

1998

## 999 University, Please Help the Third World (Africa) Help Itself: A Critique of Council Elections

Peter Ateh-Afac Fossungu

---

### Recommended Citation

Peter Ateh-Afac Fossungu, *999 University, Please Help the Third World (Africa) Help Itself: A Critique of Council Elections*, 64 J. AIR L. & COM. 339 (1998)  
<https://scholar.smu.edu/jalc/vol64/iss2/2>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# 999 UNIVERSITY, PLEASE HELP THE THIRD WORLD (AFRICA) HELP ITSELF: A CRITIQUE OF COUNCIL ELECTIONS

PETER ATEH-AFAC FOSSUNGU\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	340
II. THE PRINCIPAL PHASE OF COUNCIL ELECTIONS .....	346
A. THE CRITERIA .....	346
B. INCOMPREHENSIBLE COUNCIL ADMISSION: KOREA'S CASE .....	347
III. THE MAKE-UP PHASE OF COUNCIL ELECTIONS .....	353
A. THE INJUSTICE ISSUE AND WHAT COULD BE DONE.....	354
1. <i>Keep Out Smaller Poor States?</i> .....	359
2. <i>Amending the Amending Formula?</i> .....	361
3. <i>What About the Majority for the Drastic             Action?</i> .....	364
4. <i>Principled and Foresighted Use of the Pragmatic             Solution</i> .....	366
B. THE UNCONSTITUTIONALITY QUESTION AND ANSWER .....	366
1. <i>Delegation of Powers?</i> .....	368
2. <i>What Then are the Assembly's Powers             Proprement Dire?</i> .....	372
IV. CONCLUSION.....	374

---

\* Author is a Doctorat en Droit (LL.D) candidate at the Universite de Montreal. He has taught at the University of Buea, Cameroon from 1994-95, and at the Universite de Yaounde from 1989-91. He obtained a License en Droit, (Mention Assez-Bien), Yaoundé, 1987; Matrise en Droit (Mention Bien), Yaoundé, (Mention Bien), 1988; Diplôme d'Etudes Approfondies (D.E.A.), Yaoundé (Mention Bien), 1989; University of Alberta, LL.M., 1992; McGill University, Institute of Air and Space Law, LL.M., 1997.

## I. INTRODUCTION

THE HOME TO the International Civil Aviation Organization (ICAO) is 999 University The ICAO Council, presently composed of thirty-three States, is the governing body that is elected by the Assembly for a three-year term.<sup>1</sup> This was indeed in the text of Article 50<sup>2</sup> as amended by the 21st Session of the Assembly on October 14, 1974, which entered into force on February 15, 1980. As the arguments I make in this Article can only be better appreciated in the light of the ICAO's aims and objectives (to be carried out by the Council), it is essential to say a word or two about them in this introduction. These center around what the Preamble of the Chicago Convention refers to as the formulation of principles and arrangements geared towards the safe and orderly development of international civil aviation; a process that, in turn, should ensure that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.<sup>3</sup>

The avowed aims and purposes of the ICAO, as set out in Article 44 of the Chicago Convention and reflecting the Preamble previously cited,

are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

(a) Insure the safe and orderly growth of international civil aviation throughout the world;

(b) Encourage the arts of aircraft design and operation for peaceful purposes;

(c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;

(d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;

---

<sup>1</sup> See Convention on International Civil Aviation, Dec. 7, 1944, art. 50, 61 Stat. 1180, 1195, 15 U.N.T.S. 295, 330-31 [hereinafter Chicago Convention].

<sup>2</sup> The metamorphosis through which the original 1944 text has become what it is now can be found in Christopher T. Tourtellot, *Membership Criteria for the ICAO Council: A Proposal for Reform*, 11 DENV. J. INT'L L. & POL'Y 51, 73-74 (1981) and Nicolas Mateesco Matte, *The Chicago Convention—Where From and Where To, ICAO?*, 19-1 ANNALS AIR & SPACE L. 371, 376 (1994). For a comprehensive survey of the composition of similar governing (or executive) bodies of other international governmental organizations, see Werner Guldemann, *The Chicago Convention Revisited: Possible Improvements After 50 Years*, 19-2, ANNALS AIR & SPACE L. 347, 353-54 (1994).

<sup>3</sup> Chicago Convention, *supra* note 1, 61 Stat. at 1180, 15 U.N.T.S. at 296.

- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics.<sup>4</sup>

Just how extensive these purposes make the ICAO's jurisdiction has generated heated arguments within the academic community that would also be useful to review for a better understanding of this Article. The failure or inability of the Chicago Convention attendees to reach a consensus on economic matters has already been the subject of a considerable amount of literature.<sup>5</sup> Nevertheless, I do not think the Chicago Convention's production of an agreement involving technical and navigation issues rather than economic policy<sup>6</sup> could necessarily accord weight to the interpretation of Article 44 by some authorities as confining the ICAO to "[s]pecialized regulation of technical standards with respect to such matters as air traffic safety."<sup>7</sup> The ICAO's Legal Bureau Director at the time, Dr. Michael Milde, also pointed out that the Convention established the ICAO as "an international organization with wide quasi-legislative and executive powers in the technical regulatory field and with only consultative and advisory functions in the economic sphere."<sup>8</sup> This argument might not arise if the suggested merger of the ICAO and the International Air Transport Association (IATA)<sup>9</sup> was effected in Chicago. The suggestion Dr. Tourtellot makes about the helpfulness of the hybrid International Labour Organization's (ILO) comparison to the ICAO

---

<sup>4</sup> Chicago Convention, *supra* note 1, 61 Stat. at 1192-93, 15 U.N.T.S. at 326.

<sup>5</sup> See Tourtellot, *supra* note 2, at 51 (where some of the authorities are cited, including THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 7-16 (1969)); see also PAUL STEPHEN DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 7-16 (1987); Michael Milde, *The Chicago Convention—Are Major Amendments Necessary or Desirable 50 Years Later?*, 19-1 ANNALS AIR & SPACE L. 401 (1994).

<sup>6</sup> See Tourtellot, *supra* note 2, at 51.

<sup>7</sup> Richard Janda, *Passing the Torch: Why ICAO Should Leave Economic Regulation of International Air Transport to the WTO*, 20-1 ANNALS AIR & SPACE L. 409, 416 (1995).

<sup>8</sup> Michael Milde, *The Chicago Convention—After Forty Years*, 9 ANNALS AIR & SPACE L. 119, 122 (1984), cited in DEMPSEY, *supra* note 5, at 12.

<sup>9</sup> See Tourtellot, *supra* note 2, at 72.

could be quite interesting in the event of such a merger. It is likely that the ICAO itself would be a completely different organization today but for the Chicago Convention's keeping of "the administration of safety and technology separate from economic matters."<sup>10</sup> Dr. Tourtellot too could be placed on the side that considers the ICAO as being limited to technical matters.

Consequently, the ICAO or "this international body, bringing together aviation interests alone, [and which] has insufficient incentive or will to create an open structure for trade"<sup>11</sup> has been coolly instructed by Professor Richard Janda of McGill's Institute of Air and Space Law not to hope to "become the institutional home for a liberal multilateral agreement on trade in air transport services,"<sup>12</sup> as well as not to "presume [ ] that there will always be an "air transport industry" organized on the same basis."<sup>13</sup> Rather, according to the McGill professor, the ICAO should know "[i]t is far better to presume that air transport forms an integral part of global service markets and has a home in the GATS [General Agreement on Trade in Services]."<sup>14</sup>

While this Article agrees with most of what Professor Janda says about the ICAO, it clearly would differ on the breadth of the Organization's jurisdiction. To attempt to confine this two-headed monster (considered to be "one of the most intrepid international . . . [organizations ever] adopted by man, rendering immeasurable service to international civil aviation, which is undoubtedly one of the most vital and dynamic human endeavours in international relations"<sup>15</sup>) would seem to be both artificial and incorrect. This could be especially so in view of the provisions enshrined in the objectives (e) and (i) set out above.

Moreover, Professor Dempsey of the University of Denver College of Law, after meticulously canvassing the ICAO's functions, held that, in addition to the comprehensive, but largely dormant, adjudicatory and enforcement jurisdiction held by the ICAO under Articles 84-88 of the Chicago Convention, "the agency also has a solid foundation for enhanced participation in

---

<sup>10</sup> *Id.*

<sup>11</sup> Janda, *supra* note 7, at 410.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 430.

<sup>14</sup> *Id.*

<sup>15</sup> Ruwantissa I.R. Abeyratne, *The Economic Relevance of the Chicago Convention - A Retrospective Study*, 19-2 ANNALS AIR & SPACE L. 3, 4 (1994); see also Richard B. Lillich, *Editor's Foreword* to BUERGENTHAL, *supra* note 5, at viii.

economic regulatory aspects of international aviation in Article 44, as well as the Convention's Preamble."<sup>16</sup> Werner Guldemann certainly agrees with this view that Article 44 is "very inclusive and modern in character" although he regrets its making "no reference to the environment . . . [and should consequently] be amended to include the protection of our environment from impairment due to [civil] aviation as a fundamental aim and objective of the Organization."<sup>17</sup>

Therefore, Professor Dempsey's only warning and advice (largely shared by this study) to the ICAO is that it should

very soon assume[ ] the role its constitutional framers had in mind for it in 1944, [or else] the regulatory void over non-tariff barriers in international service industries such as air transport will soon be filled by the empire builders of UNCTAD [United Nations Conference on Trade and Development] or GATT [General Agreement on Tariffs and Trade].<sup>18</sup>

In flatly refuting Professor Janda's suggestion that the ICAO "cannot, will not and should not become the institutional home" for regulation of economic matters regarding air transport, and concerning which ICAO must be displaced by the World Trade Organization (WTO), "a body not beholden to any particular industry,"<sup>19</sup> Professor Dempsey authoritatively states that

[only] ICAO has the [best] expertise the international aviation industry needs to establish useful ground rules to enhance the flow of commerce. ICAO must become more deeply involved in economic regulatory matters, lest it loses that opportunity to an agency *less well equipped* to handle the complex trade problems unique to aviation.<sup>20</sup>

This view would thus place the ICAO in the forefront of handling economic as well as technical and other matters surrounding international aviation—the ICAO's so-called sole specialization or domain in the global division of labor.

