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AMENDMENTS TO THE CHICAGO CONVENTION: LESSONS FROM PROPOSALS THAT FAILED

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THE ICAO Assembly met in its Twentieth Extraordinary Session in Rome in August and September, 1973, to consider the proposed incorporation into the 1944 Chicago Convention on International Civil Aviation of supplementary provisions aimed at strengthening the ICAO role and enforcing obligations of States in regard to safety of civil aviation. More specifically, a machinery was expected to be put into motion by way of Chicago amendments which would ensure that ICAO States are more consistent, react properly, and work together towards the suppression of such modern threats to safety as acts of unlawful seizure of aircraft or other unlawful interference with civil aviation.

The Twentieth Assembly might have become important not only for this expected contribution to the efforts for greater safety of aviation: it might have also adopted the first amendment to the Chicago Convention of a clearly non-procedural and non-institutional type since the Chicago Conference in 1944. Indeed, two first Articles of the newly proposed Chapter XVI (bis) on "Supplementary Provisions on the Safety of Civil Aviation" achieved the required positive vote of two thirds of States attending the Assembly, *i.e.* more than 67 votes, and the third Article was short only two votes. This doomed not only the remaining provisions but the Chapter XVI (bis) as a whole.

The Twentieth Assembly, as well as the Diplomatic Conference

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held at the same time with a similar objective to provide new international rules concerning aviation safety, will be undoubtedly analyzed in many respects. The failure of amendments to the Chicago Convention seems, however, to deserve some attention per se: it may revive some uncertainties as to the extent to which the Chicago Convention in its present unamended form is, or can be responsive to all existing needs and requirements of international civil aviation. In other words, is it at all possible to reconcile the necessary degree of rigidity appropriate for constitutions of international organizations, with the call for changes, required in response to new developments in civil aviation since 1944?

The Chicago legacy

It may indeed appear as one of the ironies of history that States, or their representatives, most actively involved in the work and functioning of the International Civil Aviation Organization had been showing greater inclination towards possible amendments of the ICAO Constitution, the Chicago Convention, back in 1947-1949 and in the early 1950's (*i.e.* immediately after the Convention entered into force and ICAO began its activities) than they seem to be now, almost thirty years after the adoption of the Convention, when international civil aviation has totally changed its image and environment.

The record of proceedings of the Chicago Conference in 1944 is not excessively informative about what the "Fathers" of the Convention on International Civil Aviation actually thought about possible future amendments of this instrument. True, there were procedural provisions regulating amendments in the Drafts tabled at the Conference,¹ and the final text of the Convention adopted by the Conference set out the rules for amendments in its Article 94. One can, however, only speculate that the reasons for the wording of this clause are attributable more to constitutional technicalities and to the anticipated implications of only partial adoption of amendments, than to a clear recognition of the need to determine procedures in a certain specific fashion for the future good of the

¹ Art. L, Canadian draft, International Air Transport Convention, Doc. 50, Proceedings of the International Civil Aviation Conference, at 590 (1948). *See also* Art. XIX, revised tripartite Canada/U.K./U.S. draft, Doc. 402, *id.* at 417, and two alternative forms of Art. XIX, Section (3), third revision of the same tripartite draft, Doc. 442, *id.* at 389.

long-term development of international civil aviation.

In all fairness, it must be acknowledged that the participants in the Conference were certainly aware that there would be further advancements in aviation technology, operations, economy and other areas. They may have been mistaken only as to the speed and radical nature of this development but this is not what matters in our context. It is probable that, while not ignoring the real imminence of future changes in the aviation environment, and admitting fully the resulting possible need for changes in the ICAO basic document, the Convention on International Civil Aviation, they may have been thinking overly optimistically about a smooth passage of amendments and their universal acceptance. It is hard to hold this against them considering the prevailing euphoria marking the successful latter part of the Conference after its original troubles. In the rosy atmosphere of belief in a new order in aviation, it would have been a too-discordant note to suggest that possibly legally sound but somewhat rigid procedural rules on amendments might impair the capability of the Convention to respond to the vaguely anticipated future problems. There is also another plausible explanation: since aircraft technology, navigation, route facilities, etc., were to be reflected primarily in ICAO standards and recommended practices as formulated in the Annexes to the Convention, it might have been felt that some flexibility allowed for amendments of Annexes was a sufficient precaution, without softening the rules for amendments of the Convention itself, which, as a founding document of an international organization, was traditionally supposed to carry a greater degree of rigidity. And yet another consideration: at a Conference with fifty-two countries participating, all like-minded in the basic belief in ICAO and its ability to cope with whatever future requirements, the approval of amendments by two-thirds of the Assembly must certainly have appeared more easily attainable than today within a huge body of 128 ICAO member States.

The pronouncements made at the Chicago Conference about future developments and the need to shape the Organization accordingly were perhaps not too numerous, but they were unmistakably clear. The Chairman of the Mexican delegation asked the meeting "to establish the new bases and general lines along which civil aviation of the future should develop," adding, with no undue emphasis,

that "from the resolutions adopted many aspects of the future world will depend."² The Chairman of the Chinese delegation talked about "the technological progress . . . changing the art of air transportation" and about more "new emerging problems" that will require international cooperative efforts.³ In the words of the Chairman of the U.S. delegation,⁴ aviation (technical) matters "are not static" and should be continuously studied and the results of such studies applied under the authority of an international body. Dr. Warner, who was to become the first President of the ICAO Council, stressed the need "for the utmost flexibility in the adoption and amendments of Annexes (to the Convention) in order that they may be kept abreast of the development of the aeronautical arts."⁵

Related as these and other similar statements might have been primarily to technological progress and to ICAO technical law-making, it is hardly imaginable that such a clear recognition of the likelihood of future changes in civil aviation and its organization, would shy away from the idea of amendments of the Convention itself, should such amendments be really needed. It was no coincidence either that within the framework of the Provisional International Civil Aviation Organization which in 1945-1947 preceded the present ICAO, a Committee on International Convention on Civil Aviation had been called into existence under Article III Section 5 of the Interim Agreement on International Civil Aviation,⁶ the mandate of which spelled out explicitly in Section 6 (3) of the same Article, was to "continue the study of an international convention on civil aviation."⁷ The terms of reference of the Committee as adopted by the Interim Council on August 29, 1945, included "review of recommendations and policy questions arising from the continued study and amendment of an international convention on civil aviation" and making "appropriate recommendations to the Council for its guidance."⁸

Still in the same vein, the Interim Council decided in September

² *Id.* at 46.

³ *Id.* at 45.

⁴ *Id.* at 64.

⁵ *Id.* at 92.

⁶ ICAO Doc. 2187 at 27 (1960).

⁷ *Id.* at 29.

⁸ PICAO Doc. 3120 at 200 (1947).

1947 to invite Member States to "forward to PICAO any suggestions which they may have for the further development of the Convention, either by early amendment of the present form or by action by the Assembly or the Council required for the implementation of its present provisions."⁹ The Committee on Convention on International Civil Aviation concluded in its Report to the First ICAO Assembly that instead of frequent adoption of a number of amendments which could lead to uncertainties and confusion, it would be preferable to proceed to general proposals for amendments, and this for the first time at the Third Assembly. A further revision was considered timely at the Seventh Assembly and thereafter every six years so as "to bring the Convention up to date" in terms of substantive amendments, making "good omissions from the present text of the Convention" or undertake amendments necessary for clarification of its text.¹⁰ The First Session of the ICAO Assembly in May 1947 did neither endorse nor reject this result of the Committee's thinking. In regard to the procedure for preparing amendments to the Convention, Commission One of the Assembly merely decided, "in view of the limited time available and of the complexity of proposals put forward," to request the Council to take such action as may be appropriate.¹¹ The matter did not come before the plenary meeting of the Assembly.

Maturing to wisdom?

In the period 1947-1950 ICAO, its Council and Assemblies, appeared to begin to realize gradually that a general revision of the Convention of the type originally contemplated might not be an easy exercise and also might not be too helpful to the orderly expansion of ICAO activities in the early years of its existence.

