle in its entirety and took the matter too far, going well beyond the accommodation of fears. The Delegate of Sweden noted, on the basis of informal consultations which he had had previously with certain Delegates, that the existing text could eventually lead to substantial ratification problems for a large number of European countries, including his. He thus suggested that the Group revert to the Chairman's initial idea of including only some of the essence of the principle of *forum non conveniens*. In wishing to associate himself with the comments made by the Delegate of the United Kingdom with regard to the proposed addition to the second line of paragraph 2 of Article 27 of the phrase ", having regard to the specific characteristics of air transport", he noted that a Judge who read that wording would think that it must mean something specific and would try to construe it. The wording was very vague and created an element of uncertainty as to how the provision now being considered would be applied. Furthermore, it was uncertain how it would work in relation to the other provisions of the new Convention. Did it mean that one was not to have regard to the specific characteristics of air transport in the other provisions? In voicing support for the excellent proposal by the Delegate of Sri Lanka (*cf.* DCW-Min. FCG/3, paragraph 8) that the phrase "carriage by air" appearing in Article 27, paragraph 2, sub-paragraphs (b) and (c), and paragraph 3 be replaced by the phrase "carriage of passengers by air", the Delegate of Sweden averred that, as the Convention addressed passenger injury, it was only fair that a carrier should be caught if it conducted the carriage of passengers to that specific jurisdiction.

31. In raising some practical points concerning the operation of the doctrine of *forum non conveniens* in Convention cases, the Observer from the International Union of Aviation Insurers (IUAI) noted that, in late 1998, the English High Court had indicated that in a Convention case there was no room for the operation of the doctrine as a passenger had complete authority to make a decision as to which jurisdiction he could select and *forum non conveniens* would fetter that option. Thus at the moment, *forum non conveniens* was a dead letter in England. He observed that the position in Scotland was different as in Scotland there was no *forum non conveniens*, it being a completely different jurisdiction. The Observer from IUAI indicated that the said decision by the English High Court might throw light on the reason why, despite the theoretical availability of *forum non conveniens* in the United States, there were no reported cases where a carrier had been able to remove a case from the jurisdiction of the United States to another jurisdiction on the basis of that doctrine.

32. The Chairman took the above comment as an indication that the Group would need to look most carefully as to whether or not in all the circumstances it would be achieving its purposes if it did not expressly provide for it in the Convention. It would seem that if *forum non conveniens* was to play a role, that would have to be clearly indicated, having regard to the jurisprudence which might or might not exist in some countries.

33. In referring to the comments made by the Observer from the IUAI, the Delegate of the United Kingdom noted that *forum non conveniens* was unavailable in relation to the four jurisdictions set forth in paragraph 1 of Article 27 as a result of implementing the Warsaw Convention into the national legislation of the United Kingdom. It did not seem to him that the Group would really be modernizing and consolidating the Warsaw Convention if the Group were to make it necessary for the plaintiff to fight for his existing right to bring his action at the place of his choice and to leave a decision thereon to the Court. The Delegate of the United Kingdom contended that this would introduce litigation at a point where it did not currently exist. Moreover, it could lead to the possible elimination of the plaintiff's rights. These were not, in his opinion, steps forward.

34. The Chairman indicated that the last two comments had left him in a state of some confusion: the Delegate of the United Kingdom had stated that in his jurisdiction, it was the option of the plaintiff to determine which of the four jurisdictions would apply and that the principle of *forum non conveniens* had been determined not to apply; it had also been indicated that it was desirable to add a fifth jurisdiction and to circumscribe its application so as to ensure that the mischief that was perceived by many to exist in relation to that jurisdiction might indeed be fenced in. Averring that the Group could not have it both ways, he considered that if the Group did recognize that it gave rise to such mischief, then either it would determine that the fifth jurisdiction had its peculiar problems and that it therefore might be desirable to put fences in appropriate places to deal with those problems, or it would recognize that all of the jurisdictions would be subject to a *forum non conveniens* rule and, to that extent, would modify even the existing Convention rules. If, as indicated by the Observer from the IUAI, there were no cases in the United States in which the principle of *forum non conveniens* had been applied to Convention cases, then it would indicate the importance of dealing with that as an issue, certainly in relation to the fifth jurisdiction. If it were to be dealt with in relation to the other jurisdictions, then it would have to be done on the basis that the rules were being changed or clarified so that there would be uniformity in the application of the rules across the whole spectrum of jurisdictions. The issue which the Group would have to decide upon was whether it was fair to circumscribe the conditions under which the fifth jurisdiction would be exercisable, in the knowledge that concerns had been expressed and in the hope that the Group would be able to deal with the question of how to achieve uniformity and a degree of universality in dealing with the issue. The suggestion had been made that perhaps it could be dealt with under paragraph 4 of Article 27, in which questions of procedure were governed by the Court seised of the case, and that that could be elaborated upon in dealing with the introduction of the basic parameters of *forum non conveniens*. However, if, in light of what had just been said, it were dealt with in paragraph 4, which was of general application to all of the provisions contained in Article 27, then it would apply to all jurisdictions.

35. The Chairman observed that a fair degree of consensus was emerging in relation to the French and Pakistani proposals. In drawing attention to the practical difficulties which were posed by sub-paragraph (c) of paragraph 2, he suggested that they be resolved either by eliminating that sub-paragraph or by circumscribing it by much greater precision so that the scope of its application was clear.

36. The Delegate of Singapore indicated that one possible, logical interpretation of paragraph 1 of Article 27 would be that the plaintiff had the option of bringing his action for damages in one of the four jurisdictions indicated. It was up to him to make the choice. The rules in that chosen jurisdiction would accordingly apply to him. He observed that the doctrine of *forum non conveniens* was a common law doctrine which would apply in all cases unless there were a statutory provision against it. Thus all that the expression

"at the option of the plaintiff" meant was that it was for the plaintiff to decide in which jurisdiction to bring his action. Even if he did not succeed in having his case heard in the first jurisdiction so chosen, nothing would prevent him from bringing his action in one of the other jurisdictions. Thus even if that expression were retained, the action would be initiated and the preliminary question of whether the jurisdiction chosen by the plaintiff was the most appropriate forum would be overcome. The case would then proceed.

37. Noting that the text of the French proposal had now been circulated as DCW Doc No. 36, the Chairman indicated that the Group should try, on the basis of the discussion, to come up with a composite text for Article 27.

38. To a query by the Delegate of Egypt regarding paragraph 2 of Article 27 as contained in DCW Doc No. 36, the Delegate of France affirmed that his Delegation had not changed the logic of the text as set forth in DCW Doc No. 3 and that the criteria for the application of the fifth jurisdiction remained combined in its proposal.

39. In light of its discussion of Article 27, the Group resumed consideration of **Article 20** ***(Compensation in Case of Death or Injury of Passengers)***, previously discussed in FCG/2). The Chairman recalled that, following the discussion of issues relating to the proposal presented by the 53 African Contracting States in DCW Doc No. 21 for a three-tier system of liability, he had encouraged further informal consultations between Delegations in order to reach some understandings. He noted that there was a choice between the two-tier system of liability set forth in DCW Doc No. 3, where the first tier was based on strict liability as defined and the onus was on the carrier, in the second tier, to prove that either he had taken all necessary measures to avoid the damage, or that it had been impossible for him to take such measures, or that the damage was solely due to the negligence or other wrongful act or omission of a third party in order to escape unlimited liability; and the three-tier system of liability proposed in DCW Doc No. 21, where the first tier having a threshold of 100 000 SDRs was based on strict liability, where the second tier for claims exceeding that amount up to a limit of 500 000 SDRs was based on presumptive liability, with the carrier having to prove that it had taken all measures that could reasonably be required to avoid the damage or that it had been impossible for it to do so, and where the third tier for claims exceeding 500 000 SDRs was based on fault without a numerical limit of liability, the proof of which would rest with the passenger. A number of issues were to be considered: the first one was whether or not the African text would be broadly acceptable in terms of a three-tier system of liability, if the thresholds above the first tier were adjusted, for example, if the second threshold were established at 800 000 SDRs. The Chairman queried whether, for those Delegates who had some difficulties with the three-tier system of liability, that would be a movement in the right direction in trying to get a greater measure of consensus, in the knowledge that the principle of unlimited liability would continue to apply over and above that new threshold which was established. In the absence of any comments, the Chairman assumed that there were no objections.

40. The Chairman then drew attention to the second issue to be considered, one which might also involve a slight adjustment to the African proposal. He queried whether, if there were agreement on the limit for the second tier, there would be a preference for fault liability with the burden of proof resting on the passenger as proposed in DCW Doc No.21, or on the carrier. He further queried whether that would conform with where developments had taken the Group to date, both in terms of the various understandings as between carriers and in terms of the various protocols which had been reached.

41. The Delegate of Mauritius, a co-sponsor of DCW Doc No. 21, indicated that, in his view, the Chairman's second question effectively answered his first question.

42. The Delegate of China noted that his Delegation, in principle, was willing to consider either a two-tier or a three-tier system of liability. Its preference was that the passenger would bear the burden of proof. In the view of the Chinese Delegation, in the first tier the principle of strict liability should apply; in the second tier, the carrier should bear the burden of proof; and in the third tier, which was to be based on unlimited liability, the burden of proof should lie with the passenger. In elaborating on the reason why the burden of proof should rest with the passenger under that third tier, the Delegate of China noted that a carrier would have paid a considerable sum of money in compensation under the second tier. If the plaintiff were not satisfied with the amount awarded, he would have to bring an action for damages beyond the limit specified in the second tier. It should therefore be the plaintiff's responsibility to prove that the carrier had been at fault. If the burden of proof did not rest with the plaintiff, it would encourage more plaintiffs to seek compensation beyond the amount specified in the second tier, the more so as, in many cases, lawyers approached passengers offering to represent them in their actions for damages on the basis that, if they won, the amount awarded in compensation would be shared, and if they lost, the passenger would not have to pay any legal fees. The Delegate of China indicated that his Delegation could, however, go along with the suggestion that the carrier bear the burden of proof, provided that all legal costs would be paid by the passenger in the event that he lost his case.

43. The Chairman noted that the Delegate of China was suggesting that there be a threshold beyond which the plaintiff would bear the burden of proof. It had been for that reason that he had posed the initial question as to whether or not, in the African proposal, there was a need to define where that threshold would lie.

44. The Delegate of the United Kingdom then suggested that a draft consensus package be prepared for the Group's consideration based on DCW Doc No. 21, with the higher limit for the second tier mentioned by the Chairman, and taking into account in particular Article 16 *(Death and Injury of Passengers — Damage to Baggage)*, concerning which there had been some discussion regarding mental injury; Article 21 *(Limits of Liability)*, concerning which there had been some discussion regarding the specified limits; Article 22 A *(Freedom to Contract)*, where reference was made to advance payments; and Article 27 *(Jurisdiction)*, where reference was made to the fifth jurisdiction. He noted that such a package would enable the Group to approach matters in a more global way.

45. The Delegate of Ghana stressed the need to also take into account the proposals made by the Member States of the Arab Civil Aviation Commission (ACAC) and Viet Nam in DCW Doc Nos. 29 and 24, respectively.

46. The Delegate of Cameroon, a co-sponsor of DCW Doc No. 21, indicated that the limits of liability cited in that paper were not firm. Thus in preparing the proposed draft consensus package it would be possible to take into account the limit suggested by the Chairman for the second tier. In averring that there was much wisdom in the proposal made by the Delegate of China, he affirmed that a draft consensus package would assist the Group in achieving the goals of the Conference.

47. The Chairman noted that, as the main issues which required resolution in the framework of a package had become apparent, it was now necessary to begin the process of generating a draft which would be a basis for consideration of the provisions of Article 16 *(Death and Injury of Passengers — Damage to Baggage)*, in particular, in resolving the issue of mental injury and other related issues; the provisions of Article 20 *(Compensation in Case of Death or Injury of Passengers)*, taking into account the proposals which had been made in terms of the liability issues and the possibility of different tiers being applicable; and the provisions of Article 27 *(Jurisdiction)*, in particular, that relating to the fifth jurisdiction, in light of the Group's discussion that afternoon and the varying proposals which had been made. The Chairman noted that it had always been his belief that all those issues would have to be resolved within a package and not in isolation. However, by the very nature of the issues, no such package would provide an ideal solution for all. It was

nonetheless his hope that the Group would find enough within the elements of that package to recognize that, in the search for predictability and uniformity, the package was something which might form an acceptable basis, subject to whatever adjustments might arise in the course of future discussions. The Chairman affirmed that if such a package were accepted, the Group would be well on the road to resolving issues which it had not been possible to resolve for many years. He recalled, in this regard, his comment at the opening of the Conference that the Conference had before it a window of opportunity and that it should seize this historic moment.

48. The Meeting adjourned at 1630 hours.

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INTERNATIONAL CONFERENCE ON AIR LAW

"FRIENDS OF THE CHAIRMAN" GROUP

Minutes of the Fifth Meeting
(Thursday, 20 May 1999, at 1400 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Draft Consensus Package

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Group had before it DCW-FCG No. 1, "Draft Consensus Package", which contained a preliminary proposal for eventual submission to the Commission of the Whole regarding Articles 16, 20, 21 A, 22 A and 27. Introducing the document, the Chairman clarified that although it would not be possible to fully consider all of the nuances of the draft at this stage and with the limited time available, he had convened the meeting in order to provide an explanation of the content of the document, which attempted to deal with the main elements of what could constitute a package in the light of the discussions which had taken place thus far in the "Friends of the Chairman" group.

2. Referring firstly to Article 16 (*Death and Injury to Passengers — Damage to Baggage*), the Chairman recalled that in dealing with that Article at previous meetings, the group had taken the existing draft in DCW Doc No. 3 and had sought to refine it in dealing with the main issues which had arisen for consideration. In consultations within the group there had emerged a consensus on the first issue which had arisen, that being the scope of liability in respect of mental injury. In those discussions, it had been agreed that mental injury would include not only mental injury associated with or resulting from bodily injury, but would also include mental injury independent of that which significantly impaired the health of the passenger. In order to give expression to this, DCW-FCG No. 1, in Article 16, paragraph 1, referred to "death or injury" and deleted the word "bodily" which had qualified "injury" in DCW Doc No. 3. A new paragraph 2 of Article 16 clarified the meaning of the word "injury" as "bodily injury, or mental injury which significantly impairs the health of the passenger".

3. The Chairman recalled that all members of the group had agreed that even in the existing jurisprudence, mental injury associated with bodily injury was already covered. The present formulation in relation to mental injury would be adequate to cover mental injury and in particular, the concerns expressed about those cases in which there was really no serious or significant impairment of health. Cases which did not have this effect would not be included, and the purpose of the definition in Article 16, paragraph 2 of DCW-FCG No. 1 was intended to capture that. The Chairman recalled that in the course of consultations in

the group, agreement had otherwise been reached on the content of Article 16, subject only to the question of mental injury. There was therefore no change in respect of paragraphs 3, 4 and 5, which, in the document under consideration, simply reproduced the provisions contained in paragraphs 2, 3 and 4 of DCW Doc No. 3.

4. Referring to Article 20 (*Compensation in Case of Death or Injury of Passengers*), which had been one of the most difficult articles to come to terms with, the Chairman recalled that a series of proposals had been made during the group's consultations. Starting on the basis of what was now contained in DCW Doc No. 3, the system had been based firstly on the principle of strict liability up to 100 000 SDR. Article 20 said, in the version presented in Doc No. 3, that the carrier would not be liable for damages which exceeded 100 000 SDR if the carrier proved certain elements outlined in paragraphs a), b) and c) of that Article. In the course of the group's discussions and deliberations, it had been pointed out that there was a great fear that in accepting the principle of unlimited liability, a number of countries might find, particularly for their carriers and in the case of developing countries, that there would be a great exposure to liability if in fact that provision remained in its form. In that context, consideration had been given to the question of having a three-tier system of liability, the first of which would be strict; the second of which would be based upon the presumption of fault; and the third of which would impose the burden of proof on the passenger.

5. The Chairman indicated that in the light of the consultations which had taken place, including consultations with those who promoted the idea of the three-tier system, it seemed that there was a growing consensus that the system could be acceptable with two tiers. What the draft in DCW-FCG No. 1 therefore attempted to do was to preserve a two-tier system but provide for alternative texts at this stage. In Alternative 1 of Article 20, for the sake of clarification, it was thought desirable to expressly provide that for damages arising under Article 16, paragraph 1, not exceeding 100 000 SDR, the carrier shall not be able to exclude or limit its liability, subject always to the proviso, in paragraph 3, that Article 19 (*Exoneration*) would apply. If one read the text of DCW Doc No. 3, one had to come to that conclusion by inference, and it was thought desirable to clarify the situation. Paragraph 2 of Alternative 1 was based on the principle that for liability exceeding 100 000 SDR, there would need to be proof by the claimant that the damage sustained was due to the fault or neglect of the carrier or its servants or agents, acting within their scope of employment, always subject to the formulation in Alternative 1, as paragraph 3 indicated, that Article 19 would apply.

6. The second alternative in Article 20 also dealt with the question on the basis that it would be possible to have a three-tier system of liability. The three-tier system of liability would again expressly provide, in Alternative 2, that for damages not exceeding 100 000 SDR, the carrier should not be able to exclude or limit its liability, subject of course to the application of Article 19. An editorial correction was indicated by the Chairman, who pointed out that a paragraph 4 should be included in the second alternative, and should correspond to what was paragraph 3 in Alternative 1, to make it clear that Article 19 would apply.

7. The question posed in relation to Article 20, paragraph 2 concerned the circumstances in which unlimited liability would apply where the carrier would be required to prove those matters particularized in Article 20 of DCW Doc No. 3. In the second alternative, these provisions were subject to a paragraph 3, which attempted to establish a second tier between 100 000 SDR and another threshold, above which liability of the carrier would be subject to proof by the claimant that the damage sustained was due to the fault or neglect of the carrier or its servants or agents acting within the scope of their employment. The alternative formulation thus asked the question of whether or not consensus might be possible on an acceptable second tier threshold which, if exceeded, would cause the burden of proof to shift from the carrier to the claimant.

8. Although the Chairman believed that there was now considerable support for a two-tier system of liability, the issue which would have to be considered was that of on whom the burden of proof lay under the two-tier system. If one took Alternative 1, which dealt with the two-tier system, it would be important to

examine carefully and explain that there may be no practical difference between whether the burden of proof was on the claimant or on the carrier. If the doctrine of *res ipsa loquitur* applied, i.e. if in fact a passenger entered into an aircraft on the basis that he would be safely transported to his destination and something happened to that aircraft or an accident occurred, not being one attributable to Article 19 where the exoneration would apply in any event, the burden of proof would automatically shift to those who were in control of the aircraft to show why it was that the accident had occurred. Accidents did not simply "happen" - they were caused. Therefore, in practical terms, although Alternative 1 on the face of it placed a burden of proof on the passenger, such burden would shift very quickly to the airline, more so because the matter would be determined in a forum without prejudice to the rules of evidence as to how this burden of proof would be discharged. Whether it was stated expressly or inferentially, this was what would happen in practice. Therefore, although on the face of it, it appeared that the passenger was being given a heavier burden of proof, the question would arise as to whether or not there was a practical difference and whether or not this proposal might form a basis for acceptability in the context of the explanation just provided. In terms of Alternative 2 for Article 20, it was also clear that although paragraph 3 would impose the burden of proof on the claimant for claims in excess of a specified amount, the same circumstances would equally apply in terms of the evidential rules.

9. In terms of Article 21 A (*Limits of Liability*), the Chairman recalled that much had already been said to the effect that it was necessary to revise the figures which appeared in DCW Doc No. 3. An attempt had been made to do so, recognizing that the figures had largely been taken from Protocols Nos 3 and 4 of 1975 and that those limits had been eroded over time by inflation and by the change in the value of the SDR. An attempt had therefore been made to bring the figures to date. As compared with what appeared in Article 21 A, paragraph 1 of DCW Doc No. 3, instead of 4 150 SDR, there was in DCW-FCG No. 1 a figure of 7 500 SDR, which represented less than the change which had taken place but which nonetheless took it into account. In relation to paragraph 2 of Article 21 A, the amount of 1 000 SDR appearing in DCW Doc No. 3 had been revised to 3 000 SDR, an amount which accurately reflected the percentage change which had taken place.

10. In relation to paragraph 3, dealing with the carriage of cargo, and in the light of the discussion which had taken place, there had been no change in light of the arguments which had been advanced to the effect that carriage of cargo would involve parties who were quite sophisticated, who were able to protect their own interests and in any event, had the ability to make the special declaration of interest referred to in that paragraph, and were therefore able to cover themselves to the value that they believed the cargo may genuinely contain. For that reason, in the light of the arguments which had been advanced in earlier discussions of the group, no change had been made to the figure.

11. In terms of paragraphs 4, 5 and 6, there had been no change to the provisions of Article 21 A as it appeared in Doc No. 3.

12. Referring to Article 22 A (*Freedom to Contract*), the Chairman explained that although in the version now before the group, there was no Article 22 B, and Article 22 A was confined to the freedom of contract provisions contained in 22 A of Doc No. 3 and therefore contained no more than the statement that "nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage or from making regulations which do not conflict with the provisions of this Convention", an earlier incarnation of the draft consensus package had included an Article 22 B dealing with advance payments. That article had indicated that "...the carrier shall, in accordance with its national law, make advance payments without delay to a natural person or persons who may be entitled to compensation in order to meet the immediate economic needs of such persons." The formulation of Article 22 B had attempted to take into account the discussion in the group concerning cases of airline accidents, particularly those which gave rise to great tragedy, where there was a crying humanitarian need to ensure that the plight of victims or survivors

should be ameliorated through some assistance in order to address their immediate needs. In the course of the group's deliberations, it had been clear that whilst all seemed to accept the need for this to be done, there were difficulties in particularizing all the conditions which would be laid down for this assistance. What had been proposed in Article 22 B, by virtue of the Convention, had been to require the State to put in force the conditions needed in order to address this question, and to recognize that there may well be different circumstances. Article 22 B therefore did not contain an express provision as to how much, because the amount would vary from situation to situation. It moreover did not address the full details as to a number of other elements, which would be laid down in national law. For example, if one took the European Union situation, EU countries provided that in circumstances where such events occurred, the forwarding of advance payments was not to be recognized, at that stage, as an acceptance of liability; if, however, liability was subsequently established, any advance payments would be set off against the amounts which had been granted. The Article did indeed provide that, except in the case where it could be shown that the passenger had been negligent as the case may be, it would not be possible to claim a refund of the amount so made. The group had thought, however, that it would be very difficult to lay down a basic rule applicable to any and all circumstances in all jurisdictions. What was important was to signal, in the Convention, the need to address this particular question to meet the difficult circumstances in which families, dependents and others who were the victims of these situations, would be able to obtain advance payments. This was why, in fact, this formulation was put in the form presented, in order to reflect what the Chairman perceived to be an acknowledged need.

13. The Chairman recalled that in addressing Article 27 (*Jurisdiction*), the Group had derived considerable assistance from all the interventions made, including the proposals which had been made by France and the discussion which had taken place in respect of forum non-convenience and the suggestion made by Australia. Paragraph 1 of Article 27 therefore retained the existing jurisdictions as reflected in paragraph 1 of Article 27 of Doc No. 3 without any change. Paragraph 2, which had received its inspiration largely from the text proposed by France, related to the question of damage resulting from death or injury of a passenger. While recognizing that the action could be brought in one of the courts mentioned in paragraph 1 of the same Article, paragraph 2 went on to say "or, having regard to the specific characteristics of air transport, in the territory of a State party in which at the time of the accident, the passenger has his or her principal and permanent residence and to or from which a carrier operates air transport services and in which it conducts its business for the carriage by air from premises which it leases or owns." It was considered that the paragraph as drafted provided the sufficient connecting factors in relation to the principal or permanent residence of the passenger. The Chairman recalled, however, that there had been a tremendous amount of discussion as to what the term "principal and permanent residence" would mean. In the proposal by France, there had been a definitional term which the text of paragraph 3 borrowed from, albeit with some adjustments. "Principal and permanent residence" was thus defined in paragraph 3 as "the passenger's main place of abode during the twelve months immediately preceding the accident; or the main place of abode of the passenger's spouse or minor children or, if the passenger is a minor, of his or her parents, during the twelve months immediately preceding the accident; or the passenger's place of employment at the time of the accident; or, if the passenger is an official of a State Party serving in another State, whether a State Party or not, the headquarters of the authority to which that official reports." By way of comparison, the Chairman pointed out that in the text in DCW Doc No. 3, there was a simple reference to where "the passenger has his or her permanent residence". In a sense, the provision in FCG Doc No. 1 enlarged the scope, although whether this was necessary would obviously be a matter for consideration.

14. Turning to paragraph 4 of Article 27, the Chairman indicated that its first sentence was intended to repeat what constituted paragraph 4 of Article 27 in DCW Doc No. 3, i.e. that "questions of procedure shall be governed by the law of the court seised of the case". The additional provisions in DCW-FCG No. 1 were intended to address the concerns which had been expressed both about *forum non conveniens* and the fear that the resort to the additional jurisdiction might often result in circumstances in which

the facts might be somewhat remote from the locus and that this might create difficulties. There was even the fear that it might result in excessive awards being made. It was quite clear however, as a result of the consultations, that there was emerging a consensus that a fifth jurisdiction should be recognized, provided that the safeguards were in place.

15. Article 27, paragraph 4 now authorized the court to decline jurisdiction in certain specified circumstances, making it a rule of the Convention. It was necessary to make it a rule of the Convention because of the need for uniformity; whereas the doctrine of *forum non conveniens* might well exist in some jurisdictions, it might not exist in others. In much the same way that provision was being made for unique circumstances of liability and a host of other matters in the Convention, so too it became necessary to ensure that these elements would apply in whatever forum. Article 27 thus attempted to indicate that the court may decline jurisdiction. It was not mandatory for the court to decline jurisdiction; it was permissive. However, the court obviously would be obliged to address its mind to these issues which were stated in the Convention, for the purposes of coming to its own conclusion.

16. Quoting from the text of paragraph 4, the Chairman emphasized that the onus of proof would be on the carrier. The provision started on the premise that the claimant had the option of going to the court of the fifth jurisdiction. When the claimant did so, however, the carrier may take a preliminary point in which it would urge the court to decline its jurisdiction because of the unusual circumstances. What were those circumstances? Firstly, the carrier, which had the burden of proof, would have to prove that having regard to the circumstances of the accident and the issues to be determined, it would place too onerous a burden on the carrier for the case to be heard and determined in that jurisdiction. It would, however, not be enough for the carrier to simply state that this would pose an onerous burden. Even if the only serious connecting factor was the permanent residence of the claimant, and all of the facts related to the matter had occurred elsewhere, e.g. the manufacturer of the aircraft was in another jurisdiction; the aircraft was registered in another jurisdiction; the place where the accident had occurred was in another jurisdiction; and it would impose an intolerable burden to bring all witnesses to the jurisdiction in question in order for justice to be done, these elements would not be enough because paragraph 4 went on to indicate that not only must the carrier prove it was too onerous a burden, but must also prove that there existed "another jurisdiction in which a case may properly, and with a view to the interests of all the parties, more fairly and conveniently be determined".

17. The court could therefore not decline jurisdiction if there was no other convenient jurisdiction to which they could have fairly resorted. The court would have to make its determination that unless these two elements were proven, the jurisdiction could not properly be declined. The provision thus attempted to recognize the sensitivities and all the concerns which had been expressed; to recognize that there was a legitimacy in certain circumstances for a claimant to wish to bring a claim legitimately in the home of his permanent residence; and that in fact, even in cases in which the connecting factors may not be that significant, it may not be too onerous to bring the case there on the part of the carrier. Therefore, unless the two above major issues were surmounted, the court would not be in a position to decline jurisdiction. Fifth jurisdiction therefore became a very important option, but the safeguards of this provision were intended to provide against the excessive exercise of that jurisdiction in circumstances which could pose an intolerable burden and therefore would defeat the interest of justice.

18. In concluding his introduction, the Chairman observed that the draft consensus package was attempting to recognize and to bring together a host of elements. It brought together the recognition of mental injury, and so constituted a departure from the present system, recognizing that in contemporary society, mental injury could have a significant impairment to a person's health and ought to be properly compensated under the Convention. It recognized that it was necessary to assist the passengers in recovering, rather than being involved in protracted litigation, and that therefore up to 100 000 SDR, it would be possible to assert those

claims with ease, and avoid, hopefully, the intensity of litigation from which quite often only some lawyers were the beneficiaries. Thirdly, it allowed, for the first time in the Convention, for unlimited liability, depending upon the circumstances and pending further consideration of the question of proof. In Alternative 1 of Article 20, the proof would be on the claimant, in excess of 100 000 SDR, but always in the context of the realities of the situation. The practical difference between on whom the burden of proof lay may not be that substantial. In any event, the rules of evidence which would normally be applicable as to how one discharged that burden of proof would indeed be applicable. In all the cases which the Chairman had already mentioned, the exoneration provisions would apply. The alternative in Article 20 was the three-tier situation which had at the moment left out what would be the appropriate threshold. The package also addressed the limits of liability for delay, baggage and cargo; the provision for advance payments; and finally the issue of jurisdiction; and attempted to balance the variety of interests which must be accommodated.

19. The Delegate of the United Kingdom had the understanding that Article 20 (*Compensation of Death or Injury of Passengers*) was based on the text as proposed in DCW Doc Nos. 3 and 4, but noted that Alternative 1 outlined a liability regime which had not previously been discussed or proposed. He requested clarification regarding this point, as well as on the explanation which had been provided by the Chairman of the burden of proof being so easily switchable between carrier and passenger. If the burden of proof could indeed be transferred so easily, the Delegate of the United Kingdom requested clarification as to why a three-tier system could be justified.

20. Responding to the first point raised by the Delegate of the United Kingdom, the Chairman indicated that in the formulations which were before the group, the basic Article 20 was based upon a two-tier regime. In the discussions which had taken place in relation to those regimes, two questions had arisen. One question concerned whether, in respect of the second tier, the liability should rest on the carrier. Countries with small carriers, in particular, had expressed concern that in fact it would impose an enormous burden on those carriers, bearing in mind that in a strict liability regime of up to 100 000 SDR, perhaps the overwhelming majority of passengers would already have been covered. The claim had then been asserted that in a sense, a system was being devised whereby the majority would in fact be subsidizing the minority, particularly in relation to the consequences of insurance claims which arose. In that context, the discussion had also then raised the substantial question of what was the true nature of the burden of proof. It had been explained that in a practical case it did not really matter too significantly whether or not the burden of proof was indicated as resting on the carrier or on the passenger, because the evidential burden would fairly rapidly shift unless Article 19 applied. In order to address that question and taking into account the concerns which had arisen in the course of consultations, the alternative formula 1 was proposed to meet the concerns of those who had indicated that from the point of view of small carriers, that would be a more acceptable formulation, and bearing in mind the fact that the practical differences did not appear to be that significant. The Chairman recognized that a burden of proof or liability regime had not been proposed earlier, and accepted full responsibility for the formulation in the context of the observations and concerns which had been expressed. The consensus package was indeed intended to accommodate and address these concerns, as far as practicable.