The economic principle of division of labor seems to be the rationale for the United Nations (UN) system of specialized agencies. But it is underlined by the more important motivation of avoiding over-politicization of international activity that was

---

<sup>16</sup> DEMPSEY, *supra* note 5, at 302.

<sup>17</sup> Guldemann, *supra* note 2, at 357.

<sup>18</sup> DEMPSEY, *supra* note 5, at 302.

<sup>19</sup> Janda, *supra* note 7, at 410, 412.

<sup>20</sup> DEMPSEY, *supra* note 5, at 302 (emphasis added).

sure to occur within the UN. This view could be buttressed by the illuminating statement of Professor Herbert George Nicholas, renowned analyst of international and comparative political institutions. According to him, it was believed and hoped that the creation of these specialized agencies

would absorb, one by one, successive fields of international activity and might even [in the] end, like the Lilliputians, . . . [tie] down the Gulliver of politics while he slept, so that the world would find itself governed and controlled without ever having consciously yielded up those abstract rights of sovereignty which arouse such fierce political passions and prejudices.<sup>21</sup>

But whatever the rationale for having these agencies, it is certain that it would not have furnished any reason for the ICAO restrictionists to capitulate. Professor Janda would strongly disagree with Professor Dempsey's last statement, believing instead that only the WTO, through the General Agreement on Tariffs and Trade (GATT), has the necessary "accumulated experience and expertise in the international administration of trade liberalization";<sup>22</sup> a matter on which the ICAO, as the entrenched home of "classic rent-seeking behaviour by a particular interest group," is known to have always "tip-toed around the prospect of a re-structure."<sup>23</sup>

This debate on competence of specialized agencies is sure to continue. But the pro-WTO camp seems to be gaining in both the number and weight of arguments, especially as the ICAO's executive body is now not only drifting towards untouchability, but also becoming more and more absolutist. These are tendencies that can only "help to stifle the growth of international air transport."<sup>24</sup> This might also justify the admonition that the Chicago Convention not be considered "sacrosanct," and that the organization must support a discussion on its review and the improvement of the working methods of the organization, "to avoid the danger of stagnation and inertia always inherent in the anxious preservation of the *status quo*."<sup>25</sup> The present contribution is in the same line of perceiving the matter as the analysis

---

<sup>21</sup> H.G. NICHOLAS, *THE UNITED NATIONS AS A POLITICAL INSTITUTION* 6 (2nd ed. 1963); see also KURT JACOBSEN, *THE GENERAL ASSEMBLY OF THE UNITED NATIONS - A QUANTITATIVE ANALYSIS OF CONFLICT, INEQUALITY, AND RELEVANCE* (1978).

<sup>22</sup> Janda, *supra* note 7, at 416.

<sup>23</sup> *Id.* at 414-15.

<sup>24</sup> *Id.* at 414.

<sup>25</sup> Milde, *supra* note 5, at 414.

on the recruitment methods for that executive body would show.

The ICAO Council would have been shown by several experts to be principally a first world "club." Much more important to this entire paper, then, would be the question of what the third world states could do to exert any influence on policy in the ICAO as they are said to be doing elsewhere.<sup>26</sup> I propose two interconnected theses: (1) that the third world (with particular emphasis on Africa) must stop behaving like beggars and learn to fend for themselves (how they should do so is simple enough as I demonstrate herein), and (2) that the ICAO Council now wields more than enough power to be able, *if it so desires*, to overcome the so-called stumbling block to international civil aviation called national sovereignty and all its corollaries, and thus, provide the people of the world with a *real*, efficient, cheap, and economical air transport as promised them at Chicago some fifty-four years ago. The ICAO can thus very easily help the third world help itself. Let's now proceed to demonstrating how, using Council elections.

After having clothed itself with its own officers, the ICAO Assembly would then proceed to the heralded Council elections, which usually attract the main attention and require at least two meetings. According to Article 50(b), the Assembly should choose Council Member States under the following three headings: (1) States of chief importance in air transport (whatever that means), (2) States that do not fall under the first class but which make the largest contribution to the provision of facilities for air navigation, and (3) States belonging to neither of the first two groups, but whose *designation* will ensure that all the major areas of the world are therein represented.<sup>27</sup> These elections modalities will be examined under two main parts. The first will deal with the election of the Council members of

---

<sup>26</sup> "The Third World voting majority," according to Professor William C. Olson of the American University, "has promoted the advancement of economic development as the UN's first concern." *THE THEORY AND PRACTICE OF INTERNATIONAL RELATIONS* 76 (William Clinton Olson ed., 7th ed. 1987). *But see* Mwalima Julius K. Nyerere, Address to the Fourth Ministerial Meeting of the Group of 77 (Feb. 12, 1979), in 3 KARL P. SAUVANT, *THE COLLECTED DOCUMENTS OF THE GROUP OF 77* 433-34 (1981).

<sup>27</sup> See Chicago Convention, *supra* note 1, 61 Stat. at 1195, 15 U.N.T.S. at 330-31. For a compendious, incisive, and instructive comparison of the similar criteria of other organizations, and, in particular, the World Health Organization (WHO), International Labor Organization (ILO), International Atomic Energy Association (IAEA), and United Nations (UN), see Tourtellot, *supra* note 2, at 68-73.



groups one and two, since (1) both take place on the same day, one immediately following the other; and (2) no challenge has so far arisen here. The second will then analyze the controversial make-up phase of the election of council members of group three.

## II. THE PRINCIPAL PHASE OF COUNCIL ELECTIONS

This part involves a brief survey of the criteria for election, comparing them (where necessary) to similar instances in other organizations. It also illustrates how the ICAO may need to be refashioned, using the experiences of the Republic of Korea to indicate how membership in the Council is not based on any so-called statistical basis (e.g., the volume of international aviation), but solely on mere extraneous political judgment.

### A. THE CRITERIA

The criteria to be considered in electing members of the Council are clearly indicated. But the plain fact is that the Convention itself has furnished no guidance as to how we should interpret the concept of "adequate representation."<sup>28</sup> The question has, consequently, been posed: does "chief importance" imply the most far-flung airlines, the greatest number of international passengers, or the largest manufacturing industries? The attendees have avoided these questions, leaving the electors (in the Assembly) to decide appropriate interpretations. Dr. Tourtellot has analyzed at length some of these electors' interpretations of the plainly vague language of Article 50(b).<sup>29</sup>

In the past, for instance, representation on the Council has always reflected a situation in which air routes were concentrated in States owning many operating agencies. At the moment, however, air routes cover most parts of the globe and traverse States whose geographical situation and facilities guarantee satisfactory results in the economy and safety of air operations, one of the main purposes of the Convention. Should representation on the ICAO Council not now reflect this? Should States providing such vital airway facilities and whose geographical position creates an unbroken chain of services for air routes not be allowed a wider participation?

---

<sup>28</sup> Milde, *supra* note 5, at 434.

<sup>29</sup> See Tourtellot, *supra* note 2, at 59.

His excellency T.M.H. Thajeb of Indonesia (a country spread over large areas of sea and which, consequently, greatly depends on civil aviation as the primary means of communication), rightly thought these countries should be allowed wider participation.<sup>30</sup> This Delegate would not just be saying so because he is Indonesian. One session before him, the Venezuelan delegate gave the same opinion about Indonesia, which is "a country that, for a number of reasons, including its geographical position, played a very important role in the development of civil aviation."<sup>31</sup> The obvious problem that this geographic criterion could create is that, were such geography to be adopted, every country, even the land-locked mini-States (as is evident in some of the irrelevant speeches in the Assembly) would claim entitlement to being so placed. For example, we already hear claims such as "Burkina Faso is enclosed by other countries and serves as a country of transit,"<sup>32</sup> and "Lebanon, because of its privileged geographical position—it is a true meeting point for Europe, Asia and Africa—expects to retain the role it has always played in international trade."<sup>33</sup> Whatever the case, the present practice in electing ICAO council members is highly questionable (especially in view of the permanently stationed nature of some members) and needs reconsideration.

#### B. INCOMPREHENSIBLE COUNCIL ADMISSION: KOREA'S CASE

The example of the United Nations' express creation of permanent members in its Council would be laudable. Otherwise, *de facto* Council membership (e.g., Australia, Brazil, Canada, France, United Kingdom, United States, and the former Soviet Union<sup>34</sup>) in the face of wasteful elections, as is the case in the ICAO, would appear to defeat the very concept of an election. There is a disproportionately strong presence in the ICAO Council of the States from Western Europe in general and the European Union in particular. At the same time, "it is not easy for "new entrants" to gain a seat on this Council."<sup>35</sup>

---

<sup>30</sup> See *Minutes of the Plenary Meetings*, at 7-8, ICAO Doc. 8269 A14-P/21 (Aug. 21-Sept. 15, 1962).

<sup>31</sup> RESOLUTIONS, REPORT AND MINUTES, at 25, ICAO Doc. 8167 A13-Min. P/2 (June 19-21, 1961).

<sup>32</sup> *Plenary Meetings Minutes*, at 61, ICAO Doc. 9550 A27-Min. P/1-16 (Sept. 19-Oct. 6, 1989).

<sup>33</sup> *Minutes of the Plenary Meetings*, *supra* note 30, at 12.

<sup>34</sup> See Tourtellot, *supra* note 2, at 59, 63.

<sup>35</sup> Milde, *supra* note 5, at 435; see also Tourtellot, *supra* note 2, at 62-64.