It was the Fourth Session of the Assembly held in May/June 1950 in Montreal which in its Resolution A4-3¹² nailed the lid on the Pandora's box of a general revision of the Convention, opened partly in the preceding years, (particularly in 1948-1949 in the follow-up of Assembly Resolution A2-5¹³).

Probably the most important part of Assembly Resolution A4-3

⁹ PICA Doc. 2085 at 7 (1946).

¹⁰ Documentation for the 1st Ass., A1-CP/12 at 12 (1947).

¹¹ ICAO Doc. 7325-C/852 at 160 (1952).

¹² ICAO Doc. 7670 at 132-33 (1956).

¹³ *Id.* at 71.

was a clear and unambiguous decision that no plans should be initiated *in the near future* for a general revision of the Convention and that modification of the Convention should be accomplished by specific amendments only.

Also the remaining parts of the Resolution could not have other objective—and effect—than that of cooling off the eagerness of the previous years not to procrastinate with amendments but to remold ICAO's institutional framework before it was definitively settled.

Thus the Fourth Assembly concluded that an amendment of the Convention may be appropriate when either or both of the following tests is satisfied:

- (i) When it is proved necessary by experience,
- (ii) when it is demonstrably desirable or useful.

In the same vein the Council was forbidden, or at least strongly discouraged, to initiate itself any proposal for amendments unless in its opinion such an amendment would be urgent in character. The rules set forth for the submission of proposals for amendments by States, although primarily aimed at establishing some procedural order, could also be read as a call for responsibility and for sufficient reflection on the part of States before advancing any proposals. The same Assembly Resolution (A4-3) decided to maintain the procedural provision of the Chicago Convention governing its amendments, *i.e.* Article 94, in its existing form in spite of many previous efforts for its modification.

These main principles enunciated by the Fourth Assembly left little doubt about what was the prevailing trend in regard to amendments. There was, however, one exception to what would have otherwise appeared as a death knell for all early attempts to amend the Convention. The Assembly explicitly left unaffected the Council's responsibility in respect of the previous proposals for amendments (except for the procedural provisions of Article 94), including the amendments submitted to the Council prior to the Fourth Assembly in pursuance of Assembly Resolution A2-5. The Council was expected not only to consider—or reconsider—these previous proposals but also “to make proposals to the Assembly thereon.”

The interpretation of this mandate was not found to be easy and it was only after a great deal of controversy that the Council took the position which meant in substance that it did not accept any

obligation to reconsider all previous amendments but felt free to do so applying the normal criteria of usefulness and urgency and assuming also that there would be a (new) specific request for consideration or reconsideration from a Council Representative or from a non-Council Member State. The Executive Committee of the Seventh Session of the Assembly in 1943 noted this interpretation and took no further action in the matter.¹⁴

Returning to the specific proposals of the years prior to 1950, a distinction has to be made between proposals concerning Article 94 of the Chicago Convention and the other proposals.

Article 94 was predicated on the following principles:

(1) approval of an amendment to the Convention requires a two-thirds vote of the Assembly;¹⁵

(2) it comes into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly; this number may not be less than two-thirds of the total number of contracting States;

(3) the Assembly may decide, if it so deems justified, that any State which has not ratified the amendment within a specified period after its entry into force, shall thereupon cease to be an ICAO member and a party to the Convention.

It was quite natural that the Convention Committee which in its report to the First Assembly went so far as to say that "a study of the Convention indicates that it can be improved in numerous respects," did not hesitate to question that provision of the Convention which regulated the procedure for amendments. The Convention Committee was quite open in its opinion that "the early adoption of an amendment (to Article 94) seems particularly desirable as the Committee considers it urgent that in the future the coming into force of amendments to provisions of mere procedural character or merely involving clarification or editorial readjustments of the text of the Convention should be speeded up by omitting the requirement of ratification."¹⁶

To dispense with the ratification of those amendments which would not affect the rights and obligations of States, *i.e.* of provi-

¹⁴ Documentation for the 7th Ass., A7-WP/4, EX/2 (1953).

¹⁵ For problems concerning interpretation of the "two-thirds" vote, see T. BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* 207-09 (1969).

¹⁶ *Report*, working paper for ICAO 1st Ass., A1-CP/12, at 7 (1947).

sions of procedural and organizational nature or those serving the clarification of the Convention, was probably the most important, but not the only innovation, advanced by the Committee.¹⁷ In connection with the distinction between internal, organizational, "housekeeping"¹⁸ amendments and those involving the legal situation of States,¹⁹ the Committee thought that in case of doubt or controversy, it should be the Assembly itself to decide upon an amendment belonging to the first or second category. Instead of specifying the "number" of States the ratification of which was necessary for an amendment to come into force, the Committee preferred the specification of a "proportion" of States. Another suggestion was to amend the paragraph (b) of Article 94 to the effect that a State failing to ratify an amendment within the period specified by the Assembly will have its membership suspended, instead of being expelled. In addition, there were two minor suggestions concerning the deposition of instruments of ratification and the manner of ratification by States of an amended Convention.

Both the First and Second Sessions of the ICAO Assembly held in May 1947 and in June 1948 respectively, decided not to take any specific action on the amendment of Article 94. The First Assembly (its Commission No. 1), after stating that the matter required a "careful study from the legal point of view,"²⁰ referred it back to the Convention Committee for further study.

The ICAO Legal Committee prepared two alternative drafts for amendments of Article 94 during its Third Session (September, 1948).²¹ The first alternative, while preserving in substance the actual procedures for amendments which would "impose a new obligation on the Contracting States" or "deprive them of any right," provided for other amendments to come into force for all contracting States 90 days after the approval by the Assembly unless ob-

¹⁷ For details of the discussion on Art. 94, see T. BUERGENTHAL, *supra* note 15, at 207-09; see also Jones, *Amending the Chicago Convention and Its Technical Standards—Can Consent of All Member States be Eliminated?*, 16 J. AIR L. & COM. 185, 206-09 (1949).

¹⁸ T. BUERGENTHAL, *supra* note 15, at 208-09.

¹⁹ On categories of amendments to constitutions of specialized agencies, see generally Phillips, *Constitutional Revision in the Specialized Agencies*, 62 AM. J. INT'L L. 654, 658-62 (1968).

²⁰ ICAO Doc. 7325-C/852 at 160 (1952).

²¹ Documentation for the 4th Ass., A4-WP/20-P/7, App. "E" to Annexes "A" and "B" (1950).

jected to within 60 days by any State in which case the International Court of Justice would be requested to render an advisory opinion on the nature of the amendment and thus to determine the effect of the objection. The second alternative, reflecting the proposals made by the United Kingdom, did not differentiate between organizational and other amendments: amendments of any type would come into force after a certain specified period for all contracting States except for those that expressed dissent. These latter States would be deemed to have denounced the Convention.

As commented upon by Helen H. Jones,²² the Legal Committee showed little enthusiasm for either revision and indeed concluded that undertaking such revisions would not "justify the risks involved . . .," *i.e.*, in the event of absence of unanimity, the choice between reducing the number of contracting States or having two different versions of Article 94 in force for an indefinite period.²³

The Fourth Session of the ICAO Assembly apparently did not have any great difficulty in adopting the resolution recalled above which meant no immediate amendments of Article 94.

The other specific amendments considered in some way or other in the period preceding the Fourth Assembly represented a fairly heterogeneous group. Apart from the new Article 93 *bis* adopted in May 1947 and in force as of March 20, 1961, on termination of membership in ICAO in consequence a pertinent U.N. action, the rather impressive list comprised of fifteen Articles and two complete Chapters of the Convention.²⁴ Only about six of these provisions could be labelled as organizational, internal, "housekeeping" type provisions, the rest were of substantive nature, although perhaps not of the same relevance. Most of these amendments were proposed by States.²⁵ In some cases the actual examination of the problems involved seems never to have gone beyond a preliminary speculative stage.

About half of the suggested non-organizational or non-procedur-

²² Jones, *supra* note 17, at 205-06.

²³ ICAO Doc. 6021-LC/118, Annex "C" (1948).