21. In relation to the second question raised by the Delegate of the United Kingdom about the burden of proof, and the proposal for a three tier-system if the burden of proof was not significant, the Chairman indicated that although the burden of proof on the higher limit in the third tier would be on the passenger, in a practical procedure it would be the carrier who would be called upon to begin to produce the evidence. The formulation proposed started on the basis that the carrier was already liable for 100 000 SDR and that if the carrier was to escape the liability in excess of 100 000 SDR, the burden of proof was put on the carrier to prove these matters. Therefore, it was the carrier who would adduce the evidence at the beginning. That was how the proceedings would commence in accordance with the traditional court procedure. There was thus a technical difference as to who was called upon to begin, and the person who was required to begin in those circumstances would be the person on whom the burden of proof lay.

22. The Delegate of Sweden sought clarification in connection with Article 27 (Jurisdiction), paragraph 3, since it was his recollection that when the Special Group on the Modernization and Consolidation of the Warsaw System had negotiated the expression "principal and permanent residence", the general feeling had been that the expression "the one single home of the passenger" should be captured. It seemed that the present wording would work in the sense that the court to which the claimant presented his case or brought his action would have to go to the list presented in paragraph 3 and see if one of the indents or one of the conditions set out in one of the indents was applicable. The Delegate of Sweden wished to know if the passenger could still have just one principal or permanent residence, or if it was to be read in the sense that the court, in looking at the text of paragraph 3, would simply have to determine if one of the conditions set out under one of the indents was applicable. In the case of the latter, a person could have a number of different places of principal or permanent residence.

23. The Chairman concurred that the latter interpretation offered by the Delegate of Sweden was the appropriate one, but pointed out that the different possibilities listed in paragraph 3 for principal and permanent residence were preceded by the word "or", precluding the possibility of having more than one permanent residence. Paragraph 3 was more generous in its scope of addressing the different kinds of situations which would arise in terms of the forum which would have jurisdiction, giving the concept of permanent residence greater elasticity. In noting this clarification, the Delegate of Sweden indicated that his delegation was not yet convinced that there was really a need for this further language to the expression "principal and permanent residence", which might upset the conclusions of the Special Group on the Modernization and Consolidation of the Warsaw System.

24. The Delegate of France indicated that Article 27, paragraph 4, as it now read, might give rise to problems in States such as his, which had their legal systems based on Roman law. Jurisdictional competence was usually determined by a text in a mandatory fashion without the judge being seized of the case or being in a position to assess the appropriateness of having that case before him. As regards paragraph 3 of the same article, the Delegate of France concurred with the interpretation offered by the Chairman, although the interest of having a definition and even the need thereof was to avoid having this concept of a residence being transformed into being tantamount to a nationality or having different judges in different countries introducing their own interpretation or definition. The Delegate of France recognized that this was a very difficult exercise and that in order to move to a true consumer's jurisdiction or definition thereof, one might be tempted to be quite complete, leading perhaps, in some cases, to the recognition of dual residences. Although it would be difficult to go beyond that number, one could in fact have two residences, especially in terms of the second indent of the definition, which required further review. The concept of dual residence was also possible in the case of the first and third indents. Although the definition might stand to be improved, the Delegate of France believed it was essential and should be objective and precise.

25. The Chairman observed that the main concern expressed by the Delegate of France in relation to the concept of principal and permanent residence was the concern that courts might interpret this as a reference to nationality and use it as a basis for asserting jurisdiction. If this was the case, it would be possible to resolve the question by not necessarily a definition of the term "principal and permanent residence" but to say that for the purposes of paragraph 2, the expression "principal and permanent residence" shall not be regarded as equivalent to nationality. That would exclude an interpretation which would lead to the conclusion that it was a nationality criterion, and one would have to search for other means of connection with the residence. One could not rely on nationality as a basis for asserting permanent residence as such; it was an exclusionary provision and it might be that the Conference could live without a definition but just simply an interpretation which would exclude it being interpreted as equivalent to nationality.

26. The Delegate of Australia sought clarification on the different multiplying factors used in the document under consideration to reflect inflation. The Chairman indicated that he was not in a position to answer in scientific terms as to the precision with which the multiplying factors were applied. Bearing in mind that the limits would be subject to review, the concern had been expressed that the limits which were at that time reflected in the text itself were limits which had appeared in Protocols Nos 3 and 4 of 1975, and needed to be updated. It would be important to advance the process with the knowledge that it would be reviewed, since most of the carriers themselves had been parties to the present provisions and the Convention would provide something better than what now existed, albeit not by applying limits mechanically. As an example, the Chairman recalled the discussions which had taken place earlier in the group in relation to cargo, at which time many delegations had expressed the view that the provision of 17 SDR ought not to have been disturbed. If one applied the logic that a formula for inflation factors or other changes should be applied, the matter would have to be addressed in a consistent way. There was thus a certain Solomonic approach which would have to be addressed in order to deal with the real world. Whilst not pretending that the figures were ideal, they were proposals and were subject to further discussion among delegations. If other figures would command widespread consensus, the Chairman would be happy to live with the consensus approach as to what would be the appropriate figures.

27. The Delegate of Egypt recalled that at an earlier meeting, on behalf of 53 African Contracting States and the Arab Group his delegation had suggested the deletion of provisions related to delay in Article 21 A (Limits of Liability). The proposal had raised some questions by certain parties, to which his Delegation had responded. The Delegate of Egypt trusted that the figures indicated in Article 21 A, paragraphs 1 and 2 would be reviewed with a view to deleting them or reinstating the original amounts, or at least reducing them. The Chairman indicated that it had not been very clear, following the discussion which had taken place earlier, whether it was desired that paragraph 1 of Article 27 A should indeed be deleted. The concern had been expressed that if it were deleted, there would be unlimited liability for delay. It was in the context of that concern, and because he thought that it would be in the protection of both developed and developing countries not to have unlimited liability for delay, that the sentence was retained.

28. The Delegate of Switzerland referred to Article 27 (Jurisdiction), paragraph 4, whose second sentence outlined certain requirements that needed to be fulfilled if the case was to be brought before a fifth jurisdiction. The Delegate of Switzerland wished to know if these elements contained in sub-paragraphs a) and b) were the same as when one spoke about a *forum non conveniens*. The Chairman explained that the concept of *forum non conveniens* was a concept which allowed the court to make a determination that it was inappropriate for a matter to be brought in a certain forum, having regard to a variety of considerations. The considerations which were outlined in Article 27 were indicative of those which a court could properly take into account. Sub-paragraph b) of paragraph 4 addressed also the need to highlight the fact that it was not enough to say that it was an inconvenient forum; it was necessary to also show that there was access to another forum which was more convenient. The Chairman was not certain that in some jurisdictions, apart from indicating that a forum was not convenient, a court would in fact go further and indicate where a more convenient forum could be found. Recognizing, therefore, that the Convention itself established other bases for jurisdiction, it then became necessary to examine the other bases in order to determine whether or not there was another convenient forum. The Chairman therefore regarded paragraph 4 b) of Article 27 as being appropriate because the Convention delineated the forum. It was correct that the provision covered more than the *forum non conveniens* mentioned in Article 28, paragraph 4. The fact remained, however, that different jurisdictions applied, with different rules in the application of *forum non conveniens*. What the Conference was attempting to do was provide a Convention rule.

29. Further discussion of the Draft Consensus Package in DCW-FCG No. 1 was deferred to the next meeting of the group.

— END —

DCW-Min. FCG/6

INTERNATIONAL CONFERENCE ON AIR LAW

"FRIENDS OF THE CHAIRMAN" GROUP

Minutes of the Sixth Meeting
(Friday, 21 May 1999, at 0930 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Draft Consensus Package

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Group resumed its deliberations on the "Draft Consensus Package". The Chairman recalled that the issues which were related to the package had now been extensively discussed both in the Group and in the Commission of the Whole, and requested that interventions be restricted to precise suggestions so that the group could arrive at a true consensus package.

2. A number of views were expressed with respect to the various elements contained in the package, firstly in connection with Article 16 (Death and Injury of Passengers — Damage to Baggage). The Delegate of India indicated that paragraph 2 of the article was a source of concern for his Delegation for two reasons. The first related to the definition of "health", and whether it should be interpreted in terms of the definition provided by the World Health Organization, or some other specific definition. While recognizing that defining health was outside the scope of this Convention, the Delegate of India maintained that this concern would have to be met because the WHO definition was a very wide one encompassing the state of physical, mental, social and spiritual well-being of the individual.

3. The second concern raised by the Delegate of India concerned a suggestion that mental injury could take place independently of bodily injury; this could lead to certain problems, particularly when one was talking about it in relation to the fifth jurisdiction. The Delegate of India therefore suggested an amendment to the text, in accordance with which the whole of Article 16, paragraph 2 would read: "In this article, the term 'injury' means bodily injury, or mental injury which occurs in association with or as a result of such bodily injury".

4. The Delegate of the United Kingdom had no difficulty with the text of Article 16, paragraph 2 as drafted in the French language version, but did have some concerns with the English to the effect that something was missing as compared to the French. Since he regarded this as a drafting point, he suggested that the matter be referred to the drafting committee. His suggestion was supported by the Delegates of the United

States and Sweden, as well as by the Observer from the European Community. To a request for clarification put forward by the Delegate of Singapore, the Delegate of the United Kingdom indicated that the change he would propose to Article 16, paragraph 2 would result in a sentence which would read "In this article, the term 'injury' means bodily injury, mental injury associated with bodily injury, and mental injury which significantly impairs the health of the passenger."

5. The two alternatives presented for Article 20 (Compensation in case of Death or Injury to Passengers) were the subject of a number of comments. The Delegate of India indicated that he would be quite willing to go along with Alternative 1 but could live with the second alternative if that was the wish of the majority, in which case he would want the figure of 250 000 SDR inserted in the square brackets at paragraph 3 of that alternative.

6. The Delegate of Chile recalled that among the clarifications which had been provided by the Chairman at the previous meeting, mention had been made of protecting small carriers. The Delegate of Chile had difficulty with the explanation offered by the Chairman to the effect that in practice, the burden of proof was easily transferred from the claimant to the carrier. The Conference had worked very sincerely to seek a solution and choose between two drafts that had received strong support. Those drafts had been the one produced by the ICAO Secretariat in DCW Doc No. 3, and the one presented by 53 African Contracting States in DCW Doc No. 21. One version had two tiers and the other had three. The Chilean Delegation, and perhaps others, found this new scenario presented in DCW-FCG No. 1 to be somewhat confusing. Many countries would find it difficult to bring such a text before their parliaments, explaining that there was no need to worry since where it was indicated that the burden of proof would be on the claimant it would in fact be on the carrier. Legislators would quite naturally ask why this was not stated in the first place. The various analyses of Article 20 had always been carried out with an eye to the interests of the small carriers, who could be found in all countries, whether large or small. Everyone was interested in protecting the small carriers as well as the consumers. The Delegate of Chile therefore proposed that in the search for a compromise, the group focus on the drafts which had been presented by the Secretariat and the African States, and not consider Alternative No. 1 in DCW-FCG No. 1. As regards Alternative No. 2, the Delegate of Chile suggested that the amount of 800 000 SDR be inserted in the square brackets at paragraph 3.

7. In responding to the concerns expressed by the Delegate of Chile in connection with Alternative 1, the Chairman gave assurances that that alternative had been formulated in relation to a very wide and large constituency, on the basis of the proposals which they themselves had already made.

8. The comments offered by the Delegate of Chile were endorsed by the Delegate of Sweden and noted with interest by the Observer from the European Community. While liking the original proposal of Article 20 as it stood in DCW Doc No. 3, the Observer from the European Community had been looking at the two alternatives now presented and would be willing to consider Alternative 2 as a realistic compromise if the figure to be inserted in the square brackets was put at a realistic level. In this respect the proposal of 800 000 SDR put forward by the Delegate of Chile did not seem unreasonable. It would therefore come as no surprise that Alternative 1 should give rise to difficulties. Against the background of its legal tradition the European Community would find it extremely difficult, if not impossible, to write something in the Convention and then expect something else to happen before the courts, which often interpreted a text much more literally. Since it was not possible to accept that the burden of proof would actually change, Alternative 1 could not be taken into account by the Counsel of Ministers and certainly not by Parliament.

9. The Delegate of Egypt indicated that his Delegation preferred to take the first alternative, which established an objective liability with the limit of 100 000 SDR and established a burden of proof on the passenger for any amount exceeding that limit. The Egyptian Delegation could accept the second alternative only if the second layer were established at 500 000 SDR, as indicated in the paper presented by 53 African States, with the burden of proof placed on the passenger for any amount exceeding that limit. The Delegate of Egypt could not agree to a limit of 800 000 SDR or more, which, if agreed to, would be considered as unlimited liability. The Delegate of Ghana, while recalling the position of the African States on Article 20, indicated that the second alternative in DCW-FCG No. 1 would form a good basis for a compromise. The Delegate of Tunisia also indicated that while he did not object to Alternative 1, if Alternative 2 took into consideration the African proposal it would be acceptable to his Delegation.

10. The Delegate of the United States was not happy with either of the two alternatives presented in DCW-FCG No. 1. Although he did not at this juncture have a concrete proposal to make in order to move forward, he suggested that in bilateral conversations, it might be possible for delegations to consider some other formulation or alternative to the two presented. The Conference had thus far been considering the issue in terms of two and three tiers. Perhaps some other number might provide other options worthy of exploration. Noting the reference just made by the Delegate of the United States to the Conference's apparent obsession with tiers, the Chairman observed that this exercise had been one of "blood sweat and tiers". If the United States, which had undertaken to have more consultations with other interested parties, might wipe these "tiers" away in a manner which would be acceptable on a consensus basis, he too would have no "tiers" left.

11. The Delegate of Egypt recalled that at the previous meeting he had asked a question regarding the multiplicity of figures appearing in the different paragraphs of Article 21 A (Limits of Liability). Although the Chairman had, at that time, indicated that the text in the original edition was used as an illustration only, the Secretariat had since raised the limits in paragraphs 1 and 2 while retaining the amount of 17 SDR in paragraph 3. The Delegate of Egypt requested clarification as to why this had been done. His Delegation was, in principle, opposed to any increase and wished to see the original figures in DCW Doc No. 3 reinstated or the figures in DCW-FCG No. 1 reduced in order to establish a balance of interests between the passengers and the airlines.

12. Responding to the point raised by the Delegate of Egypt with respect to the changing of the figures in Article 21 A in response to some concerns which had been expressed earlier, the Chairman agreed that there had been no specific proposals as to what those figures should be. The amendments reflected in DCW-FCG No. 1 were in response to some observations which had been made, but such observations had not been specific. In light of the observation made by the Delegate of Egypt and the provisions contained in Article 21 C for there to be a review of those limits, and the fact that both in respect of baggage and in respect of cargo it was within the autonomy of the passenger or consignor, if they believed that the value was greater, to make a special declaration so as to cover the extent of that baggage, the Chairman wished to know if it would be acceptable to retain the figures in the form in which they appeared in DCW Doc No. 3, in the knowledge that they would fall within the regime of Article 21 C, i.e. the review procedures.

13. The Delegate of Cameroon supported the suggestion put forward by the Chairman, since the figures appearing in DCW Doc No. 3 had not been contested, at least not publicly.

14. The Delegate of the United Kingdom suggested that the words "is limited to" in paragraph 1 of Article 21 A be replaced by "shall not exceed", an expression which had been suggested in the drafting group and which might help in more clearly defining what was meant by a limit. The Delegate of the United Kingdom recalled that in another forum, his Delegation had favoured the inflation-proofing of figures for destruction, loss, damage or delay of baggage. The United Kingdom had therefore anticipated 12 000 SDR

for Article 21 A, paragraph 1 and 3 000 SDR for paragraph 2. The United Kingdom could probably live with the reduced figures of 7 500 and 3 000 SDR, as well as the 17 SDR indicated in paragraph 3, provided that the last figure was breakable within the terms of the existing draft paragraph 5 of Article 21 A. The figure of 7 500 SDR in the case of damage caused by delay already represented a significant reduction as compared to the existing provisions of the Warsaw Convention as amended by The Hague Protocol. The Delegate of Sweden recalled that his State had been among those which had supported the United Kingdom when they had presented these figures in the Commission of the Whole. The Delegate of Sweden wished to point out that there was a pending question on whether in paragraph 2 reference should be made to "checked baggage" or just "baggage" as a whole.

15. The Delegate of Ghana sought clarification on the payment which would be made to each passenger in the case of delay, in accordance with paragraph 1 of Article 21 A. The concern of the Delegate of Ghana was related to the fact that flights could comprise a number of different legs, the lengths of which could vary from fifteen minutes or an hour to as much as fifteen hours. On these flights, passengers carried different types of tickets, the price of which could also vary greatly. The Delegate of Ghana wondered whether any economic evaluation of these variables had been carried out with a view to according a corresponding figure.

16. The Delegate of the United States indicated that his difficulty with Article 21 A at the moment lay with paragraph 5, where breakable limits for damage caused by wilful misconduct, which had been eliminated by the Montreal Protocol No. 4, was recreated.

17. The Chairman indicated that whereas he had asked the specific question as to whether or not in light of the observations which had been made, it was possible to live with the text in Article 21 A of DCW Doc No. 3 in terms of limits, it was obvious at this stage that the group did not have a consensus on the matter. Reserving the right for consultations on the figures for some other time, he requested that discussion on the subject not continue.

18. Article 27 (Jurisdiction) was also the subject of a number of comments and suggestions. The Delegate of India suggested a compromise formula whereby the fifth and any other additional jurisdictions could be applied for calculation of damages under tier 1, i.e. up to a limit of 100 000 SDRs. If a plaintiff was to be limited to this amount, it had to be recognized that for him to travel to a jurisdiction far from his home State could cause difficulties. If, however, he was seeking a very large sum of compensation, he should have the means to travel to such faraway jurisdictions as were provided in Article 27, paragraph 1. Towards this proposal, the Delegate of India suggested that paragraph 2, first line of Article 27 be amended to qualify the word "action" by the words "as provided in paragraph 1 of Article 20."

19. The Delegate of France indicated that he had been quite moved by the comments offered the previous day in respect of Article 27, paragraph 3 when the group had endeavoured to define with precision the various cases of residence which could give rise to the exercise of jurisdiction. The meeting had tried to better define the concept of a "principal and permanent residence", because in fact this concept was very vague and gave rise to varying interpretations according to different countries. To leave this in the realm of the ambiguous would not be forwarding the cause of unifying international law. The criticisms levelled the previous day had indicated that henceforth there would be too many courts that could be seised of a case, although the objective had been simply to envisage the various cases that could arise and to provide for the residence of the passenger, of his family, of his place of employment, etc. An easier and more succinct way of saying this now seemed possible and acceptable to the French Delegation and others. At the same time, the Delegate of France thought that the Chairman's idea of avoiding recourse to the criterion of nationality could be taken up in a very satisfactory way. He therefore proposed that in paragraph 3 of Article 27, the definition

for "principal and permanent residence" be limited to the first indent and that the remainder be deleted. The text proposed by the Delegate of France would thus read "For the purposes of paragraph 2, the expression 'principal and permanent residence' shall mean the passenger's main place of abode during the twelve months preceding the accident. The criterion of nationality of the passenger cannot be used to determine it." There would thus be a clear-cut situation which would cover all of the various scenarios which the group had tried to elucidate in a more detailed way, without opening itself to the criticisms levelled at the previous meeting.

20. The Chairman observed that with the amendment just proposed, the Delegate of France had relieved the meeting of the need to have a lengthy discussion about the many jurisdictional issues which had been raised earlier. The Chairman trusted that further interventions would recognize the restricted scope which had been proposed and would examine whether the concerns expressed earlier had been satisfactorily addressed.

21. Commenting on the proposal put forward by the Delegate of France, the Delegate of Lebanon indicated that there was a basic principle in civil law and procedures regarding court jurisdictions, to the effect that stipulations in this respect had to be very clear in order to specify the competent court to which the litigation should be brought. In order to avoid extra expenses on the parties and to avoid delays concerning the final verdict, one should not confuse the parties and persons to incur extra and unnecessary expenses, since the court might subsequently decide that it was not competent. In such instances one would be facing very serious situations, especially in case of death or injury as specified in paragraph 2. Another point which should be taken into consideration was that judges concerned with cases of air traffic accidents were not necessarily experts in air law and the economics of air transport. The same was true with members of a jury, in those cases where a jury was used. On this basis, the Delegate of Lebanon wished to know what was meant, in Article 27, by the carrier operating from premises which it leased or owned. This concept might conflict with the principles applied in different countries, and might not be sufficiently specific in terms of its meaning. The Delegate of Lebanon suggested that a unified concept be developed on the basis of ICAO documents which could be applied in all countries. In this connection, he was aware of the existence of an ICAO document which explained the definitions of certain terms that could be useful for the courts when considering these cases. The Delegate of Lebanon suggested that this be mentioned in the "travaux preparatoires" of the Convention for easier application of Article 27. Referring specifically to paragraph 4 of Article 27, the Delegate of Lebanon suggested that there be stipulations specifying that the alternative jurisdiction mentioned in sub-paragraph 4 b) would not include jurisdictions extraneous to those contained within the Convention.

22. The Delegate of Egypt supported the intervention of Lebanon regarding the need to be more specific about the alternate jurisdiction indicated in Article 27, paragraph 4, with a view to obviating any problems with regard to interpretation. The Chairman observed that the suggestion put forward by the Representative of Lebanon in relation to paragraph 4 of Article 27 related to a concern already voiced by the Delegate of India regarding the possibility of being able to resort to another jurisdiction not already enumerated in Article 27.

23. The Delegate of the United Kingdom noted that code sharing arrangements had been omitted from Article 27, paragraph 2, and suggested that they be reinserted with suitable drafting. Noting this suggestion, the Chairman invited the Delegate of the United Kingdom to provide him with a precise text, taking into account the controversies and questions which had been raised in connection with the previous text, one of the bases on which the reference to commercial agreement had been deleted.

24. The Delegate of the United States agreed that the codeshare partner loophole needed to be addressed. The difficulty was perhaps in the drafting rather than the concept, and the United States would be pleased to explore drafting options with the United Kingdom with a view to resolving the problem. The United

States appreciated the movement from the French Delegation on the definition for "principal and permanent residence", but continued to have difficulties with the twelve-month definition, among other aspects, and continued to believe that the most effective way forward might be to abandon efforts to define something which the Conference would never be able to agree on. Finally, on paragraph 4 and the question of *forum non conveniens*, the United States Delegation continued to be curious, if not a little confused, by how this paragraph had been arrived at. It had been stated that "forum shopping" was a problem, was not fair to carriers and needed to be taken seriously and resolved. The United States had suggested that the addition of a fifth jurisdiction would help reduce forum shopping because in United States courts, at least, it would provide a more convenient forum to which forum shoppers' claims could be dismissed. There was now a provision that stated that *forum non conveniense* was basically an additional hurdle that those seeking the fifth jurisdiction would have to cross, but did not apply to the original four jurisdictions. If this was the case, the provision was counter-productive to the notion of trying to minimize forum shopping, and the United States had objections in principle to anything which would limit the applicability of the fifth jurisdiction in a way which was not equally applicable to the other four. The Delegate of the United States believed that the best way forward at this juncture would be to keep the first sentence of paragraph 4 and to clarify that nothing here was intended to limit the ability of courts, in their discretion, applying the law of the court seised of the case to dismiss cases that more properly belonged in one of the other jurisdictions. That at least as it would apply in the courts of the United States, would make it clear that it was perfectly appropriate for them in all five jurisdictions to apply *forum non conveniens* and to direct forum shoppers in all of those five jurisdictions to one of the other Warsaw jurisdictions that would be more appropriate for the case.

25. On the last observation of the Delegate of the United States in relation to paragraph 4 of Article 27 in the draft consensus package, the Chairman understood the Delegate of the United States to make two statements. Firstly, that the ability of the court to find that a particular jurisdiction which was being invoked was inconvenient or not to be confined to the fifth jurisdiction, and that therefore that applicability should arise in any jurisdiction in which a plaintiff brought the case. To that extent in textual terms, the words "on the basis of the additional jurisdiction" set out in paragraph 4 of Article 27 would not remain. However, the Delegate of the United States had also suggested a reformulation in terms of an additional sentence which would clearly indicate that nothing in this provision would limit the ability of the court seised of the case to dismiss the case in circumstances in which it found that the case could more properly be dealt with in another of the stipulated jurisdictions. That, in fact, would be expressly stated. In a sense, it was a terse expression of what was somewhat encompassed in the language now of paragraph 4, sub-paragraphs a) and b), save to the extent that paragraph 4 really elaborated the issues which would be considered by the court whereas the formulation of the United States would leave it open to the court to exercise the discretion, having regard to the facts with which it was presented at that time. The Chairman asked the Delegate of the United States if he could present his proposal in written form. In relation to the question of "principal and permanent residence", the Chairman noted with interest that while appreciating the new proposal made by France, the United States had some difficulty with its confinement to circumstances in which a passenger's main place of abode was confined to twelve months immediately preceding the accident. Although the Delegate of the United States had indicated some difficulty, the Chairman assumed that there was no difficulty expressed in terms of the formulation that permanent residence should not be construed to be equivalent to nationality, having regard to the many concerns which had been expressed as to the possibility of that conclusion being reached, validly or invalidly. The question was therefore whether or not those two components of the definition of "principal and permanent residence", in terms of the French text, reserving the question of whether it had to be confined to the preceding twelve months, might offer some solutions.

26. The Delegate of Sweden observed that whereas paragraph 2 of Article 27, as it appeared in DCW-FCG No. 1, read "to or from which the carrier operates air transport services", the draft text in DCW Doc No. 3 had said "to or from which the carrier actually or contractually operates services for the

carriage by air". The Delegate of Sweden was not sure whether the new formulation was narrower, the same, or wider than the text of Doc No. 3. DCW Doc No. 3 was quite clear and related to the other provisions of the Convention. It was clear to know when a carrier actually operated services, i.e. when he flew, and contractually, i.e. when his code was on the ticket for the journey. The expression "operates air transport services" could even include carriers who were a part of a longer journey by having their code on the first leg of a journey which ended up in another jurisdiction, but not having their code on the second leg, although their code was reflected on the last part of the ticket where all journeys were represented. The Delegate of Sweden therefore preferred to go back to the original wording of the draft text.

27. As regards paragraph 4 of Article 27, as it stood in FCG Doc No. 1, the Delegate of Sweden understood from the comment by the United States that it would permit courts under their national laws to apply the *forum non conveniens*. It would thus not be mandatory for States to insert this principle in their national laws. The present text could be read in such a fashion. It started out by saying that "questions of procedure shall be governed by the law of the court seised of the case." If the rest of the text was subsidiary to this statement, then of course the *forum non conveniens* principle had to be in the law of the court seised of the case for the second part of the provision to come into force at all. As had been expressed by many Delegates, this was a major problem for States of civil law tradition. Even if it was true that if a State ratified a convention, it had to enter the provisions of that convention into its legal system, a Convention had to stand the test of ratifiability. The Delegate of Sweden knew that in the case of his State as well as in many other countries, ratification of the convention could be blocked simply because of not entering the principle of *forum non conveniens* into their legal systems. However, if the solution proposed by the United States was accepted, States who at the moment applied the principle of *forum non conveniens* could continue to do so. This would, he supposed, fulfil most of the intentions behind the proposal. The Delegate of Sweden would therefore support the proposal by the United States.

28. The Chairman observed that in the field of national codification of law, which was designed to provide uniformity, these issues were bound to arise, confronting all jurisdictions. Uniformity would never be achieved unless in fact jurisdictions found the equitable basis on which it was being proposed to suggest changes of a uniform nature.

29. The Observer from the European Community echoed what had been said by the Delegate of Sweden regarding paragraph 4, to the effect that this principle was foreign to the legal system in a large number of courts. If it was to go in, it would have to do so in a very careful manner, perhaps in the way that had been suggested.

30. The Delegate of Switzerland recalled that during the group's former discussions, it had been noted that the doctrine of the *forum non conveniens* was not known in all legal systems and traditions. The doctrine was an instrument of the case law and it allowed a court to refuse a case if the judges came to the conclusion that it was inappropriate to bring in a suit before that specific court, given the fact that another court was more appropriate to look at the case. This was obviously a matter of procedure and not of substance. It had also been noted that this principle was not used in a common and uniform way within the different national legal systems which knew this instrument. There seemed to exist variations and the same case under the same conditions might be judged in a different manner in different countries, simply because of differences in the jurisprudence between these two countries. The principle of *forum non conveniens* was absolutely unknown with regard to civil actions in Swiss law, and it had been indicated that the situation was quite similar in most of the European countries. In Switzerland, the court had to take every case in which there was a jurisdiction, notwithstanding the possibility that one of several additional fora existed. A court could simply not refuse a judgement solely based on the fact that another court might be more appropriate to deal with this case. Paragraph 4 of Article 27 said in its first sentence "Questions of procedure shall be governed by the law of the

Court seised of the case". This meant that whenever a case was brought before a court which applied this principle, the court would have to examine the case and come to a conclusion as to whether it regarded itself competent for that case or not. As the Delegate of Switzerland understood it, the court had to examine this question *ex officio*, which meant it was obliged to decide on this question irrespective of whether the claimant or the defendant had put forward arguments or not. As the first sentence of paragraph 4 used the word "shall", the court would have to observe the principle under all circumstances; it had no choice not to do so.

31. The Delegate of Switzerland offered an example under the assumption that paragraph 4 consisted of the first sentence only. A case was brought before an American court, which applied the *forum non conveniens* doctrine as this was a commonly used principle in the United States. If one brought the very same case before a Swiss court, the judges would read the first sentence of Article 27, paragraph 4 and apply the principles of Swiss law, which would not include the *forum non conveniens*. The Swiss court may not refuse the case, arguing that another court may be more appropriate. Although the Delegate of Switzerland considered that the problem was a consequence of the principle set out in the first sentence of paragraph 4,there existed many more differences, not only with regard to the *forum non conveniens*. For example, also with regard to the methods of calculating the period relating to limitation of actions according to Article 29 of the draft Convention, or with regard to the principle that in some legal systems, the claimant had to compensate the defendant when the claimant failed and lost his case, and vice-versa.

32. Referring next to the second sentence of paragraph 4, the Delegate of Switzerland observed that it became obvious that the requirements contained in sub-paragraphs a) and b), which to some great extent reflected the principle of *forum non conveniens*, should only apply to cases of fifth jurisdiction but only on a non-compulsory basis, as the word "may" was used. This meant that the court was free to follow or refuse to follow the principles set out in paragraph 4, sub-paragraphs a) and b). Consequently, this sentence would not enhance the Conference's efforts to unify the law. It had also been noted that the principles which ruled the *forum non conveniens* varied from country to country. The principles set out in sub-paragraphs a) and b) could thus be in contradiction to those the courts usually applied.

33. The Delegate of Switzerland concluded by presenting a rather practical problem. If courts of those States who usually did not apply the *forum non conveniens* doctrine had to follow the principle set out in sub-paragraphs a) and b), they would simply not know what criteria they should apply and this would place too onerous a burden on the carrier for the case to be heard and determined in that jurisdiction. If another jurisdiction was, in the interests of all parties, more fairly and conveniently determined, in Switzerland's legal tradition the granting of a particular jurisdiction meant always that the legislator was of the firm opinion that it was fair to go to that particular court. In Switzerland, it would even be deemed highly unfair for a court to say that it was not competent due to certain specific reasons or interests linked to the case in question since such reasoning was out of the competence of Switzerland's courts.