At the 27th and 29th Sessions, for example, the Republic of Korea (one of Professor Dempsey's "Asian tigers [who] might well eat the lunch of the U.S. flag carriers because of their comparative cost advantage, as well as their relatively higher service levels"<sup>36</sup>) could not get into that Council. During the elections at the 29th Session in 1992 in particular, Korea was the lone candidate that failed to get in, ranking last in group two, with only fifty-five votes.<sup>37</sup> This would be particularly disturbing, especially given that this Republic "statistically ranks 8th or 9th in the world in the volume of air transport."<sup>38</sup> The Korean Delegate himself was entirely at a loss to figure out just what a seat on the ICAO Council could entail. After thanking the few donors of the meager fifty-five votes, the distinguished delegate turned to the entire Assembly with these thought-provoking words:

Before closing, I would like to take a moment to share a few thoughts with you. One of those concerns the criteria for electability to membership on the ICAO Council. We have already informed you that the Republic of Korea ranks eleventh in the volumes of traffic that consist of passengers, mail and freight - ranking sixth in freight alone. We are also about to embark upon the construction of one of the largest airports in the world, that will become a hub of the air link between Asia-Pacific and the world. We have been a member in good standing of ICAO since 1952. These were not good enough to place us in the Council seat. This has puzzled us. One other point I would like to refer to is whether the current practice of electing Council Members is "fair and equitable" in distributing Council seats to the Third World States and the small States in the North. We would recall that a fair and equitable distribution of representation in the decision making in International Organizations is the cornerstone of nations working together under one roof.<sup>39</sup>

These wise words would puzzle any right-thinking member of the international aviation community. Resentment over the Council's dominance and the perceived inequitable geographical distribution of seats led to amendments to the International

---

<sup>36</sup> Paul Stephen Dempsey, *Airlines in Turbulence: Strategies for Survival*, 23 *TRANSP. L. J.* 15, 92 (1995).

<sup>37</sup> See *Plenary Meetings Minutes*, at 128, ICAO Doc. 9601 A29-Min. P/1-14 (Sept. 22-Oct. 8, 1992).

<sup>38</sup> Milde, *supra* note 5, at 435 n.121. Even leaving Korea as a nation aside, Asia-Pacific is known to be "growing fastest" with astounding projections of passenger growth. See the impressive statistics given by Dempsey, *supra* note 36, at 27 n.27 & 81-82.

<sup>39</sup> *Plenary Meetings Minutes*, *supra* note 37, at 129.

Maritime Organization (IMO) Constitution in 1968, substituting the ratio 6:6:12 for the original formula in Article 16(1) of its 1948 Constitution; the current ratio is 8:8:16.<sup>40</sup> In the early days of the ICAO, according to Dr. Tourtellot, "the argument for regional diversity was more valid because so few African and Asian states were members. The limited number of category III positions permitted more representation from the Americas and Europe. From 1956 to 1959, the eve of widespread third world independence, three European countries held seats in category III. Two elections later, in 1962, no European countries held category III seats."<sup>41</sup>

We may, however, wonder why Korea, with all the preponderant evidence, took no positive action against what it saw as an injustice of the system or a violation of the spirit of the Convention. Here, like in the Air Navigation Commission (ANC) appointment affair,<sup>42</sup> the rights of the contracting States were not impeded or derogated by the outcome. Korea rather preferred, "[i]n spite of the outcome of the election, . . . to remain faithful and loyal to the principles and the objectives of the Chicago Convention, as we have always been in the past."<sup>43</sup> Perhaps the situation would have been better explained if the Republic of Korea had emulated Liberia (which did not have enough of this Korean forbearance with a similar interpretation of the IMO Convention).<sup>44</sup> This should have given us some idea of what exactly being a State "of chief importance in air transport" or "which make[s] the largest contribution to the provision of facilities for international civil air navigation" is understood to mean by the ICAO Council (under Chapter XVIII) or the International Court of Justice (ICJ).<sup>45</sup>

The entire Chapter XVIII (Articles 84-88) of the Chicago Convention on the settlement of disputes<sup>46</sup> is very questionable. The particular situation of the Council settling disputes in which

---

<sup>40</sup> See KENNETH R. SIMMONDS, *THE INTERNATIONAL MARITIME ORGANIZATION* 7-10 (1994).

<sup>41</sup> Tourtellot, *supra* note 2, at 62 n.66.

<sup>42</sup> As to the details of which, see Ebere Osieke, *Unconstitutional Acts in International Organisations: The Law and Practice of the ICAO*, 28 INT'L & COMP. L.Q. 1, 8 (1979).

<sup>43</sup> *Plenary Meetings Minutes*, *supra* note 37, at 129.

<sup>44</sup> See discussion *infra* notes 51-58.

<sup>45</sup> Chicago Convention, *supra* note 1, 61 Stat. at 1195, 15 U.N.T.S. at 330-31.

<sup>46</sup> For a discussion of the procedures and cases, see BUERGENTHAL, *supra* note 5, at 123-97; Osieke, *supra* note 42, at 8-14; Michael Milde, *Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)* in INTERNATIONAL

it is a party would, of course, drag in the 58th ILO Session criticisms that "[f]or the Conference first to condemn and then to call for inquiry, the terms of reference of which would be to confirm such condemnation, would be to offend the principle of due process on which all our work relating to the implementation of the Convention rests."<sup>47</sup>

Even the case of the ICJ would not be free of criticisms with its perceived limitations to adequately respond to an international crisis.<sup>48</sup> Chapter XVIII of the Chicago Convention has been held to be "one of the weakest and least effective parts of the Chicago Convention"<sup>49</sup> because "[t]he results of these interventions [under it] are not encouraging for the future of adjudication in the Council."<sup>50</sup>

Maybe (all those criticisms notwithstanding) the Republic of Korea realized that it would have made no difference, with its possible substitution for another Asian or third world nation, as was the situation in the Liberia case. In a similar election to the IMO's fourteen-member Maritime Safety Committee (MSC) Liberia and Panama ranking third and eighth respectively, in world shipping activities could not gain admission. Liberia, like Korea, could not understand why and went to court. This led to an advisory opinion of the ICJ as to whether a MSC elected on January 15, 1959, was "in accordance with the Convention for the Establishment of the Organization."<sup>51</sup> The court, on June 8, 1960, held in the negative. It decided that: (1) the eight largest shipowning nations of Article 28(a) were the eight nations with the largest tonnage registered under their flags, (2) the registered tonnage criterion was *exclusive* and it was unnecessary to consider the linkage between the vessel and flag, and (3) the Intergovernmental Maritime Consultative Organization (IMCO) Assembly had a mandatory, non-discretionary obligation as to the election of members of the MSC.

---

AVIATION ORGANIZATIONS - CASES AND MATERIALS 287-90 (M. Milde & M. Siciliano eds., 1994), DEMPSEY, *supra* note 5, at ch. 15, especially 293-302.

<sup>47</sup> Osieke, *supra* note 42, at 2; see also PETER H. RUSSELL, *THE JUDICIARY IN CANADA: THE THIRD BRANCH OF GOVERNMENT* (1987); Robert F. Kennedy, *Libya v. United States: The International Court of Justice and the Power of Judicial Review*, 33 VA. J. INT'L L. 899 (1993); Heidi K. Hubbard, Note, *Separation of Powers Within the United Nations: A Revised Role for the International Court of Justice*, 38 STAN. L. REV. 165 (1985).

<sup>48</sup> See Hubbard, *supra* note 47.

<sup>49</sup> Milde, *supra* note 5, at 441.

<sup>50</sup> Matte, *supra* note 2, at 379.

<sup>51</sup> As to details, see SIMMONDS, *supra* note 40, at 9-15.

What was really intriguing in the Liberia challenge was that a two-tiered re-election then followed during which Liberia (but not Panama) gained admission with States like France and Germany (ranking 9th and 10th respectively in world shipping tonnage) maintaining their places. Moreover, the so-called second stage of the election was by "secret ballot," which has been aptly described as "prevent[ing] any transparency of the process."<sup>52</sup> As Dr. Milde tersely adds, the whole electing process is "a process which is traditionally well orchestrated prior to, and during, the Assembly."<sup>53</sup> Indeed, what actually happened was a mere substitution of one third world nation for another with no change in the rest of the seats. Professor Simmonds succinctly put it when he affirms that "the end result was that Liberia now appeared in the principal group of eight members and the United Arab Republic disappeared from the group of six members, all other seats being retained."<sup>54</sup>

But an aspect of Professor Simmonds's criticism of the court is itself highly untenable. The professor has trenchantly criticized the decision, stating that there should have been linkage so that the court's decision was "disappointing in its application of the rules of treaty interpretation and unhelpful to the purposes and functions of" the organization.<sup>55</sup> I would, however, doubt the relevance of such linkage, especially knowing that the mere fact of registration and nationality would impose both rights and duties (or responsibilities) on the state of registry and/or nationality.<sup>56</sup> It should be stressed, furthermore, that this nationality concept now in aviation took roots from maritime practices.<sup>57</sup> Linkage in this case would have the effect of allowing the concerned State *only* the responsibilities attached to, and not the rights accruing from, those acts.<sup>58</sup> This is as untenable as the pre-arranged winning and losing of Council seats.

---

<sup>52</sup> Milde, *supra* note 5, at 434.

<sup>53</sup> *Id.*

<sup>54</sup> SIMMONDS, *supra* note 40, at 15.

<sup>55</sup> *Id.* at 13.

<sup>56</sup> See Chicago Convention, *supra* note 1, art. 17-21, 61 Stat. at 1185, 15 U.N.T.S. at 308; see also Joseph Z. Gertler, *Nationality of Airlines: Is it a Janus with Two (or More) Faces?*, 19-1 ANNALS AIR & SPACE L. 211 (1994).

<sup>57</sup> See B. Cheng, *Nationality for Spacecraft?* (1992) (full reference not given) as found in SPACE LAW AND INSTITUTIONS: DOCUMENTS AND READINGS 50 (Supp. I 1996 IASL, McGill University, Ivan A. Vasic, ed., Supp. I 1996).

<sup>58</sup> Some of these gross violations do take place simply because most of these third world States lack adequate representation (i.e., by people who are knowledgeable in what is going on) since the right people are hardly put in the right

The pre-arranged winning and losing may probably explain why sometimes a State is said to have "won an election" for a seat on the prestige-oriented ICAO Council even without its knowledge. To some critics,

perhaps an entirely new convention should be drafted [as] [w]e all know these principles [of Art. 50] have become highly theoretical over the years. Elections in the Assembly are politically orchestrated, primarily by the Third World countries for the sake of greater regional representation, especially in the second and third categories. . . . [T]he problem is apparently one of prestige and international bureaucratic interests, which should be eliminated.<sup>59</sup>

Poor third world, a world which is supposed to be with no interests. I am no defender of the current third world way of looking at the issues, but several commentators would strongly object to Rocha's proposals because "[s]pecific limitations upon. . . [their] representation would be politically unacceptable as a rejection of the principle of equality of states."<sup>60</sup> I also favor not specifically limiting their representation, but I do not agree with the current idea of equality of states as it is employed in ICAO because it does not help the third world states at all. Just how equal are these "equal States?"<sup>61</sup> The current practice is apparently one of prestige and international bureaucratic interests and should be eliminated. The difference is mostly in how to effect the elimination.