²⁴ Amendments to the following Articles of the Convention were considered in some way or other: Arts. 2, 5, 9, 12, 15, 26, 33, 35, 45, 52, 54 (d) (e), 55, 56, 90, 96; Ch. VI (Art. 37 to 42) and Ch. XV of the Convention.

²⁵ British proposals concerning Arts. 2, 5, 33, 39, 40, 41, 45, 94, 96, Ch. XV; Greek proposal on Art. 9; amendments to Arts. 26, 39, 40 and 41 proposed by the Netherlands.

al amendments were of the type called usually, if not quite accurately, "technical."

The ultimate failure of these proposals might have been at least to some extent due to the dictum of the Air Navigation Commission pronounced in September, 1949.²⁶ The Commission, while admitting that a "number of amendments are both desirable and ultimately necessary" and that the work "has been impeded in some measure by reason of unclear and unsatisfactory provisions of the Convention," found at the same time that no serious impediment for international air navigation resulted from these deficiencies. The consequence of a piecemeal approach to amendments might be, in the Commission's view, more serious than present deficiencies.

Looking at the other substantive, non-technical amendments, and having all the benefits of hindsight, one could discern some amendments which, although having the potential of improving the Convention (be it in their proposed form or after some possible refinements) were simply not of such relevance or urgency as to be able to arouse what later at the Ninth Assembly the French delegate called "the enthusiastic support of contracting States generally."²⁷ The lack of such support was accepted by ICAO representative bodies to be the best criterion for judging the usefulness for the Organization of any amendment.

There was another group of proposed amendments that, even if not adopted, led to initiation of certain practices not inconsistent with the unamended version and yet stretching or modifying somewhat its application so as to take care of main difficulties. The flexibility of ICAO technical law-making, based on the Annexes to the Convention as the primary vehicle, has proved to be quite suitable for such an approach.

It has to be noted also, however, that there were several proposals which have stood well the test of time, posing in the late Forties and early Fifties questions that are still with ICAO in the Seventies and in some form or other still create difficulties. Among these are proposals seeking a definition of "scheduled international air service," amendments of Article 5 (Right of non-scheduled flight), clarification of procedures for representations to ICAO Council on excessive airport and other charges, provisions concerning Coun-

²⁶ ICAO paper AN-WP/272, reprinted as Annex "C" to A4-WP/20 (1950).

²⁷ ICAO Doc. 7597, A 9-EX/Min. 1-12, at 60 (1955).

cil's power to adjudicate disagreements in civil aviation, its voting procedures (elimination of the requirement that its decisions need the approval of the majority of its full membership), etc. One hastens to add that ICAO at that time did not simply have enough experience and accumulated knowledge which would seem necessary for a satisfactory answer to problems that have become more urgent only relatively recently, as in the case of the definition of "scheduled" and "non-scheduled" services. Also the feeling of urgency or of priorities in relation to the individual problems and proposals was, of course, hardly identical with the present thinking. And yet, to name just an example, an early amendment of Article 52 on Council's voting procedures might have helped to avoid some difficulties experienced up to this moment, thus enabling the Council to cope with its numerous tasks in a more orderly and perhaps smoother fashion.

Why do proposals for amendments fail?

Assembly Resolution A4-3 put an end to the earlier attempts to undertake a general revision of the Chicago Convention in an organized and planned fashion. Council's "Plan of procedure for amending the Convention and time-table" of November, 1948,²⁸ although faithfully carried out in its main points, did not produce a revision of the Convention on the scale that might have been anticipated. It was doomed to failure because it was implemented at a time which was not responsive to this kind of call. A piecemeal approach to amendments so dreaded by many in the early years of the Organization has now become the only available solution. The risk of possible fragmentation of the Organization into sub-groups of States according to whether they have ratified or not, and are therefore bound or not, by individual specific amendments, was prevented from inflicting any serious damage upon the Organization thanks primarily to two factors:

- (1) all the seven amendments to the Convention adopted up to now were of an organizational or institutional nature, not affecting directly the rights and obligations of States.
- (2) the Organization adopted, with no opposition of Member States, a practice eliminating any possible adverse effect of only partial ratifications of such organizational or institutional amendments.

²⁸ ICAO Doc. 6544-C/742 at 68-69 (1949).

The seven amendments to the Chicago Convention were as follows:²⁹

- (1) Amendment introducing Article 93 *bis*, on termination of membership (adopted 27 May 1947, in force as of 20 March 1961).
- (2) Amendment to Article 45 to permit transfer of the seat of the Organization (adopted 14 June 1954, in force as of 16 May 1958).
- (3) Amendment to Articles 48(a), 49(e) and 61 to provide for an Assembly Session not less than once in three years (adopted 14 June 1954, in force as of 12 December 1956).
- (4) Amendment to Article 50(a) raising the membership of the Council to 27 (adopted 21 June 1961, in force as of 17 July 1962).
- (5) Amendment to Article 48(a) raising the number of Contracting States upon whose request an extraordinary meeting of the Assembly may be called (adopted 14 September 1962, not yet in force).
- (6) Amendment to Article 50(a) raising the membership of the Council to 30 (adopted 12 March 1971, in force as of 16 January 1973).
- (7) Amendment to Article 56 raising the membership of the Air Navigation Commission to 15 (adopted 5 July 1971, not yet in force).

Although basically organizational in their nature, these amendments transformed in some way or other the institutions and functioning of the Organization, thus affecting, if not the rights and obligations of States as Members of the Organization, at least the institutional framework and conditions under which the membership in the Organization could be actively pursued. The legal problems which were bound to arise in these circumstances were alleviated by the factual introduction into Article 94, governing the amendments, of the distinction between organizational and other amendments. In other words, it was a process of making inoperative for purely organizational amendments that proviso of Article 94 under which an amendment comes into force in respect (and only in respect) of States which have ratified such an amendment.

To illustrate this practice, T. Buergenthal analyzes³⁰ the situation as it developed in connection with the amendment of Article 50(a) of the Convention, (increase of the number of Council Members);

²⁹ For more details on the status of amendments, see ICAO Doc. 9046 at 85-86 (1973).

³⁰ T. BUERGENTHAL, *supra* note 15, at 209-16.

amendments of Articles 48(a), 49(e) and 61 (frequency of Assembly sessions); and also in connection with the application of new Article 93 (bis) in the case of Spain in 1947.

The amendment concerning the frequency of Assembly sessions entered into force on 12 December 1956, with the deposit of the forty-second instrument of ratification. There were seventy ICAO Member States at the end of 1956, and for thirty-eight of them the amendment was not, strictly speaking, in force, and yet the Assembly decided in July, 1956, and again in 1959 and 1962, to go ahead with the new policy concerning convening the Assemblies.

The amendment of Article 50(a) raising the membership of the Council to twenty-seven Member States, entered into force on July 17, 1962, the date of the deposit of the fifty-sixth instrument of ratification. At that time the membership of the Organization stood at ninety-eight Member States. Consequently, for forty-two States, the Council should still be composed of twenty-one Members only. Faced with the question about the position of these forty-two States in regard to voting or standing for election to the Council of twenty-seven Members, the Council decided, following the advice of the ICAO Legal Bureau that the ratification of the amendments was not a prerequisite either for the candidate for election or for voting in the election.³¹

The same point was raised again in March, 1973 in connection with the increase of Council membership to thirty, and the President of the Council referred without objection to the understanding reached in 1962. The ICAO Legal Bureau re-iterated at this recent occasion its understanding that all the amendments to the Convention adopted to date had been of an "institutional" character but should there have been at any time an amendment imposing an obligation on Contracting States, it would be, under Article 94(a), binding only on States that ratified it.

It is not the purpose of this article to examine the merits of these practices or of suggestions given to overcome the inherent legal complexities,³² but it is interesting to note that the Organization has

³¹ ICAO Doc. 8317, A 15-P/1 at 89 (1963); ICAO Doc. 8311-C/941 at 21 (1963).