34. The Delegate of Switzerland saw the problem of *forum non conveniens* not as a matter of substance, but of procedure. The present instrument dealt with liability, which was a matter of substance and not of procedure. If questions of procedure were left to the law of the courts seised of the case, the case would have to be left there in toto. The Delegate of Switzerland considered it essential, and for the benefit of this Convention, not to bring in elements which were not a matter of substance. The Conference should not try to unify one special element of procedure by adding an unclear rule in the Convention. The Delegate of Switzerland therefore proposed to maintain the current wording of Article 28, paragraph 2 of the Warsaw Convention and suggested that the second sentence of Article 27, paragraph 4 of the draft Convention be deleted.

35. The Chairman made a special appeal to all Delegations to recognize that very limited time was available. The Chairman had, earlier on, indicated that he wished to have precise suggestions for resolving these issues because it was quite clear that the arguments which had been advanced and which would be advanced were now pretty much very uppermost and clear in the minds of all. In the course of this meeting, the group had had a very useful discussion of the draft consensus package and a number of observations had been made, designed to indicate how it might well be possible to bridge the differences and to arrive at a consensus. Some of these observations had concerned drafting issues, and in that regard suggestions had been made in relation to mental injury in connection with Article 16, paragraph 2. In terms of Article 20, the issues which had arisen had related to the choices which would be available between the alternative texts. Even those who had shown preferences for Alternative 1 had indicated that they too could accept Alternative 2. The only difference which had been expressed in relation to Alternative 2 concerned the figure which would be inserted in paragraph 3, dealing with the circumstances where the claim exceeded a certain amount. There had been a suggestion that a figure of 800 000 SDR would be appropriate and another expressing a preference for 500 000 SDR. It appeared that there was therefore a very small difference to be bridged, and the Chairman asked the parties concerned to consult each other and try to find a resolution of the question. It was necessary for Delegations to come together and recognize that, as in all international negotiations, the need to give and take a little and to arrive at something one could live with — not necessarily that which was ideal — must be the goal.

36. In terms of Article 21 A, dealing with limits of liability in relation to delay, baggage and cargo, the Chairman did not believe that discussions in this group or in any other, larger, body would bring about a resolution. Again, it would be necessary to intensify consultations both bilaterally and across groups. In respect of all of the provisions, except for paragraph 5, the issue concerned figures, and to negotiate figures in an open forum with a large number of delegations was not an appropriate way to arrive at a consensus. The Chairman therefore urged delegations to come together and decide on the appropriate figures to be placed in the square brackets. In connection with paragraph 5, a question had been raised about whether or not the limits which were provided for would apply in relation to wilful default, or whether those limits should not be made breakable. The Chairman observed that the formulation contained in paragraph 5 was of course identical to that contained in DCW Doc No. 3 in respect of which it appeared from the general discussion that there had been overwhelming support for its retention.

37. In relation to the question of jurisdiction, the Chairman observed that this meeting's discussion had moved towards consensus. On the one hand, the problems which had been posed in relation to the definition of principal and permanent residence had, to a significant degree, been ameliorated by the suggestion made by France, no longer insisting upon the multiplicity of possible jurisdictions which could arise from the formulation, but content with a provision which would relate "principal and permanent residence" to the passenger's main place of abode immediately preceding the accident. The French suggestion had been that it should be within a period of twelve months, and some views had been offered to the effect that it should not be so restricted. The French suggestion which would clarify the fact that the expression "principal and permanent residence" should not be construed so as to be equivalent to nationality had met with no objections.

38. In relation to what was contained in paragraph 4 of Article 27 in dealing with the question of *forum non conveniens*, there had been a rather intensive discussion as to the place it could occupy, having regard to the different jurisprudential bases of the civil law and common law systems in particular, and that *forum non conveniens* was a foreign concept in some jurisdictions. Indeed, there was the view that in those countries which did not recognize the concept there would be problems of ratification. Without prejudice to the legitimacy of the questions as to whether or not an injustice could be brought about by persons who would seek to resort to an inconvenient jurisdiction and in the search for uniformity and codification of law, the Chairman indicated that the suggestion made by the Representative of the United States, to indicate that it would be enough to indicate that nothing in this article is intended to limit the ability of the court seised of the

case to dismiss cases which could more properly belong to another of the jurisdictions stated in the Convention, would in fact preserve the right of those States which had the *forum non conveniens* principle and in no way derogated from those who did not have it. It would leave the door open to the latter to think in the future as to whether it may well be appropriate to change their own law if they so wished.

39. The Chairman suggested that in consultation with the Secretariat and having regard to these considerations which had emerged, and encouraging Delegations to have bilateral consultations which he had suggested and consultations across groups, Delegates try their hand in order to see whether or not the refinements might take place which would generate a draft which might take account of all these considerations which had arisen, and which might bring the Conference closer and closer to consensus. With this the Chairman adjourned the meeting.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Tenth Meeting
(Friday, 21 May 1999, at 1130 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: **Consideration of the draft Convention**

SUMMARY OF DISCUSSIONS

1. The Chairman indicated that this meeting was being convened in order to provide information on the progress being made in the "Friends of the Chairman" Group; to obtain the Commission's agreement to referring, to the Drafting Committee, the preparation of the text on the Final Clauses, with the understanding that any substantive matters would be discussed in the Commission in due course; and to review the Articles which remained to be considered, commencing with Article 28 (Arbitration).

2. As regards the first point, the Chairman recalled that when he had last reported to the Commission of the Whole, he had indicated that the "Friends of the Chairman" Group had been able to arrive at what appeared to be a consensus in terms of the question of how to formulate the issue of mental injury; had begun its consideration of that issue, which concerned liability questions; and had begun consideration of Article 27 (Jurisdiction), and in particular the fifth jurisdiction. The Chairman directed the Commission's attention to DCW Doc No. 39, which contained a summary report on the third, fourth and fifth meetings of the Group. As was indicated in Doc No. 39, the Group, while able to examine the issues, had recognized that Articles 16 (Death and Injury of Passengers — Damage to Baggage), 20 (Compensation in Case of Death or Injury of Passengers) and 27 should be considered in the context of an overall package solution. The Group had therefore looked at Article 20 in which Doc No. 3 provided firstly for strict liability up to 100 000 SDR but would have unlimited liability thereafter unless the carrier was able to prove the matters contained in sub-paragraphs (a), (b) and (c) of that article.

3. The Chairman recalled that the Commission had recognized that in respect of any of the liability regime limits, the provisions of Article 19 (Exoneration) would apply equally in respect of limits up to 100 000 SDR as well as above, so that if the carrier proved that the damage had been caused by the negligence or wrongful act of the person claiming compensation, the carrier would be exonerated, wholly or in part, to the extent of such negligence or wrongful act. The "Friends of the Chairman" Group had had to look very carefully at what would be the most appropriate compensation regime which would serve to strike that proper balance between the interests of the passenger, the interests of the carrier, and what would normally be regarded as the general public interest. The Group had had to consider not only Article 20 as presented in Doc No. 3, but had also had a proposal presented in Doc No. 21 by 53 African States

regarding a three-tier regime. In the first tier there would be a strict liability up to 100 000 SDR. For claims exceeding that amount and up to a layer of 500 000 SDR there would be a presumption of fault; on that basis the carrier could prove that it had taken all reasonable measures to avoid the damage. In respect of claims above the threshold of 500 000 SDR, the burden of proof would be on the passenger, whereby it could be established that that damage was due to the fault or neglect of the air carrier or his servants or agents acting within the course of their employment. In the course of its deliberations, the Group had to see exactly how — not only in theoretical but in practical terms — the system would work and what would be the most appropriate system to protect those interests.

4. The Group had rapidly recognized that these issues could not be considered in isolation from the issue contained in Article 27 and in particular relating to the fifth jurisdiction. The Group had had intense discussions as to how in fact it would be possible to accept a fifth jurisdiction and how it should, in those circumstances, be formulated. A number of concerns had been expressed related to ensuring that there was indeed a sufficient connecting link between the passenger and the jurisdiction, as well as in relation to the carrier. Article 27 attempted to do that by reference to the principle of permanent residence of the passenger and by reference to where the carrier actually or contractually operated service by air and conducted its business from premises owned or leased in that jurisdiction, or with another carrier with which it had a commercial agreement. In order to advance those discussions, and taking into account concerns which had been expressed relating to forum shopping and related matters to ensure that there was a convenient forum, the Group had considered whether or not the question of such a jurisdiction might, in fact, be subject to fences or circumscribed in a way which would prevent abuse.

5. The discussions in the Group had reached a stage which clearly indicated that a paper bringing together Articles 16, 20 and 27 was needed, and the Chairman had taken upon himself the responsibility of preparing what was described as a "draft consensus package". The intention behind that draft was to bring together all the elements in a single document in order to concentrate on those issues and their interrelationship, so that the concerns which would be expressed in relation to the document would be seen as a whole and any adjustments which would be required could take place in that context.

6. The draft consensus package enshrined in Article 16, by and large, a consensus which had been arrived at in relation to mental injury. The Group had then proceeded to recognize that there was not a sufficient degree of consensus yet in respect of compensation and limits, and alternative proposals had been put forward having regard to the views expressed by delegations both within and outside of the Group. Two proposals had then been made. One proposal had related to the question of strict liability to 100 000 SDR, over and above which the burden of proof would be on the claimant to show the fault or neglect of the carrier. The second proposal contained three tiers: strict liability up to 100 000 SDR; an amount above that threshold of 100 000 SDR to be specified (and various suggestions had been made as to what that figure would be) in which it would be subject to proof by the claimant that the damage was due to the fault or neglect of the carrier or its servants or agents; and a tier which would provide that between the 100 000 SDR and the other threshold figure, however defined, the carrier would be liable unless it proved the matters now contained in Article 20, sub-paragraphs (a), (b) and (c).

7. The Group's discussions on that matter over the course of the past few days had shown that in fact there were concerns in respect of both these formulations. The discussions were nevertheless continuing, and it might well be possible to arrive at some appropriate threshold figure. The subject had been left on the basis that what would be the appropriate figure would be the matter of consultations among delegations, and in any event would be without prejudice to any other proposals which would serve to

bring about a greater measure of consensus. It was the Chairman's intention to continue consultations.

8. The Chairman indicated that the Group had had a very important discussion on Article 27 (Jurisdiction), in the course of which it had become clear that there was a need to refine the text in relation to the concept of principal and permanent residence, having regard to the concerns which had been expressed as to whether or not that might provide scope for many permanent or principal residences as well as the concern whereby, in some jurisdictions, this concept was believed to be assimilated to nationality. The Group was attempting to refine the concept so as to alleviate some of those fears, and discussions were continuing.

9. There had also been intense discussion on the question of forum non convenience; i.e. whether or not in relation to the jurisdiction provided by the Convention it might be possible to find any appropriate language which would assist in the elimination of the practice of "forum shopping", whereby people would go to what they considered to be the jurisdiction in which they would be able to get the best result. This matter had arisen primarily in articulation of the fifth jurisdiction, although it might well be appropriate to other jurisdictions. Suggestions made in this connection would have sought to require the court to determine whether or not it was a convenient jurisdiction. Those discussions had remained somewhat inconclusive, although the Chairman was encouraged by the fact that the Conference had reached a stage of its discussions where specific suggestions for addressing specific problems were now being made. Therefore, to the extent that delegations had problems, it was expected that they would make specific proposals to resolve those problems rather than simply assert that the problems existed.

10. Consultations would continue bilaterally and across delegations through the weekend, and it was expected that in light of those consultations a revised draft consensus package would be available Monday, 24 May 1999. The Chairman would clearly not be in a position on Monday to put to the Commission of the Whole a package for consensus ratification or adoption; therefore, a meeting of the Commission of the Whole would be convened Monday morning merely to inform delegations of progress made, with the understanding that a meeting of the "Friends of the Chairman" Group would take place Monday afternoon.

11. On the question of the final clauses, the Chairman sought the Commission's approval for entrusting to the drafting committee the initial preparation of these. One or two areas would raise issues of substance, and the Chairman had indicated to the Chairman of the drafting committee that these matters were expected to come up to the Commission of the Whole for substantive discussion and subsequent referral to the drafting committee, but there were many standard clauses on which work could begin at this time.

Agenda Item 9: Consideration of the draft Convention

Article 28 (Arbitration)

12. The Delegate of Brazil observed that the possibility of arbitration was an important and desirable form of dispute solution for all parties involved, including passengers. Taking this into account and to make this possibility clear in the text, the Brazilian Delegation proposed the introduction of two changes in paragraph 1 of Article 28, deleting the words "for cargo" and replacing the word "shall" with the word "may". This would, he suggested, open a clear avenue for the passenger to achieve a satisfactory solution with the carrier in case of any dispute, without the need for expensive judicial proceedings which

would constitute an additional burden for both parties and which should be reserved only for those cases where complex legal questions or disagreements arose. The Delegates of the Dominican Republic and Switzerland supported the proposal by Brazil.

13. An observation similar to that of the Delegate of Brazil was offered by the Delegate of Japan, who suggested that in order to make it clear the Article 28, which stipulated "carriage for cargo" in its first paragraph, did not exclude passenger cases from being settled by arbitration, paragraph 1 be extended to conclude with the words "without prejudice to the right of a claimant to settle through arbitration any dispute relating to liability in case of death or bodily injury of a passenger."

14. The Delegate of Sweden did not see much of a problem in the prospect of parties settling a dispute by means of arbitration, but did have a problem in that he did not consider it fair to enter into these contracts before there was a dispute. Arbitration may, in Europe, be extremely expensive; its cost could reach the amount mentioned in the draft Convention for the first tier of liability. The Delegate of Sweden therefore did not wish to see an arrangement whereby passengers, upon purchasing their tickets, agreed on arbitration. For the same reason stated by the Delegate of Sweden, the Delegate of Germany preferred to retain the present wording of Article 28. The German Delegation did not believe that arbitration was a procedure intended for the average passenger, but was a special sort of procedure intended for the business sector. The Delegate of Italy wished to be associated with the views expressed by the Delegates of Sweden and Germany, and in principle preferred to keep the text as it was since the proposed amendment could result in problems and costs which were better to avoid.

15. While fully cognizant of the tradition in Latin American countries with regard to the arbitration systems and their favourable view of this form of settlement of dispute, the Delegate of France indicated that in the tradition of his region this was not common. Having recourse to such a system could only occur when it involved a balanced situation with two parties of virtually equal strength. That was why in the *travaux préparatoires* the issue of arbitration in respect of cargo had been included, since it was difficult to envisage an individual involved in arbitration with an airline. The Delegate of France therefore opted for the viewpoint expressed by Sweden, Germany and Italy. The Delegate of Lebanon also suggested that the text as presented be retained, especially since it did not preclude a resort to arbitration if it was used in the domestic legislations between the carrier and the passenger.

16. In light of the observations just offered by the Delegate of Lebanon, and recognizing that when an accident arose, there would be nothing inconsistent with the provisions of the Convention for a claimant to agree with the airline that the issue could be settled by arbitration, the Chairman suggested that the present text of Article 28 be retained. The Commission agreed to this suggestion.

Article 29 (Limitation of Actions)

17. The Delegate of Greece indicated that the limitation period of two years stipulated in Article 29 had caused problems in jurisprudence in the past. If this was a statute of limitations which could be suspended by national domestic legislation, the Delegate of Greece believed this should be clarified so as not to leave such an ambiguity in the scope of the Convention. The Chairman requested that the Delegate of Greece provide specific suggestions to the drafting committee.

18. The Delegate of Namibia observed that in most jurisdictions the courts had had substantial power to condone non-compliance with time limits, for example in the interest of equity or to prevent fraud. The Delegate of Namibia suggested that a provision be inserted in Article 29 to make that point

clear, i.e. that nothing contained in a preceding paragraph would affect the power inherent in a court seized of the case, to condone non-compliance with the time-limit referred to in paragraph 1 of that article. The Chairman noted that the method of calculating the period would be determined by the law of the court seized of the case, and that it may well be that a court seized of the case, in determining its method of calculation, would in fact interpret it to mean that insofar as there had been some act which would prevent the normal period of calculation being done, by virtue of fraud or otherwise, it would be the relevant law of the forum to make that determination. The Chairman trusted that this clarification would go some way in addressing the concern expressed by Namibia.

19. The Observer from the International Union of Aviation Insurers (IUAI) wished to take advantage of the Commission's review of Article 29 to highlight the submission he had made on behalf of his Union in DCW Doc No. 32, on the definition of "beneficiary" in Article 16. Given the unlimited liability of airlines contemplated by the Conference, the IUAI proposed that parties such as subrogated insurers and others, who might ride on the coat-tails of passengers, should not be given that benefit for the various reasons outlined in Doc No. 32, which principally concerned balance, fairness and equity and perhaps the protection of the smaller and regional carriers.

20. The Observer from the International Air Transport Association indicated that the IATA inter-carrier agreement did reflect the concerns expressed in Doc No. 32, which was an issue of great concern to the carriers that had signed the agreement.

21. The Delegate of Sri Lanka supported the proposal of the IUAI in Doc No. 32, to give a definition as to the beneficiary. In a regime in which there would be unlimited strict liability, the Conference should be concerned about the people who could actually make claims against the carriers. The Delegate of Sri Lanka suggested two amendments to the wording suggested by IUAI, whereby the text would include the words "by this Convention" and the reference to "natural persons" would be deleted.

22. The Delegate of the United Kingdom observed that Article 29 was simply dealing with limitation of actions in terms of determining within what period of time a claim should be brought. It seemed confusing to be thinking in terms of qualifying this clause in order to determine who might be able to bring an action. As could be seen from Doc No. 32, the substance of who might bring an action did not belong to Article 29 at all, but belonged elsewhere and earlier in the Convention. Unless the Conference were to introduce a new provision designed to spell out in extenso who may bring an action and who may not, it did not seem appropriate to mention it in Article 29.

23. The Delegate of the United States echoed the concerns just raised by the United Kingdom. Since 1929 to this day, it had been up to local jurisdictions to decide such matters as which classes of persons, which orders of relatives, what types of persons or non-natural persons, etc. could bring suit, and what the elements of the measures of damages were. For the Conference to attempt, at this juncture, to limit that jurisdiction did not strike him as a productive use of the time available to the Conference.

24. The Chairman observed that the Convention, which primarily addressed the liability question of limits, had been careful to provide in Article 23 (Basis of Claims) that an action for damages — however founded — could only be brought on the condition and subject to the limits of liability without prejudice to the question as to who were the persons who had the right to bring the suit and what were their respective rights. Article 23 in effect put fences around how great an exposure the carrier would be liable to, by ensuring that whatever may be the nature of the action and however brought, it was subject to the conditions of the Convention. The more delicate issues as to the persons who had the

right to bring the action were not really governed as such by the Convention, but were left to national law, subject only to the provision that one remained within the limits set by the Convention and the conditions subject to which the claims may be brought. The Chairman suggested that in the interest of achieving a consensus, the text of Article 29 be left without change. The Delegate of Singapore believed it would be unwise to include a definition since it could require States to change their legislation prescribing who could place claims. He could therefore agree to the suggestion put forward by the Chairman for retaining the present text of Article 29.

Articles 30 (Successive Carriage), 31 (Right of Recourse against Third Parties), 32 (Combined Carriage), 33 (Contracting Carrier — Actual Carrier) and 34 (Respective Liability of Contracting and Actual Carriers)

25. Drafting suggestions put forward by the Delegates of Cameroon, Singapore and Canada in connection with Articles 30 and 32 were referred to the drafting committee. No comments were offered in connection with Articles 31, 33 and 34.

Article 35 (Mutual Liability)

26. The Delegate of China noted that although Article 35 was based on Article III, paragraph 2 of the Guadalajara Convention, the last sentence of Guada. III.2, which was very important for the equitable sharing of responsibilities between the actual carrier and the contracting carrier, had been deleted in this new provision. The Guadalajara Convention had been ratified by 75 countries and played a very important role in the Warsaw System. The new Convention should therefore retain the original provision. The Delegate of the United Kingdom endorsed these comments.

27. The Delegate of the United States recalled that the sentence referred to by the Delegate of China had been deleted partly in recognition of the notion that the new Convention provided for unlimited liability and also recognized the fact that Article 42 (Mutual Relations of Contracting and Actual Carriers) allowed the carriers to work out amongst themselves issues of indemnification, so that if the action of one carrier bound the other that did not prevent the latter from obtaining indemnification for the consequences of binding action on the part of its partner. The Delegate of the United States was content with the draft as presented. The Chairman observed from the intervention of the Delegate of the United States that the contents of Article 42 would be adequate to cover the sentence of the Guadalajara Convention referred to by the Delegate of China. The Chairman requested that the Delegates of China, the United Kingdom and the United States consult among themselves and with a view to determining whether they could resolve the matter.

28. Further discussion of the draft Convention was deferred to a future meeting of the Commission of the Whole, and the Meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Eleventh Meeting
(Monday, 24 May 1999, at 1000 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

1. The Commission resumed its consideration of the draft Convention. A suggestion put forward by the Delegate of Israel for amending Article 21 A (Limits of liability), paragraph 2 to refer to "Special Drawing Rights for each passenger *with checked baggage*" was referred to the drafting committee, as was a suggestion put forward by the Delegate of the United States for reviewing the terminology used in Chapter V in order to align it, where necessary, with refinements made to Article 33 (Contracting Carrier — Actual Carrier) by the Special Group on the Modernization of the "Warsaw System".

2. Referring to Article 34 (Respective Liability of Contracting and Actual Carriers), the Delegate of the United States indicated that his country had encountered a peculiar situation with respect to the Swissair Flight 111 crash. In the case of certain passengers who had been ticketed by Swissair and on board Flight 111, a suit had nonetheless been filed with Delta Airlines, whose code had been carried on the Swissair aircraft with respect to a different group of passengers. The Delegate of the United States believed that Chapter V was not intended to produce such a result, and in the interest of clarity proposed the addition of a sentence indicating that the provisions of Chapter V did not apply to passengers, consignors, or persons acting on their behalf when their contract of carriage was with the actual carrier. The Chairman asked the Delegate of the United States to circulate his proposal in written form so that it could be appropriately considered.

Article 35 (Mutual Liability)

3. The Delegate of China referred to her proposal of the previous meeting in connection with Article 35, paragraph no. 2, and indicated that after consultations with the Delegations of the United States and the United Kingdom, the Chinese Delegation continued to believe that it was appropriate to re-insert the last sentence, proposed for deletion in DCW Doc. 4, with the addition of the words "or defences" after "or any waiver". The Delegate of the United States was in agreement with the Delegate of China as to the desirability of re-inserting this sentence with the change mentioned. The language and the reference to the Warsaw Convention would need to be revised to reflect the contents of the new Convention and, possibly, the references in the preceding sentences to Article 20.

4. The Chairman observed that there was no objection to the suggestion made by the Delegate of China and duly supported by the Delegate of the United States, which was referred to the drafting committee for appropriate textual adjustments.

Article 37 (Servants and Agents)

5. A linguistic point raised by the Delegate of Ukraine in connection with the Russian version was noted for verification.

Article 40 (Additional Jurisdiction)

6. On a point raised by the Delegate of France, it was noted that Article 40 might require revision in light of the text which would eventually be agreed on for Article 27.

Article 41 (Invalidity of Contractual Provisions)

7. A point raised by the Delegate of Japan, who contended that in the light of the provisions of Article 17, paragraph 2, the provisions in respect of inherent defect, quality or vice might be unnecessary or in any event may require alignment, was referred to the drafting committee.

8. The Delegate of Lebanon referred to DCW Doc No. 43, in which his Delegation proposed the deletion of paragraph 2 of Article 41. The Chairman observed that Doc No. 43 did not seem to differ in substance from the issue raised by the Delegate of Japan as to whether the provisions were already covered in Article 17, paragraph 2(a). In relation to this point, the Delegate of the United Kingdom drew the Commission's attention to the fact that in Article 34 (Respective Liability of Contracting and Actual Carriers) of the Convention there was provision to ensure that both the contracting carrier and the actual carrier would be subject to the rules of the Convention, except as otherwise stated in Chapter V. It thus appeared that there certainly was an indication that Article 17 would apply to the actual carrier as it applied to the contracting carrier. The Delegate of the United Kingdom suspected that Article 41, paragraph 2 had been included because of the possibility that Article 41, in its first paragraph, might otherwise have been construed as a disapplication of Article 17, in part. There could thus be some substance to the second paragraph of Article 41 justifying its retention.

9. The Chairman suggested that Article 41, paragraph 2 in substance would indeed apply, having regard to the provisions of Article 17, and that the issue was largely to be considered in a drafting context only, the substance of the provision being that nothing in Article 41, paragraph 1 would in any way be deemed to be a modification of the substance of Article 17, paragraph 2. The Chairman would leave it to the drafting committee to ensure that that decision of substance was adequately and properly reflected.

Article 45 (Insurance)

10. An editorial point raised by the Delegate of the United Kingdom, whereby the reference to "State" would more accurately refer to "State Party", was noted for verification. This point was also noted in connection with the text of Article 48 (Reservations).

11. To a query raised by the Delegate of Japan, who wished to know if the words "into which it operates" included an overflight situation, the Chairman understood that the reference, taken in the

context of the Convention as a whole — which also included embarking, disembarking, etc. — related to the State in which the carrier landed rather than an overflight situation.

12. The Delegate of Canada wished to know whether it was the common view among Delegations that Article 45 would preclude the State into which the carrier operated from imposing a certain level of insurance. If such was the case, the Canadian Delegation would have strong objections to that interpretation. The Chairman observed that an objective assessment as to whether a State's requirement exceeded the level of adequate insurance would have to take account of the facts and circumstances of each individual case, and that if there was a disagreement, the parties would have to resolve it between themselves. The Chairman believed that no provision in the article could be formulated in so specific a term as to be able to cover all and every situation and the ingenuity of Man to create differences by virtue of individual perceptions as to what was adequate and what was not.

Article 48 (Reservations)

13. The Delegate of the United States referred to DCW Doc No. 13, in which his State proposed that Article 48 be revised to take account of the Additional Protocol With Reference to Article 2 to the original Warsaw Convention, allowing States to take reservations with regard to transportation performed directly by those States, including their military authorities. The United States believed strongly that this Reservation should be preserved, and Doc No. 13 proposed a formulation to accomplish this. The Delegate of Canada indicated his support for the proposal in Doc No. 13.

14. Noting the proposal of the United States, the Chairman considered it would be important to record that this Reservation was not intended to cover a situation in which it could be said that carriage was performed by the State simply because the carrier was owned by the State; it was for this reason that the formulation contained in the proposal of the United States referred to "international transportation by air performed directly by that State ...". To a point raised by the Delegate of Singapore regarding the possibility of referring to "State Party" in the proposal of the United States, the Chairman observed that the possibility of making a reservation would obviously only apply to a State Party because it was the State Party which was making a declaration addressed to the Depositary; therefore, the words "directly by that State" would mean the State which was making a reservation by a notification addressed to the Depositary and would thus concern a State Party.

15. The proposal presented by the United States in Doc No. 13 was referred to the drafting committee for its review. To a request put forward by the Delegate of Egypt for clarification on the use of the word "directly" in DCW Doc No. 13, the Delegate of the United States indicated that paragraph 2 of the proposal referred to civil, and not State, aircraft, that were in essence chartered on behalf of military authorities. Paragraph 1 of the proposal concerned transportation directly provided by the State with its own aircraft. It might, for example, be an air ambulance or an evacuation helicopter used by the City of Chicago to evacuate crash victims.

16. Like the Delegate of Egypt, the Delegate of India saw a need for some clarification about the application of this new definition, especially now that one example had been given relating to air ambulances; it was the practice in certain countries to charge for such ambulance services and if the passenger was actually paying, that person should have the benefit of the Convention. The Delegate of the United States agreed that there was a difference between the example he had cited and air ambulances that sold their services as common carriers. A more appropriate example would perhaps be police helicopters that were used by authorities in local jurisdictions of the United States for the apprehension

of criminals or the observation of accidents, forest fire-fighting helicopters operated by municipalities, etc., as well as what would normally be considered State aircraft. On the basis of the examples provided by the Delegate of the United States, the Delegate of India did not envisage any situations in which international transportation by air would be provided unless there was a contract between nations.

17. The Delegate of Côte d'Ivoire asked whether it would be possible to expand Article 48 to refer to "aircraft registered in that State *or chartered by that State* ...". The Delegate of the United Kingdom pointed out that Article 48, as shown in Doc No. 13 with the two Reservations, did not do anything more substantial than repeat a provision already contained in the Additional Protocol to the Warsaw Convention and in Article 26 in The Hague Protocol; since, in principle, the document now under consideration was a consolidation, the Commission should be thinking in terms of accepting text which did agree with those two documents. Having said that, the Delegate of the United Kingdom had some sympathy with the point raised by the Delegate of Côte d'Ivoire to indicate that carriage in aircraft registered in that State might possibly be extended to cover lease situations.

18. The Delegate of Canada shared the view just expressed by the Delegate of the United Kingdom, and added that the existing language in relation to military aircraft appeared not only in The Hague Protocol but also in the Guatemala City Protocol and in the four Montreal Protocols. The language used in relation to State aircraft appeared in the 1929 Additional Protocol and although only a limited number of States had picked it up, none of those States seemed to have had any difficulty in implementing the Reservation. At the same time, if there was a will to broaden this exception in the manner suggested by Côte d'Ivoire, Canada would certainly have no objections.

19. The Delegate of Egypt fully supported the idea put forward by Côte d'Ivoire, which met some of the requirement concerning leased aircraft, thus widening the scope of applicability of Article 48. The Delegate of Egypt requested clarification on the scope of applicability concerning sub-paragraph 1 of Article 48 as presented in Doc No. 13 in relation to sub-paragraph 1 of Article 2 in the draft presented in Doc No. 3. It was the Chairman's understanding that in light of the fact that the Convention, in Article 2, paragraph 1, applied to "carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1," in order to deal with the question of carriage of persons and baggage for military purposes it was necessary to create a Reservation; otherwise the existing provision of Article 2, paragraph 1 would apply. Secondly, it was recognized that there were other means of international transportation performed directly by the State; these means were already recognized in a number of instruments, including The Hague Protocol, and the language which was contained in Article 48, paragraph 1 was designed not to extend, but to reflect that language. The meeting was thus now embarked upon an exercise of unification to bring together these two elements in the single instrument now under consideration in order to have a total picture without extending it unnecessarily. The Chairman observed that there was general support for recognizing that activities were conducted under Article 48, paragraph 2 of Doc No. 13 in relation to transport by military authorities, but in fact the practice was not restricted to using a State aircraft owned by, or registered in the State, and sometimes involved aircraft chartered by that State; this was the basis behind the suggestion of Côte d'Ivoire which appeared to have received general support and which the Chairman referred to the drafting committee.

20. The Commission thus completed its review of the text as contained in DCW Doc No. 3. The Chairman recalled that at the Commission's Tenth Meeting on Friday, 21 May 1999, he had indicated that the drafting committee had been requested to examine the final clauses. It was his understanding that the drafting committee had made significant progress in that regard and that the report of the drafting committee would be available the following day. In respect of the final clauses, some matters would have

to be addressed in the Commission of the Whole; these matters included the question of the number of States which would be required to bring the Convention into focus and some related issues.