This decried orchestration by the Council can be realized in often-heard declarations during election time such as:

[m]y country, which was first elected to that Council in 1980, was unable to sit on it for reasons beyond its control. Today, Cameroon would like to be able to count on the firm support of all of you for its election to the Council during the present session. And it expresses its infinite gratitude to you in advance.<sup>62</sup>

What would be incomprehensible, absent political orchestration, is that Cameroon in fact went in. No one is suggesting that it was/is incompetent as a member. Not at all. If anyone had to *unnecessarily* do that it would not be one of its own citizens, for

---

place. Their systems are largely built on patronage rather than merit or competence.

<sup>59</sup> Ernesto Vásquez Rocha, *Toward A New International Civil Aviation Convention?*, 19-1 ANNALS AIR & SPACE L. 477, 477-78 (1994).

<sup>60</sup> Tourtellot, *supra* note 2, at 75.

<sup>61</sup> See *infra* Part III.

<sup>62</sup> *Plenary Meetings Minutes*, *supra* note 37, at 119.

sure. But during the greater part of that entire term (to the best of my knowledge), as the Council has been going about its duties, Cameroon's contribution to the cause has simply been its empty seat. Meanwhile, States like the Republic of Korea and many others, which would have actively and willingly contributed both ideas and material, are out in the cold.

The questions one could ask here include: what actually could have been the reasons beyond Cameroon's control that it could not take its seat in 1980? Did it not overcome those inhibiting conditions before coming to demand the seat again in 1992? What happened this time? What does the ICAO Council have to say? In fact, there would appear to be no need for wasting time and expenses conducting "elections" when the same results can simply be achieved more pragmatically (and honestly) by having certain entrenched States in the Council, with the others coming in, from time to time, with "new blood" in a rotating manner. Moreover, "[w]ith a smaller Council and no election categories, the Assembly would still be obliged to acknowledge certain issues of priority to the more influential States, merely for reasons of political convenience, seeing that without their support ICAO would be meaningless."<sup>63</sup> These changes would improve the efficiency of the organization in terms of management and time.<sup>64</sup>

The present scheme only unsuccessfully tries to fool people that those "elections" do matter. Dr. Tourtellot, like several others, after a careful review of the various schemes (such as regional and sub-regional blocs) devised by states in order to secure especially the category III seats,<sup>65</sup> came to the inevitable conclusion "that membership criteria and the election process in the ICAO no longer function satisfactorily."<sup>66</sup> The hypocrisy involved in the whole process is even conspicuously magnified as far as the category three states are concerned. Did not the Convention itself talk of their *designation*?

### III. THE MAKE-UP PHASE OF COUNCIL ELECTIONS

This part looks at Nicaragua's allegation that the Assembly's Rules of Procedures regarding this *Make-Up* phase are both un-

---

<sup>63</sup> Rocha, *supra* note 59, at 478.

<sup>64</sup> *Id.*

<sup>65</sup> See Tourtellot, *supra* note 2, at 63-67; see also Rocha, *supra* note 59, at 477-78; Guldemann, *supra* note 2, at 354; Milde, *supra* note 5, at 434-35.

<sup>66</sup> Tourtellot, *supra* note 2, at 67.



just and unconstitutional. The Assembly's response to this challenge will also be evaluated. This response will be shown to furnish further reinforcement to the vexed notion of the ICAO's *Subordinate Supreme and/or Supreme Subordinate Organ(s)*. It will also take a look at the Council's "pragmatic solution" to the dilemma created by Article 94(a); showing how this so-called solution has taken away in a seemingly very innocuous manner the Assembly's most "drastic action" against a contracting State under Article 94(b). Finally, this part examines the associated question of delegation of powers by the Assembly to the Council and "other bodies." Some proposals in regard of the third world are also tendered in the course of all these. As previously indicated, the rules regarding this phase of council elections have been challenged for being both unjust and unconstitutional. Without further ado, I will proceed with studying those two issues, beginning with the injustice charge and how to go about it.

#### A. THE INJUSTICE ISSUE AND WHAT COULD BE DONE

The injustice could be seen in at least two respects. First, the rules accord undue advantage to some States while robbing others of the virtually nonexistent chance to gain admission on the much-cherished Council. In other words, they sacrifice those States that can *only* get in through this particular door. The current practice would seem to be designed to promote the saying, "to those who already have much, more is given; and from those who do not have much, more is taken." This is a sort of plain denial of the "equitable geographical representation principle" that is, *prima facie*, meant to be promoted. What a paradox!

Secondly, injustice is done even to those States that have worked hard and achieved victory through doors *one* and *two* by beating the very States that they thereafter have to sit and rub shoulders with in the Council anyway. The practice could be likened to Britain beating Argentina at the World Cup semi-final only to find itself at the final being pitted against the same Argentina. Maybe the Republic of Korea realized this nonsense when it refused to proceed to the poor-man field after its incomprehensible so-called defeat in the rich field? But not all others would be as civilized to think and behave like this forbearing and over-civilized Korea or rights-defending Liberia.

These rules have also been challenged as being at variance with the Convention's provisions. The Canadian delegate at the Fifth Session, seconded by the Portuguese delegate, indicated

that Rule 4 was in conflict with Article 48(a),<sup>67</sup> with the delegate of Iraq also doubting if Rule 44 did not contravene Article 48(b).<sup>68</sup> The French delegate, on his part, defended the Rule 4 stance by indicating that two considerations influenced it. First, there was no dual representation in U.N. meetings, although that organization's rules contained no provision to that effect, it apparently being axiomatic that a delegate represented only one State. Second, when considering on November 2, 1948, the question of dual representation at ICAO meetings that the French delegate had pursued, the Council decided that there was no objection to the participation of two or more States through a single individual "in any ICAO Divisional, regional or similar special meeting," this wording having been deliberately chosen to exclude this kind of representation in meetings of the Assembly.<sup>69</sup> It should be mentioned, however, that the French delegate concluded that the Universal Postal Union (UPU) specifically permitted the representation of two States by one person.<sup>70</sup> The question to ask is: why should the ICAO want to emulate the U.N. *only* here?

It is even doubtful if Article 50(b) itself does not contradict the sacrosanct principle of sovereign equality found in the Preamble and Article 1 in particular of the Chicago Convention. This view would seem to be supported by the "more visionary than practical" suggestion "reflected [in] the enlightened attitude of two small states active in the aviation field"<sup>71</sup> (i.e. Australia and New Zealand). Even pragmatic Mr. de Brito Subtil of Portugal could see "no justification for treating the Contracting States differently,"<sup>72</sup> especially so just after having solemnly avowed and declared their unqualified "equality" with each having one equal vote, with equal say in their unequal airspace. The idea of "one man/one vote," which has now been accepted as a norm in almost all political systems, was introduced into institutions of the international system by the twentieth century idea of formal equality among nations.<sup>73</sup>

---

<sup>67</sup> *Proceedings of the Fifth Session of the Assembly*, at 46, ICAO Doc. 7203-C/830 (June 5-18, 1951).

<sup>68</sup> *Id.* at 48.

<sup>69</sup> *Id.* at 46.

<sup>70</sup> *Id.*

<sup>71</sup> Tourtellot, *supra* note 2, at 60.

<sup>72</sup> *Minutes of the First Plenary Meetings*, at 5, ICAO Doc. 7297 A6-P/2 (May 27, 1952).

<sup>73</sup> See JACOBSEN, *supra* note 21, at 26.

This sovereign equality principle, unrealistic and objectionable as it may seem, is already well-entrenched in public international law.<sup>74</sup> Kurt Jacobsen sees the problems of balance between political institutions and other centers of power in a system as being no less in international institutions than in the case of national ones. Two reasons given for this are: (1) there are only a few states in the international system and they show extreme differences in their power bases, and (2) normally the states, not the institutions, possess most of the means to implement policy, especially in the case of coercive power.<sup>75</sup>

Indeed, this principle that each state, however small, however artificial, has one vote,<sup>76</sup> which is already well-entrenched in international practice, has been criticized as unrealistic not only for ignoring the vast differences of material capability among states, but also for its combination with the majority rule.<sup>77</sup> "A separate question worth serious consideration," Professor Michael Milde indicates, "is whether weighted voting should not be introduced in the [ICAO] Assembly, at least in the decisions on the budget of the Organization: without the concurring votes of the main contributors any budgetary decisions may prove unrealistic and futile."<sup>78</sup> Professor Peterson answers in the affirmative, though taking population (and not financial contribution) as the weighting gauge: "it would make voting in the General Assembly conform more closely to the democratic notion of treating each person as equally significant."<sup>79</sup> The professor indicates immediately that this proposal "will never be adopted . . . because more states would lose than would gain from the change."<sup>80</sup> But quite apart from Peterson's reasons for refusal, another common and apt criticism of it comes from the United States. According to Stephen Schwebel, most of these assem-

---

<sup>74</sup> See Chicago Convention, *supra* note 1, Preamble 6I Stat. at 1180, 15 U.N.T.S. at 295. For space law, see Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, G.A. Res. 34/68, U.N. GAOR, 34th Sess., at 77, U.N. Doc. A/Res/34/68 (1979), and Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205, 206-08.

<sup>75</sup> See JACOBSEN, *supra* note 21, at 26; see also THEODORE A. COULOMBIS & JAMES H. WOLFE, INTRODUCTION TO INTERNATIONAL RELATIONS: POWER AND JUSTICE 24-27 (2d ed. 1982).

<sup>76</sup> See NICHOLAS, *supra* note 21, at 201; see also SAMUEL SHIH-TSAI CHEN, THE THEORY AND PRACTICE OF INTERNATIONAL ORGANIZATION 56-57 (1971).

<sup>77</sup> See M.J. PETERSON, THE GENERAL ASSEMBLY IN WORLD POLITICS 55-56 (1986).

<sup>78</sup> Milde, *supra* note 5, at 432.

<sup>79</sup> PETERSON, *supra* note 7, at 56.