³² For one of such possible approaches, see T. BUERGENTHAL, *supra* note 15, at 215-16; the idea of the Assembly having the power to stipulate when an amendment shall enter into force for purely organizational purposes may not, however, be quite uncontroversial.

in this way been able, with greater or lesser success,³³ to develop its internal machinery and procedures so as to cope effectively with the changing conditions in international civil aviation. Yet, it has not felt the pressure of the changing conditions in regard to other than organizational provisions of the Convention strongly enough as to take all the necessary risks of initiation of some more fundamental amendments of such a non-institutional nature. In this it has been, of course, enjoying a solid and acquiescent support of Member States that may well have decided to press more strongly for specific amendments and even to initiate them themselves.

In spite of this generally prevailing disinclination to amendments, in the more than twenty years of ICAO life after Assembly Resolution A4-3 had been adopted in June, 1950, there have been, in addition to seven successful amendments mentioned above, several attempts or suggestions for amending the Convention. Most of these suggestions would merit a closer examination for one reason or another. The scope and main objective of this article permits, however, only a brief comment on some of the most salient features.

It seems undoubtedly true that "over the years, ICAO has demonstrated an unusual capacity for reshaping many provisions of the Convention without formally amending them . . ." and that "modification which cannot be achieved directly by amendments can often be obtained through acquiescence to certain practices that bring about these modifications."³⁴ The question could be asked however in any particular case, and also generally, to what extent such a "surrogate" procedure proved in the past to be an adequate and satisfactory answer to the need for certain amendments.

In this context, the amendments to Articles 29 and 34, amendments related to the lease, charter and interchange of aircraft, and finally the proposed addition of Article 93 (ter) will be discussed. The first matter raises, as will be shown in the following, also another serious problem concerning the kind of impact which the supersession or abrogation, in practice, of some specific provision may have on the respect for international rules as embodied in the Convention, and their general observation.

³³ *E.g.*, the unsuccessful U.K. proposal for changes in the "higher direction of the Organization:" ICAO Doc. 7597, A9-EX/Min. 1-12 at 57-63 (1955), note 69 *infra* and accompanying text.

³⁴ T. BUERGENTHAL, *supra* note 15, at 226.

Article 29 of the Chicago Convention prescribes that every aircraft of an ICAO State engaged in international navigation shall carry certain specified documents, among which are a list of passengers, declaration of the cargo and a journey log book. Article 34 deals specifically with the journey log book.

Acting upon the recommendations of the 1954 Strasbourg Conference on coordination of air transport in Europe, the ICAO Council decided in November, 1954 "to examine the question of amending Article 29" and as an "immediate measure" suggested some simplifications of the forms of journey log book, passenger list and cargo manifest. A "general declaration" as specified in Annex 9 to the Convention was suggested for use instead of the journey log book.³⁵

These documentary requirements were afterwards discussed by the Fourth Session of the ICAO Facilitation Division (Manila, October, 1955) which identified itself to a large extent with the "widely held view that . . . existing provisions of Articles 29 and 34 of the Convention can be considered as out-of-date and therefore a possible deterrent to further progress in the FAL field unless corrective action is taken,"³⁶ and recommended that the Council present to the ICAO Tenth Assembly proposals for deletion of Article 34 and a substantial amendment of Article 29. (The documents required for control purposes would not be named in the Article itself but in the Annexes to the Convention.)³⁷ There were, however, several dissenting views. The Egyptian delegate argued that "it is not desirable nor practical to introduce any amendments to the Convention unless it is found urgent and also meets the unanimous approval of Contracting States." The Argentine delegate believed that "there is no justification for amending Article 29. . . ."³⁸

The U.K. proposal submitted to the Tenth Assembly in 1956³⁹ envisaged simply the deletion of Article 34 and the deletion in Article 29 of all references to the journey log book.

The Assembly, faced with three alternative amendments to Article 29 (and with the proposal to delete Article 34), decided for

³⁵ ICAO Doc. 7525-C/874 at 140-41 (1955).

³⁶ ICAO Doc. 7642-FAL/560 at 33-34 (1955); *see also* documentation for the 10th Ass., A 10-WP/26 at 3-4, App. 2 (1956).

³⁷ ICAO Doc. 7642-FAL/560 at 66 (1955).

³⁸ *Id.* at 71-72.

³⁹ Documentation for the 10th Ass., A10-WP/26, App. 1 (1956).

none of them. Having found that the material to be contained in a journey book is also included in the General Declaration referred to in Annex 9 to the Convention resolved, in its Resolution A10-36,⁴⁰ that the carriage and maintenance of the General Declaration may be considered to fulfill the purpose of Articles 29 and 34 with respect to the journey log book.

The years following the 1956 Assembly saw, however, a considerable simplification of documentary requirements under Annex 9 of the Convention and Annex 9 ultimately established as a "recommended practice" that Contracting States do not require the presentation of general declarations.⁴¹

When the matter of documentary requirements in relationship to Article 29 of the Convention was again brought to the attention of the ICAO Assembly at its Sixteenth Session in 1968, this time in relation to passenger and cargo manifests, it was noted that several States no longer require presentation of general declarations. The Assembly's Economic Commission recognized the distinction drawn by the ICAO Council "between carriage of documents on board aircraft (*cf.* Article 29 of the Convention) and requirements of States that documents be presented to them (*e.g.*, paragraph 2.6 of Annex 9)."⁴² Mindful that this distinction cannot, however, remove the difficulty with the lucid and unambiguous requirement of Article 29, the Commission decided to proceed on the basis that Article 29 "was a long-range rather than an immediate impediment to continued progress in this aspect of Facilitation."⁴³ Hence, the Commission's conclusion that Article 29 should be amended "on the first occasion when the Convention was being generally amended," and that in the meantime "the Secretariat might study what was involved in amending that Article from the technical and legal viewpoints."⁴⁴

No such study has been undertaken yet but the ICAO Secretariat keeps this matter under review as one of the items on its work program in the air transport field, although apparently with a very low priority.

⁴⁰ ICAO Doc. 7670, *Resolutions of the Assembly*, at 35 (1964).

⁴¹ Annex 9 at 9 (7th ed. 1974).

⁴² ICAO Doc. 8772 A16-EC at 26 (1968).

⁴³ *Id.*

⁴⁴ *Id.*

In hindsight, one may be tempted to say that the 1968 opinion of the Economic Commission, which in the preservation of present Article 29 saw no "immediate impediment" for progress in the facilitation area, was closer to reality than the assessment of the 1955 Facilitation Division about Article 29 (and Article 34) being a "possible deterrent" to such further progress. What is at stake, however, is also the respect for international rules of whatever nature. The view that the General Declaration may be considered to fulfill the purpose of Articles 29 and 34 as to the journey log book, which might have some merit at some time, is probably less plausible in other circumstances when the system of general declarations is being eroded with ICAO encouragement or benevolent blessing.

It may also be useful to mention the problems of amendments related to the lease, charter and interchange of aircraft in international operations. The Convention, its Annexes, and other ICAO rules, assign certain specific responsibilities to the State of registry of aircraft and the concept of nationality of aircraft has given rise to some difficulties in the case of international transactions on lease, charter and interchange of aircraft. Problems arising under the Chicago Convention, in the case of these transactions, have been under study by different ICAO bodies since the mid-Fifties. Resolution "B" of the Guadalajara International Conference on Private Law held in August and September, 1961, recognized the necessity to deal, in addition to matters decided upon by the Conference, also with the legal problems "affecting the regulation and enforcement of air safety . . . experienced . . . when an aircraft registered in one State is operated by an operator belonging to another State."⁴⁵ An ICAO Legal Subcommittee considered the possible solutions for problems raised by Guadalajara Resolution "B", one such solution being an amendment to the Chicago Convention. The aim of such an amendment would have been, in the opinion of the Subcommittee, to permit "a State of registration to be relieved of its responsibility under the Convention when delegating certain functions to be exercised in relation to its aircraft to the State of the operator."⁴⁶ The Subcommittee did not however, consider the problem to be of such importance, or "so incapable of solution by other means as to

⁴⁵ Final Act of the Guadalajara Conference, ICAO Doc. 8182 at 11 (1961).