21. Further discussion of the draft Convention was deferred to a future meeting of the Commission of the Whole, and the Meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the Fifth Meeting
(Tuesday, 25 May 1999, at 1055 hours)

SUBJECTS DISCUSSED

1. Agenda Item 8: Report of the Credentials Committee

SUMMARY OF DISCUSSIONS

Agenda Item 8: Report of the Credentials Committee

1. In presenting the Report of the Credentials Committee documented in DCW Doc No. 46, the Chairman (Mr. S.N. Ahmad, Delegate of Pakistan) indicated that the Credentials of 111 Contracting States and one non-Contracting State had been found to be in due and proper form. In addition, 11 Observer delegations had registered and presented proper evidence of accreditation. Furthermore, as of 24 May 1999, 54 Contracting States and one non-Contracting State had deposited their Full Powers to sign the Convention.

2. The President thanked the Credentials Committee for the work it had done under the leadership of Mr. Ahmad.

3. In the absence of any comments, the President declared the Report of the Credentials Committee adopted, on the understanding that an addendum to DCW Doc No. 46 would be issued in due course indicating those Credentials and Full Powers deposited subsequent to the Report.

4. The Plenary reconvened as the Commission of the Whole (COW/12) at 1100 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Twelfth Meeting
(Tuesday, 25 May 1999, at 1100 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Report of the Drafting Committee on its First to Fifth Meetings (DCW Doc No. 47): Articles 1 to 15, 17 to 19, 21A, 21B to 22, 23 to 26, 28, 37 and 49 to 52; and the draft Final Clauses

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. In presenting the Report of the Drafting Committee on its First to Fifth Meetings documented in DCW Doc No. 47, the Chairman of the Committee (Mr. A. Jones, Delegate of the United Kingdom) noted that consensus had been reached on all the matters referred to the Committee and upon which decisions had been taken. He wished to place on record the two statements contained in sub-paragraphs 1 and 2 of the Report and reproduced below:

> "1. With respect to the wording of draft Article 3, paragraph 4, it has been the understanding of the Drafting Committee that notice shall be given by the carrier in a timely fashion, sufficiently prior to the departure, in order to allow the passenger to take appropriate action, namely to decide whether or not to take out insurance. All language versions should convey this understanding adequately."; and
>
> "2. As far as the expression 'is limited to' in draft Article 21A, paragraphs 1 to 3, is concerned, it has been the understanding of the Committee that the amounts appearing thereafter do not constitute amounts which can be automatically recovered by claimants in all instances, but rather maximum amounts, which could be recovered in the event the claimant has discharged the burden of proof with respect to the extent of the damage he or she has sustained. Although it was observed that this understanding could be more accurately reflected by using an expression such as 'may not exceed' it was decided to retain the present wording, and to confirm this understanding, given that there already exists a body of judicial precedents on this matter in relation to the Warsaw Convention where the expression 'is limited to' is also used.".

2. The Chairman of the Commission of the Whole commended the Drafting Committee for its excellent work under the leadership of Mr. Jones.

3. In the absence of any comments, he then declared the Report of the Drafting Committee adopted, on the understanding that the Drafting Committee would continue its work on outstanding Articles which the Commission had completed the previous day and such other issues as might be referred to it.

4. The Meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Thirteenth Meeting
(Tuesday, 25 May 1999, at 1545 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Consensus package (DCW Doc No. 50): Articles 16, 19, 20, 21A, 22A, 22B and 27

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Chairman presented DCW Doc No. 50 setting forth the consensus package developed by the Friends of the Chairman's Group with regard to Articles 16 *(Death and Injury of Passengers — Damage to Baggage)*, 19 *(Exoneration)*, 20 *(Compensation in Case of Death or Injury of Passengers)*, 21A *(Limits of Liability)*, 22A *(Freedom to Contract)*, 22B *(Advance Payments)* and 27 *(Jurisdiction)* of the Convention. As the document as available in its complete form only in the English language at the present time, he would indicate the changes made to the draft consensus package contained in DCW-FCG No. 1 (Revision 2) which had been distributed earlier in all language versions.

2. The Chairman recalled that it had become apparent in the course of the discussions in the Conference that there were a number of important core issues which had to be resolved and in the framework of a package. Those core issues related to a host of sensitive matters, particularly those addressed in Articles 16, 20, 21, 22 and 27, as well as Article 19. The said Articles had a systemic inter-relationship, constituting in themselves a package of proposals. It had thus been necessary to ensure that a very careful and in-depth examination would be made of the contents and to strive to find common ground upon which a consensus could be built. It had been against that background that the Friends of the Chairman's Group, an open-ended group, had been established, and that many positions asserted in the Commission of the Whole were, in the intense discussions which had subsequently taken place, adjusted in recognition of the simple fact that in order to achieve universality and uniformity in a Convention of this kind it was fundamentally essential that all States should be willing to make accommodation so that a global solution which would command general consensus could be achieved. The resulting package represented a very, very fine balance of the sometimes conflicting, sometimes competing, but certainly varied interests in which the Friends of the Chairman's Group had sought to accommodate the interests of passengers, of the victims' families, of the air carriers, including in particular those of many small air carriers which would, in fact, be faced with the liability system, and the overall public

interest, which must demonstrate that the package represented a way forward and that it constituted a significant improvement over the present system. The latter was characterized by disuniformity and would only lead to continuing differences in terms of views, as well as of judgments and awards which were based sometimes upon the choice of jurisdiction. What the Group was seeking to do through the package was essentially to bring about a certain degree of predictability and uniformity and to gain recognition that international civil aviation must continue to be open to the participation of all. In that context, the package must provide for a universal framework which would take into account the interests of all.

3. Noting that what was contained in DCW Doc No. 50 was no longer a draft consensus package, the Chairman underscored that it represented a very fragile balance between the interests which he had identified. Cautioning that any attempt to tinker with one element of that balance could have a very significant domino effect, he indicated that the package was indivisible and was intended to be accepted as a whole or not at all. It had been necessary for the Group to recognize the stark reality that it was impossible to arrive at a solution which would satisfy the ideal requirements of all States and that the package could only seek to arrive at a just accommodation of interests on the basis that it was intended to be universal in scope. Although the package was one which was not ideal, it was a document which the Chairman believed made a significant improvement upon the chaos and disorder which currently existed within the application of the "Warsaw System". It was important for the Conference to ensure that the legacy which it would bequeath to the approaching 21st century would be one based upon more solid foundations. The Conference had a duty to history and history would condemn it if it did not seize this window of opportunity to move forward so as to ensure that the passenger who was injured or killed in an accident, the victims and their families, might not have to suffer lengthy court litigation, the expenses and the horrors which often characterized the system which was dependent upon many unpredictable factors.

4. It was for that reason that the package was concerned with bringing a greater degree of certainty and ease to the recovery by passengers of damages up to a certain threshold. The package equally recognized that an intolerable burden of an unlimited nature could not be imposed upon air carriers. Although the Conference was making a radical departure from the past by accepting unlimited liability, the circumstances in which that would be applicable - where, in fact, it was beyond the threshold - would be sufficiently circumscribed so as to create that delicate balance of protection between the interests of the passenger and the interests of the air carrier.

5. It seemed to the Chairman that the Conference now faced its moment of truth, when it had to recognize that what was needed was a package of proposals which, although possibly not responsive to all ideal aspirations, offered more just foundations than those which now existed. He noted that the Convention provided the opportunity for the review of the limits of liability, thus ensuring that some of the matters addressed in the package could be revisited.

6. Against this background, the Chairman wished to thank all the "Friends of the Chairman", meaning all Conference participants, for their tolerance, goodwill, cooperation and demonstrated willingness to find accommodation and compromise so as to enable him, as President of the Conference, to present DCW Doc No. 50, which he considered to be a consensus package.

7. In then elaborating on the contents and meaning of the Articles included in the package, the Chairman indicated that a major discussion had taken place within the Group about how to formulate the question of liability for death or injury in **Article 16** ***(Death and Injury of Passengers — Damage to Baggage)***. He recalled that in DCW Doc No. 3 it was formulated on the basis of death or bodily injury.

During the major discussion on how to reflect the question of mental injury, a considerable degree of reservation had been expressed by some Delegations about expressing mental injury in a form in which it would be independent of bodily injury, therefore suggesting that, to the extent that that was admissible, it would be necessary to circumscribe it greatly. Following a series of drafting permutations aimed at accommodating that concern, the Group had concluded firstly, that the concept of death or bodily injury as now contained in the Warsaw Convention and as reflected in DCW Doc No. 3 would indeed be an adequate reflection against the background of the jurisprudence which existed in relation to the question as to the circumstances in which mental injury might be recovered. All had recognized that under the concept of bodily injury there were circumstances in which mental injury which was associated with bodily injury would indeed be recoverable and damages paid therefor. The Group had equally recognized that the jurisprudence in this area was still developing. What had therefore happened was that the word "bodily" had been inserted before the word "injury" in the text of Article 16 appearing in DCW-FCG No. 1 (Revision 2) so that it now read "death or bodily injury", as was the case in DCW Doc No. 3; secondly, the last sentence of Article 16, paragraph 1, in DCW-FCG No. 1 (Revision 2) and DCW Doc No. 3 ("However, the carrier is not liable to the extent that the death or injury resulted from the state of health of the passenger.") had been deleted.

8. The definition of "injury" which was contained in Article 16, paragraph 2, of DCW-FCG No. 1 (Revision 2) had equally been deleted in the context of recognition that under the "Warsaw System" damage for mental injuries might, in certain circumstances, be recoverable. It had been equally recognized that the jurisprudence in the area was still developing. In coming to this accommodation, which sought to take into account the concerns which had been expressed with regard to the developing jurisprudence, the changes which had taken place in the Chairman's text and in the course of the development of the consensus package were not intended to interfere with the jurisprudence under the "Warsaw System" or indeed under the present Convention as it developed; nor was it intended to interfere with the continued development of that jurisprudence in order to address the requirements of contemporary society, particularly the development of jurisprudence in other areas of national jurisdiction. Secondly, the deletion of the final sentence of paragraph 1 of Article 16 was recognition that in this new context such a sentence would not be necessary. The removal of that sentence was not intended, clearly, to indicate that, for example, if a passenger sustained a heart attack and died on board an aircraft that by itself would allow the person to recover damages, as it could not be said that the accident had caused the injury. With regard to Article 16, paragraphs 2, 3 and 4, of DCW Doc No. 50, no changes had been made to the corresponding provisions of DCW-FCG No. 1, which were substantially the same as those of DCW Doc No. 3. The sole exception was that the reference made in paragraph 2 as contained in DCW Doc No. 3 to damage to baggage sustained "in the course of any of the operations of embarking or disembarking" had been recognized to be wholly inappropriate and had therefore been deleted, it being necessary only to refer to when the baggage "was in the charge of the carrier".

9. With respect to **Article 19** ***(Exoneration)***, the Group had retained the text set forth in DCW Doc No. 3, adding the following statement at the end only for the purpose of clarity: "For the avoidance of doubt, this Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 20.". This was to address the question raised of whether one could speak loosely in terms of strict liability and still have an exoneration of liability for contributory negligence.

10. The Chairman underscored that **Article 20** ***(Compensation in Case of Death or Injury of Passengers)*** had gone through a significant metamorphosis. In taking, as a point of departure, the text of that Article as it appeared in DCW Doc No. 3, a secretariat draft, he observed that it comprised two tiers. In the course of the Group's discussions, a considerable amount of concern had been expressed regarding

the threshold above 100 000 SDRs. The Group had thus begun an experimentation to see whether or not it could formulate an intermediate position between unlimited liability and a 100 000 SDRs limit in which the burden of proof would be on the carrier. A considerable amount of time was spent on that formulation — indeed, one of the draft consensus packages contained it — but great problems had been encountered at first in determining the threshold. The Chairman recalled, in this regard, the proposal by 53 African Contracting States (*cf.* DCW Doc No. 21) for a three-tier régime with the third tier being for claims in excess of 500 000 SDRs. He noted that the issue was further complicated by the need, in light of concerns raised, to determine the nature of the burden of proof which would be available. The Group, having considered two tiers, three tiers, one tier and no tiers, had come to agree to maintain a two-tier liability régime. This was to ensure the continued predictability of recovery up to a threshold which would apply in the majority of cases. It had been necessary for the Group to identify that threshold with a certain degree of precision so as to give some measure of comfort from the point of view of insurability. The Group had also had to satisfy the constituency of the consumers and victims who could readily see within the context of the consensus package that there would be no absolute need to resort to litigation and that therefore the chance of settlement would be greatly facilitated. With lawyers perhaps not having as much work to do in the future on such matters, the costs attendant upon seeking to recover damages could be ameliorated. The Chairman indicated that paragraph 1 of Article 20 of DCW Doc No. 50 sought to address the significant concerns of those who had the misfortune of suffering injury as a result of aircraft accident, as well as those of the victims' families, who formed an overwhelming majority of claimants, by providing that for damages arising under paragraph 1 of Article 16 not exceeding 100 000 SDRs for each passenger, the air carrier "shall not be able to exclude or limit its liability". Bearing in mind his earlier observation regarding Article 19 *(Exoneration)*, it was necessary for the avoidance of doubt to specify in that Article that it would equally apply to paragraph 1 of Article 20 and thus to all the liability provisions of the Convention. Thus recovery of damages would be mitigated to the extent that an accident was caused or contributed to by the negligence or other wrongful act or omission of the passenger. Under Article 19, the burden of proving contributory negligence rested with the air carrier. In all cases of liability under Article 20, paragraph 2, be it up to the threshold of 100 000 SDRs or above, it was for the passenger to prove that the damage sustained was caused by the accident and the extent of such damage. Those two principles of quantum of damage and causation would always remain. In concluding that in the case of unlimited liability arising under Article 20, paragraph 2, the burden of proof should be on the air carrier, the Group had decided to lower the standard of proof set forth in the corresponding Article of DCW Doc No. 3 that "the carrier and its servants and agents had taken all necessary measures to avoid the damage; or it was impossible for the carrier or them to take such measures" so that the air carrier was required, under Article 20, paragraph 2, of DCW Doc No. 50, to prove that the damage "was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or such damage was solely due to the negligence or other wrongful act or omission of a third party" for claims in excess of 100 000 SDRs. A compromise had thus been reached, with a three-tier régime being avoided by giving greater predictability to a threshold in relation to recovery up to 100 000 SDRs and by reducing the extent of the burden of proof, albeit remaining on the carrier, in terms of what would be required to be proved and in tying it to issues of negligence.

11. **Article 21A** ***(Limits of Liability)*** dealing with the quantification of liability for damage caused by delay and for damage caused in relation to the carriage of baggage and of cargo was the result of a great deal of examination. The proposal contained in the consensus package was substantially based on Article 21A of DCW Doc No. 3, "substantially" inasmuch as the Group had not attempted to change the liability limits. In explaining why the Group had not made any such modifications, the Chairman noted that in the course of its initial discussions one of the Group's documents circulated for consideration had increased the limit of liability for damage caused by delay from 4 150 SDRs to 7 500 SDRs. This had

been done in recognition of the inflation which had taken place and in light of the fact that some of the existing instruments provided for higher liability limits. The Group had also increased the limit for baggage but had left the limit for cargo unchanged. It had subsequently reflected on this matter with a great deal of agony and had come to the conclusion that there had been considerable concern expressed about increasing those limits. In terms of the liability for delay in the carriage of passengers, the Group had decided to retain the limit of 4 150 SDRs, notwithstanding the fact that the limit specified in The Hague Protocol was in excess thereof. In relation to liability in respect of baggage, the Group had decided to retain the limit of 1 000 SDRs per passenger, in recognition of the fact that the passenger had the ability to make a special declaration of interest in delivery at destination and to pay a supplementary sum if he considered that the value of the baggage was greater, so that that could be covered by insurance. Similarly, in relation to cargo, the limit of 17 SDRs had been retained, for two reasons: firstly, in recognition of the fact that the consignor could also make a special declaration and pay a supplementary sum so that the liability might be beyond that amount and be covered by insurance; and secondly, in recognition of the concerns expressed in the Conference that in dealing with cargo one had to recognize that one was dealing with sophisticated consignors and persons who obviously would address those issues and that they stood on a better footing of equality with air carriers than the person who checked his baggage. It was in that context that the current text had been developed.

12. Article 21A, paragraph 5, of DCW Doc No. 3, whereby the limits of liability specified in paragraphs 1, 2 and 3 of that Article for delay, baggage and cargo would not apply if it were proved that "the damage resulted from the act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result ..." had been amended by the Group in DCW Doc No. 50 so as not to refer to paragraph 3 relating to cargo, for the same reasons cited by the Chairman earlier. Paragraph 6 was a reproduction of what was contained in Article 21A, paragraph 6, of DCW Doc No. 3.

13. The Chairman indicated that, in considering Article 21A, the Group had attempted to face some practical considerations relating to the fact that, while many contended that the liability limits were out of date and should be updated, some were of the opinion that certain liability limits should be reduced, particularly those for delay. Ultimately, the Group had had to come to a compromise, in the knowledge that Article 21C provided for a review of the liability limits at the end of the fifth year following the date of entry into force of the Convention and thereafter at five-year intervals. The Group proposed its text as a starting point in order to accommodate all the interests which had been identified.

14. Considering it improper to deal with the two separate issues of freedom to contract and advance payments in a single Article, the Group had divided **Article 22A** as it appeared in DCW Doc No. 3 into two Articles, Article 22A and Article 22B. The provisions of new Article 22A relating to freedom to contract were substantially similar to those contained in the second part of Article 22A of DCW Doc No. 3 save and except it had been enlarged by adding after the first phrase "Nothing contained in this Convention shall prevent the carrier from refusing to enter into any contract of carriage", the phrase "from waiving any defences available under the Convention", a statement of the obvious, consistent with practice, and the phrase "or from laying down conditions which do not conflict with the provisions of this Convention". In the latter phrase the word "conditions" replaced the word "regulations" used in Article 22A of DCW Doc No. 3 as "regulations" were considered by the Group to relate to governmental action rather than to what the air carrier would be able to do.

15. **Article 22B *(Advance Payments)*** was a very important Article. The Group had listened with great interest to the statement made by the distinguished Delegate of Switzerland concerning the agony suffered by the victims of aviation accidents and their families and had noted the increasing practice

among air carriers to make advance payments without delay when accidents occurred so that the survivors of accident victims might receive assistance in meeting their humanitarian needs, particularly their economic needs, at that time. The Group recognized that it was important for such payments to be made without delay. The key question which had arisen in its discussions was whether or not the Convention should state it in mandatory terms. Recognizing that it was the practice in most States, and the good practice of all air carriers, to make such payments, the Group had formulated Article 22B on the basis that the air carrier "shall, if required by its national law, make advance payments without delay to a natural person or persons who are entitled to claim compensation in order to meet the immediate economic needs of such persons". The Group recognized the importance of creating momentum in the adoption by States of such national legislation and of ensuring that there was a consistent practice among air carriers in making advance payments. Drawing attention to the first footnote to DCW Doc No. 50, the Chairman indicated that the Final Act of the Conference would include a resolution urging air carriers to make such payments and encouraging State Parties to take appropriate measures to promote such actions. The Group was of the view that this struck a delicate balance, which in fact was a response of the international community as a whole to this important question. The final sentence of Article 22B recognized that, since an advance payment would be made before liability had been established, and even in the face that it might later be contested, such advance payment "shall not constitute a recognition of liability and may be offset against any amounts subsequently paid as damages by the carrier".

16. Turning to **Article 27 *(Jurisdiction)***, the Chairman indicated that it was an Article over which the Group had agonized greatly. Paragraph 1 thereof simply reproduced the existing jurisdictions where an action for damages could be brought. The Group had then to address the question of the additional jurisdiction, often referred to as the "fifth jurisdiction", and the circumstances under which it would be appropriate for that fifth jurisdiction to be available. The Group had recognized that it would be important to address the need for the accident victim to have a convenient forum in which to bring the action. It had equally recognized that it would be important for there to be connecting links between the forum which was chosen and the air carrier so that in fact it would be possible to adjudicate upon the matter in an appropriate forum. Paragraph 2 sought to establish that, in the case of damage resulting from the death or injury of a passenger (and not damage to cargo), an action could be brought not only before the courts specified in paragraph 1 but also before the Court "in the territory of a State Party in which at the time of the accident the passenger has his or her principal and permanent residence". That was insufficient, however, as there were a number of cumulative conditions which had to be satisfied: firstly, it must be the principal and permanent residence of the passenger at the time of the accident; secondly, that principal and permanent residence of the passenger must be the place "to or from which the carrier operates services for the carriage of passengers by air, either on its own aircraft, or on another carrier's aircraft pursuant to a commercial agreement"; and thirdly, it must be in the territory in which the carrier "conducts its business of carriage of passengers by air from premises leased or owned by the carrier itself or by another carrier with which it has a commercial agreement". Thus the nexus between the principal and permanent residence must clearly relate to a place to or from which the air carrier operated services for the carriage of passengers by air. Those services might be rendered by its own aircraft or by another aircraft pursuant to a commercial agreement. The air carrier must have some presence in that jurisdiction, either in the form of premises which were leased or owned by the air carrier itself or by another air carrier with which it had a commercial agreement. The Chairman averred that it was important to recognize that there was a restricted scope in the application of Article 27. It would not simply apply because there was an interline agreement between air carriers or because there was some marketing arrangement between them. For the Article to apply, the air carrier would have to be operating services to or from the territory where the passenger had his principal and permanent residence, either on its own aircraft or on an aircraft of another air carrier pursuant to a commercial agreement. The definition of "commercial agreement"

given in paragraph 3 (a) was "an agreement ... made between carriers and relating to the provision of their joint services for carriage of passengers by air". Paragraph 3 (b) defined "principal and permanent residence" as being "the one fixed and permanent abode of the passenger at the time of the accident. The nationality of the passenger may be considered as a factor, but shall not be the determining factor in this regard.". This definition ensured that it was not possible to have several principal and permanent residences from among which to choose the most convenient one in which to bring an action. The last sentence had been added in light of the considerable concerns expressed regarding some jurisdictions which would view nationality as being equivalent to "principal and permanent residence". Referring to the second footnote to DCW Doc No. 50, the Chairman indicated that, in order to ensure that this fifth jurisdiction was understood in the context which gave it legitimacy in the Convention, the Final Act of the Conference would include a statement that paragraph 2 of Article 27 was included because of the special nature of international carriage by air. It was quite clear, therefore, that in circumstances in which a person happened to be on a flight between some two jurisdictions, a flight which had not been operated pursuant to a commercial agreement and which did not qualify under the various provisions coming under this Article, the fifth jurisdiction could not be invoked.

17. The Chairman reiterated that the consensus package was to be seen in the context of the Group's having exhausted all possible means of arriving at consensus. It had done so on the basis of the widest possible consultations, of taking into account the concerns of all, of recognizing that no Delegation would find it an ideal solution to all its States' problems. While it was not possible to solve the problems of the world in one Conference, the Conference could make a beginning, an important step forward which would lead to something which would be a significant advance on that which the Conference had. The Conference could do so in recognition of the fact that the consequences of a failure to make a beginning would be far more disastrous that not accepting a package of this kind. Recalling that he had presented the package as being indivisible, the Chairman indicated that it was because he firmly believed that the Conference had a unique opportunity, a unique challenge, to lay better foundations for the liability régime in respect of the carriage of passengers, baggage and cargo, and that if it allowed that opportunity to pass, the consequences would be far worse than accepting a package in this form. The Chairman thus commended the consensus package to the Conference for its acceptance as a whole. He implored that it be accepted as all possible means had been exhausted. He affirmed that history would not forgive the Conference if it lost this opportunity.

The presentation of the package was greeted with sustained applause.

18. The President of the Council averred that the Chairman had provided the Commission of the Whole with ample explanation and had informed it about the efforts that everybody participating in the Conference had made. He and the Chairman had worked with all present, formally and informally, hours and hours, until they had been able to produce DCW Doc No. 50, which was a package to be considered as a whole. The President fully agreed with the Chairman that history would not forgive the Conference if it failed to seize this opportunity. All were here with the Chairman to make history - a constructive history, a positive history - which gave guarantees to all partners in air transport. He would not repeat the Chairman's comments concerning passengers, air carriers — everybody involved in the air transport industry. As mentioned in his opening address, the President had himself been part of this exercise for the last fifty years, having taken part in the Rio de Janeiro 1953 meeting to prepare for the first revision of the Warsaw Convention, a convention which went back to 1929 when aviation was an adventure. He had later attended The Hague Conference in 1955. Since that time the Warsaw Convention had been fragmented into different protocols and into different views, interpretations and jurisdictions. The Conference was making history in consolidating, for the first time, what had been fragmented and by introducing new elements to cope with the vision for the 21st century. In taking the ensuing applause as acceptance, the President invited the Conference to officially accept DCW Doc No. 50.

19. In the absence of further comments, the Chairman declared the consensus package set forth in DCW Doc No. 50 adopted. Thanking the Conference most sincerely for accepting the document, he affirmed that whatever achievements it reflected were the achievements of the Conference. It was his hope that the consensus package, together with the other parts of the draft Convention, would emerge as a true attempt at bringing about uniformity and predictability in the system.

20. The Delegate of Mauritius congratulated the Chairman most warmly for the outstanding and obviously most persuasive presentation he had given of DCW Doc No. 50. He also congratulated and thanked the President of the Council for his most timely and commendable endorsement of that document. The Delegate of Mauritius noted that it had always been recognized that consolidating and modernizing the "Warsaw System" would be a formidable challenge. Some had even begun to think it was an impossible challenge, the more so because of the various and often conflicting interests and objectives of the stakeholders, not only between regions but within regions, and even within a single State. All Conference participants fully appreciated the formidable difficulties of balancing such a variety of interests. They were at the present Conference because they believed that universal problems required universal solutions and because they believed in ICAO. They were also here because they believed that they could rise above particular interests and address general interests and thereby rise to the formidable challenge before the Conference. That was why, in their search for a universal and uniform cure for the "Warsaw System", their only guiding principle - and the Chairman's only guiding principle - had been and had remained equity for all. It was indeed only equity which could secure the necessary balance of interests and promote ratification of the new Convention. The informal consultations and brainstormings which the Chairman had urged Conference participants to have, as well as the ones over which the Chairman had himself presided and in which the Delegate of Mauritius had been particularly privileged to have been involved over the last four days and three nights, had sought to apply these principles of equity and to push the formidable spirit of compromise, goodwill and dedication of all those who were involved, to the limit. They had thus been able to put together the elements for the package which had just been presented to us. It was in that spirit that the package represented to the Conference participants the fairest compromise for this difficult equitable balance of interests all desired, all needed, and all were hoping against hope for. Each Conference participant would certainly have individually wished for more, but for a package to be fair, it had to be fair to all, and perhaps the only compromise possible was the one presented, which represented significant concessions by many, if not by all, only to achieve this consensus. The Delegate of Mauritius took the applause which the Chairman had twice received after his presentation and the commendation of the President of the Council to indicate clearly that the Commission of the Whole endorsed the consensus package as a whole in the spirit of everything that united them.

21. The Meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Fourteenth Meeting
(Wednesday, 26 May 1999, at 1100 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

1. The Chairman indicated that this meeting would deal with some outstanding issues identified in the report of the drafting committee in DCW Doc No. 47, which the Commission had begun to consider at its Twelfth Meeting. The document contained some marginal notes indicating those areas that would have to be reviewed within the Commission of the Whole. Taking stock of where the Commission stood in terms of the matters which remained, the Chairman indicated that the Commission would still have to deal with the preamble and the title to the Convention; would have to examine, in Doc No. 47, Article 21 C relating to the review mechanism; would have to review the report of the drafting committee, which had met earlier in the day and dealt with all the outstanding issues referred to it; and would also have to deal with the Final Act. On the assumption that the Commission would be able to deal with these matters by the end of the day, a reproduction of the Convention in its entirety would hopefully be available the next day for adoption by the Commission of the Whole and Plenary.

2. The Chairman then directed the meeting's attention to Doc No. 47, containing the report of the drafting committee, and specifically to the first marginal note referring to the Commission of the Whole, in connection with the inclusion of the word "nature" in Article 5 (Contents of Air Waybill or Cargo Receipt), paragraph c). It was recalled that Montreal Protocol No. 4 did not include a reference to the word "nature". The issue therefore was whether in the light of that and other circumstances, the word ought to be retained.

3. The Delegate of the United States wished to preserve the language of Montreal Protocol No. 4, noting that "nature of the goods" could be a costly element to include in the electronic media; it was preferable not to list on the air waybill that one was transporting, for example, gem stones or other valuable materials. The Delegate of New Zealand added her support to the proposal that "nature" be excluded from Article 5(c). New Zealand believed that Annex 18 (*The Safe Transport of Dangerous Goods by Air*) to the *Convention on International Civil Aviation* adequately covered the matters relating to dangerous goods and that the addition of "nature" was superfluous and simply added extra cost and expense for carriers and shippers.

4. The Delegate of Greece observed that according to Article 44 (*Objectives*) of the Chicago Convention, one of the aims of ICAO was to promote the safe transport of persons and goods. In order

to enhance the safety of the transport of persons and cargo, Article 5 of the draft Convention should, in his view, include an indication of the nature of the consignment. The Delegate of Madagascar indicated that in order to avoid any form of litigation regarding the interpretation of the air waybill in the case of loss of baggage or cargo, Madagascar would support the proposal by Greece. The Delegate of Ghana believed that Article 5 as presented in Doc No. 3 had been considered at length by both the Legal Committee and the Special Group on the Modernization and Consolidation of the "Warsaw System", and was therefore inclined to think that enough consensus had been built around the inclusion of the word "nature". As a Delegate of a developing country, he had some concern that if the word was not included to describe the goods coming into his region of the world, in the absence of an appropriate mechanism for dealing with the issue there could be some abuse in terms of toxic waste or other substances. The Delegate of the Russian Federation added his support to the inclusion of the word "nature".

5. The Chairman observed that the Commission had before it a suggestion for the deletion of the word "nature" and another which maintained that it would be important for such an indication to be given. It was also said that Annex 18 (*The Safe Transport of Dangerous Goods by Air*) already dealt with this question. The Chairman was not sure that these issues were necessarily incompatible. Annex 18 laid down very special procedures which were applicable to the acceptance of dangerous goods, and those procedures must in any event be observed, but to the extent that the nature of the consignment qualified as dangerous goods, such procedures would have to be satisfied independently. To the extent that the consignment did not qualify as dangerous goods, it would still be necessary to provide some generic description. It might well be that the indication of the nature of the consignment which constituted dangerous goods in terms of the air waybill itself would be satisfied by the generic description of the dangerous goods, which would not relieve the consignor of the responsibility to satisfy the varying provisions contained in Annex 18. The Chairman wondered whether it would not be possible to find an accommodation which would retain the description of "nature" in the knowledge that in so far as dangerous goods were concerned, those provisions of Annex 18 were in no way derogated from because of the special procedures which may require far more detail than a generic description.

6. The Delegate of Canada had difficulty seeing what a "mid-term" position would be; either the word "nature" would be included in Article 5 or it would be left out. This was not the first time that this debate had occurred; the minutes of The Hague Convention in 1955, where the word had been taken out, indicated that the philosophy had been to make the air waybill as simple as possible so that the air waybill dealing with matters relating to the liability of carriers should contain only matters that served to indicate the application of the Convention, including what was then the Warsaw notice. That was how the "nature of the goods" provision had been removed from the Warsaw Convention as amended at The Hague. Canada saw no useful purpose being served by putting the words back in for the reasons underlined by the Chairman. Annex 18 required States to impose an obligation on the carriers to have dangerous goods declared by their shippers and to have them properly packed in accordance with the regulations instituted by ICAO. Therefore, if the concern was for dangerous goods, the rules established by ICAO served that purpose and served it much better than requiring the nature of the goods to be explained in this article.