<sup>80</sup> *Id.*

blies are "composed on the basis of the unrepresentative principle of sovereign equality of states, *states which in turn are represented by governments so many of which are themselves not representative of their peoples.*"<sup>81</sup>

It would appear to me that should weighting be adopted at all, the criterion ought to be financial contribution. This will not only tie in with the suggestion that those with much at stake ought to be in control, but it could also aid in securing capable states to be represented on the Council, while at the same time encouraging the others to improve their situation.<sup>82</sup> This is a possible and acceptable means of helping the third world help itself and at the same time furthering the aims of the ICAO. Let us explicate by hinging on the foregoing criticisms of the sovereign equality rule. The questions raised by, or implicit in, those criticisms center around the larger one of reconciling equality (or justice) and power. First, how does the strength of the nations in the international system help explain the level of activity in the Assembly? Second, what difficulties are encountered, if at all, in implementing decisions taken in accordance with the equality principle but without the support of the stronger nations? These are certainly not new issues, being as old as the modern state itself. The General Assembly, formally based on the principle of sovereign equality, does not reflect this principle in its actual operation. Without going into details here,<sup>83</sup> we may simply "state that *the representation, behavior, and interaction in the General Assembly to a large extent is dependent on the power or capabilities of the various members.*"<sup>84</sup>

It has been suggested in some quarters that ideal equality among nations should be understood only with respect to their *status* in the organization (ICAO for instance) and nothing else because equality at all times would be impossible in the system. For example, only one state at a time can have the floor of debate, and all cannot be members of a limited membership or-

---

<sup>81</sup> Stephen M. Schwebel, Address to the American Branch of the International Law Association (Nov. 3, 1978), in *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW* 1978 (1980), in *PUBLIC INTERNATIONAL AIR LAW: DOCUMENTS AND MATERIALS* 20 (Ivan A. Vlasic ed., 3d ed. ISASL, McGill University, 1995) (emphasis added).

<sup>82</sup> See, e.g., COULOUMBIS & WOLFE, *supra* note 75, at 60; Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443, 1446 (1992).

<sup>83</sup> For elaborate discussions, see JACOBSEN, *supra* note 21, at 132-70. See also COULOUMBIS & WOLFE, *supra* note 75, at 2.

<sup>84</sup> JACOBSEN, *supra* note 21, at 27.

ganization at the same time.<sup>85</sup> This suggested solution would seem to be flawed because "status" in the Assembly, it would appear, cannot be safely divorced from the powers, privileges, and obligations or responsibilities conferred by it. For instance, the U.N. General Assembly stage affords the "new boys" (some of whose population would fit comfortably into two city buses<sup>86</sup>) not only the opportunity "for the assertion of their new-found personalities";<sup>87</sup> but, more importantly, the power to influence or change the course (or sometimes even block progress altogether)<sup>88</sup> on issues literally unconnected to *their status in the organization*. Otherwise, what else would explain "what disgruntled Northerners call the "mechanical majority:" a teeming, depressingly uniform array of African, Asian, and even Latin American states [which] [i]n the ICAO Council . . . has . . . absorb[ed] most of the category III seats that might otherwise have gone to the small states already long established?"<sup>89</sup> Status in the organization cannot therefore be divorced from the attributes of that status, and the suggested interpretation would thus not seem to answer the question.

I would be as audacious as to advance some proposals here, notwithstanding their obvious controversial character, since they certainly would touch those abstract rights of sovereignty that are said to always arouse fierce political passions and prejudices. The ICAO should put aside the delusive idea of sovereign equality and make this very important membership to the Council dependent on (1) positive contribution to air transport, and (2) meeting the Article 37 requirements (Adoption of International Standards and Procedures), *without* the application of the "general escape clause" within Article 38 (which must then find a resting place in limbo). These suggested conditions are intertwined. These considerations, on their part, would further other objectives of the Convention while principally meeting the promise of cheap, efficient, and economical air transport to the

---

<sup>85</sup> See *id.* at 132-33.

<sup>86</sup> See Tourtellot, *supra* note 2, at 75.

<sup>87</sup> NICHOLAS, *supra* note 21, at 200.

<sup>88</sup> See Nasrollah Entezam, *Foreward* to H. FIELD HAVILAND, JR., *THE POLITICAL ROLE OF THE GENERAL ASSEMBLY* (1951) (stating that "indeed at times they have prevented the General Assembly from going astray and guided it to the right track. One outstanding illustration . . . [being] [t]he representative of Haiti, who proved how important the role of a small nation can be and how one vote can affect the destiny of a country during the question of Libyan independence before that Assembly."). *Id.* at vii.

<sup>89</sup> Tourtellot, *supra* note 2, at 66.

peoples of the world. These suggested criteria would obviously engender some finger-pointing. But because we must face the obvious facts, I have anticipated and attempted answers to the following sure complaints.

1. *Keeping Out Smaller Poor States?*

Of course, one could be told that this proposal will keep out smaller, poor or mini-states from the international aviation sphere altogether. It would, therefore, the argument would continue, be a violation of their right under Article 44(f), as outlined above in the introductory part of this Article. Before proceeding any further to indicate that this is simply not the case, it would perhaps pay off to recall some proposals in the same line which were jettisoned, but today their logic haunts us.

At its formation, the Netherlands proposed that membership to the U.N. be made dependent upon the existence in the applicant State of "political institutions which insure that the state is the servant of its citizens,"<sup>90</sup> that is, its having a democratic, representative and responsible government. This was rejected then as being "an undue interference with internal arrangements."<sup>91</sup> This stance or rationale paradoxically turned a complete blind eye to the very thing the U.N. was doing to the Spanish when it was busy insisting on keeping their country out "until a new and acceptable government is formed in Spain."<sup>92</sup> Who was then not interfering in a country's internal affairs? Who can even convince us so far that these same small and poor States are not now being kept out? Double standards may be the rule then. This awkward situation would not have arisen if the Dutch proposals had been accepted outright; complaints such as Stephen M. Schwebel's would not be heard as often today.<sup>93</sup>

Coming back squarely to the two suggested criteria for membership to the ICAO Council, they would rather encourage smaller States to pool their resources and efforts and operate more viable, competitive, and efficient joint air transport agencies. Even keeping this prestigious Council membership aside,

---

<sup>90</sup> HAVILAND, *supra* note 88, at 29.

<sup>91</sup> *Id.* at 30.

<sup>92</sup> Specialized Agency Agreement with ICAO; full text cited in INTERNATIONAL AVIATION ORGANIZATIONS-CASES AND MATERIALS, *supra* note 46, at 42-44. The ICAO's compliance with it took the form of an Annex B (Article 93 *bis*) of the Chicago Convention. Chicago Convention, *supra* note 1, art. 93, 61 Stat. 1206, 15 U.N.T.S. at 358.

<sup>93</sup> See Schwebel, *supra* note 81, at 20.

international air transport is currently going through a period of dynamic change as a result of increasing competition, transnationalization of business, globalization of the world economy, and the emergence of regional economic and political groupings, privatization of service industries, and the introduction of new global trading arrangements for service sectors. Necessitated by the ever-changing technology in the field, the international air transport industry is now faced with the almost irreversible trend of oligopolization and extremely high investment. Against this scenario alone, would one not naturally think that the time may be ripe for developing countries in general, and Africa in particular, to take a more balanced and serious look at the possibility of pooling resources together in order to jointly operate more efficient, competitive, and viable air transport agencies? Only by doing this could we hope to hear of "African Tigers" that could even smell (let alone eat) the lunch and/or supper of U.S. and EU flag carriers.

Could joint air transport organizations or agencies (which the Chicago Convention even implores the Council to encourage<sup>94</sup>) not provide a better nucleus and locomotion (than the Organization of African Unity (OAU) Charter presently does) for the eventual emergence of a United States of Africa (USAF)? Would the world's complex metamorphoses outrun Africa's ability to devise new mechanisms of legal, political, and social cushions? Would Africa not be flexible enough to adjust its perceptions to changing global realities? Would Africa not be able to exchange conventional mental habits for ones more suitable for understanding unconventional circumstances or phenomena? What, if at all, could Africa learn in this regard from the European Union's experiences? Would "Mama Africa" never wake up from her long sleep?

Not only does the Chicago Convention make room for these joint ventures; in addition, there are living examples, such as the Scandinavian Air Systems (SAS), to adaptively emulate. The prospects and challenges involved in such ventures for Africa cannot be extensively canvassed in this Article, but could be a possible and interesting area of further research. The proffered criteria would thus not be any attempt to keep them out. On

---

<sup>94</sup> Chicago Convention, *supra* note 1, art. 78, 61 Stat. at 1202, 15 U.N.T.S. at 348. The Council is especially mandated to "suggest to contracting States concerned that they form joint organizations to operate air services . . . in any regions." *Id.*

the contrary, it could be a sound way of showing them how to fend for themselves and stop waiting on the ICAO, which they would then also be able to positively influence. Has it not been said that it is better to teach a hungry person how to grow the crop rather than to give this person prepared food? The present ICAO scheme would only go a very long way to encouraging complacency, especially in the third world. Most of these third world states on the Council, especially those from Africa, are therefor nothing else except mere prestige; this does not help them influence things at all.<sup>95</sup> With the suggested pooling of resources (and why not even entering into federal unions<sup>96?</sup>), they would probably not only meet the indicated criteria for ICAO Council membership but also be able to sponsor well-to-do representatives to the ICAO Council meetings at which most of the important business, including the sometimes untoward amendments to their meager rights, occurs.

## 2. *Amending the Amending Formula?*

Of course, the suggested proposals, it would be quickly indicated, can only be effected through an amendment of Articles 38, 50, and 94 in particular, or an overhaul of the entire Convention. Even as far back as the very controversial Eighth Session: "the Assembly was virtually unanimous in feeling that there was something lacking in the Chicago Convention that had to be remedied. The difference of opinion was on when and how the omission should be rectified."<sup>97</sup> Such a process of amending

---

<sup>95</sup> See Ram S. Jakhu, *The Evolution of the ITU's Regulatory Regime Governing Space Radiocommunication Services and the Geostationary Satellite Orbit*, 8 ANNALS AIR & SPACE L. 381, 400-01 (1983).