⁴⁶ Report of the Subcommittee on Resolution "B" of the Guadalajara Conference, ICAO Doc. 8582-LC/153-2 at 127 (1966).

warrant the amending of the Convention, which procedure some States might be reluctant to undertake."

Resolution "B" of the Guadalajara Conference still appears in the list of "subjects of current study" of the ICAO general program of work in the legal field but not with a high priority.⁴⁷

In the meantime, it was recognized that, to use the language of the ninth "whereas" clause of Resolution A18-16 adopted in 1971 by the ICAO Eighteenth Assembly, "the safety and economics of international air transportation may be adversely affected by the lack of clearly defined responsibilities for aircraft leased, chartered and interchanged, in particular without crew, under the existing provisions of the Convention."⁴⁸

The Assembly adopted something which the ICAO Legal Subcommittee called, as referred to above, "solution by other means," namely the principle of the delegation by the State of registry, to the State of the operator, the pertinent functions under Annex 6⁴⁹ to the Convention. On the other hand, sensing the inadequacy of this measure, it directed the Council not only to examine the Annexes to the Convention with a view to their amendment but also to "examine expeditiously" the Convention itself and submit a report to the next Assembly.⁵⁰

In the words of the U.S. paper presented to the Eighteenth Assembly, "it appears essential that serious thought be given to amending (the Chicago Convention) to redefine the rights, obligations, responsibilities and interests of the various parties."⁵¹

In spite of attempts to deal with these problems otherwise, particularly using the Annex machinery for distributing some specific functions between the State of registry and State of the operator, the possible need to amend the Convention seems to be still felt and there are indications that new consideration will be given to amendments to the Convention to adequately cover these problems.

In a different light appear the results obtained in consequence of the proposal to amend Article 93 of the Convention (addition of a new Article 93 ter).

⁴⁷ ICAO Doc. 9050-LC/169-2 at 14 (1973); resolution "B" is now item No. 6 in the work program.

⁴⁸ ICAO Doc. 8958 at 61 (1971).

⁴⁹ Annex 6—Operation of Aircraft, Part I (3d ed. 1973).

⁵⁰ ICAO Doc. 8958 at 61 (1971).

⁵¹ Assembly working paper A 18-WP/63, LE/7, TE/8 (1971).

The amendment was proposed by thirty-one African States to the Fifteenth Session of the ICAO Assembly (June and July, 1965) and was aimed clearly at the Government of South Africa and its policy of apartheid. The amendment would authorize the ICAO Assembly to "suspend or exclude" from ICAO membership any Contracting State "whose Government violates the principles laid down in the Preamble to this [Chicago] Convention and practices a policy of apartheid and racial discrimination." A State, the membership of which would be suspended, would "cease to enjoy the rights and privileges" stemming from membership.⁵²

Since the proposal was submitted at the Assembly without observing the requirement of Assembly procedural Rule 10 (d) (prior communication of such proposals to States at least ninety days before the opening of the session), the sponsors had first to overcome this procedural obstacle by suspending Rule 10(d). The suspension was approved by the vote of 41 to 34, with 11 abstentions and 14 delegations absent. The amendment itself however, failed to get the required two-thirds vote of the Assembly (42 to 30 with 15 abstentions, 13 delegations were absent; the required majority was 67 affirmative votes). The Assembly adopted instead a resolution strongly condemning the apartheid policies of South Africa.⁵³ On the question of whether a State practicing these policies could remain a member of ICAO, the President of the Assembly ruled that such was not a legal question but a political one.⁵⁴

Although attempts to amend Article 93 at the Fifteenth Assembly failed, States pursuing this subject at least partly achieved their objective at the Eighteenth Session of the Assembly. Resolution A18-4, adopted by a 44 to 39 vote with 4 abstentions,⁵⁵ decided that South Africa shall not be invited to attend any meetings convened by ICAO, except as provided in Articles 48(b), 53 and 57(b) of the Convention, and "shall not be provided with any ICAO documents or communications," with the exception of cases where provision of documents is specifically required by the Convention and documents for meetings which South Africa is permitted to attend. A resolution along the same lines concerning Por-

⁵² ICAO Doc. A15-WP/213 Min. EX/1-13 at 83-84 (1965).

⁵³ ICAO Doc. 8516 at 143, 190-91 (1965).

⁵⁴ *Id.* at 191.

⁵⁵ ICAO Doc. 8963 at 148 (1972).

tugal (which the Portuguese delegation considered a "de facto amendment of the Convention")⁵⁶ was defeated at the Eighteenth Assembly (40 to 41 with 6 abstentions) but adopted by the Nineteenth (Extraordinary) Assembly in February and March, 1973. The belief of the Congolese delegation at the Eighteenth Assembly, that the "sponsors of the (anti-Portuguese) resolution . . . would return again at the next Session, stronger and more determined"⁵⁷ has thus been pathetically confirmed.

A review of past unsuccessful attempts to amend the Chicago Convention reveals a few cases where a certain specific provision has clearly been found unsatisfactory. Yet, no amendment procedures were initiated in view of the undesirability of a "piecemeal" approach to amendments.

As for Article 67 of the Convention on filing (statistical) reports with the Council, the ICAO Statistic Division concluded at its Fifth Session in 1970 that this provision and other relevant Articles do not fully cover the requirements of the ICAO statistical program and their updating should be considered "when the opportunity arises for amending the Chicago Convention."⁵⁸ In this context, particular attention should be directed to Article 52 of the Convention on voting in Council. Under this Article, the decisions by the Council shall require approval by a majority of its members. According to Article 54(c) of the Convention, it is the Council's responsibility to determine its rules of procedure. The ICAO Secretariat explained in the Repertory Guide to the Convention⁵⁹ that for procedural questions the system of the majority required is that established by the Council's Rules of Procedure.⁶⁰

The Rules of Procedure use different formulae for specifying the number of votes required for certain particular decisions, namely:

- (a) majority of the members of the Council
- (b) majority of votes cast
- (c) majority of the Council
- (d) unanimous consent of all the members
- (e) decision by the Council (unspecified)

⁵⁶ *Id.* at 141.

⁵⁷ *Id.* at 144.

⁵⁸ ICAO Doc. 8882-STA/532 ¶ 9, at 15 (1970).

⁵⁹ ICAO Doc. 8900, Article 52 (1971).

⁶⁰ ICAO Doc. 7559/4 (1970).

Should Article 52 be interpreted as a categorical, clear and explicit stipulation, Article 54(c), which merely settles the question of Council's Rules of Procedure, could hardly be used to override such interpretations and the Council would not have any power to depart from the rule of Article 52, or to waive this rule, be it for procedural or other matters.

Looking at this problem historically, the Proceedings of the 1944 International Civil Aviation Conference are unfortunately only of little help in understanding the intent of those who drafted the provision of Article 52 at the Chicago Conference.

Whereas the original U.S. proposal, tabled at the Conference,⁶¹ referred in its Article 24 to "actions . . . authorized by a majority of the total voting strength of the Council," the Canadian proposal⁶² contemplated, in its Article IV, Section 4, "decisions . . . taken by a majority of the votes cast." In the process of drafting, at the Conference, the U.S. formula prevailed as indicated in Article IV, Section 3, of the draft emanating from the drafting Committee of the Joint Subcommittees of Committees I, II and IV of the Conference. The formula of this type was then used in Article III, Section 3 of the Interim Agreement on International Civil Aviation and in Article 52 of the Convention on International Civil Aviation.

Yet, as early as in 1947-48, the first "generation" of ICAO Council Rules of Procedure⁶³ introduced, on a limited scale, the formula of votes taken on the basis of a majority of the Council Members attending. The evidence of these voting procedures appears in the proceedings of the Council in the latter part of 1947.

The relationship between the present rules on voting and Article 52 of the Convention may have some questionable aspects and at least two explanations or interpretations have been advanced to remove such doubts. One theory revolves around the meaning of abstentions: those who abstain do not feel strongly about, and are not opposed to, a certain specific proposal and consequently could join the majority, if the vote is challenged. Another explanation regards Article 52 as permitting different interpretations of what is meant by a "majority of members." In the light of this Council's authority,

⁶¹ Proceedings of the International Civil Aviation Conference, at 562-63 (1948).