7. The Canadian Delegation also had technical problems with the insertion of the words "nature of the goods". What exactly would be done in the case of a consolidated shipment? In such instances, the carrier did not know what was inside the package; all he knew was that he was going to receive a certificate indicating that there were no dangerous goods in the package. To oblige the forwarders to list all the items within the shipment might bring some commercial realities into play, in particular the fact that very often the forwarders saw themselves as being in competition with the carriers

for the business patronage of the people who were shipping the goods. Finally, the Delegate of Canada would have concerns about the effect which placing this requirement in the new Convention would have on ICAO provisions. There was a potential for litigation to arise if two different types of instruments sought to regulate the same issue. For these reasons, the Delegate of Canada suggested that the Commission refrain from including the words "nature of the goods," which would serve a regulatory more than a liability purpose.

8. The Delegate of Mauritius was sensitive to the concerns which had been expressed at this meeting and earlier during deliberations on the need to not jeopardize the safety and security of international civil aviation. He was, however, convinced that ICAO had mechanisms and provisions in place to provide for the promotion of safety and security in a very comprehensive manner. In so far as the proposed Convention sought essentially to deal with liability and sought also to simplify and modernize the documentary requirements, the Delegate of Mauritius would tend to concur with the arguments put forward by the Delegate of Canada, with the additional element that deleting the word "nature" from Article 5 (c) and Article 10, paragraph 2 would be consistent with the provisions of Montreal Protocol No. 4 which was in force already in relation to cargo. The Delegate of Mauritius therefore endorsed the proposal of deleting the word "nature" in these two articles. The Observer from IATA and the Delegate of the United Kingdom supported the deletion of the reference to "nature" for the reasons expressed by the Delegate of Canada. The Delegate of China also spoke in favour of not including the word "nature" in order to simplify the contents of the air waybill and facilitate the operation of both parties of the contract.

9. The Delegate of Egypt supported the retention of the reference to the nature of the cargo, since the text had already been accepted by consensus within the Legal Committee. The Delegate of Egypt contended that Annex 18 did not have the same level of international commitment as would be the case with the draft Convention. The Delegate of Saudi Arabia supported the comments just offered by the Delegate of Egypt, and agreed that in cases of litigation, the provisions of Annex 18 would not have the same level as what was being contemplated for the draft Convention. The Delegate of Côte d'Ivoire wished to be associated with the arguments presented in favour of retaining the word "nature".

10. The Chairman observed that there were two clearly articulated views, one in favour of the deletion of the word "nature" and the other which advocated its retention. Those who supported the deletion did so on the basis that it was necessary to simplify the documentation in relation to the carriage of cargo and that therefore the reference to the nature in the document might be unnecessary at this stage, and that in so far as the nature of the cargo or baggage related to dangerous goods, there were specific rules contained in Annex 18 which would in any event have to be satisfied. On the other hand, there were those who contended that in fact it was important that there be some indication of the nature of the consignment which was being made, because it did give some indication of what it was that was being consigned in that cargo, and that the sensitivities in relation to matters relating to dangerous goods, albeit covered in Annex 18, ought to have a conventional voice in terms of the fact that Annex 18 itself may enjoy a different status as such.

11. The Chairman also noted that in terms of the original Warsaw Convention, which still applied in many countries, the reference to "nature" could be found in its Article 8(g). In fact, whether the word "nature" was retained or deleted would not have any impact whatsoever upon the liability issues, because even non-compliance with the documentary requirements as articulated in Article 8(g) would not affect those relating to limitations of liability and so forth.

12. Since the arguments in favour of simplification and in favour of retention were nicely balanced, the Chairman observed that the question at hand would concern what Delegations could live with in order to move forward and gain consensus. At one time the Chairman had thought that it the divide in opinions could be bridged by deleting the word "nature" and having in the record of the proceedings a clear indication that this would not in any way relieve the carrier or consignor from complying with the provisions required in respect of carriage of dangerous goods, as provided by Annex 18. If that solution was not acceptable, the Chairman would urge Delegations to allow the word "nature" to remain.

13. The Chairman then invited views on the first suggestion, i.e. whether there would be any objection to the deletion of the word "nature", with the record indicating that this did not relieve the obligations arising in respect of Annex 18 in relation to the carriage of dangerous goods, and the particular and specific requirements which would have to be complied with.

14. The Delegate of Tunisia indicated that the expression "nature of the consignment" was the subject of an almost unanimous agreement in the field of air transport, as it was used in most of the international conventions in the field of railroads, maritime transport and transport by road. He therefore suggested that the word "nature" be retained with the addition of the word "general" as a compromise for the various parties to accept.

15. The Chairman observed that it was obvious his first suggestion had not commanded the consensus he had sought, and he therefore asked if his second suggestion, as modified by the Delegate of Tunisia, i.e. to refer to "general nature", would be agreeable. The Delegate of Saudi Arabia indicated that if there was a consensus to accept the Tunisian proposal, he would not object to it.

16. The Delegate of Sweden believed that the first compromise solution which had been suggested by the Chairman, whereby the word "nature" would not be retained but a clear reference to what had to be followed with respect to other rules and with respect to safety or security, would be much more preferable. The Delegate of the United Kingdom endorsed the comments just made by the Delegate of Sweden. Whilst the word and the requirement to insert the nature of the goods had appeared in the Warsaw Convention of 1929 at Article 8(g) as indicated by the Chairman, it had been deleted in The Hague Protocol of 1955 to which most States were now party, and the requirement to state what the nature of goods was had not been a requirement for States since 1955. Furthermore, that particular position had been endorsed with the coming into force of Montreal Protocol No. 4. It seemed to him that to the extent that The Hague Protocol had made an advance in 1955 and this Conference sought to make an advance in 1999, to return to the wording of 1929 would be going backwards. He therefore maintained that the word "nature" should be deleted and suitable language should be included where appropriate, making it perfectly clear that as to safety regarding goods, other rules must be complied with by carriers.

17. The Delegate of Ghana questioned the logic of deleting the word "nature" and retaining the word "weight" in Article 5(c), since the two words connoted security and safety of air carriage. He would, however, be willing to accept the expression "general nature" for the description of the goods.

18. The Delegate of France believed the meeting should take into consideration the texts that had already been adopted in their chronological order since in principle, the objective was to make progress. The Delegate of France was in any case opposed to the adoption of the concept of "general nature" since it was not included in any of the earlier texts. There was absolutely no jurisprudence as to the meaning of "general nature" and in cases of litigation, one would not know exactly what that term connoted. The Delegate of France recognized that the deletion or retention of "nature" was a good

question to ask, but cautioned strongly against the introduction of the word "general", which could only be a bone of contention in the future.

19. The Chairman observed that rather than continuing the discussion at this stage, Delegates would have to resort to more informal and intensive consultations on the issue. He therefore suspended the discussion on the retention or deletion of the word "nature" in order that consultations might take place in a more informal atmosphere.

20. The Chairman then directed the meeting's attention to Article 12 (Delivery of the Cargo), and the words "or consignor" appearing in brackets in paragraph 3. The Delegate of the United Kingdom indicated that the reason why the words "or consignor" appeared in that paragraph resulted from work that the United Kingdom had undertaken in the Legal Committee as a result of representations it had received. This point had subsequently been discussed in the drafting group and upon reflection, the United Kingdom would be content not to press for the words "or consignor" to remain in Article 12, paragraph 3. In the absence of any further views on the subject, the Chairman observed that there was agreement on the deletion of the words "or consignor".

21. The Chairman next referred to Article 21 C (Review of Limits) and recalled the discussions which had taken place on this question in relation to the period at which the review would take place. In the present formulation of Article 21 C, the first review would take place at the end of the fifth year following the date of entry into force of the Convention. The question as to what would be the appropriate period of time became important, bearing in mind that what the review of limits sought to do was to take into account the inflation factor so that the limits which were contained therein might be adjusted accordingly. In light of the observations which had been made earlier, the Chairman asked whether it would be acceptable to provide that if the Convention did not enter into force within five years of the date of signature, the review would take place within a year of the entry into force of the Convention.

22. The Delegate of Italy supported the Chairman's proposal, which would follow the logic of Article 21 C while providing for the possibility of a review of the limits one year after the entry into force of the Convention, if there was some length of time in the process of ratification.

23. The Delegate of Egypt recalled that he had raised this problem at an earlier meeting, at which time he had had in mind a specific formulation which he now delivered at dictation speed. The Chairman observed that the formulation proposed by the Delegate of Egypt was entirely consistent with the suggestion he had just made.

24. The Delegate of India recalled that during the last round of talks on this subject, the Indian Delegation, while accepting the need for providing for periodic review of the limit of liability, had proposed that a conference of parties to the new Convention may be convened at an interval of every six years after the date of entry into force of the Convention for the purpose of reviewing these limits. These conferences could be convened to coincide with the triennial sessions of the ICAO Assembly. This proposal was included in DCW Doc No. 19, which was presented by India and was still on the table. Thanking the Delegate of India for reminding the meeting of his proposal in Doc No. 19, the Chairman thought it would be important to observe also that in terms of Article 21 C, the effect of the review did not carry an automaticity that the article preserved the rights of the States Parties to determine whether or not the review would in fact become effective. The States Parties in Article 21 C, paragraph 2 retained the right within three months after the notification by a majority to register their disapproval, and the revision would not become effective. Thereafter, the depository would be obliged to refer the matter to

a meeting of States Parties. There was thus a balance between the inauguration of the process of review and the competence of the States Parties to pass final judgement as to whether it would come into effect. If a majority determined that in fact it would not be approved, then it would not.

25. The Delegate of the United Kingdom was generally in support of the idea put forward by the Chairman. His understanding was that if the Convention did not come into force within five years, a review would occur within one year of the date when it did come into force. The Delegate of the United Kingdom assumed that where the text in Article 21 C, paragraph 1 referred to how that would be done by reference to the inflation factor corresponding to the accumulated rate of inflation since the date of entry into force of the Convention, one would instead be referring to an accumulated rate of inflation since the end of that five-year period. Wherein the Delegate of the United Kingdom would be in favour of that, he thought that Article 21 C did have the merit that it provided for a mechanical examination of this matter and did lend itself to uniformity. The Delegates of Chile and Nigeria added their support to the proposal put forward by the Chairman.

26. In the spirit of compromise and understanding, the Chairman did not see fundamental differences between any of the proposals put forward, be it the Indian proposal or the Egyptian proposal or the one he had made. All were predicated upon a review; all were predicated upon the fact that the State parties had an important role to play in determining whether or not the consequences of that review would be in fact acceptable or not, because if a majority said it was not to be acceptable, then it would not. The Chairman then asked whether the proposal he had made, which was in substance the proposal of the Representative of Egypt with the provision that it would be within one year of the entry into force, would be an acceptable basis for coming to a consensus. In the absence of any objection, the Chairman indicated that it was so decided.

27. Further consideration of DCW Doc No. 47 was deferred to the next meeting of the Commission of the Whole, and the meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Fifteenth Meeting
(Wednesday, 26 May 1999, at 1515 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Report of the Drafting Committee on its First to Fifth Meetings (DCW Doc No. 47): Articles 49 to 52; title and Preamble of the Convention; Articles 35, 48 and 5(c)

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Commission of the Whole resumed its consideration of the outstanding issues in the Report of the Drafting Committee on its First to Fifth Meetings (DCW Doc No. 47). It was recalled that at the time of adjournment of the previous meeting, the Commission had reserved the issue of the "nature" of the consignment for further consideration in relation to the contents of the air waybill [*cf.* Article 5, paragraph (c), and Article 10, paragraph 2]. Leaving aside, for the time being, this issue, as well as the issue of Regional Economic Integration Organisations (*cf.* paragraphs 2, 3, 4 and 7 of Article 49), the Commission turned its attention to **paragraph 6 of Article 49 *(Signature, Ratification and Entry into Force)* of Chapter VII *(Final Clauses)*** setting forth the requirements for the entry into force of the Convention. The Chairman highlighted two related papers: DCW Doc No. 45 presented by the United States, which proposed that the required number of ratifications by States be increased from 15 to 30 and that the percentage of the total international scheduled air traffic which such States represented be increased from at least 40 per cent to at least 60 per cent; and DCW Doc No. 49 presented by Australia and New Zealand, which advocated ratification by 30 States representing at least 51 per cent of the total international scheduled air traffic of the carriers of ICAO Member States.

2. While supporting the proposed increase in the number of ratifications needed to bring the Convention into force (30), the Delegate of Egypt considered any linkage of that number to a percentage of the total international scheduled air traffic to be totally unacceptable. He contended that such a criterion would undermine all the efforts being made to achieve unification of the rules governing international carriage by air. The Delegates of Cameroon, China, Sweden, Saudi Arabia, the Netherlands, Yemen, Ghana, Pakistan, Germany, Jordan, Mauritius, Senegal, France, Chile, Bahrain, the Syrian Arab Republic,

Italy, Brazil, Cuba, Lebanon and Poland were also in favour of 30 ratifications without any qualitative conditions being attached to that requirement.

3. The Delegate of Cameroon maintained that it would be unfair to make the number of ratifications required conditional upon a fixed percentage of the total international scheduled air traffic as a large number of States could ratify the Convention without the latter ever coming into force. Such a qualitative condition might thus indirectly become a type of veto. He affirmed the importance of following the normal practice in international law and specifying only the number of ratifications required to bring the Convention into force.

4. Concurring, the Delegate of China indicated that, from the point of view of achieving universality for the Convention, it would be inadvisable to attach any qualitative conditions.

5. The Delegate of Sweden recalled that five ratifications had been required for the entry into force of the Warsaw Convention, whereas 30 had been required for The Hague Protocol and the four Montreal Protocols. In noting the long period of time which had elapsed before Montreal Protocol No. 4 had entered into force and that Additional Protocol No. 3 had not yet come into force, he averred that 30 was a high number of ratifications to require. To add to that requirement a condition relating to a percentage of total international scheduled air traffic could create a real obstacle to the entry into force of the Convention. The Delegates of Saudi Arabia and the Netherlands shared this view, with the former contending that any additional condition could undermine the whole Convention as well as impede its entry into force.

6. Deeming 15 ratifications to be too low a number, the Delegate of Ghana endorsed 30 ratifications as being a reasonable requirement. He cautioned that if the Conference were to link that to the volume of international scheduled air traffic it would undermine the integrity of ICAO, an Organization which dealt with States regardless of their size and regardless of whether or not they had airlines operating out of their respective territories. The Delegate of Pakistan was of the same opinion.

7. In supporting the comments made by the previous speakers, the Delegate of Germany indicated that he could accept 30, 50 or even 20 ratifications. He voiced a strong preference for not linking that requirement to a percentage of total international scheduled air traffic.

8. The Delegate of Jordan asserted that such a qualitative condition would not be practicable.

9. Noting that Article 49, paragraph 3, of DCW Doc No. 5 presented by the Secretariat called only for ratification by 15 States and did not specify any additional conditions, the Delegate of Mauritius indicated that the Commission, in the same spirit of compromise with which it had, the previous day, adopted by consensus the package set forth in DCW Doc No. 50, should support the proposal put forward by the Delegate of Egypt for 30 ratifications without any other requirements. This would, of course, be subject to whatever decision was later reached concerning the issue of automatic denunciation of the Convention.

10. The Delegate of Australia recalled that, in preparing DCW Doc No. 49, her Delegation and the Delegation of New Zealand had initially looked at the implications arising from Articles 49 and 51 *(Relationship with other Warsaw Convention Instruments)* together. Consideration had been given in particular to what the impact would be for the transitional arrangements in recognition of the fact that no one would be in a position to ensure that the changeover to the new Convention would be effected on a

given day. Noting that the Conference had, over the past two and a half weeks, been constantly referring to the balance between the needs of different stakeholders and the beneficiaries of the new Convention, the Delegate of Australia indicated that the two Delegations had considered that it would be untenable from both the passengers' and air carriers' perspective if a situation were generated in which the majority, or a significant proportion, of the passengers was not covered by either the existing liability régime or that established under the new Convention. It was against that background that they had started to look at whether or not the passengers' perspective should be given some priority. However, recognizing from the comments made during the present meeting that there was doubt as to whether or not a percentage factor were needed with respect to Article 49, the Delegate of Australia indicated that her Delegation was now quite supportive of the proposal agreed to by many Delegates that the number of ratifications by States required for entry into force of the Convention be set at 30 and that there be no percentage of total international scheduled air traffic associated therewith.

11. The Delegate of Lebanon agreed with previous speakers that 30 ratifications was a sufficient requirement, especially given the importance which the Conference attached to the Convention's early entry into force. He preferred not linking that requirement to the volume of international scheduled air traffic so as to avoid setting a precedent in the field of international law.

12. In also supporting a requirement for 30 ratifications without a qualitative condition, the Delegate of Poland maintained that 15 ratifications was too low a requirement for such an important Convention. Noting that the number of parties to the Warsaw Convention (152) almost equalled the number of UN Member States, he contended that at least 30 ratifications should be required to bring the Convention into force.

13. The Chairman observed that there was an emerging consensus that the number of ratifications (15) specified in Article 49, paragraph 3, of DCW Doc No. 5 was inadequate and that it should be increased to 30, and that there should not be any additional requirements to bring the Convention into force. In clarifying that the ratification by 30 States would bring the Convention into force only between the States Parties to the Convention, he emphasized that that entry into force would not impose any obligations on those States not yet parties.

14. In the absence of further comments, the Chàirman indicated that, on the basis of consensus, Article 49, paragraph 3, would be amended to indicate that 30 ratifications were required to bring the Convention into force, without qualifications. The other provisions contained in that Article would be aligned as necessary.

15. Underscoring that his Government had served as depositary of the Warsaw Convention for almost seventy years and had some experience in the matter at hand, the Delegate of Poland indicated that it was especially interested in the final clauses of the "modernized Warsaw Convention", as he termed it. He expressed doubts concerning certain of the many changes introduced in Chapter VII of DCW Doc No. 47, as well as those proposed in related papers presented by the Delegations of Australia, New Zealand and the United States. The Delegate of Poland cited, in this regard, the deletion of the last sentence of Article 49, paragraph 1 of DCW Doc No. 47 ("Any State which does not sign this Convention may accept, approve of or accede to it at any time.") and the inclusion of a similar provision in paragraph 4 which encompassed not only States but also Regional Economic Integration Organisations. The Delegate of Poland contended that such a provision was incorrect, it not being possible for States or organizations to accede to a Convention which had not yet entered into force. His Delegation nonetheless fully accepted the membership of Regional Economic Integration Organisations in the new Convention, as provided for

in paragraph 2. Noting that many new States had become party to the Warsaw Convention through succession, the Delegate of Poland suggested that paragraph 5 of Article 49 be expanded to include that possibility. With regard to paragraph 7, he spoke in favour of retaining the original wording "shall enter into force" instead of the proposed new wording "shall take effect". In his view, the two terms were not interchangeable. The Delegate of Poland considered the original wording to be better and more correct.

16. In offering clarifications, the Chairman indicated that the concept embodied in the last sentence of paragraph 1 of Article 49 had been transposed by the Drafting Committee to paragraph 4 to take into account the inclusion of a reference to Regional Economic Integration Organisations in paragraph 2. Noting that State succession was one of the most complex issues of international law, the determination of which had created great problems for both scholars and States, he questioned whether it would be appropriate for the Commission to consider that issue in light of the limited time available and concerns to bring the Conference to a successful conclusion.

17. The Chairman then drew attention to **paragraph 2 of Article 51 *(Relationship with other Warsaw Convention Instruments)*** and to two papers relating thereto: DCW Doc No. 49 presented by Australia and New Zealand, proposing that States Parties not be required to give notice of denunciation of the existing "Warsaw System" instruments to which they were party "until the eighty-fifth (85th) instrument has been deposited, or, as the case may be, until instruments have been deposited by such greater number of States as would be necessary to ensure that the States Parties represent at least 75% of the total international scheduled air traffic of the carriers of ICAO Member States."; and that the authority or the prerogative to take such action not be conferred on the Depositary, remaining instead within the sovereign province of each State Party. This would entail the deletion of paragraph 3 of Article 51; and DCW Doc No. 48 presented by the United States, proposing deletion of paragraphs 2, 3 and 4 of Article 51 and alignment of Article 49 by deletion of paragraph 8 (f) and (g) thereof, so that there would be no provisions for automatic denunciation of the "Warsaw System" instruments. That paper contended that such automatic denunciation would create a gap between those States Parties which denounced the existing instruments and those States not yet parties to the new Convention which remained parties to those instruments and thus might discourage States' ratification of the Convention.

18. Referring to paragraphs 2 and 3 of Article 51, the Delegate of Poland queried to whom the requisite notices of denunciation were to be made and which depositary would be deemed authorized to act on behalf of the States Parties to serve the said notices of denunciation. He proposed that the Convention include a statement to the effect that the depositaries of the "Warsaw System" instruments and the depositary of the present Convention should cooperate to ensure the suitable application of the Warsaw Convention with its amendments and the new Convention.

19. The Chairman clarified that, pursuant to the terms of the 1969 *Vienna Convention on the Law of Treaties*, the notices of denunciation could only be served to the respective depositaries of the "Warsaw System" instruments. The receipt of such notices formed part of their depositary functions. He further noted that the Depositary referred to in paragraph 3 was the Depositary of the new Convention, ICAO.

20. Recalling that his State was at least partly responsible for the proposed provision on automatic denunciation, the Delegate of the United Kingdom noted that one aim had been to provide some incentive to States to ratify the new Convention by avoiding the creation of a situation where there was some confusion regarding which instrument was to be applied. Having further reflected on this matter following the issuance of DCW Doc No. 48, he and his Delegation had come to the view that perhaps it

was not a good thing to unduly constrain the sovereignty of States Parties. States Parties should retain their freedom to denounce the "Warsaw System" instruments listed in paragraph 2 as and when it became clear to them that the present Convention was adequate to provide a uniform basis for air carrier liability. Thus paragraphs 2, 3 and 4 of Article 51 and paragraphs 8(f) and (g) of Article 49 should be deleted, as proposed by the United States in DCW Doc No. 48.

21. The Chairman indicated that it was so decided.

22. Consideration was then given to the **title** of the Convention, with the Delegate of Pakistan proposing, as its short name, "The Montreal Convention". He favoured that designation over one which would refer to the Warsaw Convention as it would constitute recognition of the work of the Conference. The title "Warsaw Convention" had already been in use for seventy years. The Chairman proposed, as the Convention's long name, "Convention for the Unification of Certain Rules for International Carriage by Air".

23. The Delegates of Egypt, Saudi Arabia, Panama, Belize, and China endorsed these proposals, with the Delegate of Egypt citing, as one reason, the reference made in the suggested short name to the beautiful city of Montreal, the mecca of international civil aviation.

24. The Delegate of Spain indicated that, while he could, in principle, accept the proposals, he favoured the title "Modernized Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air", even though the new Convention would not be concluded in Warsaw. This designation would avoid any confusion which might arise in connection with the numerous instruments which had been adopted in Montreal and which bore that city's name. In addition, it would reflect the link between the provisions of the Warsaw Convention and those of the new Convention. It would be a pity to lose the name of such a Convention which had been in existence for seventy years.

25. In appealing for the retention of the title "Warsaw Convention" for the new Convention, the Delegate of Poland supported, as a short name, "Modernized Warsaw Convention". The title "Warsaw Convention" was known in aviation circles throughout the world. Recalling that his Government had acted as depositary of the Convention for the last seventy years, even when it was in exile in London during the Second World War, he asked that the title be retained for the sake of tradition and continuity.

26. The Delegate of Colombia voiced support for the long name put forward by the Delegate of Spain and the short name put forward by the Delegate of Poland.

27. The Delegate of Côte d'Ivoire indicated that it would be sufficient for the new Convention to be entitled "Convention for the Unification of Certain Rules for International Carriage by Air" as proposed by the Chairman since it was apparent from the Preamble that it related to the harmonization and codification of the existing rules governing international carriage by air.

28. The Delegate of Bangladesh indicated that, in order to establish the independence of the new Convention from the existing "Warsaw System" instruments and so ensure its success, no reference should be made in its title to the "unification of certain rules". It should instead be entitled "Montreal Convention for International Carriage by Air".

29. In acknowledging the delicate nature of the question under discussion, the Chairman noted that all of the Conference's labours in Montreal had recognized the pivotal role played by the Warsaw

Convention in the development of a liability régime for the carriage of passengers, baggage and cargo at a crucial time in 1929. He recalled, in this regard, the First Preambular Clause, "recognizing the significant contribution of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed in Warsaw on 12 October 1929, hereinafter referred to as the 'Warsaw Convention' ... ;" (*cf.* DCW Doc No. 3). Indicating that it was customary for the short name of a Convention to be derived from the country or city in which it was concluded, the Chairman noted that that was how the title "Warsaw Convention" had come about — not by an express reference in the Convention itself but by reference to the fact that it had indeed been adopted in Warsaw. He emphasized that nothing said in the course of the Conference's deliberations was to be construed as derogating from the seminal contribution of the city of Warsaw to the present efforts. The current discussion was not to take place in an atmosphere in which it appeared that there were competing interests between the achievements of Warsaw and what might be achieved in Montreal. The description of the Convention was intended to give a contemporary name to what the Conference was seeking to achieve in 1999. There was no other contextual meaning. Thus the word "Montreal" could be either included or excluded from the title of the new Convention with the knowledge that the symbolism of the city where it would be concluded would be the short name for what was the modernization and consolidation of the "Warsaw System". The Chairman affirmed that the Conference must continue to pay tribute to the contribution made by the Warsaw Convention in laying the foundations for subsequent instruments and in providing an opportunity for its modernization — as indeed it had in the First Preambular Clause — while at the same time taking stock of contemporary achievements made possible through the work being done in Montreal. He then put the question before the Conference of whether, in that context, the Delegate of Pakistan's proposal and his proposal for, respectively, the short and long names of the Convention, were acceptable ("Montreal Convention" and "Convention for the Unification of Certain Rules for International Carriage by Air"). It was so decided.

30. Drawing attention to the **Preamble** to the Convention set forth in DCW Doc No. 3, the Chairman affirmed that it contained, in a large measure, all the elements which the Conference had sought to achieve, and continued to seek to achieve, and that it might be considered as an adequate reflection of the contents of the succeeding Chapters of the Convention. He thus asked that the Preamble be regarded as an appropriate basis on which to deal with the Convention and that it be accepted in its present form.

31. Noting that the new Convention would become a basic law governing international civil aviation, second only to the *Convention on International Civil Aviation*, the Delegate of Egypt suggested that a link between the two Conventions be established in the Preamble by amending the penultimate clause to read along the following lines: "Reaffirming the desirability of an orderly development of international air transport operations and the smooth flow of passengers, baggage and cargo *in accordance with the principles and objectives of the Convention on International Civil Aviation, done at Chicago on 7 December 1944*;". The Delegate of Saudi Arabia supported this proposal.

32. The Delegate of the United States proposed that a new clause be added to the Preamble in recognition of the frequently-cited objective of preserving, to the extent appropriate in these circumstances, the existing jurisprudence, standards and language which had been developed from 1929 onwards through many instruments. The clause would read as follows: "Desiring to preserve and build upon the body of law developed under the Warsaw Convention and related instruments in force;". The Delegate of Japan strongly supported this proposed amendment to the Preamble.

33. While fully supporting the desire expressed by the Delegate of the United States to allow the international community to build upon the existing jurisprudence relating to the "Warsaw System", the Delegate of Sweden favoured the deletion from the proposed clause of the words "preserve and",

contending that they might restrict the further development of the said body of law. The Delegates of the United Kingdom, Australia, Canada, Denmark and Ireland endorsed this comment, with the Delegate of Canada underscoring that the body of law, both case law and doctrine, which had developed around the Warsaw Convention and its related amendments would be important considerations for Courts in interpreting the new Convention.

34. In highlighting the substantive nature of the proposal made by the Delegate of the United States, the Delegate of Mauritius contended that the Second Preambular Clause which recognized "the need to modernize and consolidate the Warsaw Convention and related instruments" would have been sufficient indication to the Courts of the existing instruments. He would certainly have difficulty in endorsing any proposal to put in the Preamble specific language in respect of jurisprudence. The Delegate of China supported this view.

35. The Delegate of Côte d'Ivoire did not endorse the said proposal in view of the Second Preambular Clause. If the proposal by the Delegate of the United States was based on the use of jurisprudence arising from the "Warsaw System", then it would be sufficient to add to one of the existing Preambular Clauses a phrase along the lines that the Convention would wish to be part of the international law in force.

36. The Delegate of Lebanon preferred not making any mention of jurisprudence in the Preamble as jurisprudence arising from the new Convention might conflict with that arising from the "Warsaw System".

37. The Delegate of Egypt found it difficult to accept the proposal put forward by the Delegate of the United States for the reasons cited by the Delegates of Côte d'Ivoire and Lebanon. In his view, the first two Preambular clauses covered the matter sufficiently. The Delegate of China concurred.

38. In sharing the concerns expressed by the Delegates of Mauritius, Lebanon and Egypt, the Delegate of Sri Lanka averred that inclusion in the Preamble of any reference to jurisprudence would lead to difficulties later on.

39. Agreeing with the Delegate of Mauritius that a reference to jurisprudence would limit the scope of the Convention and later developments which might inspire new jurisprudence, the Delegate of Burkina Faso underscored that such a reference was unnecessary as jurisprudence was born of the application and interpretation of a Convention. That had been true in the case of the Warsaw Convention and would also be true in the case of the new, independent Convention. The application and interpretation of the Convention should not be prejudged. Jurisprudence would develop, aside from that which already existed. The scope of the new Convention should not be limited.

40. Noting that there were both similarities and differences between the approaches taken in the new Convention and the "Warsaw System" instruments, the Delegate of Greece favoured retaining the current references to the latter in the Preamble, deeming them to be adequate. The Delegate of Saudi Arabia shared this view.

41. The Delegate of Nigeria indicated that his Delegation considered that jurisprudence was a means to an end, an end which had already been reflected in the Preamble, and therefore did not support the proposal put forward by the Delegate of the United States.

42. The Delegate of Cameroon averred that it was unnecessary to include a reference to jurisprudence in the Preamble, especially as the body of law had been developed only in certain parts of the world and not globally. Jurisprudence was the fruit of a given system, and the jurisprudence which had arisen in some States should not be imposed on other States.

43. In endorsing the comments made by the Delegates of Greece and Saudi Arabia, *inter alia*, the Delegate of Pakistan indicated that jurisprudence was a concept which developed with the passage of time in light of the deliberations of, and opinions given by, various jurists at various times. The discussions which had taken place during the present Conference, as well as the decisions taken, were a matter of record, and any jurisprudence which would be developed would be based thereon. Thus no reference should be made to jurisprudence in the Preamble in any case.