<sup>96</sup> "If it is [truly] desired to assure the development of the group of adjacent States, it will be necessary to by-pass the formula of the common market, which risks giving the definite advantage to the countries with the most important natural resources, and to consider recourse to a political federation. The backward countries could thus acquire greater power of negotiation. Their peoples would then obtain larger benefit from the advantages of the more advanced countries." GILBERT TIXIER, *A COMPARATIVE STUDY OF THE ECONOMIC POLICIES OF THE CAMEEROONS AND THE IVORY COAST* 87 (1974); see also Thomas M. Franck, *The East African Federation*, in *WHY FEDERATIONS FAIL: AN INQUIRY INTO THE REQUISITES FOR SUCCESSFUL FEDERALISM* 3 (Thomas M. Franck ed., 1968); PAUL BIYA, *COMMUNAL LIBERALISM* 134 (1986).

<sup>97</sup> Delegate of Brazil at the 8th Session; see *Minutes of the Plenary Meetings*, at 56, ICAO Doc. 7505, A8-P/10 (June 1954). As to details of why this 8th Session is controversial, see Peter Atch-Afac Fossungu, *The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions*, 26 TRANSP. L.J. 1 (1998).



or overhauling, it has been held, would not be implemented before the first part of the twenty-first century because any change to Article 94 itself would be subject to the procedure within the present text.<sup>98</sup> Those could be palpable obstacles indeed.

But it might appear that they would not be so but for the fact that the Council, in an open and naked Olympian affirmation of its powers, had deprived the Assembly of its one and only effective power over recalcitrant non-ratifying member States under Article 94(b). This was effected through the Council's so-called "pragmatic solution." It has been sufficiently indicated how the question of whether a State that had not ratified an amendment increasing the membership of the Council could vote and/or be voted on "*was resolved in a most pragmatic fashion. At the 14th Session of the Assembly . . . [during which] the Plenary accepted, without a vote and without a recorded objection, the view of the Executive Committee that any State participating in the Assembly could be a candidate in the election, . . . whether or not it had ratified the amendment to the Convention.*"<sup>99</sup>

This so-called "pragmatic solution," like Hitler's war cry of "self-determination" for German minorities within the boundaries of Germany's neighbors, would have now been employed not only as a tool against the ICAO Assembly (the immediate target like Czechoslovakia) but also as one against the U.N. itself (the entire world). The U.N./ICAO Specialized Agency Agreement would now appear to stand in the same position as the piece of useless paper British Prime Minister Chamberlain waved to his countrymen on his return from the Munich meeting with the *Fuhrer* while dogmatically announcing that he had brought "peace of our time."

The so-called solution not only creates ghost members in the Council<sup>100</sup> among other paradoxes created, but also illustrates how such *ad hoc* methods postpone the problem rather than solve it. Chamberlainism or superelastic appeasement did only

---

<sup>98</sup> See Guldemann, *supra* note 2, at 352.

<sup>99</sup> Michael Milde, *Chicago Convention—45 Years Later: A Note on Amendments* 14 ANNALS AIR & SPACE L. 203, 208 (1989) (emphasis added); see also BUERGENTHAL, *supra* note 5, at 43.

<sup>100</sup> If Cameroon has ratified the amendment increasing the size of Council to thirty-three but Nigeria has not, the former may not be in that Council (though still being there) in the estimation of the latter, especially since the former is elected in group three before which the Council might already have the maximum number that the latter is still sticking to. I could write a whole book on this ghost membership issue alone, but let us leave it at this level.

postpone Hitler's war. Professor Groom has identified this and perhaps the idea behind it when he wrote that generally, political leaders are preoccupied by short-term considerations and there is no effective constituency for the long term since to them what happens then will be someone else's problem—a problem made more acute because of the lack of appropriate and timely action now.<sup>101</sup> Moreover, he carries on, consensus political leaders do not have time to think, being engulfed by the questions of the day and the emotional and mental stability perhaps even before political values and intellectual insight.<sup>102</sup> And his conclusion is that in “the long term, the innovatory, anything out of the ordinary is thus at a discount until it forces itself, perhaps in a calamitous manner, on the center of the political stage.”<sup>103</sup> A clear example of the last sentence would be the KE007 incident wherein a Korean Airliner was downed by the Soviet Union. Let us leave all that aside and elucidate how and why the UN could be, or has been, affected.

It is thus not inconceivable that some Members would easily put a big question mark after that “pragmatic solution” whenever it stands against their perceived national interests as the following illustration may concretely show. Australia has not yet ratified the amendment to Article 93 *bis*, which was introduced on May 27, 1947 by the Assembly and came into force on March 20, 1961 in States which ratified it.<sup>104</sup> That amendment states:

- (a) Notwithstanding the provisions of Articles 91, 92 and 93 above: (1) A State whose government the General Assembly of the United Nations has recommended be debarred from membership in international agencies established by or brought into relationship with the United Nations shall automatically cease to be a member of the International Civil Aviation Organization; (2) A State which has been expelled from membership in the United Nations shall automatically cease to be a member of the International Civil Aviation Organization unless the General As-

---

<sup>101</sup> See A.J.R. Groom, *Reflections on a Changing System*, in GLOBAL ISSUES IN THE UNITED NATIONS' FRAMEWORK 235, 290-91 (Paul Taylor & A.J.R. Groom eds., 1989).

<sup>102</sup> See *id.*

<sup>103</sup> *Id.*

<sup>104</sup> See *Annual Report of the Council*, at 95-97, ICAO Doc. 9637 (1994). Switzerland, which has ratified the amendment, can be expelled under it but not suspended thereunder. See BUERGENTHAL, *supra* note 5, at 52-54.

sembly of the United Nations attaches to its act of expulsion a recommendation to the contrary.<sup>105</sup>

Now, should Australia, a founding and entrenched Council member be expelled from the UN, but constitutionally or conventionally would refuse to cede its seat in the ICAO Council because it has never accepted that automatic termination of its ICAO membership, occurs upon exclusion from the UN. In other words, would the recalcitrant "member" in this scenario be Australia in the ICAO or the ICAO in the UN system? Of course, commonsense would suggest the latter. Would the ICAO Council not have used its "pragmatic solution," initially fashioned in demonstration of its alpha-and-omega status within the ICAO, to invalidate the Agency Agreement?

But what if ICAO, to eschew the description of a recalcitrant member, now insists upon Australia's expulsion? Would Australia, like Spain did, simply pack bags and leave with "we could hardly accept the role of an unwelcome guest"?<sup>106</sup> The response would certainly be anything but yes. Some authorities would also think "it is by no means clear what the status of an expelled state is in relation to the states that have not ratified Article 93 *bis*."<sup>107</sup> One could not fail to indicate here that this Australian situation is one of those real eventualities where "[t]his pragmatic experience, which has been perpetuated since 1962, [would doubtlessly] lead[ ] to the conclusion that amendments to the Chicago Convention dealing with institutional problems of the Organization are deemed [*not*] to come into force *erga omnes*."<sup>108</sup> This interpretation could be fortified with the issue of the majority required for drastic action against such a recalcitrant state.

### 3. *What About the Majority for the Drastic Action?*

It would also seem that the solution through Assembly pressure under Article 94(b) would not be likely to succeed. This is because such "drastic action" (which "[t]he Assembly has not availed itself of . . . even though it has adopted a number of important organizational amendments over the years"<sup>109</sup>) would

---

<sup>105</sup> Chicago Convention, *supra* note 1, art. 93 *bis*, 61 Stat. at 1206, 15 U.N.T.S. at 345.

<sup>106</sup> BUERGENTHAL, *supra* note 5, at 41.

<sup>107</sup> *Id.* at 43.

<sup>108</sup> Milde, *supra* note 99, at 208-09.

<sup>109</sup> BUERGENTHAL, *supra* note 5, at 39.

inevitably require a two-thirds majority. The third world states (with "heavily subsidized, uneconomic State airlines . . . contrary to the need for increased business links and trade growth in the developing countries"<sup>110</sup>) to be directly affected by the proposed changes constitute "the mechanical majority" of more than half of the Assembly; an Assembly which Stalin disdainfully termed "a talking shop for the underlings."<sup>111</sup> For example, the said countries are said to be assured (from their claim of being non-aligned) of the support of at least seventy-four countries, namely, "forty-two African countries [that] expressed their opposition to liberalized market access, lowering of foreign investment restrictions and any moves in the direction of a right of establishment, while defending the continued use of State aids and subsidies to ensure survival of uneconomical airlines . . . [plus] an overlapping group of 16 Arab States and . . . of sixteen Latin American and Caribbean States."<sup>112</sup>

These countries, rightly or unjustifiably, "fear that the disappearance of their carriers could mean the disappearance of reliable service. Once a national carrier has disappeared, what is to prevent a foreign-based carrier from curtailing or discontinuing an unprofitable service?"<sup>113</sup>

As the argument would then run, they could very easily block any decision in the direction I am suggesting, especially as existing statistics would even show that just "66 African, Arab, Latin American and Caribbean countries constitute over one third of the ICAO contracting States, although their regions account for only 13% of international traffic and 10% of total domestic and international traffic."<sup>114</sup> This would be in contrast with Asia (another portion of the third world) which, through hard work and the desire to succeed instead of folding arms and complaining very loudly like Africa,<sup>115</sup> already gravely threatens the first world. This study does not, it must be repeated, advocate for their going out of the airline operation business. What it does call for is their doing it effectively and efficiently, which they can only seriously do if they pool their human and material

---

<sup>110</sup> Janda, *supra* note 7, at 427; see also NEAL RIEMER, *POLITICAL SCIENCE: AN INTRODUCTION TO POLITICS* 185 (1983) (declaring how most of them are "not even developing").

<sup>111</sup> NICHOLAS, *supra* note 21, at 183.

<sup>112</sup> Janda, *supra* note 7, at 413.

<sup>113</sup> *Id.* at 415.

<sup>114</sup> *Id.* at 413.

<sup>115</sup> See Nyerere, *supra* note 26, at 132.

resources by leaving aside this mere prestige of flying the flag no matter how inefficiently and uneconomically it is being flown. This could be the only answer these States have for surviving in the 21st century which, undoubtedly, is one for an oligopolized airline industry, a century in which even unoligopolized mega carriers may find it hard to survive in. How should the ICAO's part come about in all of this?