⁶² *Id.* at 577.

⁶³ ICAO Docs. 4594 (1947), 4792 (1947), 6338 (1948).

under Article 54 (c), to determine its rules of procedure is understood to include also the determination of the meaning of "majority of members" and a possible distinction between procedural and important substantive matters.

Neither of these explanations is too convincing and only the amendment of Article 52 seems to be the way for removing all existing difficulties. Yet, there is apparently some reluctance to initiate another "piecemeal" procedural amendment, particularly since the matter is not of an immediate interest of the large body of ICAO States outside of the ICAO Council.

There seems to be another category of problems where the reason for not initiating any specific amendment procedure was not so much possible misgivings over a "piecemeal" approach as it was the apparent feeling, justified or not, that a solution is simply not available or not ripe enough for being translated into the specific language of an international rule.

This observation can be illustrated by Article 5 of the Convention. It has been mentioned that Article 5 of the Convention ("right of non-scheduled flight") was among those provisions the amendment of which had been proposed in the early years of ICAO existence. At that time the U.K.-proposed amendment was aimed at the elimination of the right of the State overflowed to require landing, and at some amplification of the regime governing flights over regions without adequate air navigation facilities. With the enormous growth of charter operations particularly in the last decade, and also with the development of charter forms approaching systematic, individually ticketed transportation, there has been some dissatisfaction, manifested more outside than within ICAO, with the way Article 5, or the Chicago Convention as a whole, regulates two basic matters: (1) the concept and definition of non-scheduled (commercial) flights as opposed to scheduled services, and the applicability of national regulations to non-scheduled (charter) operations. Not surprisingly, it was the organization of carriers interested primarily in scheduled transportation, the IATA, which was seeking some precise distinction between the scheduled and non-scheduled services,⁶⁴ and on the other hand a forum ex-

⁶⁴ The definition of "scheduled services" was adopted by the ICAO Council on 25 March 1952. Under this definition it is required, *inter alia*, that for being "scheduled," services must be operated according to a published time-table or

pressing the trends among charter carriers, (the First World Congress on Air Transportation and Tourism, Madrid, April 1972) that called for a radical overhaul of the regulatory principles of Article 5 of the Chicago Convention and for a new multilateral agreement guaranteeing "freedom of the skies for international charter services." Secor D. Browne, then the Chairman of the U.S. Civil Aeronautics Board, also advocated at the Madrid Meeting new legislative action in the area of charters because the founders of the present system "failed to provide any adequate basis in international air law for the nonscheduled mass movement of tourist groups."⁶⁵

The complexity of the scheduled versus non-scheduled problems, and the apparent controversy as to the desirable modifications of the present system of Article 5, are the most likely reasons that these problems are not even listed as one of the items kept under review by the ICAO Secretariat in the Organization's work program in the air transport field.

There are presently some indications of some shifting of the balance between the regulatory role of the "charter originating" State and "charter receiving" State which, although not contradicting directly Article 5 of the Chicago Convention, departs somewhat from its traditional interpretation. Of such nature seem to be the special regulatory powers of the State of the origination of charters over several aspects of the performance of charter flights under the "Declaration of Agreed Principles" on charters adopted by Canada, United States and the European Civil Aviation Conference in October, 1972⁶⁶ [e.g., in its paragraph (3)], as well as some elements in the U.S.-Belgium "Memorandum of Understanding" on the application of regulatory policies in the charter field (17 October 1972).⁶⁷ This may again be the beginning of the development of certain practices which, if more broadly accepted, may remove at

with flights so regular or frequent that they constitute a recognizably systematic series. ICAO Doc. 7278-C/841 at 3 (1952). Clarification of the terms "scheduled" and "non-scheduled" air transport was one of the areas where "some modification (of the Chicago Convention) is worth considering." Address by IATA Director General K. Hammarskjold, International Conference on the Freedom of the Air, in Montreal, Nov. 3, 1967.

⁶⁵ AV. WEEK & SPACE TECHNOLOGY, Apr. 24, 1972, at 27.

⁶⁶ ICAO Doc. 9044 at 21 (1972).

⁶⁷ Lichtman, *Regularization of the Legal Status of International Air Charter Services*, 38 J. AIR L. & COM. 441, 470-71 (1972).

least those difficulties with Article 5 that relate to the application of national regulations of the "receiving" State. It would be, however, all too easy to say that the modification of Article 5 would thus become moot.

The lack of broader support by States as reason for failure of several attempted amendments to the Chicago Convention has been, on some occasions, so amply evident as to discourage any further attempts in the same direction. In a few other instances, the position taken by States has been less clear, leaving a lot of room for doubts about the relative merits of the proposed amendments. The comprehensive proposal to amend, or to add new provisions, to Articles 48, 50 bis, 51, 51 bis, 54, 58, 59, 60 and 85 of the Convention seems to fall clearly into the first category.

This proposal submitted by the United Kingdom, first to the Ninth Session of the Assembly in 1955 and, in an expanded version, to the Assembly's Tenth Session in 1956,⁶⁸ called for re-arranging the working methods of the Council so as to dispense with the permanent representation of Council Member States at the seat of the Organization and for the replacement of the two offices of President of the Council and Secretary General by a single office of Director General.

When discussing the U.K. proposal at the Ninth Session of the Assembly, the French delegation, while expressing some reservations as to the justification of the proposed amendments, discussed in a more general vein the difficulties in getting even minor amendments ratified which, in its opinion, "indicated the difficulties likely to arise if amendments of major importance . . . did not have the enthusiastic support of Contracting States generally."⁶⁹ Misgivings of this type were shared by many and there is little wonder that the Tenth Assembly did not adopt anything along the U.K. lines (the U.K. delegation withdrew its proposal). Resolution A10-14, on the number and length of sessions and working methods of the Council and its subordinate bodies,⁷⁰ did, in effect, retain the concept of permanent representations of Council Member States at ICAO Headquarters, the removal of which had been the prime target of the British effort.

⁶⁸ Documentation for ICAO 10th Ass., A 10-WP/5 App. "A" (1956).

⁶⁹ ICAO Doc. 7597 at 60 (1955).

⁷⁰ ICAO Doc. 7707 at 29 (1956).

Even with the benefit of five more years or so it still seems difficult to understand what transpired in 1966-1968 in regard to the Swedish initiative for amendments of Article 7 of the Convention, concerning cabotage. In 1966, Sweden asked the ICAO Council to express an opinion on the interpretation of the second sentence of Article 7 and, more specifically, to endorse the Swedish interpretation thereof. The problem revolved around the concept of non-exclusiveness in granting, or obtaining, the cabotage rights. Against the complete non-exclusiveness idea, that if one Contracting State grants cabotage rights to another Contracting State, any third Contracting State may demand cabotage rights from the grantor State, the Swedish delegation maintained that the grantor State reserves the right to grant cabotage privileges to additional Contracting States, but these States cannot insist that such privileges be granted to them. The conditions would be, however, that the authorization to operate cabotage traffic is not granted on an exclusive basis.

Sweden argued that the second sentence of Article 7 "has given rise to ambiguity and difficulties in regard to interpretation," and the situation was therefore "unsatisfactory" to the Scandinavian Governments.⁷¹ The discussion in the Council was as lengthy as it was unproductive. There was a definite apprehension that if a completely objective interpretation turned out to be contrary to the Swedish one, which was probably in the best interests of aviation, the Council would be in real trouble.⁷² Two main reasons were given in the discussion, for not acting upon the Swedish request: (1) Article 7 was indeed open to different interpretations and many States might not be satisfied with the interpretation adopted, and (2) if the States experienced real difficulties with the interpretation of Article 7 the best way to proceed would be for them to propose an amendment to this provision.