44. The Delegate of France cited the following three reasons why reference should not be made to jurisprudence in the Preamble: firstly, it would constitute an attack on the separation of powers to indicate to the judge what direction to take in the future. Judges must be free to take their decisions on the basis of the Convention itself, without having earlier jurisprudence imposed upon them. Secondly, the fact that jurisprudence varied substantially from State to State precluded the inclusion of a general reference to jurisprudence such as the one proposed. Thirdly, as the adoption of the Convention would entail the application of new law, there would necessarily be new jurisprudence. To stipulate that reference should be made to existing jurisprudence would be tantamount to depriving the Convention of any legal force. The Courts must have the freedom to develop new jurisprudence with regard to the new legal instrument.

45. The Delegate of the United States recalled that a number of Delegates had, throughout the course of the Conference, as well as in response to his proposal, noted the importance of precedents as had developed under the Warsaw Convention and had supported the view that future efforts to interpret the Convention would truly benefit if, in addition to preserving existing standards, new standards were established . However, in a spirit of compromise and out of a desire to promote the efficiency of the Conference at this late date, he considered it unnecessary to pursue the matter in the context of the Preamble. The Delegate of the United States wished to retain for consideration the possibility of there being another appropriate place for such a concept to be addressed, such as in a resolution set forth in the Final Act of the Conference.

46. The Chairman declared the Preamble approved subject to the amendment to the penultimate clause proposed by the Delegate of Egypt (*cf.* paragraph 31 above) and to his consideration of whether that clause should be made the First Preambular Clause as suggested by the Delegate of Mauritius in view of the fact that it was the *Convention on International Civil Aviation* which governed the Organization. An editorial suggestion made by the Delegate of Spain with regard to the Spanish translation in the Third Preambular Clause of the word "consumers" was noted.

47. The Observer from the International Union of Aviation Insurers (IUAI) recalled that the Drafting Committee had discussed earlier that day the proposal presented by the United States in DCW Doc No. 51 for a new **Article 35A *(Situations not Covered by Chapter V)*** and had decided to refer it to the Commission, considering it to be a matter of substance and not one of drafting. Averring that that proposal had considerable merit in practice, addressing matters which currently gave rise to misunderstandings and caused delays in the resolution of claims, he proposed that a new paragraph 3 be added to Article 35 *(Mutual Liability)* which would read along the following lines: "No action shall lie

against a carrier which is not either a contracting or actual carrier as defined in Article 33". The Observer from IUAI contended that the suggested new paragraph would easily resolve the said misunderstandings.

48. The Chairman indicated that it had been his hope that an appropriate explanation in the Conference's records would have been able to deal effectively with DCW Doc No. 51. The provisions of Chapter V *(Carriage by Air Performed by a Person other than the Contracting Carrier)*, in particular, those of Article 35 as set forth in DCW Doc No. 54 presented by the Chairman of the Drafting Committee, were only applicable if a combination of factors existed. It was necessary to first consider Article 33 *(Contracting Carrier — Actual Carrier)* (*cf.* DCW Doc No. 3), which indicated that the provisions of the Chapter could only be applied if the contracting carrier, as a principal and not as an agent, made a contract of carriage. In addition, the contracting carrier as a principal had to make a contract of carriage with a passenger or consignor or with a person acting on behalf of the passenger or consignor and another person, namely, the actual carrier, performed, by virtue of authority from the contracting carrier, the whole or part of the carriage. If the Chairman had understood the situation which had been posed, it was one in which the carrier acted as an agent and not as a principal. He underscored that the entire Chapter was predicated upon the relationship between the contracting carrier acting as a principal in the contract of carriage and the actual carrier performing the contract of carriage. The Chairman expressed concern that any changes to the present text of Chapter V would give rise to uncertainties. In light of these comments, the question was not reopened.

49. In response to a query by the Delegate of Egypt with regard to **Article 48 *(Reservations)*, paragraph (a)** as set forth in DCW Doc No. 54 and the amendment to that Article proposed by the United States in DCW Doc No. 13 (with Corrigendum), the Delegate of the United States noted that the language of the said amendment, consistent with historic precedent, was not specifically limited to State aircraft, although certainly such aircraft, as defined in the *Convention on International Civil Aviation*, was the principal consideration. Inasmuch as that Convention did not give a definitive scope of the term "State aircraft" and that different States might define it differently, he would not suggest that it was strictly limited to the definition of "State aircraft" by any particular State or that it was appropriate in the current context to try to define that term. The reference made in paragraph 1 of the proposed amended text of Article 48 to "international transportation by air performed directly by that State" related to aircraft generally owned but principally aircraft which were operated by the State itself. This was in contrast to the 1975 amendment which was meant to apply to chartered aircraft which perhaps were neither owned nor operated by the State.

50. The Delegate of the United States endorsed a suggestion by the Chairman that paragraph 1 of the proposed amended text be changed to read "international transportation by air performed *and operated* directly by that State, or any territory under its authority;", indicating that it was certainly consistent with his understanding of the language used in the Warsaw Convention. He noted that in presenting its proposal the United States had intended to take that language rather than to try to craft clearer language which might diverge from existing standards. To a point raised by the Delegate of Singapore regarding the term "territory", the Delegate of the United States indicated that it referred to a government or municipality. While not wishing to unduly limit the terminology, he would have no objection to clarifying the language used.

51. The Delegate of Greece then queried whether paragraph (a) of Article 48 as set forth in DCW Doc No. 54 encompassed the international carriage by air of persons or goods for humanitarian purposes. He cited, as examples, the carriage, on board an aircraft leased by a State or a humanitarian

non-governmental organization under the protection of the UN, of medicine or refugees to a State willing to receive them.

52. The Delegate of Sri Lanka contended that paragraph 1 of the amended text of Article 48 proposed by the United States conflicted with Article 2, paragraph 1, of the new Convention (*cf.* DCW Doc No. 47), which indicated that "This Convention applies to carriage performed by the State ...". In recalling that the Drafting Committee had appropriately left this text unchanged pending further review in connection with Article 48, he suggested that consideration also be given to substituting Article 48, paragraph (a), for Article 2, paragraph 1. The Delegate of Sri Lanka noted that, while Article 2 of the Warsaw Convention applied to all carriage by air covered by that Convention, Article 2 of the new Convention appeared, from its title *(Carriage Performed by State — Postal Items)*, to be restricted to the carriage of postal items.

53. In offering clarifications, the Chairman recalled that the reference to postal items had its origins in Montreal Protocol No. 4. Its inclusion in the new Convention was part of the present effort to consolidate the "Warsaw System" instruments by embracing developments which had taken place since 1929. He noted that the issue of postal items had been dealt with in the same manner in DCW Doc No. 3 and in subsequent work carried out by the Legal Committee. The Chairman further indicated that most postal items in many, if not all, cases fell with the jurisdiction of the State.

54. Noting that Article 2 of the new Convention applied equally to "carriage performed by the State or by legally constituted public bodies provided it falls within the conditions laid down in Article 1", the Chairman underscored that carriage performed by the State was indeed covered. Thus, if there were indeed to be a certain type of transportation performed by the State which it was intended that there should be the ability to make a reservation in respect thereof, it would become necessary to have a provision in Article 48 dealing with reservations so that there would be no conflict between what was contained in the scope of the Convention in Article 2 and Article 48 itself. To make those two Articles consistent, it was necessary to prescribe definitively what type of transportation by air performed by the State would be capable of falling within a reservation. The intent of Article 48 was to circumscribe both provisions to two categories only: international transportation performed directly by the State itself and the carriage of persons, cargo and baggage for its military operations, the latter being a much clearer category than the former. The Chairman left the question raised by the Delegate of Greece (*cf.* paragraph 51) to the authors of the Convention, particularly the United States.

55. The Delegate of Sweden suggested that the word "territory" in Article 48, paragraph (a), be replaced with the word "entity".

56. To a point raised by the Delegate of Singapore, the Chairman indicated that the new Convention applied not only to carriage for reward but also to gratuitous carriage by air performed by an air transport undertaking. Whatever the meaning of the term "air transport undertaking" might be, there were certain circumstances in which gratuitous carriage was indeed encompassed within the scope of application of the Convention. It was his impression that the reference to the word "territory" in Article 48, paragraph (a), had its historical origins at a time in which it was possible to have what was known as the "metropolitan clause" in conventions. The Chairman cited, in this regard, Article 40, paragraph (1), of the Warsaw Convention, which provided that "Any High Contracting Party may, at the time of signature or of deposit of ratification or of accession declare that the acceptance which he gives to this Convention does not apply to all or any of his colonies, protectorates, territories under mandate or any other territory subject to his sovereignty or his authority, or any territory under his suzerainty.". Such

a declaration could thus exclude the application of the Convention's provisions to its territories. The Warsaw Convention equally allowed, in paragraph (3) of the same Article, for its denunciation by a High Contracting Party "separately or for all or any of his colonies, protectorates, territories under mandate or any other territory subject to his sovereignty or to his authority, or any other territory under his suzerainty.". Thus the concept of "territory" obviously had an application in relation to the ability to extend or not to extend the application of the Convention to the non self-governing territories of States. The Chairman observed that the mandate system for non self-governing territories which had been in place at the time of the Warsaw Convention had subsequently given way to the trusteeship system. If those territories were not administered under such a system, then they would have been considered as part of a State as they had not yet attained full independence. He noted that many conventions provided for the extension of their application to non self-governing territories.

57. The Chairman indicated that, in light of the above, it would seem that the question of international transportation by air performed directly by the State Party in the context of the new Convention would include a territory without reference to such a territory as a territory would presumably be regarded as a part of the State Party. Thus to the extent that the territory was a part of the State itself it would be equally covered. Under that umbrella, international transportation by air provided by that State Party was done on the basis that the territory must, in some respects, be regarded as a part of the State for the purposes of application of the Convention. Therefore, exclusion of the reference to "territory" would perhaps do no harm whatsoever as it would still be regarded as international transportation by air performed by the State Party itself. This was fairly consistent with the *Convention on International Civil Aviation*, in particular, with Article 2 thereof, which stipulated that "... the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.". That provision meant that anything which fell within its jurisdiction was a part of the State. The Chairman therefore questioned whether or not it was necessary to retain the word "territory" in Article 48, paragraph (a), in the knowledge that the State which, in terms of sovereignty, was responsible for a territory would be regarded as performing international carriage by air directly.

58. The Delegate of the United States indicated that he appreciated and agreed with the Chairman's helpful comments. He noted that Article 2 of the new Convention, as well his State's proposed amendment to Article 48 contained in DCW Doc No. 13, used the language of the Warsaw Convention. At the same time, the Delegate of the United States noted that the Chairman's interpretation seemed most reasonable and appropriate. His State's concern was primarily with the reference made in Article 48, paragraph (a), to "State Party". If it were understood that that term included entities under the State Party, it would have no objection to the deletion from that paragraph of the reference made to "territory". The Delegate of the United States wished to reiterate the importance of having paragraph (b), perhaps in an abbreviated form. To the point raised regarding carriage performed by aircraft for reward, he indicated that, while it might not be easy or simple to find any "reward" in instances where military aircraft were engaged in a joint exercise, there was some reimbursement which could be construed, or at least argued, to constitute "reward". The reservation envisaged by the United States would have a scope which would be understood as being limited to State ventures which were not profit seeking, being rather acts of sovereignty for State purposes. The United States believed that to be the understanding. It did not belong in the specific language of the new Convention. The latter should rely on the well-established language developed since 1929.

59. The Chairman therefore suggested that the first paragraph of Article 48 be amended to read: "international transportation by air performed and operated directly by that State Party *for the purposes of the State*;".

60. Indicating that the Conference was dealing with problems which were more common than it might think, the Delegate of Canada noted that, while the colonial aspect had disappeared, there were federal governments with provinces which had to be considered. It was not clear that transportation by air performed by the State Party might equate with such transportation performed by a territory "under its authority". He thus suggested that the term "territorial unit" be used in place of the word "territory". This would be consistent with the wording used in new Article 52 *(States with more than one System of Law)* (*cf.* DCW Doc No. 47) further to a proposal by the Delegate of China. The Delegate of Canada considered that the word "territory" had a geographic connotation but not the connotation of a legal person which the term "territorial unit" had. Thus the latter term addressed the concerns raised regarding usage of the word "territory" while also having the advantage of being consistent with the terminology used in the rest of the Convention.

61. In an effort to try and clarify the scope of Article 48, paragraph (a), the Delegate of Namibia offered the following as a possible solution: "International transportation by air performed and operated directly by that State Party *in respect of its functions and duties as a sovereign State*;". With regard to the question of territorial units, he was of the opinion that territorial units were part and parcel of the sovereign State so that when a particular State entered a reservation, that reservation was operative vis-à-vis the entire State, including the territorial units, and not only at the federal level. The Delegate of Namibia thus did not see the need for an additional provision addressing territories or territorial units. The Delegate of Argentina spoke in favour of this proposed new wording for paragraph (a).

62. The Delegate of Egypt suggested that the wording of paragraph (a) proposed by the Chairman be amended by adding, after the words "State Party", the words "*as an authority*".

63. In noting that a number of interesting comments had been made, the Delegate of the United States recalled the example given of the provision of humanitarian aid, which perhaps was not a duty or a function of the State. Underscoring that one common thread which ran through the examples cited was the non-commercial nature of the ventures, he proposed that paragraph (a) be revised to read "international transportation by air performed and operated directly by that State Party *for non-commercial purposes* ...;".

64. Indicating that the host of suggestions put forward all converged on one another, the Chairman proposed to marry those made by the Delegates of Namibia and the United States so that paragraph (a) would read as follows: "international transportation by air performed and operated directly by that State Party for non-commercial purposes in respect to its functions and duties as a sovereign State;". This was accepted, subject to the replacement of the word "transportation" with the word "carriage" suggested by the Delegate of Mauritius to ensure consistency.

65. The Delegate of the United States indicated that the above wording was acceptable to the United States as it met the objective of the language used in the Warsaw Convention and its objective in proposing the amendment contained in DCW Doc No. 13.

66. Drawing attention to **paragraph (c) of Article 5** ***(Contents of Air Waybill or Cargo Receipt)*** (*cf.* DCW Doc No. 47), the Chairman recalled that many of the concerns legitimately expressed

related to the question of the need to have information in respect of the nature of consignments. The latter sometimes had quite profound implications, particularly in the area of safety and security. He cited, as an example, the case where the consignment comprised goods which, by their very nature, might be dangerous. It was important that information be provided. The Chairman stressed the need to consider the contents of the air waybill in the context of modernization of the "Warsaw System" instruments and the simplification of the information provided in the air waybill. The Conference was not attempting, by virtue of the present Convention, to derogate in any way from the obligation to provide, independently of the air waybill, information which States might require for safety purposes or to meet requirements which existed independently to identify dangerous goods or requirements imposed by States in the exercise of their sovereign rights. The fact that the Conference might decide to delete the reference to the "nature" of the consignment in the air waybill must not be construed in any way as derogating from the sovereign right of States to require independent information and to require information as required in relation to dangerous goods or other matters of that kind. In response to the legitimate concerns which had been expressed with regard to this matter, the Chairman suggested that the issue might be resolved by deleting the word "nature" from paragraph (c) of Article 5, by recording exactly what he had just said and by having, in addition, a resolution which quite clearly indicated that in relation to these matters which touched and concerned matters of security and the carriage of dangerous goods and to other matters of that kind, that they were not intended to be prejudiced in any way in terms of the obligations which would be required in the their identification. He understood that, in the light of some consultation which had taken place, this might be the answer to the question.

67. The Delegate of Mauritius indicated that, in an effort to resolve this ultimate question, consultations had indeed taken place. In recognition of the fact that neither The Hague Protocol nor Montreal Protocol No. 4, which were in force, included a reference to the nature of the consignment, and on the clear understanding that any deletion of the word "nature" from the text should not be interpreted to mean any lessening or any derogation from the clear obligations of States under the *Convention on International Civil Aviation*, and that now, following the proposal by the Delegate of Egypt, that Convention was expressly referred to in the Preamble to the present Convention, he suggested that the Conference endorse the deletion of the word "nature" from Articles 5 and 10 *(Evidentiary Value of Documentation)* of the Convention. To make that understanding about the reference to safety and security very clear, the Delegate of Mauritius further suggested that, in addition to the statement just made by the Chairman, there should also be a resolution by the Conference clearly calling on States to comply with the provisions of Annex 18 *(The Safe Transport of Dangerous Goods by Air)* to the *Convention on International Civil Aviation*. He would offer the text of such a resolution to the Secretariat through the Chairman.

68. The Delegate of France voiced support for the resolution proposed by the Chairman and referred to by the Delegate of Mauritius.

69. In endorsing the proposal made by the Chairman, the Delegate of Italy indicated that she viewed the new Convention not in isolation but as part of the body of international law governing civil aviation. Annex 18, while having a different legal value, was also part of the latter, by virtue of its relationship to the *Convention on International Civil Aviation*, which Convention was now referred to in the Preamble to the present Convention.

70. The Delegate of Ghana averred that the Chairman's exhortation, at the opening of the Conference, for the highest degree of compromise possible had become even more pertinent to the deliberations, now at a crucial stage, and, to a greater extent, to the conclusion of this all-important

Conference. He therefore supported the Chairman's proposed compromise in the belief that all States would act responsibly and accordingly for the safe and orderly development of international air transport.

71. In light of the comments made, the Delegate of Zambia suggested that a link be made between Article 4 *(Cargo)* and Article 5 by referring in paragraph (c) of the latter to "an indication permitting identification of the contents of the consignment". This proposal was based on his understanding that the purpose of that paragraph was to facilitate the description and subsequent identification of cargo or consignment.

72. The Delegate of Singapore had noted from the morning's discussions the need to balance the concerns of carriers, consignors and shippers in industry to have a simplified system which would not be economically burdensome or which would slow down or impede the development of industry with the valid safety concerns of States. Those safety concerns had given rise to the support for reference being made in paragraph (c) to the "nature" of the consignment. The inclusion of such a reference would ensure that States knew the nature of the cargo and that they would be in a position to verify that hazardous material would not be improperly carried on board aircraft. It was therefore insufficient for the proposed resolution to call upon States to comply with Annex 18. Compliance with that Annex and other regulations relating to dangerous goods required the cooperation of the whole industry if a balance were to be struck in the new Convention with regard to the issue of safety which had arisen. While the balance to be struck was between the interests of the passenger and the carrier, the safety issue touched the interests of the passenger. It was thus very important that the industry support the safety concerns and give their full cooperation.

73. The Chairman indicated that these observations would be taken into account in the proposed resolution to be submitted by the Delegate of Mauritius.

74. The Delegate of Saudi Arabia reiterated his request that the word "nature" be retained in the text of the Convention. While recognizing the importance of Annex 18 which had been referred to in most of the comments made, he emphasized that it did not have the same legal status as the provisions of either the *Convention on International Civil Aviation*, to which it was attached, or even of the present Convention. Furthermore, Annex 18 was subject to various procedures which differed substantially from those of Conventions. He noted, in this regard, that it was the right of any State to file a difference with regard to the Standards contained in the Annex. Past experience had shown that the Organization's pleas that States comply with the provisions of that and other Annexes often went unanswered. The Delegate of Saudi Arabia averred that the absence of a reference to the nature of the consignment in the air waybill had had a negative impact on aviation safety. In his view, it should be referred to in order to avoid confusion during transportation, especially multimodal transportation, and in any litigation. Recalling that instruments relating to other modes of transport referred to the nature of the consignment in the cargo documents, the Delegate of Saudi Arabia queried why the contents of the air waybill were being dealt with in a different manner. In his opinion, requesting States in a resolution to comply with the provisions of Annex 18 was inadequate. He therefore requested retention of the word "nature" in the text of the Convention.

75. In noting that this was the only outstanding issue remaining to be addressed, the Chairman observed that it was a sensitive one. It was an issue which was of some practical significance to the way in which operations were carried out. It was not, however, an issue which affected liability — the provisions of the new Convention made it clear that the documentation requirements, even if they were not complied with, did not in any way affect liability. There was a legitimate concern that information

should be available regarding the nature of the consignment, particularly when such consignment might have certain intrinsic dangers. As the Chairman had attempted to explain, nothing in Article 5 would prevent States from requiring information regarding the nature of the consignment independent of the contents of the air waybill and even of Annex 18, in circumstances in which they considered that such information was necessary for reasons of safety and security, including the identification of cargo which might have some intrinsic dangerous quality. Such a requirement would be outside of the present Convention and would not be inconsistent with it. It would not be a requirement in the air waybill but by some separate requirement which States could insist upon. It seemed to the Chairman that that, together with what would be contained in the Conference resolution in that context and in the records of these proceedings, would go far in alleviating the concerns which had been legitimately expressed. He therefore urged all participants to recognize the reservations which had been expressed by States while at the same time marching forward in consensus through the deletion from the text of the Convention of reference to the "nature" of the consignment. The Chairman emphasized that the envisaged resolution would go far beyond Annex 18. He reiterated that the proposed deletion would not in any way derogate from the sovereign competence of States, independently and outside of the air waybill in the conduct of activities within its jurisdiction, to require additional information which it might think necessary in order to safeguard its own legitimate interests.

76. There was a consensus to proceed on this basis.

77. The Meeting adjourned at 1800 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Sixteenth Meeting
(Thursday, 27 May 1999, at 1030 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

SUMMARY OF DISCUSSIONS

1. The Chairman indicated that the purpose of the meeting at this stage was to give consideration to a number of documents which, when approved, would constitute the documents to be presented to the Plenary. Although the matters to be addressed were not new, having been reviewed on previous occasions in the Commission of the Whole, the Commission had before it for the first time DCW Doc No. 55, containing the draft Convention for the Unification of Certain Rules for International Carriage by Air. That draft incorporated the full text together with all of the amendments which had been made in the course of the Commission's discussions. In preparing Doc No. 55, it had been necessary to have a careful revision and there were certain editorial changes which had been required merely for the sake of consistency, in order to ensure that those were reflected in the light of the discussions as well as any other issues which may have arisen.

2. The Chairman wished to bring certain points in Doc No. 55 to the meeting's attention. Firstly, he recalled that when the Commission had considered the report of the drafting committee in Doc No. 47 in relation to Article 3 (Passengers and Baggage), paragraph 4, it had approved the text as modified by the drafting committee in respect of that paragraph. Whereas the old and new versions had appeared in Doc No. 47, what was now contained in Doc No. 55 was the alternative text proposed by the drafting committee and approved by the Commission of the Whole.

3. The next point which the Chairman wished to highlight related to what was contained in Article 21 C (Review of Limits). It was recalled that at its fourteenth meeting, the Commission had agreed that the review mechanism would take place within five years of the entry into force of the Convention,but that if the Convention did not enter into force within five years of its first opening for signature, it would be necessary to ensure that the review take place within the first year of its entry into force; the inflation factor which would be used would be adjusted to take account of that fact. The Chairman suggested that the inflation factor to be taken into account be related to the date from which the Convention was open for signature, for consistency. An appropriate adjustment would be made to paragraph 1 of Article 21 C.

4. The Chairman then referred to Article 29 (Servants, Agents — Aggregation of Claims). It was recalled that when dealing with Article 21 A (Limits of Liability) in respect of cargo, it had been agreed, in connection with paragraph 5 of that Article, that whereas the limits which were provided would

not apply if it was proven that "the damage resulted from an act or omission of the carrier ... done with intent to cause damage ...", this usual default provision would not apply to paragraph 3, which related to cargo. For the purpose of ensuring that there was consistency in the document therefore, it was necessary to ensure, in Article 29, paragraph 3, which dealt with the liability of the servant or agent of the carrier, to ensure that that liability was consistent; this could be achieved through the insertion, in paragraph 3, of the words "save in respect of the carriage of cargo." Otherwise, there would be the incongruous situation whereby the carrier would not be liable, but the servant or agent could be.

5. The Chairman then directed attention to Article 40 (Mutual Liability). In earlier versions of the draft Convention this provision had been numbered as Article 35 and had been the subject of a proposed new Article 35 A presented by the United States in DCW Doc No. 51. In light of the explanation which the Chairman had given at the time, it had been agreed not to pursue that proposal. The Chairman wished to reaffirm that Article 40 as presented in DCW Doc No. 55 applied only where a person as principal — and not as agent — made a contract of carriage with a passenger and that contract of carriage was performed by another carrier, i.e. the "actual carrier". Therefore, in circumstances in which a contract of carriage was entered into by an agent (for example, a ticket agent), the provisions foreshadowed in Chapter V and, in particular, the issues arising under Article 40, would not apply.

6. An editorial correction to DCW Doc No. 55 was then pointed out by the Chairman, who indicated that Articles 48 to 52 should appear under the heading of "Chapter VI — Other Provisions," which would be inserted in the final text. Another textual adjustment pointed out by the Chairman concerned Article 53, paragraph 2. The word "includes" in the penultimate sentence was replaced by "applies equally to", and the word "include" in the last sentence was replaced by "apply".

7. The Commission then proceeded with an article-by-article review of the draft Convention presented in DCW Doc No. 55. It was noted that some editorial comments affecting the Russian version would be provided to the Secretariat by the Delegate of the Russian Federation. The Chairman suggested that the same procedure be followed with any comments of an editorial nature affecting the other language versions.

8. Further to a point raised by the Delegate of Sri Lanka in connection with Article 2 (Carriage Performed by State — Postal Items), the Chairman confirmed that paragraph 1 of that article was not restricted to postal items. On a suggestion put forward by the Delegate of Sweden, the title of Article 2 was amended to read "Carriage Performed by State and of Postal Items".

9. The Delegate of Saudi Arabia recalled that at previous meetings, he had asked that Article 5 (Contents of Air Waybill or Cargo Receipt), sub-paragraph (c) be drafted in the way it had appeared in DCW Doc No. 3, i.e. retaining the reference to the nature of the consignment. It was his understanding that a large number of Delegates had held the same view, including some who had not had the chance of expressing their opinion. The Delegate of Saudi Arabia expressed his dissatisfaction with the manner in which the issue had been decided. Whereas an effort was being made to reach a consensus on every issue, certain very important opinions expressed by a number of Delegations had been ignored in a manner not consistent with the diplomatic practices of conferences. The applause which had been heard at an earlier meeting in connection with this change had been interpreted as a unanimous opinion, which was not the case. In DCW Doc No. 56 another Delegation expressed the same concerns, which the Delegation of Saudi Arabia would reiterate when the draft Convention was presented to the Plenary.

10. The Chairman assured the Delegate of Saudi Arabia that the intention had not been to disregard the views of any or several delegations. The meeting's search for consensus had been an extraordinarily difficult road. The Chairman understood the concerns expressed by the Delegate of Saudi Arabia and thanked him for his cooperation.

11. The Delegate of Ukraine also had concerns regarding the deletion of the word "nature" from Article 5, sub-paragraph (c) and requested an explanation of the decision.

12. The Chairman recalled that the previous day, there had been an intense effort to reconcile the different views and to find an answer to this particular question. The Commission had agonized as to whether it was absolutely essential for the word to be retained. It had taken into account the fact that it was engaged in the process of modernization, and that the word "nature" had in fact been deleted in The Hague Protocol as well as in Montreal Protocol No. 4. The Commission had also recognized quite clearly that the removal of the word "nature" must be seen in the context of what it was the air waybill was attempting to do. The Commission's work in respect of Article 5 was to try to simplify the contents of the air waybill in a manner in which the information given would be provided, but would not in any way derogate from the obligation of consignors or passengers to be able to identify the nature of items if required, and, in particular, required for purposes of safety or security. Nothing in Article 5 derogated from the rights of a State to require the information to be provided independently of, and apart from, the contents of the air waybill. The air waybill was merely an arrangement as between the consignor and the airlines and the consignee, and accordingly it would be made quite clear that in fact, to the extent that such information may be required by the State as, for example, for customs purposes to make declaration as to the contents of packages, so too the State could require information to be given in an independent document. It had also been indicated that in recognition of the very serious concern expressed about the nature and content of cargo, States would be reminded of the importance, particularly in relation to the transportation of dangerous goods to be regulated by Annex 18. The Commission would seek the approval of a Conference resolution which would call upon States to take all appropriate measures to ensure continued strict compliance by carriers, shippers and freight forwarders with the provisions of Annex 18 as well as with all applicable safety measures in that regard. DCW Doc No. 53, which would be considered by the Commission, contained a draft resolution to this effect. Against the background that Article 5 contained the contents of the air waybill in so far as this draft Convention was dealing with issues of liability, it was in no way affected by the omission of the word "nature" because it was expressly provided in Article 8 of the Convention that the failure to provide information in respect of documentation or non-compliance with those provisions would not affect the existence or the validity of the contract of carriage which would nonetheless be subject to the liability rules of the Convention.

13. The Delegate of Egypt wished to be associated with the views expressed by the Delegates of Saudi Arabia and Ukraine, recalling that his Delegation had been among those who had requested the floor at the end of the Commission's discussion on the nature of the cargo. Noting what had been stated by the Delegate of Saudi Arabia, the Delegate of Egypt added that the compromises which had been reached about some of the controversial points in this Conference did not, in most cases, take into account the needs and interests of the developing countries. The compromise that had been reached on Article 5, paragraph (c) figured among these compromises. The Chairman thanked the Delegate of Egypt for the cooperation he had shown in this matter.

14. The Delegate of Burkina Faso also wished to be associated with the statement made by the Delegate of Saudi Arabia. His Delegation had requested the floor during the Commission's consideration of Article 5 because Burkina Faso felt that the search for a consensus should not make it impossible to

listen to one another. It was not just a question of the safety of air transport that should be taken into account; one had to look at this from the point of view of liability as well, because if one looked at the articles that followed, particularly Articles 16 and 17, the nature of the goods was an essential element in determining the liability. Burkina Faso therefore believed that eliminating this term from the air waybill would create problems because various parties in any dispute could avoid liability in the case of a problem. The deletion of the word "nature" from The Hague and Montreal Protocols did not serve as a justification for its elimination from the new Convention, which was an attempt to strengthen, modernize and improve the Warsaw Convention of 1929. Such effort to strengthen and modernize should take into account the interests and views of all parties.

15. The Delegate of Yemen added his support to the views expressed by the Delegate of Saudi Arabia regarding the need to retain the word "nature" in Article 5, paragraph (c). Having noted the references which had been made to the effect that Annex 18, which dealt with the transport of dangerous goods, covered this matter, Yemen maintained that a technical annex could not be regarded as a document which would guard the Convention, the legal basis for governing such a matter. The Delegate of Yemen agreed that the interests of all parties should be taken into consideration; if a vote were to be taken on the subject, he believed that the majority would prefer to retain the word "nature".

16. The Delegate of Pakistan also wished to place on record that right from the beginning, his Delegation's standpoint had been that the word "nature" should be included. This would facilitate the work of the consignor as well as the carrier for the reason that it would clarify what sort of consignment was taken, in particular whether or not it was a perishable good. Such indication should not include the details of the items, but should simply provide a general description. It was his understanding that the difficulty experienced by some countries regarding inclusion of the word "nature" was related to the fact that this element would be difficult to incorporate in an electronic system already being used in those countries for issuing the documentation. The Delegate of Pakistan did not think that this reason should carry any weight in deciding whether to include the word "nature". He also wished to bring to the meeting's notice Article 10 (Evidentiary Value of Documentation), paragraphs 1 and 2, which referred to the air waybill or cargo receipt as *prima facie* evidence; the Delegate of Pakistan observed in this respect that if the nature of the consignment was not given, the documentation in question would not be used amply as an evidence, giving rise to some problems. He therefore supported previous speakers and requested that the issue be properly resolved.