#### 4. *Principled and Foresighted Use of the Pragmatic Solution*

The inevitable answer to the question would be from another question; namely, to know just how other measures have until now been adopted in the ICAO despite their obvious adverse affect in the majority States. It all eventually boils down to where we started: Article 94(a) and the "pragmatic solution." The ICAO Council should now employ the "solution" to give the people of the world the kind of air transport that the Chicago Convention promised them. This Council must then *pragmatically* make its membership dependent not on wasteful and deceitful elections, but on the criteria I have just indicated and the many other worthwhile ones that have been advanced by other writings. A State or group of them would be free not to fulfill the conditions; but that would mean it should not hope to join the prestigious ranks of the ICAO Councilors. The Council must do so to be able to convince us that it has not turned the powers conferred upon it at Chicago to solely furthering, to the utter neglect of the *raison d'être* of the ICAO, its own institutional value—even when it would mean committing unconstitutional acts to achieve that.

#### B. THE UNCONSTITUTIONALITY QUESTION AND ANSWER

Questions of unconstitutionality often arise regarding what has been termed the "disregard of established constitutional procedures and due process."<sup>116</sup> The query as to the legal effect of the acts of international organizations, which were not in conformity with their constitutive instruments, has given rise to conflicting points of view.<sup>117</sup> The Council election of 1956<sup>118</sup> was important for a number of reasons. The fourth since the ICAO's establishment in 1947, it was the very first in which the

---

<sup>116</sup> Osieke, *supra* note 42, at 2-3, 14-20.

<sup>117</sup> See *id.* at 20. The author discusses some of them in regard to ICAO at 21-23.

<sup>118</sup> For a catalog of the various council elections and the states that have been therein represented until 1980, see Tourtellot, *supra* note 2, app. at 79-80.

number of candidates exceeded the places to be filled.<sup>119</sup> The Federal Republic of Germany refrained from presenting itself as candidate here simply because it had been a member of the Organization for only about a month. The vote resulted in two changes in the Council Membership, Sweden taking the "Scandinavian seat" previously held by Norway and Japan replacing the Philippines.<sup>120</sup> In such a scenario, the "pro-forma procedure" commonly used where "there were as many seats as candidates"<sup>121</sup> must then be abandoned. Consequently, dormant "centrifugal forces" and interpretations would be bound to be drawn into play as is always the case when a nation's abstract interests are imperiled. According to the Nicaraguan delegation that withdrew their candidate just before balloting (in protest against the procedure to be followed), the provision in Rule 57 was categorically unconstitutional.<sup>122</sup>

Maintaining that it was contrary to the letter and spirit of Article 50 of the Convention, they proposed an amendment that would have required the Assembly, after balloting for the first two categories had been completed, to specify the major geographic areas of the world still unrepresented on the Council and would have included in the list of candidates for election in the third category only such States not elected in the first or second category as came from those areas.<sup>123</sup> The sanity of these proposals could hardly require amplification.

Most delegates opposed this principled approach and the Assembly, therefore, decided to follow the same course as it had in 1954 when Rule 57 had been unexpectedly questioned. It asked the Council to study it, circulate appropriate material to the Contracting States with a request for their comments, and, after considering any comments received, present its recommendations to the Assembly "as soon as practicable."<sup>124</sup> As a first step,

---

<sup>119</sup> See *Annual Report of the Council to the Assembly for 1957*, at 58-59, ICAO Doc. 7866 A11-P/3 (May 20-June 2, 1958). Twenty-four candidates for twenty-one positions.

<sup>120</sup> See *id.*

<sup>121</sup> Tourtellot, *supra* note 2, at 62.

<sup>122</sup> States failing to get elected in the first and second categories are automatically included in the list of candidates for the third category (States whose designation will ensure adequate geographical representation). See *Proceedings of the Fourth Session of the Assembly*, at 28-30, ICAO Doc. 7225-C/834 (May 30-June 20, 1950). For other similar charges of unconstitutionality, see Osieke, *supra* note 42, at 14-20.

<sup>123</sup> *Annual Report of the Council to the Assembly for 1957*, *supra* note 119, at 52-53.

<sup>124</sup> See *id.*

the Council requested the advice of the Legal Committee, with the expectation that a sub-committee would be established to study the matter and report to the Eleventh Session of the Committee. The Council thus hoped to be in a position to make a recommendation to the Assembly in 1958.<sup>125</sup>

One would be inclined to think that such a recommendation has never been submitted, since the ICAO is to this date still using the contested procedure. How soon is "as soon as practicable?" Or did the recommendation make a determination against the Nicaraguan proposals? Whatever the case, our interest here would not be so much in whatever the Council put or did not put forward; that would not significantly affect the consequences to be drawn from the Assembly's response to that challenge of unconstitutionality of *its own rules determined by it*. Was the Assembly thus delegating its powers under the Convention?

### 1. *Delegation of Powers?*

In not acting when and where it should have acted and instead looking up to the Council, was the Assembly exercising its constitutional right to delegate to the Council? As previously noted, the Assembly has as one of its funny powers and duties, the delegation of powers to the Council. They would seem to have this quality not only because they are not the "crucial ones," but more importantly also because of two essential considerations. First, most, if not all, of them are so carefully hedged that the Assembly would simply not be free to act in their regard without the Council having first pulled the gear lever. This concerns what could be termed (i) the "reference duties," exemplified by Article 49(c) under which the Assembly has to examine and take action on the reports of the Council and decide on any matter *referred* to it by the Council. It is important to note here that "any matter" cannot include anything that has not been specifically referred to it by the Council; and (ii) the "linked duties" such as Article 49(e). Second, the no-go areas to this Assembly (i.e., Council's exclusive competence) are elastic enough to cover *all* of these listed non-exclusive powers and duties of the Assembly.

Thus, Article 49, which could be taken as cover here by the Assembly in the present controversy, clearly stipulates that: "[t]he powers and duties of the Assembly shall be to: . . . (h)

---

<sup>125</sup> See *id.*

[d]elegated to the Council the powers and authority necessary or desirable for the discharge of the duties of the Organization and revoke or modify the delegations of authority at any time."<sup>126</sup>

What these powers and duties specifically entail would be hard to tell. But, if the question of delegation is answered in the affirmative, were the conditions for such delegation met? Are there any non-delegable functions of the Assembly?

It is submitted that the Assembly, regarding the particular issue in question (its own rules of procedure), could not have been delegating under Article 49(h) because (1) the power or duty could be non-delegable and (2) conditions necessary for such action may not have been met. For example, was the purported delegated power "necessary or desirable for the discharge of the duties of the *Organization*?"<sup>127</sup> And could the Assembly thereafter "revoke or modify the delegations of authority at any time?"<sup>128</sup> Of course, it would hardly be said that these conditions could be, or were, met. Or could/were they? Assuming even that they were, it could not still shield the Assembly from rebuke.

A further criticism could be that the response of the ICAO's most distinguished Assembly, that is, in referring the matter to the Council, can only go deeper into exposing its acceptance of its subordination to, and helplessness without, the Council. First of all, there would seem to be no logic in asking the Council to decide on its own rules of procedure, which it itself (exercising its basic constitutional rights and prerogatives under Article 49(d)) brought into existence. This interpretation will clearly come within the Legal Bureau's stipulation that: "[t]he powers of the Assembly were at any given time, those which were in accordance with the provisions of the Convention and could not be deemed to extend to such powers as might later accrue by virtue of the entry into force of an amendment to the Convention."<sup>129</sup>

---

<sup>126</sup> Chicago Convention, *supra* note 1, art. 49, 61 Stat. at 1194, 15 U.N.T.S. at 330.

<sup>127</sup> *See id.*

<sup>128</sup> *See id.*

<sup>129</sup> *Minutes of the Executive Committee*, 18th Session of the Assembly of the ICAO, at 54, ICAO Doc. A18-Min. Ex/1-16 (June 15-July 7, 1971), *cited in* Osiecke, *supra* note 42, at 18.



The case of the United Nations General Assembly Special Committee<sup>130</sup> is graphical here. The General Assembly never delegated this issue to the Security Council because it is, of course, independent and supreme. Otherwise, the ICAO Assembly would be telling us that making of its own rules was not the case as it certainly would seem not to have been.

When a national Parliament or Congress enacts a law or regulation and thereafter realizes that the enactment is attacked as unconstitutional by one of its own members, does that entity turn over the matter "for consideration" to the executive branch? Certainly not if it is the supreme organ. What is usual for Congress to do? Two alternatives are available. One is to "consider" the matter itself through its relevant committee(s) as the UN General Assembly did. The second choice involves expressly asking the judges (and not the Council as the ICAO Assembly did) to decide the issue. After all, is that not the reason for having the ICJ within the UN system?

Perhaps the ICAO Assembly took this to be an issue falling within the purview of Article 54(n)? (By it "[t]he Council shall: . . . (n) [c]onsider any matter relating to the Convention which any contracting State refers to it.")<sup>131</sup> If so, was it "any contracting State" that referred the matter to the Council? Of course not. Perhaps the Assembly might also have thought the matter was one for the Article 84 procedure? Article 84 may also be excluded. Appeals from the Council lie to the UN organ, the ICJ, (or other arbitration tribunals). But this should not be taken to mean that a case cannot be taken directly to the ICJ without its having gone first through the Council. The *Liberia* case discussed above is an example. Discussing Article 84 of the Convention, Ebere Osieke even argues that:

since the power of the Court [ICJ] is derived from Article 84 of the Chicago Convention which applies only to any disagreement between "two or more contracting States," a decision concerning a disagreement between the Council and a contracting State or between two organs of the ICAO, cannot be the subject of an appeal under that Article.<sup>132</sup>

---

<sup>130</sup> See *Report of the Special Committee on Measures to Limit the Duration of Regular Sessions of the General Assembly*, U.N. GAOR, 8th Sess., Annexes, Agenda Item 54, at 2-13, U.N. Doc. A/2402 (1953), reprinted in S.D. BAILEY, *THE GENERAL ASSEMBLY OF THE UNITED NATIONS: A STUDY OF PROCEDURE AND PRACTICE* 323-30 (1960).