In spite of all optimistic remarks made in the Council on the "amendment" approach to the problem, when this approach was finally adopted by Sweden after inconclusive deliberations in the Council, the results were equally disappointing. Sweden's proposal for the delegation of the second sentence of Article 7 was first considered at the Sixteenth Session of the ICAO Assembly in 1968. Against the Swedish view that the Convention is "a living instru-

⁷¹ ICAO Doc. 8596 C/964 at 116 (1966).

⁷² ICAO Doc. 8629 at 168 (1967).

ment [which] must not be allowed to become a 'frozen' one that could hamper rather than promote the development of international civil aviation,⁷³ stood the arguments that difficulties actually encountered by States were too slight to "warrant the trouble involved in amending the Convention" and that there were other Articles in the Convention equally "ambiguous or otherwise unsatisfactory" which fact made a piecemeal approach to amendments undesirable. The proposal failed since the required affirmative vote of two thirds of the Assembly was not obtained (66 votes were required but because of absences, only 67 delegations were voting; 44 were in favour of the proposal).

There was almost the same scenario of events at the Eighteenth Session of the Assembly in 1971. Again the Swedish proposal for deletion of the second sentence of Article 7 was adopted by an impressive majority in the Executive Committee but failed to obtain two-thirds of the vote of the Assembly. Seventy affirmative votes were required for the adoption but only thirty delegations were in favour, considerably less than in 1968. The feeling of the "third world" countries that Article 7 in the present form may represent a defense against bilaterally applied pressures for granting cabotage rights may have been one of the main factors which doomed the proposal.⁷⁴

The upsurge in recent years of acts of unlawful seizure of aircraft and other unlawful interference with civil aviation gave, quite understandably, rise to a question of the role the ICAO and its constitution, the Chicago Convention, should play in broad new international efforts to curb this menace to civil aviation. There has been no doubt that even the unamended Convention, and the existing ICAO framework, provide the international civil aviation community a useful vehicle for developing and adopting new legal systems and preventive measures aimed at the deterrence of unlawful acts and at the alleviation of their consequences, thus diminishing the hazards to the safety of aviation. The list of ICAO actions in this field, including the Hague and Montreal Conventions adopted under ICAO auspices,⁷⁵ resolutions of the ICAO Seventeenth (Extra-

⁷³ Minutes of Plenary Meeting, ICAO Doc. 8775/A 16/Min P/1-9 at 90 (1969).

⁷⁴ Minutes of Plenary Meeting, ICAO Doc. 8963/A 18/Min. P/1-16 at 121-23 (1972).

⁷⁵ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 1970

ordinary) Assembly in 1970, amendments to ICAO Annexes, etc., is quite impressive.

At the Seventeenth (Extraordinary) Session of the Assembly, Switzerland made the following proposal for amendments to the Chicago Convention,⁷⁶ a new Article on security measures which would follow the present Article 13 (entry and clearance regulations) and would oblige the ICAO States to adopt effective measures to prevent offenses against civil aviation, render mutually legal assistance in prosecuting the perpetrators of offenses, and to report such offences to ICAO and to the State of registration of the aircraft involved. Another new Article was also proposed to follow Article 28 (the navigation facilities and standard systems), explaining that preventive or repressive measures taken in regard to offenses against air navigation shall not constitute a violation of Chapter IV of the Convention, *i.e.*, its provisions aimed at facilitation of formalities and air navigation generally. The same new Article would also have allowed reservations as to individuals enjoying diplomatic privileges and to couriers and diplomatic pouches.

The Swiss paper presented to the Seventeenth Assembly produced an interesting discussion in the Executive Committee, several delegations seemed to oppose the amendment since they feared that once the process of amendments started, it would be impossible to confine it only to Swiss ideas.⁷⁷ In view of the experience with the protracted revision of some other air conventions, some delegates considered it inopportune to "weaken the one solid edifice remaining in international civil aviation by . . . amending the Chicago Convention."⁷⁸ The apparent difference of opinion on the proposed amendment led the Tunisian delegate to a sober prediction that obtaining the necessary two-thirds vote for the adoption of the amendment under Article 94 (a) of the Convention is very doubtful.⁷⁹

The Resolution finally adopted by the Assembly merely called for a study to be arranged by the Council on the "desirability" of

(effective Oct. 14, 1971); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 1971 (effective Jan. 26, 1973), ICAO Doc. 8966 (1971).

⁷⁶ Documentation for the 17th (Extraordinary) Sess. of the Assembly, A 17-WP/27 at 3 (1970).

⁷⁷ ICAO Doc. A 17-Min. Ex/1-8 at 11, 14, 15 (1971).

⁷⁸ *Id.* at 11.

⁷⁹ *Id.* at 17.

revising the Chicago Convention with a view to including provisions related to unlawful interference. The study was to take "account of existing conventions or conventions to be concluded."⁸⁰ In December, 1970, the Council decided to postpone the initiation of the study until more was known about the results of other legal work on the subject of unlawful interference then in progress.⁸¹

In the efforts evolving in 1970 through 1973, under ICAO auspices, to enforce the compliance by States with the international rules against unlawful interference with civil aviation (primarily the Hague and Montreal Convention rules) the idea of amending the Chicago Convention resurfaced again as one of the available alternatives, the others being a separate Convention establishing a new legal system for the enforcement purposes, and supplementary Protocols to the Hague and Montreal Conventions.

The Twentieth Session (Special) of the ICAO Legal Committee, which met in Montreal in January, 1973, had before it, among other proposals, the French and the Swiss-U.K. amendments to the Chicago Convention.⁸²

The French draft contemplated the incorporation into the Chicago Convention of a new Chapter XVII entitled "Suppression of Unlawful Seizure of Aircraft" which would consist of Articles 1 to 11 of the Hague Convention. As between ICAO Contracting States, the Hague Convention would be replaced by this new Chapter (Article 3 of the French draft). It was also proposed that in conformity with Article 94 (b) of the Chicago Convention any ICAO State which would not ratify the amendment within one year after its coming into force would thereupon cease to be a Member of the Organization and a party to the Convention.

The Swiss-U.K. proposal similarly considered the insertion of a new Chapter in the Convention, named in this case "Measures to Protect the Security of Civil Aviation." Under the new Chapter, States would be obligated, in regard to situations under both the Hague and Montreal Conventions, to either extradite the perpetrators or to submit the case to their competent authorities for the pur-

⁸⁰ Resolution A 17-21; Resolutions adopted by the Assembly, ICAO Doc. 8895 at 31 (1970).

⁸¹ ICAO Doc. 8923-C/998 at 38, 39 (1972).

⁸² Annexes 2 and 3 to Part II of the Report of the Committee, ICAO Doc. 9050-LC/169-2, Vol. II, at 40-56 (1973).

pose of prosecution. The amendment also restated the principles of the Tokyo,⁸³ Hague and Montreal Conventions about facilitating the continuation of the journey for passengers and return of hijacked aircraft. Finally, the Draft envisaged some modifications of the present Chapter XVIII of the Chicago Convention ("Disputes and Default"), the most important of which was to be introduced in Article 87 to make its enforcement system (refusal to allow operations in their respective airspace) available also against States found in breach of new provisions on the protection of aviation security.

One of the main objections raised against proposals to amend the Chicago Convention was the length of time needed to bring the amendment into effect. In this context, the U.S. delegation referred to a period of five to ten years and made abundantly clear its preference for a new Convention that, supposedly, could be brought into force at an earlier date.⁸⁴

Not being able to harmonize contradictory views expressed, the Legal Committee recommended to the Council to submit both the French and Swiss-U.K. proposals to the ICAO Extraordinary Assembly and the two other proposals, not involving amendments to the Chicago Convention, to a Diplomatic Conference to be convened at the same time and place as the Assembly.

The ICAO Twentieth (Extraordinary) Assembly (Rome, August and September, 1973) considered not only the original, partly amended Swiss-U.K. and French drafts but also a combined, if not fully consolidated, French-Swiss-U.K. text.⁸⁵

In the introductory part of this combined document an amendment to the Chicago Convention was declared as the "only practicable way of securing more effective application of measures to

⁸³ Convention on Offences and Certain other Acts Committed on Board Aircraft, Sept. 1963 (effective Dec. 4, 1969), ICAO Doc. 8364 (1963).