17. Quite aside from the important matter of safety, the Delegate of Togo believed that the inclusion or non-inclusion of the word "nature" should be looked at with respect to the balance that should exist between the interests of the consignor and the interests of the carrier. Togo considered that its inclusion would facilitate the carrier's task in administering proof, mainly with respect to Article 17, whereas its deletion would favour the consignor. The choice of either would thus depend upon which interest was favoured.

18. The Delegate of Guinea supported the arguments put forward by Egypt, Saudi Arabia, Burkina Faso, Yemen and others, and added that in his Delegation's view, it was important to also facilitate the work of the customs services. To the extent possible, a reference to national legislation, along the lines of what appeared in Article 27 (Advance Payments) could be included. In relation to the last point made by the Delegate of Guinea, the Chairman directed attention to the provisions of Article 15, which enabled customs authorities to require the consignor to furnish information as necessary to meet the formalities of customs, police and other public authorities before the cargo could be delivered. Customs

declarations in particular could, and in fact quite often did require that the nature of the packages or of the contents be properly disclosed.

19. The Delegate of Oman endorsed the retention of the word "nature" since certain provisions that were not covered by Annex 18 would require clearance from State authorities and the reference to "nature" would help in arrangements for clearing such cargo. The Delegate of Indonesia supported the statements by Saudi Arabia, Yemen and others, as did the Delegate of Jordan, who had asked for the floor at the fourteenth meeting but had not been accorded the opportunity to express his views. The Delegate of Côte d'Ivoire also supported the retention of the word "nature". The Conference was about to adopt a legal instrument and should be aware of legal considerations. As had already been stated, the word "nature" provided for evidentiary proof for other articles appearing later on in the Convention, namely Article 16, sub-paragraph (d) and Article 17, paragraph 2 (a). If the Conference wished to delete the word "nature" from Article 5, it would have to redraft the other provisions.

20. The Delegate of Norway supported the deletion of the word "nature" from Article 5 for the reasons already given by the Chairman. The Delegate of Thailand also supported the deletion of the word "nature" from Article 5, and accepted that in practice the formalities of customs were sufficient for the purpose of security of aviation.

21. The Chairman suggested that further discussion on Article 5 be suspended for the time being. There were no comments related to Articles 6, 7, 8, 9, 11, 12, 13 and 14. Article 10 was reserved in light of its relationship with Article 2, and Article 15 was reserved pending finalization of Articles 2 and 10.

22. On a suggestion by the Delegate of Lebanon, the last sentence of Article 16, paragraph 2 was amended to conclude with the words "or its servants or agent". A suggestion put forward by the Delegate of China for amending the first sentence of Article 16, paragraph 2 to qualify the second reference to "baggage" with the adjective "checked" was noted for further consideration at the next meeting.

23. Further consideration of DCW Doc No. 55 was deferred to the next meeting and the meeting adjourned at 1230 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

COMMISSION OF THE WHOLE

Minutes of the Seventeenth Meeting
(Thursday, 27 May 1999, at 1525 hours)

SUBJECTS DISCUSSED

1. Agenda Item 9: Consideration of the draft Convention

— Final review of draft Convention as set forth in DCW Doc No. 55: Article 16 onwards, with package regarding Articles 5, 10, 15 and 32; draft Final Act (DCW Doc No. 52); draft Resolutions Nos. 1, 2 and 3 and draft Statement of the Conference (DCW Doc No. 53)

SUMMARY OF DISCUSSIONS

Agenda Item 9: Consideration of the draft Convention

1. The Commission of the Whole resumed its Article-by-Article review of the draft text of the Convention set forth in DCW Doc No. 55. It was noted that points of an editorial nature raised during the discussion would be dealt with in consultation with the Secretariat to ensure consistency in and among the various language versions of the Convention.

2. Recalling a point raised by the Delegate of China at the end of the previous meeting regarding **paragraph 2 of Article 16** ***(Death and Injury of Passengers — Damage to Baggage)***, the Chairman clarified that the reference made to "baggage" in the third line of the first sentence was a reference to "checked baggage", the term used in the first line of that sentence.

3. Drawing attention to **Article 19** ***(Exoneration)***, the Delegate of Lebanon proposed the deletion of the last sentence ("For the avoidance of doubt, this Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 20."), averring that it was not customary to have such a sentence in an international instrument. He also suggested that the Article be divided into two after the first sentence.

4. A compromise solution then suggested by the Chairman, whereby the phrase "For the avoidance of doubt," would be deleted from the last sentence of Article 19, was accepted by the Conference.

5. Noting that the non-English language versions of DCW Doc No. 50 had not been available when **Article 27** ***(Advance Payments)*** had been discussed earlier (COW/13) in the context of the consensus

package, the Delegate of Côte d'Ivoire proposed that the first sentence be amended to read "In the case of aircraft accidents resulting in death or injury of passengers, the carrier shall, *unless there are no objections under its national law or the law of the country of the victim*, make advance payments ...". He contended that the current wording ("... the carrier shall, if required by its national law, ...") was restrictive. A strict interpretation of that wording would be that, if the national law in a carrier's country did not specifically oblige the carrier to make such payments, then the carrier would not be able to do so, even if it so desired. Under his proposed wording, the carrier would always have the freedom to make advance payments, even in cases where its national law did not contain any reference thereto — the case in the vast majority of countries — unless such payments were prohibited under the said national law. The Delegate of Côte d'Ivoire underscored that his proposal fell within the terms of the consensus reached earlier as it provided for advance payments and referred to national law. It differed in that it did not impose that national law on the carrier. His proposal was in the same spirit as Article 22A *(Freedom to Contract)* set forth in DCW Doc No. 3 ("Nothing contained in this Convention shall prevent the carrier from making advance payments based on the immediate economic needs of families of victims or survivors of accidents ..."). The Delegate of Côte d'Ivoire noted that his proposal contained the additional phrase "or the law of the country of the victim" so as to take into account the interests of both the carrier and the victim. Justification for this addition was the same as that given for the inclusion of the fifth jurisdiction.

6. While recognizing the legitimacy of the concerns expressed by the Delegate of Côte d'Ivoire and others, the Chairman reiterated his earlier comments (*cf.* DCW-Min. COW/13, paragraphs 2-5, 16 and 17) regarding the fragility of the consensus package (subsequently approved in all language versions) and the importance of not disturbing the balance of interests which it represented. He recalled the agreement reached as part of that consensus package that a Resolution urging carriers to make advance payments without delay and encouraging States Parties to the Convention to take appropriate measures under national law to promote such action by carriers would be included in the Final Act of the Conference in order to give effect to the concerns raised and to the consensus package as a whole. Article 27 was thus not to be read in isolation but in conjunction with that Resolution, a draft text of which was set forth in DCW Doc No. 53 (*cf.* Draft Resolution No. 2).

7. The Delegate of Nigeria noted that, while the current wording of Article 27 would not lead to problems in the case where the national law of the carrier stated that advance payments were to be made by the latter, it would give rise to difficulties in the case where the national law of the carrier did not mandate such payments but the national law of the victim did. The proposed Resolution was based on the assumption that States would act in good faith and stipulate in their national laws that carriers were to make advance payments. If, however, States did not take such action, complications could arise in the practical application of Article 27 if the national law of the carrier did not provide for advance payments but the national law of the victim did. The Delegate of Nigeria maintained that the proposed insertion of the words "*unless there are no objections under its national law*" would not in any way harm the consensus package. The further addition of the words "*or the law of the country of the victim*" would balance the interests of the two parties involved. He underscored, in this regard, that the current wording was based only on the national law of one such party. It was for these reasons that the Delegate of Nigeria supported the proposal made by the Delegate of Côte d'Ivoire.

8. The Chairman recalled that when the Conference had considered the question of advance payments there had been two very opposing trends: one which would require that advance payments be made fully mandatory by the Convention; and another that such payments should be made on a purely permissive basis. According to the latter trend, it would be excessive to make advance payments mandatory. The practice of carriers to make such payments on humanitarian and other grounds called for

general recognition of the need to do so. A compromise had subsequently been reached, couched in language which allowed advance payments to be mandatory if required by the national law of the carrier. In explaining the reasoning behind that formulation, the Chairman noted that at the time when a carrier would be required to make an advance payment — immediately after an accident — there would be no established liability. No adjudication would have taken place in respect of that liability. No court action would have taken place. It might well turn out that there was no liability at all on the part of the carrier. Its motivating force might have been the humanitarian considerations which arose at a moment of tragedy, including the desire to afford some relief. In that context, to make advance payments mandatory would be to have a payment being made even if the claim were unfounded. As it would be the carrier which would have the responsibility, it had to be the national law of the carrier which would impose on it that obligation which went beyond an obligation arising from its liability, an obligation which, on humanitarian grounds, the national law of the carrier considered just and fair to impose upon the carrier. That was why it was the carrier's national law which was the regulating law. To allow another national law to stipulate that a carrier must make an advance payment without delay even if it were not liable for the accident would create problems. These considerations had led to the current wording of Article 27, a wording which constituted a very delicate compromise. In this context, the Chairman urged the Conference to retain the present form of that Article and to seek, by virtue of the latter and the companion Resolution, to urge carriers to make advance payments without delay and to encourage States to take appropriate measures under national law to promote such action by carriers. The Conference agreed to proceed on that basis.

9. The Delegate of Sri Lanka requested clarification regarding the scope of **Article 28 *(Basis of Claims)***, whereby "... any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention ...". Recalling that matters such as the non-fulfilment of a contract of carriage, denied boarding and refunds were not covered by the Warsaw Convention, he indicated that he would not wish it to be construed that such matters were within the ambit of the new Convention under the said Article, especially as more cases were anticipated involving matters of that nature as a result of the increased usage of codesharing and other similar arrangements.

10. The Chairman indicated that the scope of the Convention would govern the regulation of the types of actions which could be brought before the Courts. The purpose behind Article 28 was to ensure that, in circumstances in which the Convention applied, it was not possible to circumvent its provisions by bringing an action for damages in the carriage of passengers, baggage and cargo in contract or in tort or otherwise. Once the Convention applied, its conditions and limits of liability were applicable.

11. Referring to **paragraph 2 of Article 32 *(Jurisdiction)***, the Delegate of Tunisia averred that the introduction of the fifth jurisdiction would give rise to complex situations in which the carrier could, as a result of a single accident, find itself forced to be take part in litigation in a number of States corresponding to the home countries of the passengers. To facilitate future implementation of this Article, he requested examples of how the fifth jurisdiction could be applied.

12. The Chairman recalled, in this regard, the extensive statement which he had made regarding the implications of paragraph 2 during his presentation of the consensus package set forth in DCW Doc No. 50 (*cf.* DCW-Min. COW/13, paragraphs 16 and 17). As an example, he cited the case of an air carrier which did not operate services into State A, either on its own aircraft or on that of another pursuant to a commercial agreement, although it might have a codeshared flight on another aircraft to another destination and although that aircraft with which it had a codeshared flight to another destination — not State A — itself operated to State A. A resident of State A who suffered an injury on such a flight

between two destinations of that codeshared aircraft not touching State A could not invoke the fifth jurisdiction by suing the air carrier which was not the actual carrier. In those circumstances, the mere fact that the air carrier with whom the codesharing arrangements might have existed might itself have had an office in State A would not be an adequate basis. Underscoring that the scope of the provision on fifth jurisdiction was thus rather restricted, the Chairman hoped that his explanation would allay concerns expressed with regard thereto.

13. Stressing that the new Convention should be based on the principle of balancing the interests of consumers and air carriers, taking into account the small- and medium-sized air carriers, the Delegate of Viet Nam indicated that, in the view of her Delegation, the fifth jurisdiction should only be applied under the following conditions: that it was the jurisdiction in which the passenger at the time of the accident had his principal and permanent residence; that it was the jurisdiction to or from which the carrier actually operated air transport services on its own aircraft; and that it was the jurisdiction in which the carrier conducted its business from premises which it leased or owned.

14. At the request of the Delegate of Egypt, it was agreed not to complete consideration of Article 32 until a decision had been reached regarding related Articles 5 *(Contents of Air Waybill or Cargo Receipt)* and 10 *(Evidentiary Value of Documentation)*.

15. Noting that **Article 34 *(Limitation of Actions)*** stated in very emphatic terms that if an action for damages was not brought within a period of two years then any right that a claimant might have would be extinguished, the Delegate of Namibia averred that by necessary implication it removed whatever discretion a Court might currently have in most jurisdictions to condone non-compliance with statutory time limits in the interest of equity, *i.e.* in appropriate cases and on good cause being shown. Foreseeing that serious problems would arise from the current formulation of Article 34, he proposed, pursuant to paragraph 6 of DCW Doc No. 44 presented by his Delegation, that a new paragraph 2 be added along the following lines: "Notwithstanding the provisions of paragraph 1 hereof a Court seized of a case may, on good cause shown, condone non-compliance with the time-limit referred to therein.". The Delegate of Namibia underscored that this new provision simply empowered a Court to condone non-compliance and did not compel it to do so. Thus if it were inserted in Article 34, it would in no way impinge on the authority of those Courts in those jurisdictions where their laws did not so provide. He averred that it would solve many problems for those jurisdictions where, because of constitutional provisions relating to fairness, it was a requirement.

16. Observing that this was a matter of substance which had been considered before, the Chairman indicated that it related to the exercise in jurisdictions to deal with time limits on the basis that there might be aspects which would render it fraudulent or inequitable. He noted that many Courts did indeed exercise that jurisdiction. In terms of private international law, in terms of limitations of action, the matter was viewed as a procedural one, as a classification to be determined by *lex fori*. It was not without significance that that language had been used for the last seventy years in Article 29 of the Warsaw Convention, as well as in its successors. The Chairman had no doubt that, if any action came up before a Court under circumstances where the claimant had been precluded from bringing suit as a result of imprisonment, kidnapping or matters of that kind, then a Court, in the exercise of its inherent jurisdiction, in exercise of *lex fori*, would come to the conclusion that time did not begin to run until the claimant were free to be available. He noted that Courts had done that on a continuous basis, on the basis that it is the Court of *lex fori* which dealt with time issues of that kind. The Chairman affirmed that the provision was wholly consistent with international jurisprudence in relation to matters of this kind.

17. Bearing in mind that practice, and the fact that the provision in its present form had indeed stood the test of time without any recognized difficulties arising, and in the context of the explanation given by the Chairman, the Conference accepted Article 34 in the form presented.

18. The Delegate of Côte d'Ivoire suggested that **Article 56** ***(States with more than one System of Law)*** be merged with **Article 52** ***(Reservations)***, forming a second paragraph, so that the provisions enabling States to waive the application of the Convention would be grouped together. To meet this concern, the Chairman proposed that Article 56 be placed immediately after Article 52. In light of comments made by the Delegates of Mozambique and Spain, it was decided to transfer Article 52 to Chapter VII *(Final Clauses)* and to place it after Article 56.

19. The Delegate of Peru then presented DCW Doc No. 56 containing a **declaration** by his Delegation which, *inter alia*, set forth the reasons why it favoured the retention of the word "nature" in Article 5, paragraph (c), and Article 10, paragraph 2, of the Convention. He noted that, if the Conference were to resolve that issue in a manner which was satisfactory to his State, then it would withdraw that part of its declaration so as to achieve consensus. The declaration also expressed the Delegation's concern that the final clauses of the Convention did not establish the procedure for the withdrawal of a denunciation made by a State Party pursuant to Article 54 thereof. The Delegation harboured that concern despite being aware that certain matters referred to in the final clauses were covered by the 1969 *Vienna Convention on the Law of Treaties*. The declaration further expressed the Delegation's view that the absence in the Convention of any reference to its duration and to a procedure for its amendment was inappropriate.

20. The Conference duly noted the aforesaid declaration by the Delegation of Peru.

21. In echoing the Delegation of Peru's concern regarding the absence of any provision regarding the amendment of the Convention, the Delegate of Bangladesh enquired as to what procedure would be followed in the event that States Parties wished to take such action. The Chairman noted that, while there was no express provision in the Convention relating to its amendment, the over-arching legal régime established by the 1969 *Vienna Convention on the Law of Treaties*, which codified the rules of international law relating to international treaty-making, would govern. There were fairly well-established rules which would enable Protocols of Amendment of one form or another to be drawn up and those rules would be observed.

22. The Chairman noted that the four Articles in DCW Doc No. 55 remaining to be finalized — **Article 5** ***(Contents of Air Waybill or Cargo Receipt)***, **Article 10** ***(Evidentiary Value of Documentation)***, **Article 15** ***(Formalities of Customs, Police or Other Public Authorities)*** and **Article 32** ***(Jurisdiction)*** — had been the subject of further intense consultations in an effort to maintain a consensus and to seize the opportunity to go forward. It would be recalled that Article 5 related to the question of whether the air waybill should indicate the nature of the consignment; that Article 10 had been set aside in view of the consequential issues which could arise from a resolution of that matter; that Article 15 had been set aside as it had been considered that it might provide some assistance in the resolution of that matter; and that Article 32 had been set aside at the request of the Delegate of Egypt, who had indicated that the resolution of the issue of nationality might form an integral part of the overall resolution of the issues before the Conference. The consultations which had taken place had sought to determine whether or not all those matters could be resolved together. While there was no doubt that all of the concerns expressed on all parts of the said issues were legitimate concerns, it had been recognized that, if the Conference were to go forward with what would be acceptable as a modernized and universal régime, it would be necessary to be able to arrive at acceptable compromises. All were aware that, at the end of the

day, there would be no ideal solution to the issues which the Conference was seeking to resolve on a universal basis. There could only be overall generally acceptable solutions with which all could live and which would provide a better foundation for moving forward together rather than each State going its separate way with the disuniformity and disorder which such action would entail. It was in this context that the Chairman made the following proposals of a composite nature: firstly, there would be a new **Article 6** dealing with the issue of the nature of the cargo which would read "The consignor may be required, if necessary, to meet the formalities of customs, police and similar public authorities to deliver a document indicating the nature of the cargo. This provision creates for the carrier no duty, obligation or liability resulting therefrom.". The last sentence of that Article was similar in substance to the last sentence of Article 15, paragraph 2, according to which "The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.". There would be no changes to Articles 10 and 15. With regard to Article 32 dealing with the fifth jurisdiction, an Article which had engendered considerable concern relating to nationality, the original formulation contained in the draft consensus package, DCW-FCG No. 1 (Revision 2), would replace the last sentence of paragraph 3(b), so that it would read "The nationality of the passenger shall not be the determining factor in this regard.". This change was being made in the context that what was being dealt with was the determination of the principal and permanent residence. In that context, therefore, nationality could not be the determining factor. In making this change to the present text, it must be recognized that in determining the principal and permanent residence, Courts would have to have regard to all of the relevant facts and circumstances. The change did not preclude this. The Chairman expressed the hope that with all the changes which he had proposed being taken together the Conference might now be able to complete its work on the text of the draft Convention as a package.

23. The Conference decided to move forward on that basis.

24. To a point raised by the Delegate of Singapore, the Chairman affirmed that the new Article 6 was not inconsistent with the other provisions of the Convention, including Article 15, paragraph 2.

25. The **Final Act of the Conference** set forth in DCW Doc No. 52 was then approved, on the understanding that minor changes would be made to the names of the members of the various Committees in consultation with the Delegations represented thereon.

26. Consideration was then given to DCW Doc No. 53 containing the texts of three draft Resolutions relating to the early ratification by States of the Convention, timely advance payments by carriers to the families of victims or survivors of accidents and strict compliance by carriers, shippers and freight forwarders with the Standards of Annex 18 to the *Convention on International Civil Aviation*, as well as the text of a draft Statement by the Conference for the purpose of interpretation of the new Convention.

27. **Draft Resolution No. 1** was approved subject to the last sentence of the First Operative Clause being amended to refer to Article 53 instead of to Article 49.

28. **Draft Resolution No. 2** was then approved subject to the insertion of the words "without delay" after the words "advance payments" in the First Operative Clause, suggested by the Chairman, and to an editorial amendment relating to the French translation of the expression "to take appropriate measures under national law" appearing in the Second Operative Clause, suggested by the Delegate of Senegal.

29. At the suggestion of the Chairman, the First Operative Clause of **Draft Resolution No. 3** was amended to refer to "continued *strict* compliance". Linguistic points raised by the Delegates of France and Senegal concerning the French translation of the expressions "The Conference resolves" and "Annex 18 to the Convention" were noted by the Secretariat.

30. Pursuant to a point raised by the Delegate of Egypt regarding the non-mandatory nature of certain of the "provisions" of Annex 18 referred to in the First Operative Clause, namely, Recommended Practices, the Chairman suggested that the term "provisions" be replaced by the term "Standards" to avoid any questions concerning ensuring strict compliance therewith. Further to an additional point raised by the Delegate of the Netherlands regarding the need to protect people living in the vicinity of airports, the Chairman suggested that the Second Preambular Clause be amended to read "Recognizing the importance of the protection of passengers, crew, air transport workers *and the general public*;".

31. While not opposing the adoption of Draft Resolution No. 3, the Delegate of Burkina Faso questioned its usefulness, underscoring that the *Convention on International Civil Aviation* already imposed an obligation on States to apply the Standards contained in its Annexes. He also contended that Draft Resolution No. 3 did not reflect the discussions which had taken place.

32. The Delegate of Greece voiced support for the Resolution, averring that it was useful as it referred to the need to establish an air waybill.

33. The Conference then approved Draft Resolution No. 3, subject to the amendments outlined above.

34. The **draft Statement by the Conference** was also approved, subject to the opening line being amended to read "adopted *at Montreal* on 28 May 1999", as suggested by the Delegate of Nigeria, and to the second paragraph being amended to refer to Article 32 instead of to Article 27. The Chairman noted that the Statement should be seen in the context of the extensive elaboration which he had given in presenting the consensus package contained in DCW Doc No. 50 (*cf.* DCW-Min. COW/13). The text of the amended draft Statement is given below:

"For the purpose of interpretation of the *Convention for the Unification of Certain Rules for International Carriage by Air*, adopted at Montreal on 28 May 1999,

"*THE CONFERENCE STATES AS FOLLOWS:*

1. with reference to Article 16, paragraph 1, of the Convention, the expression 'bodily injury' is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air;

2. with reference to Article 32[1], paragraphs 2 and 3, these provisions are included in view of the special nature of international carriage by air."

35. The Delegate of Germany then informed the Conference that that the Member States of the European Community (EC) wished to make the following **declaration** relating to the relationship between the EC and Members States with regard to certain competencies transferred to the EC by the Member States and to the establishment of a commitment to inform States Parties thereon, for inclusion in the Final Act:

"Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom, Member States of the European Community, will declare, upon their signature of the Convention, that in accordance with the Treaty establishing the European Community, the Community has competence to take actions in certain matters covered by the Convention. Furthermore, given the exceptional nature of the present Convention, provisions for informing States Parties as to the nature and extent of competence transferred to a Regional International Economic Organisation by its Member States are not required. Nevertheless, the Member States of the European Community will ensure that, at the time of depositing its instrument of ratification, acceptance, approval or accession, the European Community shall make a declaration specifying the matters covered by this Convention in respect of which competence has been transferred to it by its Member States. Any changes occurring in the division of competence between the European Community and its Member States shall be immediately declared."

36. This declaration was duly noted by the Commission.

37. The Delegate of Senegal questioned whether the Final Act was the appropriate place in which to record the above declaration, contending that it should instead appear in the body of the report of the Conference.

38. The Delegate of Germany, noting that it was the normal practice to include in such a Final Act important declarations by Groups of States which were of interest not only to the Groups concerned but also to other States, averred that it should be possible to include the above declaration by the EC Member States in the present Final Act.

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[1] Article 33 in the final, published version of the Convention (Doc 9740)

39. The Delegate of Canada indicated that his Delegation had some difficulty with the proposed incorporation of the declaration into the Final Act given that it reflected some rather complicated arrangements within the EC legislation, that there had been no opportunity to study it, that it not have any instructions on how to handle the declaration and that it would be asked to sign the Final Act. He wondered if the Delegate of Germany would be kind enough to perhaps reconsider the position and to agree to the declaration's being included in the "travaux préparatoires" instead of in the Final Act simply to accommodate those States which did not have any instructions regarding the complicated matters.

40. In supporting this proposal, the Delegate of Mauritius recalled that the Statement of the Conference was being included in the "travaux préparatoires".

41. In light of the comments made, the Chairman indicated that there would be adequate recording of the contents of the declaration in the records of the Conference and equal recording at the time of the signature of the Convention of matters relating to the declaration.

42. The Delegate of Germany voiced his acceptance of this proposed method of handling the declaration by EC Member States.

43. To a request by the Delegate of Ghana for more information regarding the implications of the said declaration, the Chairman, speaking in general terms, indicated that under the Treaty establishing the EC there were certain matters relating to international air transport which fell within the EC's competence. The jurisdiction to deal with such matters was dealt with by the EC. That was not to say that the EC, insofar as being a party to the Convention, would have any votes additional to those of EC Member States; nor was that to say that the EC Member States themselves would then have independent competence in respect of the same matters covered by the EC. The exact nature of those areas was rather complex. What the draft declaration was saying in effect was that the EC Member States would, at the time of depositing their instruments of ratification, *etc.*, specify the matters which would fall within the EC's competence; furthermore, any changes in those matters would, in fact, be immediately declared. It almost became necessary to look at the said Treaty to see which matters fell within the EC's competence. In indicating that this was not the first Convention where this problem had arisen, he noted that it had also surfaced in connection with the 1982 *UN Convention on the Law of the Sea*, to which the EC was also a party. Similar provisions had been made so that when those matters relating to the law of the sea which had been almost delegated under the Treaty to the EC arose, it would be for the EC to deal with them and not the individual Member States of the EC. He suggested that further information be obtained from the Observer from the EC.

44. The Commission of the Whole then reconvened as the Plenary (P/6) at 1920 hours.

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the Sixth Meeting
(Thursday, 27 May 1999, at 1920 hours)

SUBJECTS DISCUSSED

1. Agenda Item 10: Adoption of the Convention and of any Resolutions

2. Agenda Item 11: Adoption of the Final Act of the Conference

SUMMARY OF DISCUSSIONS

Agenda Item 10: Adoption of the Convention and of any Resolutions

1. The Plenary adopted the draft Convention as presented in DCW Doc No. 55, subject to the amendments made thereto in the Commission of the Whole (COW/16 and COW/17).

Agenda Item 11: Adoption of the Final Act of the Conference

2. The Plenary next adopted the Final Act of the Conference as set forth in DCW Doc No. 52, on the understanding that minor changes would be made to the names of the members of the various Committees in consultation with the Delegations represented thereon.

Agenda Item 10: Adoption of the Convention and of any Resolutions

3. The Plenary then adopted, subject to the amendments made by the Commission of the Whole (COW/17), the three draft Resolutions presented in DCW Doc No. 53 relating to the early ratification by States of the Convention, timely advance payments by carriers to the families of victims or survivors of accidents and strict compliance by carriers, shippers and freight forwarders with the Standards of Annex 18 to the *Convention on International Civil Aviation*.

4. The Plenary also adopted the draft Statement by the Conference for the purpose of interpretation of the new Convention contained in that same DCW Doc No. 53, subject to the amendments made by the Commission of the Whole (COW/17) and to a linguistic point raised during the present meeting by the Delegate of Panama relating to the Spanish translation of the phrase "jurisprudence ... is developing" appearing in the first paragraph. The text of that Statement in its amended form is given below:

"For the purpose of interpretation of the *Convention for the Unification of Certain Rules for International Carriage by Air*, adopted at Montreal on 28 May 1999,

"*THE CONFERENCE STATES AS FOLLOWS:*

1. with reference to Article 16, paragraph 1, of the Convention, the expression 'bodily injury' is included on the basis of the fact that in some States damages for mental injuries are recoverable under certain circumstances, that jurisprudence in this area is developing and that it is not intended to interfere with this development, having regard to jurisprudence in areas other than international carriage by air;

2. with reference to Article 32[1], paragraphs 2 and 3, these provisions are included in view of the special nature of international carriage by air."

5. In noting that the signature ceremony for both the Final Act of the Conference and the Convention would take place the following afternoon, the Chairman expressed his profound appreciation for the remarkable degree of cooperation and compromise which had been exhibited in the course of the last three weeks. He affirmed that it would not have been possible to reach this stage without the great sense of cooperation which had been manifested by the Conference participants.

6. The Meeting adjourned at 1930 hours.

[1] Article 33 in the final, published version of the Convention (Doc 9740)

— END —

INTERNATIONAL CONFERENCE ON AIR LAW

PLENARY

Minutes of the Seventh Meeting
(Friday, 28 May 1999, at 1530 hours)

SUBJECTS DISCUSSED

1. Agenda Item 12: Signature of the Final Act and of the Convention

2. Votes of Thanks

3. Close of the Conference

SUMMARY OF DISCUSSIONS

1. The President welcomed Delegates to this final session of the Conference and spoke as follows:

"In the course of the last three weeks, we have embarked upon an enterprise to which we have been summoned in order to modernize the system relating to the rules for international carriage by air.

We have met here in a defining moment in the history of ICAO as we approach the 21st century, and we have done so against the background of the recognition that in order to promote the orderly development of international civil aviation in an era in which there has been increasing globalization and in which the world has now become increasingly characterized by a seamless exercise in aviation, it becomes fundamental and essential that the rules relating to the carriage of passengers, baggage and cargo by air should be modernized, so as to be responsive to contemporary needs and that we should seize the opportunity to ensure that the diversity of rules which now exist should be brought together in a consolidated form, modernized and made uniform so that the orderly development of international air transport might be promoted and so that the legacy which we bequeath to the 21st century will be one on which the foundations for further development in aviation can be promoted on a sustainable basis.

In the course of the last three weeks, we have examined in great depth over long hours the provisions of the draft Convention which was presented to you as a basis for our discussion. That draft Convention itself was a product of intensive consultations in the Legal Committee of ICAO, in the Secretariat Study Group, and in the Special Group on the Modernization and Consolidation of the "Warsaw System". You, who have represented here your countries, have been brought together so as to ensure that the final product of our work will represent a balancing of the variety of interests and an accommodation

in a manner which will give effect to the global concerns of all, and which will produce a Convention which would be generally and universally acceptable.

In the course of the last three weeks, I have been fortunate to witness, as you no doubt have been also, the spirit of accommodation, the spirit of compromise, and the need to not let the opportunity pass in the search for our common objectives. I wish therefore to pay tribute to that spirit of compromise by all Delegations, to the friendship which you have shown to me as your President, as "Friends of the Chairman", which means all of you, in allowing us to be here today, because as the result of our labours we have been able to arrive at consensus on the new Montreal Convention. This Convention, in a sense, represents a watershed in the life of international civil aviation; a watershed in recognizing the universality which must be secured in relation to air transportation, because air transportation is no longer something reserved for a few, but is a common means by which the frontiers have been bridged and in which we have sought to promote the interests of all humanity. It is therefore right that as we seek to modernize and consolidate those rules, we should do so within the context of accommodating the interests of all, so that all humanity will share in this common heritage.

Why did we meet here? We met — as the preamble to the draft Convention makes it clear — because we were convinced of the need to modernize and consolidate. But we also met because we believed that it was necessary to find an instrument which would represent, in consolidated form, something which would provide for the protection of the interests of all, be they consumers, be they the carriers, be they the general public interest. We met because we saw the crying need to recognize the humanitarian and other considerations which can arise when in fact there is an aircraft accident. And, above all and within the principles of the Chicago Convention, we met because of the desirability for an orderly development of international air transport operations which would facilitate, on a uniform basis, the smooth flow of passengers, baggage and cargo. And we met because we believed that we could only secure this through the collective action of all States, and that true harmonization and codification of rules for the international carriage by air required the resolve of the international community as a whole so that the balance of interests within the global community might be expressed in a single document.