<sup>131</sup> Chicago Convention, *supra* note 1, art. 54(n), 61 Stat. at 1197, 15 U.N.T.S. at 336.

<sup>132</sup> Osieke, *supra* note 42, at 13-14.

This could only be understood to mean that excluded matters or disagreements must in the first instance lie only to the ICJ. Were it to be otherwise, it would be a naked installation of the Council as both definitive judge and party. This would not only offend common sense but also render the entire adjudication process farcical "and difficult to sustain as a public institution."<sup>133</sup>

The present case would clearly be within those excluded disagreements. It is not a question between contracting states *inter se* as in *India v. Pakistan* (1952),<sup>134</sup> *United Kingdom v. Spain* (1967),<sup>135</sup> or *Pakistan v. India* (1971);<sup>136</sup> nor even as in *Libya v. United States*,<sup>137</sup> whose "order of the World Court of 14 April 1992 does not appeal to the professional instincts of an international lawyer."<sup>138</sup> The present case instead concerns a dispute between a contracting State and the Assembly as an organ instead of "other contracting states" regarding its internal rules. The Council could therefore not come into play here since (1) this is not even a dispute "relating to the interpretation or application of this Convention and its Annexes,"<sup>139</sup> and (2) nor is it "on the application of any State [such as Nicaragua] concerned in the disagreement."<sup>140</sup>

The Council's involvement in this case can only go a long way to telling us that it, and not the Assembly, brought the rules of procedure into existence. This could even be evident in the French defense of the rules.<sup>141</sup> If this suggestion is true, the vexed issue of usurpation of the Assembly's functions under Ar-

<sup>133</sup> RUSSELL, *supra* note 47, at 20.

<sup>134</sup> For discussion of which, see Milde, *supra* note 46, at 289-90.

<sup>135</sup> As to the instinctive memorials of both parties, see PUBLIC INTERNATIONAL AIR LAW: DOCUMENTS AND MATERIALS, *supra* note 81, at 216-32.

<sup>136</sup> See BUERGENTHAL, *supra* note 5, at 123-97; DEMPSEY, *supra* note 5, at 293-302; Milde, *supra* note 46, at 287-90; Osieke, *supra* note 42, at 8-14.

<sup>137</sup> A very insightful discussion of the case has been done by Kennedy, *supra* note 47.

<sup>138</sup> C. Tomuschat, *The Lockerbie Case Before the International Court of Justice* THE REVIEW, INTERNATIONAL COMMISSION OF JURISTS (1992), in PUBLIC INTERNATIONAL AIR LAW: DOCUMENT AND MATERIALS, *supra* note 81, at 48.

<sup>139</sup> Chicago Convention, *supra* note 1, 61 Stat. at 1204, 15 U.N.T.S. at 352. This stance, no doubt, may be somewhat difficult to sustain as the attack of the Rules is solely predicated on the Convention. It would thus be hard to separate the two; to that extent, the entire dispute could then be regarded as one of the application or interpretation.

<sup>140</sup> Chicago Convention, *supra* note 1, 61 Stat. at 1204, 15 U.N.T.S. at 352 (emphasis added).

<sup>141</sup> See *Proceedings of the Fifth Session of the Assembly*, *supra* note 67, at 46, 48.

ticle 49(d) would then inevitably follow. As Judge Lacks has stated: '[i]t is important for the purposes and principles of the United Nations that the two main organs with specific powers . . . act in harmony—though not, of course, in concert—and that each should perform its functions . . . without prejudicing the exercise of the other's powers.'<sup>142</sup>

At this level, the issue would have to become an inter-organ one, which, as previously indicated, is not also covered by Article 84 of the Convention. The ICJ alternative consequently ought to have been pursued by Nicaragua, even if the Assembly itself did not do so. It would not have been setting any precedent as Liberia's case has been taken before within the UN family regarding the same type of election to the venerated Council or Governing Body. But, since Nicaragua did not, the elected Council stands unchallenged. There is another reason why this Council could boast about it: being seemingly given cover by the Assembly's uncertain powers.

## 2. *What then are the Assembly's Powers Properment Dire?*

This question would be particularly important in the light of an informed look at the Council's "14 mandatory and 5 permissive functions outlined in Articles 54 and 55 of the Convention, respectively."<sup>143</sup> Could the Assembly successfully hide behind its discretionary delegation? In other words, could we also dismiss the possibility of its hiding behind Article 49(g)—its discretionary delegation power? Article 49(g) would seem to answer in the negative when it stipulates that the Assembly *shall* "refer, at its discretion, to the Council, to subsidiary commissions, or to any other body any matter within its sphere of action."<sup>144</sup> This would seem to provide a comfortable hiding ground for the Assembly's criticized response to Nicaragua's challenge. Delegating "any matter within its sphere of action" in this instance to whichever of the listed bodies is entirely "at its discretion." But there the matter ends.

This attempted cover could simply be equated to "the illusion of subordination [of the Council] to the universal body"<sup>145</sup> which is very cleverly and innocuously embedded in Article

---

<sup>142</sup> *Libya v. United States*, I.C.J. 114 at 139 (1992), cited in Kennedy, *supra* note 47, at 923 n.110.

<sup>143</sup> DEMPSEY, *supra* note 5, at 274 n.9.

<sup>144</sup> Chicago Convention, *supra* note 1, art. 49(g), 61 Stat. at 1194, 15 U.N.T.S. at 330.

<sup>145</sup> Tourtellot, *supra* note 2, at 56.

50(a); or to the “ideological myth”<sup>146</sup> that the ICAO Assembly is the supreme organ of the Organization, having a “sphere of action of its own” that it can delegate “at its discretion.” Indeed, to shorten a long tale of two organs, all this “is simply to indulge in self-delusion.”<sup>147</sup> How and why?

First, could this Assembly, in exercise of its so-called discretion, refuse delegation and thereby effectively keep the Council out of “its sphere of action?” It simply can or could not, and the reverse would instead be the rule. The Council would seem to be able to validly arrogate or assume this function, not so much because it is delegated. Article 55(d) gives it the exclusive permissive function to “[s]tudy any matters affecting *the organization* . . . and submit to the Assembly plans in relation thereto.”<sup>148</sup> The present dispute would unambiguously be captured by the all-embracing or catch-all phrase: “any matters affecting the organization.” This is especially reinforced by Article 55(e) which also makes the power of investigation the Council’s exclusive permissive function.<sup>149</sup> Even though this latter function must only be “at the request of any contracting State”, the very fact that, under it, the Council only issues “such report as may appear to it [Council] desirable” would make the Council the sole decider of what may be encapsulated by the Article.<sup>150</sup> It is important also to note that, here, unlike in the case of Article 54(n), no “Contracting State” nor “any organ” need refer the matter to it before the Council can assume jurisdiction.<sup>151</sup>

As previously noted, the conclusion could be that these principles would very effectively preclude the ICAO Assembly from doing anything whatsoever, except what the ICAO Council would warrant or permit. Moreover, has it not even been made crystal-clear by the Legal Bureau Director that the Assembly’s powers and duties, both implicit and ancillary, were specified in Article 49 as were certain specific limitations on those powers—for example, Article 49(k)?<sup>152</sup>

---

<sup>146</sup> RUSSELL, *supra* note 47, at 107.

<sup>147</sup> Lord Hailsham of St. Marylebone, *The Office of Lord Chancellor and the Separation of Powers*, 8 CIV. JUST. Q. 308, 317 (1989).

<sup>148</sup> Chicago Convention, *supra* note 1, art. 55(d), 61 Stat. at 1197, 15 U.N.T.S. at 336.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Chicago Convention, *supra* note 1, art. 49, 61 Stat. at 1194, 15 U.N.T.S. at 330.

## IV. CONCLUSION

The entire constitutional and political set-up of the ICAO can hardly be justified in both the spheres of democracy and of its corollary, the supremacy of the Assemblies of international organizations. The result of this strange arrangement has been that the majority of States simply cannot contribute to the advancement of the international aviation cause as they might have had the ICAO Assembly had the voice and say that it now lacks. For example, a country like Singapore, with a lot of aviation potential, though small in population and territory and coming from the Southern Hemisphere, can scarcely make its views heard since it is not a member of the Council. Entrance into this Council has also been fashioned so that getting in is dependent on the ousting of one of the ICAO Council's Asia-Pacific "giants" or "immutables" (Australia, China, India, Japan, New Zealand, Pakistan). Because these can hardly be thrown out, Singapore (like many others) must therefore not be heard. This would not have been the case if they could actively participate through the Assembly like is the case in the other international organizations. This curious framework does not argue well even for the integrity of the ICAO itself.

The ICAO Council now wields more than enough power to be able, *if it so desires*, to overcome this stumbling block to international civil aviation called national sovereignty and all its corollaries, and provide the peoples of the world with a *real* efficient, cheap, and economical air transport. Of course, the required changes would necessitate an entire re-examination of the Chicago Convention. This would seem difficult to achieve, but it is not impossible. The difficulties, no doubt, underlie the problems of balancing power and justice. Hopefully, the ICAO can advance further as it learns from its mistakes. Therefore, as one of its 14th Session Delegates has rightly said, the ICAO must not follow the example of the ostrich by putting its head in the sand to avoid seeing dangers ahead. It must now face the problems open-heartedly and honestly by creating an atmosphere in which these problems can be discussed freely and the requisite modification effected. Otherwise, "we shall be in the same boat again."<sup>153</sup> Could we afford being in this same boat without adequate paddles forever? Surely not, for in the absence of any form of trial in this direction, the words of Mayor

---

<sup>153</sup> *Minutes of the Plenary Meetings*, at 25, ICAO Doc. 8269/A14-P/21 (Aug. 21, 1962).

La Guardia of New York at Chicago in 1944 would be apt: "the meat is taken right out of the Convention. All the rest sauce. Everybody prefers aircraft which do not break up in the air and everybody, in aviation, is opposed to bad weather; but we must go further than that, if we do not care for the sauce without the meat!"<sup>154</sup>

---

<sup>154</sup> *Minutes of the Plenary Meetings*, *supra* note 30, at 49. "If there are unpalatable facts to be faced, it is useless to blame those who discover them; harm can only result from refusing to face them, or perhaps, even to grasp them." MICHAEL DUMMETT, VOTING PROCEDURES 12 (1984).