What then does this document aim to do, and how does it achieve these objectives? First of all, the Montreal Convention has made a giant step forward in ensuring that there is a simplification and a modernization of the documentation which is required for international carriage by air. It does so in recognition of the technological revolution which has taken place and the means by which electronic ticketing and other forms are available. These were unknown factors in 1929 in Warsaw. Therefore, it was right that we should recognize in this Convention that it would be possible to provide alternative means which would preserve the information in respect of the contract of carriage and to offer some document to be available which would state the information to the passenger.

So in that regard, we have made a step forward. We have done so in recognition of the simplification of the contents of the air waybill. We have made a giant step forward in relation to the principles and regime of liability, one of the core matters which we addressed in the course of the last three weeks. Our experience over several years has shown us that in circumstances in which there are airline accidents, those who are the victims of such accidents are often held hostage to interminable delays in the settlement of claims because of the regime of liability, quite often held hostage to lengthy court proceedings, often held hostage to expensive proceedings and therefore within that framework, we had to find what would be the appropriate balance between the interests of the carrier and the interests of the passenger. How do we provide a system which would in fact provide for resolution of the delays which have been taking place, which would provide for greater predictability in restitution in respect of claims,

without the need for expensive litigation? We are able to resolve that in this Convention by establishing a two-tier system: a system of strict liability up to 100 000 SDRs; a principle of unlimited liability thereafter, but with the burden of proof on the carrier - a burden of proof, however, which could be discharged by the carrier establishing that the accident was not caused by the negligence of its servants or agents, or that it was caused by the wrongful act or negligence of some other person.

Equally in the field of delay, baggage and cargo, we examined the limits of liability and through accommodation and compromise, we were able to establish within the framework of this document the appropriate levels for that purpose. We equally, however, recognized that if the system is to be dynamic, it was not enough for us to establish these figures and these limits. It was important for us to recognize also that in a dynamic field such as civil aviation and in order to preserve the continued universality of this Convention, there should be internal mechanisms for review to enable those limits to remain appropriate. We addressed that question in some comprehensive fashion which allowed primarily for there to be five-yearly reviews after the entry into force of the Convention, and to provide also an opportunity for States themselves, in the light of a review taking into account the inflation factor, to determine whether or not such a determination is appropriate and, by majority, to determine whether a Conference of States' priorities should be convened.

But it was not enough for us to be able to establish this new regime of liability. We recognized that in any case in which there was an aviation incident or accident with catastrophic consequences in particular, the humanitarian needs cry out for resolution on an immediate basis. We therefore pushed the frontiers to accept that it was necessary to recognize the need to provide for advance payments. We did so in recognition of the fact that those payments should be made without delay, in order to meet the economic needs of the families of victims at that time, but we equally did so in recognition of the fact that this would be imposing on the carrier an obligation at a time at which liability had not even yet been established. And so we formulated something by compromise in which we require that the carrier, if required by national law, would make these advance payments without delay and we equally provided that such advance payments would not constitute a recognition of liability but may be offset against any amounts subsequently paid as damages by the carrier.

We also made a step forward in relation to the important issue of jurisdiction. The issue of jurisdiction was one of the issues on which we spent a considerable amount of time. We recognized and reaffirmed the jurisdictions which had already been recognized, that is to say the option of the plaintiff in the territory of one of the States parties, either before the court of the domicile of the carrier or its principal place of business, or where it has a place of business in which a contract has been made, before the court of a place of destination. And then we addressed the fundamental question as to what will be the appropriate circumstances in which it would be possible for a claim to be instituted in the principal and permanent home of the passenger. We looked at it in the light of the contemporary developments in civil aviation and we did so in ensuring that there was an appropriate nexus which would enable, in an appropriate case, for the action to be brought in the principal and permanent residence of the passenger. We circumscribed Article 33 in order to ensure that there would be that nexus and to ensure that it would be brought in the territory in which, at the time of the accident, the passenger has the principal place of residence. But that was not enough. We had to ensure that it be a place to and from which the carrier operated services for the carriage of passengers either on its own aircraft or on the aircraft of another carrier under a commercial agreement, and to indicate that a commercial agreement would be one for the provision of joint services and that in addition, the carrier had to conduct business either through its leased or owned premises. We recognized that in that context, it was important to indicate that the nationality of the passenger should not be the determining factor in this regard.

The Convention which we have carefully and painstakingly forged would not have been possible without the cooperation of all. We therefore had to consider more closely a number of other matters. We had to consider in particular how many States would be required in order to bring the Convention into force, and we determined that that would require 30 ratifying States. But we also recognized developments which had taken place in contemporary society in which regional economic integration movements had developed, which had allocated competencies to those bodies, by the States which constituted them in respect of certain matters in civil aviation. And so we provided for those regional integration movements to become parties to the Convention in respect of matters within which they have their competence.

We equally recognized that States with more than one system of law might be able to apply the Convention to all of those territorial units which had different systems of law, or to one or more of them, and to make a declaration at the time of signature, ratification or acceptance or approval. We recognized that there were limited circumstances in which reservations would be made and we particularly provided that no reservations could be made except by a State party which declared at the time, to the depository, that it would not apply to two circumstances: international carriage of air performed and operated directly by the State for non-commercial purposes in respect of its functions and duties as sovereign State; and the carriage of persons, cargo and baggage for its military authority in aircraft registered or leased by the State party.

I have gone through these aspects of the Convention in order to demonstrate that we have made a quantum leap forward. We have done so in recognition of our duty and this has only been possible because of your cooperation. I would therefore like to take this opportunity to say that that which is represented by this Convention is in full measure the result of your efforts, that you have shown a remarkable spirit of compromise, and that this Montreal Convention therefore will become an important contribution to the development of international civil aviation because of your efforts. I would like to thank each and every delegation for the good will which they shown, for the cooperation which they offered to me at all stages of these negotiations, and to let you know once more that the achievements of this Convention would not have been possible without that cooperation.

I would also like to thank particularly the President of the Council for his unswerving support and for assisting particularly in those difficult times when it appeared that the light at the end of the tunnel might well have been the on-coming train, but by his own efforts and because of his skills, we were able to navigate around these matters successfully. I would like to thank Dr. L.J. Weber, D/LEB and all the members of the Legal Bureau for their assistance. I would like particularly to thank Mr. R.C. Costa Pereira for his unswerving support, for making available all the resources to us, and for the manner in which he assisted in these deliberations. I would like to thank the entire Secretariat staff for their assistance. But over and above all, I would like to thank the interpreters, for without them, a lot of what I said in the course of the last few weeks would have been quite unintelligible to all of you. So I wish to thank you most sincerely not only for that assistance, but for bearing with my keeping you beyond your normal hours, in order to enable us to have this achievement. So therefore, it is only left for me to say that the Montreal Convention will be your monument."

Agenda Item 12: Signature of the Final Act and of the Convention

2. The Secretary of the Conference then outlined the procedure which would be followed for the signing of the Final Act and the Convention. Upon completion of the signing of the two documents, the President of the Conference indicated that the Final Act had been signed by 105 Contracting States,

one non-Contracting State and one regional economic integration organization, for a total of 107 signatures. The Convention itself had been signed by 52 Contracting States. The President then opened the floor for statements.

Votes of thanks

3. The Delegate of Egypt, speaking on behalf of the Arab States, the African States, and also in the name of the Members of the Delegation of Egypt, extended his appreciation to the President of the Conference for his commendable efforts, thanks to which the Conference had reached a successful outcome and was producing a new, historic Convention, a Convention which he viewed as the most important air law instrument for the third millennium. The Delegate of Egypt also thanked the Members of all other States, in particular the Arab and African States, who had worked tirelessly and had spared no effort to achieve this successful outcome and to reconcile differing points of view, whether in the Commission of the Whole, the drafting committee, or other committees and groups. Such efforts had helped to develop a Convention which would be applicable and acceptable in the international arena. The Delegate of Egypt extended his sincere thanks to the ICAO Secretariat, in particular the staff of the Legal Bureau and its Director, Dr. L.J. Weber; and to the Language Branch, for the excellent translation and interpretation services which had been provided. The Delegate of Egypt noted in particular that the Arabic language had been used for the first time at an Air Law Conference at this level, and thanked for Arabic Section for the sincere efforts which had helped contribute to the success of the Conference. It was a source of honour to see the Arabic language figure among the authentic languages of the new Convention.

4. The Delegate of Namibia, one of the three African Delegates addressing this meeting at the request of the President of the African Civil Aviation Commission and other African countries, paid tribute to the President of the Conference for his brilliant stewardship of this enormous initiative and recalled that at the outset, Namibia had, on behalf of various African countries, seconded the nomination of Dr. K. Rattray for the presidency, knowing that Dr. Rattray's considerable experience in international civil aviation matters and his other fine qualities as a world-renown international jurist would stand him in good stead to ensure a successful outcome. Although every participating State and international organization had a right to claim credit for having contributed to the final outcome of the Conference, everyone was aware that at the critical stages of the negotiation process, the President's brilliant skills as an astute advocate and cool-headed diplomat had served to avoid a potential disaster.

5. The Delegate of Namibia recalled that in his opening address to the Conference, the President of the ICAO Council, Dr. Assad Kotaite, had invited Delegates to work in a spirit of cooperation in order not to leave the situation as it currently stood, with the Warsaw System characterized by a high degree of complexity and fragmentation. Instead, Dr. Kotaite had beseeched the Conference to provide the world with a revised Convention which responded to the contemporary needs of States, the travelling public, air carriers and the air transport industry as a whole in the next millennium. The Conference's unanimous adoption of the draft Convention today was a fine testimony of the degree to which it had lived up to the historic challenge which it had faced at the beginning of this initiative.

6. Commenting on the Convention, the Delegate of Namibia observed that this was clearly not the best text which African States had hoped for. The African community was however mindful of the fact that the same sentiment probably applied to the other regional groupings as well. In that sense, the new Convention was the product of a delicately balanced compromise among some 120 Contracting States, one non-Contracting State and eleven observer delegations. Against this background, as well as the fact that the Convention represented an improvement when compared to the current Warsaw System,

African Delegates were of the opinion that they could live with the new Convention and were ready to commend it to their political principals for ratification. Namibia wished to make a special appeal to those countries who accounted for a significant proportion of scheduled international air traffic and whose views were more than adequately accommodated by this Convention, to ensure that this worthy and unique international effort did not go to waste as a result in delays in ratification. Finally, on behalf of the African Delegates and as a tribute to international cooperation, the Delegate of Namibia invited the Conference to note that consensus on certain contentious articles of the draft Convention had been reached on 25 May, the date on which the mother body of AFCAC, namely the Organization of African Unity (OAU), had been founded.

7. The Delegate of Guatemala congratulated the President of the Conference and the President of the ICAO Council for having developed this project and for having made it a success. There was nevertheless much work left to do, and the international community had a very long road to travel yet. The Delegate of Guatemala wished to thank those countries that had helped Guatemala in dealing with serious problems caused some months earlier by "Mitch", the hurricane which had caused losses of such magnitude bringing to attention the forces of Mother Nature and the will of God. Civil aviation had played a very important role in this assistance, with more than 600 flights a day sending humanitarian assistance, even to areas where there were no landing strips. In less than forty days, 70 per cent of the country had recovered its roads, its infrastructure and runways, thanks to the efforts of aviation. The Delegate of Guatemala expressed special thanks to Dr. Assad Kotaite, President of the ICAO Council, for his great concern and the tremendous help he had provided during that time through the Delegate of Panama, Mr. R. García de Paredes.

8. The Delegate of Côte d'Ivoire also wished to address the Conference not only on behalf of his country but also on behalf of AFCAC, of which he was one of the five Vice-Chairmen, in conveying his recognition and gratitude to all Delegations who had participated in the work just accomplished following three arduous weeks. When returning to their homes, participants could legitimately feel satisfied that in the time accorded and notwithstanding sometimes contradictory interests, they had adopted a Convention which was globally satisfactory and which unified the liability regulations of international air transport. Discussions, in light of the stakes, had been very sensitive, sometimes heated, but always cordial with the utmost courtesy shown and utmost respect for the views of others. The Delegate of Côte d'Ivoire trusted that Delegates at this Conference would echo with the appropriate authorities this great spirit by ratifying the instrument in the shortest possible time.

9. The Delegate of Côte d'Ivoire expressed his thanks and congratulations to Mr. R.C. Costa Pereira, the Secretary General of ICAO, as well as to his staff for the flawless organization of the Conference; to Dr. L.J. Weber, D/LEB, and his entire team for the spirit of dedication and self-sacrifice with which they had worked to ensure the success of the Conference; and to the President of the Conference, Dr. K. Rattray, who had revealed his many talents. The father of a very calm family, Dr. Rattray had nevertheless shown that should the occasion arise, he knew how to use both the carrot and the stick in exercising flexibility and firmness. Donning his sorcerer's hat, Dr. Rattray had managed to resolve deadlock situations with appropriate solutions, demonstrating his knowledge of deliberative bodies.

10. While paying tribute to the President of the Conference, the Delegate of Côte d'Ivoire did not think it was possible to overlook the grandeur of Dr. Assad Kotaite, the pace-setter, the orchestra leader, the maestro of ICAO, the man of difficult moments, the man who sought compromises. Dr. Kotaite, who spared no effort and who always ensured behind the scenes that everything went off for

the best of all possible worlds and interests. The moral authority and the stature of Dr. Kotaite was known by all, was one of the most valuable assets of ICAO and had been the absolute guarantee of the success of this Conference.

11. Last but not least, the Delegate of Côte d'Ivoire thanked the interpreters and the translators, men and women who had demonstrated their intelligence, having from the outset understood the stakes entailed in this Conference and had never failed in their duty, working beyond the scheduled time to help in ensuring its success. The Delegate of Côte d'Ivoire wished everyone a safe and pleasant journey home.

12. The Delegate of Ghana brought warm greetings from the President of the Republic of Ghana and the Ghanian Government and expressed his pleasure and honour with having participated in this all-important and historic Conference aimed at unifying and modernizing the Warsaw System. The timing of this Air Law Conference was most appropriate and timely, as the international community transitted into the next millennium. The Delegate of Ghana extended congratulations to the President of the Conference, to his four Vice-Presidents, to the President of the ICAO Council, and to the Secretary General and his able Secretariat, as well as to all of those who had contributed immensely to the success of this Conference. The Delegate of Ghana recalled that when the Conference had commenced three weeks earlier, he had questioned the need for allocating three weeks for its duration, when a regular session of the ICAO Assembly took only ten days. Today marked exactly three weeks since the start of the Conference and the position taken three weeks earlier by the President of the Council was thus completely vindicated. The Delegate of Ghana therefore saluted the President for his wisdom which had always prevailed at all ICAO conferences and meetings.

13. Notwithstanding the adequacy of the period allocated to this Conference, the Delegate of Ghana observed that it would not have been possible to achieve its objective without the remarkable display of flexibility, wisdom, sheer determination and above all, perseverance of the Delegates. There was no doubt that the document signed today would serve as an enduring legacy for posterity. The Delegate of Ghana wished to acknowledge the honour bestowed on his country in particular, and Africa in general, through the election of Mr. A.K. Mensah, the Director General of Ghana's Civil Aviation Authority, as the Second Vice President of the Conference. The acknowledgement of Ghana's modest competence to serve in the aforementioned capacity would provide the Government of Ghana, and indeed the Ministry of Roads and Transport in Ghana, the extra impetus and encouragement to support even more the endeavours and programmes of ICAO. The Delegate of Ghana wished ICAO, its Contracting States and international civil aviation affiliates and agencies, his country's best wishes for success in the next millennium.

14. Speaking on behalf of the Member States of the European Civil Aviation Conference, the Delegate of Italy congratulated the President of the Conference on the very objective and masterly way in which he had conducted the debates. The Convention for the Unification of Certain Rules Relative to International Carriage by Air and the Final Act that had just been signed were undeniably the result of the very high-level work which had been carried out thanks to the President's ability to reconcile situations that had sometimes seemed impossible. The President had gone to great lengths to provide detailed definitions and clarifications, efforts which typified those of the Conference in toto. The consensus now before the Conference would place new responsibilities on States and airlines. The Delegate of Italy did not doubt that the President's efforts would be followed up by many instruments of ratification, adherence, approval and accession; in this respect the Delegate of Italy gave assurances on behalf of the ECAC States that all efforts would be made to complete the ratification process as quickly as possible.

15. The Delegate of Italy wished to avail herself of this opportunity to present the warmest thanks of ECAC to the President of the ICAO Council, Dr. Assad Kotaite, for his very formidable diplomatic activities that had assisted Delegates in achieving an historic objective in international civil aviation. The congratulations of ECAC Member States were also addressed to the Secretary General, Mr. R.C. Costa Pereira, and to the Secretary of the Conference, Dr. L.J. Weber, and his colleagues in the Legal Bureau who had assisted Delegates so ably. In conclusion, the Delegate of Italy could not forget the interpreters, translators and all those who had worked so competently for the Conference. On behalf of the Member States and on her own behalf, the Delegate of Italy congratulated Dr. K. Rattray, President of the Conference, and Dr. Kotaite, President of the ICAO Council.

16. The Delegate of Panama expressed his Delegation's satisfaction with the achievements of this Conference and congratulated ICAO on its role in paving the way towards signature of the new Convention. Panama wished to thank Dr. K. Rattray, the President of the Conference; Dr. Assad Kotaite, President of the ICAO Council; and Mr. R.C. Costa Pereira, Secretary General; as well as the officials of the Secretariat, in particular the Members of the Legal Bureau and its Director, Dr. L.J. Weber, and the members of the different committees which had been established. The Delegate of Panama thanked Delegations for their spirit of cooperation and compromise and their interest in achieving results, and urged all ICAO Member States to quickly ratify the Montreal Convention for the benefit of international air transport.

17. The Delegate of the United States indicated that at the close of this historic Conference, one in which it had been a great pleasure and privilege to take part, the Delegation of the United States of America wished to congratulate all Delegations here assembled on the advances which had been achieved in Montreal. The Delegate of the United States extended her Delegation's appreciation to Dr. Assad Kotaite, Dr. L.J. Weber, Mr. R.C. Costa Pereira, the ICAO Secretariat, and the Chairmen of the various committees for the superb work they had done; it was not an overstatement to say that the Conference would not have reached this conclusion without their extraordinary efforts. The United States also joined with all the previous Delegates who had applauded the efforts of the interpreters and translators, whose services had been so crucial to the work of the Conference.

18. In particular, the Delegate of the United States warmly congratulated Dr. K. Rattray, the President of the Conference, for the exemplary manner in which he had guided these proceedings to their successful conclusion. Dr. Rattray's leadership, his sense of humour, his guidance and his exhortations had repeatedly helped Delegates bridge differences and find solutions. As the international community stood on the brink of a new millennium, all Delegations to the Conference had an extraordinary responsibility to try to develop a more just, more modern and more equitable liability regime for those who suffered the tragedy of an aviation disaster. This Conference had sought to preserve the benefits of uniformity provided by the Warsaw System, and yet to modernize and improve upon that system for the transportation by air of passengers, baggage and cargo as the international community entered the 21st century. Dr. Rattray had reminded Delegations repeatedly throughout this Conference that in achieving consensus among all parties, there could be no perfect solution which fully satisfied every interest. It was the view of the United States that this Convention had achieved a delicate yet just balance of the interests of consumers and of air carriers, and of the interests of all States here assembled. The Convention had been enriched by the contributions of all the Delegations assembled and the Delegation of the United States, like others, would have to return home and consult with its Government and its constituents on the results of the Conference's painstaking labours. The United States Delegation strongly believed that this Convention represented a significant step forward, and was honoured today to have signed the 1999 Montreal Convention.

19. The Observer from the Latin American Civil Aviation Conference (LACAC) indicated that those who had already spoken had said exactly what should be said about the importance of today and the gratitude all States present felt because of the excellent work carried out by the President of the Conference, the President of the Council, and the ICAO Secretariat. This work had certainly allowed for the success of the Conference and LACAC wished to thank the interpreters for the tremendous work they had carried out. It had been very difficult, the language had been very complex. There had been many subtleties and the interpreters had certainly done an excellent job, a silent but important task, in supporting the work of the Conference leading to the signing of this important document. Addressing all countries that made up the Latin American Region, LACAC wished to thank all those States most sincerely because they had actually ceded some of their aspirations for the benefit of the international community as a whole. LACAC was also very proud because it had been able to compromise on some of its aspirations for the benefit of others. This showed once again that there was solidarity in this great family of international civil aviation.

20. The Delegate of Germany indicated that the Member States of the European Community, and Germany in particular, congratulated the President of the Conference and thanked him as well as everyone who had assisted him. The European Community was very satisfied with the outcome of the Conference. From a legal point of view, the new Convention was a masterpiece. Politically and economically speaking, it would serve the interests of consumers and those of the carriers. Against this background, Germany would make every effort to make sure that the Convention entered into force as soon as possible.

21. Having listened to the eloquent statements by certain Delegations, statements which truly expressed the feelings of every person in this hall, the Delegate of Saudi Arabia added his congratulations to the President of the Conference for his wise leadership and the depth of his understanding of the important subject of this Convention, whose conclusion represented a milestone for the air transport industry and humanity at large, one of the landmarks for the beginning of the third millennium. The achievements of this Conference would lead to positive and practical results. The Delegate of Saudi Arabia thanked Mr. R.C. Costa Pereira, the Secretary General of ICAO, and through him the Legal Bureau as well as the Language Branch, in particular the Arabic Section, for their efforts that had enabled all Delegations to understand each other in the different working languages of this Conference. Finally, the Delegate of Saudi Arabia paid tribute to the valuable contribution and great initiatives of Dr. Assad Kotaite, the President of the ICAO Council, who had helped the Conference achieve practical, acceptable solutions.

22. The Delegate of Canada wished to be associated with all of the congratulations extended to the President of the Conference, as well as to the President of the Council for the masterful way in which the work of the Conference had been guided, thus ensuring its success. She also thanked the Secretary General and the Secretariat, in particular the Legal Bureau, as well as the interpreters and translators for the tremendous amount of work they had carried out over the last three weeks. As the Representative of Canada, she wished to highlight how proud and happy Canada had been to welcome Delegates in Montreal for the duration of this Conference, and hoped that everyone would enjoy the rest of their stay and have a safe and pleasant trip home.

23. The Delegate of Trinidad and Tobago accorded his highest commendations to the supreme efforts that had been made by all participants over the past three weeks of this remarkable Conference. This meeting could be likened to a long flight which had transported its participants from one era to another. To a great extent, this flight had been achieved through the depth of the President's skills as pilot-

in-command, greatly supported by the astute skills of the President of the Council, Dr. Assad Kotaite, as well as that of the Legal Bureau, led by Dr. L.J. Weber, and the ICAO Secretariat as a whole. In closing, the Delegate of Trinidad and Tobago expressed a personal sentiment in recognizing the good work which Dr. K. Rattray had achieved and assured him that he had done the Caribbean Region proud.

24. Having had the honour and privilege of serving as rapporteur of the ICAO Legal Committee and Chairman of the ICAO Special Group on the Modernization and Consolidation of the "Warsaw System", the Delegate of Mauritius recalled that as the participants at this Conference had embarked on this historic journey to which the President of the Conference had referred in his opening statement, all had been fully aware of the formidable challenges which the chosen destination posed. Participants had all known that the weather forecast for the flight was not encouraging at all. That the Conference was taxiing to its arrival terminal, one could now confirm that the flight had been challenging and at times even turbulent, but it was a fitting tribute to ICAO and to the international community represented here that everyone was still on board today. Participants had recognized from the outset that they would never be able to meet all the expectations of global, regional or even national stakeholders, and that they would therefore all have to make the necessary compromises to promote equity, consensus, uniformity and eventually the ratifiability of the new Convention.

25. The Delegate of Mauritius had no doubt whatsoever that the new Convention represented, in the light of all the relevant circumstances, including the unattractive alternatives, the only fair and equitable global solution to a global problem. He was confident that history would look favourably upon the wisdom and foresight of all the delegates to this Conference, whose expertise and formidable spirit of dialogue, ingenuity and compromise had enabled them to meet all the foreseeable and unforeseeable obstacles, and to land together safely and on time. The contribution of the host State, Canada, to this process of consensus-building could not go unnoticed.

26. The Delegate of Mauritius paid special tribute to the Conference's outstanding pilot-in-command, Dr. K. Rattray, and particularly for his determining "Consensus Package" in DCW Doc No. 50, whose remarkable presentation he could only qualify as pure "Rattray vintage". A special tribute to the co-pilots, the Chairman of the Drafting Committee, Mr. A. Jones and the Chairman of the Credentials Committee, Mr. S. Ahmad. A special tribute to all the known members of the crew, including particularly Dr. L.J. Weber and his team in the Legal Bureau, and all the unseen, but fortunately not always unheard, groundstaff — the Secretariat led by Mr. R.C. Costa Pereira — for never, ever having failed the Conference. Last, but certainly not least, the Delegate of Mauritius paid tribute to the wise and distinguished air traffic controller, Dr. Assad Kotaite, whose incredible ability to deal with turbulence and conflicting traffic never ceased to amaze. But of course, the work of the Conference was not quite done yet. The Delegate of Mauritius therefore urged everyone to promote the speedy ratification of the Montreal Convention of 1999 in the knowledge that the objective of uniformity would only be reached through universal ratification. In closing, he thanked everyone present for the privilege of having been able to take part in this historic task and wished everyone all the best.

27. The President of the ICAO Council in addressing this closing session of the Conference, pronounced the following:

"Mr President, in listening carefully to your opening statement, to the declarations of many Delegations, I wonder whether something is left to be said. However, I wish to take the floor briefly and in so doing I have a certain feeling of nostalgia and also gratitude, mixed with a bit of sadness. But it is largely compensated by a feeling of satisfaction.

Nostalgia refers to the Warsaw System, because for about 50 years, I was party to all the amendments that were made to this Convention. My gratitude goes to the depository State of the Convention, which dates back to 1929 and which has provided services from the very beginning of civil aviation until today and has assisted humanity, in spite of its fragmentation, in spite of its diversity, and above all in spite of all the jurisprudence which was not unified. Therefore, I wish to sincerely thank the depository State of the Warsaw Convention because it protected the Convention's welfare for 70 years even under difficult circumstances.

Therefore, you understand very well why I am sad, but this is largely compensated by my feeling of satisfaction because the Convention you have produced under your leadership, Mr. President, has now been deposited in the archives of ICAO, which belongs to all Contracting States, and I should say that each and every one present has played a role in this action. And when this Convention will enter into force, it will be referred to undoubtedly as the "Montreal Convention".

My good friend Dr. Rattray, President of this Conference, I have known you for the last 35 years since you first participated in the ICAO Legal Committee, of which I was a member from 1953 until my appointment as ICAO Secretary General in 1970. Through our close relations and working together through the years, we find that we have the same approach. We are motivated by the same spirit of cooperation and internationalism. In your opening statement you said that we are in an era of globalization, which is true. But the fact that we are in this era represents another motive to all of us to move to a greater internationalism. Participants at this Conference, working under the outstanding leadership and chairmanship of Dr. Rattray, you have produced, as your President, Dr. Rattray has said, a monument for the third millennium. But this monument could not have been achieved without your extraordinary work together and without the inspiration that through the proceedings we all, including myself, found in the thinking and in the approach of Dr Rattray, to whom I would like to pay a very vibrant tribute.

Dr Rattray has announced that 52 States, through their respective delegations, have signed the Convention. Then I will count on you to speed up the ratification. I would call on those, both present and absent, who have not signed the Convention to do so as soon as possible. Once we have the 30th ratification, we will ask the States that have not ratified it to adhere to this Convention which will be our monument for the third millennium. From this point on, I will be a pilgrim; I will start my crusade calling on States to ratify, to sign or to adhere in the future.

I have always considered that we should "humanize" air transport. This was my conception from the beginning of my career, and within the framework of this Convention, I find a very human spirit. This Conference introduced a provision concerning assistance to be given to the families of victims, a provision we see for the first time in this Convention, and I am grateful to you. Of course the Secretariat of the Organization, under the leadership of the Secretary General, has offered all possible services and facilities in order to facilitate our work. On behalf of the Secretary General, Mr. Costa Pereira, I would like to thank you for acknowledging the services, for acknowledging the efficiencies of the Secretariat, and for acknowledging particularly the remarkable work of the Legal Bureau under the leadership of Dr. Weber. For the last three years, Dr. Weber has spared no effort through the studies that he provided, through his analyses; through the Legal Committee, as its Secretary; and through different groups. I recall when Dr. Weber reported to the Council on the difficulties we were facing; of course no great achievement could be realized without difficulties. But those obstacles and those difficulties can be overcome if we keep in our minds not the interests of one region or of one country - regardless of whether the country is small

or large, weak or strong, rich or poor. We are working globally and when we work globally we have to find a good balance.

As Dr. Rattray has mentioned in our press release issued today, "In developing this new Montreal Convention, we were able to reach a delicate balance between the needs and interests of all partners in international civil aviation, States, the travelling public, air carriers, and the transport industry". If we continue to work together, I don't think that we will face any obstacle which we cannot remove.

In concluding, I would like to thank you all and I do hope, since this Convention has tried to unify certain rules between the air carriers and the passengers in case of accident and injury, that no injuries, no accidents, will happen in the future and we will not need to use it. It will be only a remarkable reference, a remarkable achievement. Thank you especially, Dr. Rattray; thank you, Dr. Weber; and I wish to all of you a safe journey."

Close of Conference

28. The President of the Conference observed that this brought to a conclusion what must by any standard be regarded as a historic event — historic not simply in terms of its achievements but because it now symbolized, in a sense, a new era in international relations which provided a ray of hope that in spite of all the complexities in international life and the divisions which may appear to exist, there were possibilities for international cooperation in areas of common interest, where there was both the will and in fact the energy to be able to search for solutions on an accommodating basis.

29. The President of the Conference did not intend to repeat what he had said at the opening of this meeting, but simply wished to take this opportunity to thank all Delegates for the very kind expressions which they had made in respect of his own presidency. Any success achieved at this Conference would not at all have been possible without the cooperation of everyone present, because the Conference represented in a true sense its participants' achievements. Delegates must therefore look forward beyond today, to the speedy ratification of the Convention so that the foundations which were laid here would be realized and the international aviation community and the travelling public as a whole would now operate on a regime which would produce more equity, more balance, and would lay solid foundations for the future. The President also thanked Dr. L.J. Weber, upon whom he had had to rely from time to time during the debates in the hope of receiving some inspiration as the Conference appeared to be involved in deadlock situations. The President had found in Dr. Weber the font of wisdom, for which he expressed his most sincere appreciation. The President repeated his thanks to the entire Secretariat, to the interpreters and translators, and finally to Dr. Assad Kotaite for his continued support and friendship and for his feelings and commitment to international civil aviation. Finally, to the Delegates, the President wished a "bon voyage" and a safe return home. With these remarks, the President of the Conference declared this Conference at an end.

11. The Meeting adjourned and the Conference ended at 1900 hours.

— END —

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