⁸⁴ ICAO Doc. 9050-LC/169-1 at 171 (1973). C.N. Brower, Acting Legal Adviser of the Department of State, thought that "an amendment to the Chicago Convention could never provide a timely and effective response to a pressing threat. . . . In the nearly 30 year history of the Convention, only seven amendments have been adopted by an Assembly, and only one of them was of a politically substantive nature. . . . These historical realities provide persuasive proof of the fact that important issues of substance touching on what could be described as political matters, cannot effectively be handled in timely fashion by the procedure for amending the Chicago Convention." Address by C.N. Brower, International Aviation Club, in Washington, May 31, 1973.

⁸⁵ Assembly 20th Session (Extraordinary), A 20-WP/4 (1973).

secure the safety of civil aviation." The combined draft provided for a two-step implementation procedure: some of its Articles would enter into force upon the ratification of the amendment by the required number of ICAO Contracting States, whereas the incorporation into the Chicago Convention of the bulk of the substantive provisions of the Hague and Montreal Conventions would take place only after the ratification of, or accession to, these two Conventions by two-thirds of the total number of ICAO Contracting States. In its final form prepared by the drafting group at the Assembly⁸⁶ the amendment comprised five provisions, three based on the French-Swiss-U.K. proposal, the other two newly formulated to cover the reporting to ICAO Council and the unlawful interference with civil aviation by States.

The United States delegation was clearly in favour of a new instrument "separate and apart from the Chicago Convention," desiring to achieve in this way "greater ease and speed into coming into force," greater effectiveness of the system and also a 'non-political' procedure to determine facts and make recommendations.⁸⁷ More closely related to the problem under study was the first objection stressing the practical difficulties of amending the Chicago Convention; in the U.S. view, the amendment approach was simply not an "effective current answer" to pressing problems.

It seems, however, that the overwhelming majority of States represented at the Assembly considered the amendment approach quite feasible. In spite of the stringent two-thirds majority vote requirement for adoption of amendments, there was sufficient support in the Assembly for two provisions of the amendment "package." Even the provision on unlawful interference of States, considered controversial by some delegations, fell short by only two votes with 65 votes in favor. In these circumstances it is difficult to interpret this failure, which ultimately led to the failure of the amendment as a whole, as a sign of reluctance or aversion in principle to the idea of amendments to the Chicago Convention to strengthen the ICAO role in regard to unlawful seizure of aircraft and unlawful interference with civil aviation. There was almost no opposition against the proposed new rules and their failure was due primarily to abstentions, with only the Eastern European bloc and a few Afri-

⁸⁶ Assembly 20th Session (Extraordinary), A 20-WP/28 (1973).

⁸⁷ Assembly 20th Session (Extraordinary), A 20-WP/6 at 1 (1973).

can and South American delegations abstaining persistently.

In the resolution which the Assembly adopted in the effort to salvage something from the unsuccessful meeting, ICAO competence was re-affirmed to "facilitate the resolution of any questions which may arise between contracting States in relation to any matters affecting the safe and orderly operation of civil aviation." In its second "Whereas" clause the resolution referred to the ICAO "mandate . . . to safeguard the safe and orderly development of international civil aviation."⁸⁸ In the context of this Resolution, unlawful interference with civil aviation has been brought once again, albeit in a vague and indirect language, within the broad ambit of the Chicago convention. This vague language apparently represents the maximum common denominator acceptable to the States at the Assembly.

Foundations for future progress

A review of the more important past attempts to amend the Chicago Convention allows us to make a few observations which might be now summarized as follows:

(1) The concept of factual reshaping the Convention, or some of its provisions, without their formal amendments, has some inherent limitations and there is an evident inadequacy in some cases of "surrogate" measures taken to alleviate the need for amendments.

(2) A desirable advance is often stalemated as a consequence of apprehensions over a piecemeal approach to amendments and, at the same time, of a real scare of shaking the ICAO foundations by undertaking a more comprehensive overhaul.

(3) ICAO ability to respond, by way of amendments to the Chicago Convention, to pressing needs of international aviation seems to be hampered in some cases by the apparently indispensable and logical interval between the manifestation of a specific problem and the development of at least some elements of consensus among States on the revision of rules.

(4) While the lack of broad support for a specific proposal for amendment, or disinterest of a large segment of the community of States in such a proposal, might be, as a general rule, considered an unfavorable judgment on its necessity, there seem to be cases where

⁸⁸ Assembly 20th Session (Extraordinary), A 20-WP/33 (1973).

the lack of interest is apparently attributable to other reasons than to the merits of the proposal, *i.e.*, the failure of such a proposal does not necessarily mean that it is worthless from the point of view of long-range general interest of the aviation community and the needs of its continuous orderly development.

The existence of unamended and, in practice, superseded rules and the maintaining "in the books" of provisions outdated and clearly unusable and unnecessary, cannot but unfavorably affect the respect for the Chicago Convention as a set of binding legal rules which have to be duly observed.

The Chicago Convention is a whole, but at the same time it is an amalgamation or integration of two parts: the ICAO constitution and a set of international rules on air navigation and transport, including determination of rights and obligations of contracting States. In this heterogeny, the Convention may not be quite unique, yet what may be at issue is the proportion and relationship between the constitutional and other provisions.

When commenting on constitutional revisions in international organizations some writers, notably Dr. C. Wilfred Jenks⁸⁹ and Lester H. Phillips⁹⁰ came up with the idea of a desirable balance between undue rigidity and excessive flexibility. It was Dr. C. W. Jenks who together with Evan Luard⁹¹ saw the problem of procedures for formal amendments being sometimes so rigid as to make the passage of amendments virtually impossible. L. H. Phillips, while admitting that the "probability is for rigidity to prevail"⁹² believes, somewhat optimistically, that the contemporary constitutions of the U.N. Specialized Agencies "have generally achieved the desired balance " between rigidity and flexibility as described above.⁹³

Is the general concept of a balance of this kind applicable in the same fashion and in the same degree to all parts of conventions of the Chicago type, irrespective of the different nature of these individual parts?

⁸⁹ Jenks, *Some Constitutional Problems of International Organization*, 22 BRIT. Y. B. INT'L L. 11 (1945).

⁹⁰ See Phillips, *supra* note 19.

⁹¹ E. LUARD, *THE EVOLUTION OF INTERNATIONAL ORGANIZATIONS* 23 (1966).

⁹² Phillips, *supra* note 19, at 654.

⁹³ *Id.* at 678.

Does the danger of the "dissolution of the Convention into several subsidiary agreements" referred to by Helen Hart Jones⁸⁴ as something which may result from unduly flexible procedures and less than uniform acceptance of amendments, appear in the same light when we do not consider the basic constitutional elements of an international organization but rather a multilateral structure of rights and obligations of States, comparable to other multilateral conventions or agreements? And if the answer is for making some distinction in this sense, should not the degree of rigidity be, at least for a part of Chicago provisions, not higher than the rules of general international law governing amendments of multilateral treaties? Should not the non-constitutional body of Chicago rules be permitted to develop more freely and flexibly, being less influenced by the objective of uniformity of acceptance or of stability and continuity of an international organization?

The past experience with successful and particularly with aborted amendments to the Chicago Convention seems to have built a good case for reopening the discussion on the Chicago amendment procedure itself as represented now by Article 94 of the Convention if a suitable opportunity arises for undertaking such a new study.

There are at least three favourable factors which may facilitate a future ICAO probe into the subject of amendments.

A discrepancy may be more strongly felt in the future between ICAO flexibility in regard to international (primarily technical) standards and international practices embodied in the Annexes to the Convention, and its obvious difficulties when faced with a revision of even the simplest rules but having the form of Articles of the Convention.

Similarly, it may also be felt that there is a discrepancy between the systematic process of re-affirmation or consolidation of the resolutions of ICAO Assemblies which are in force and identification of those which are no more in force⁸⁵ on the one hand, and the uncertainty prevailing in regard to the observation, application or interpretation of some of the Chicago provisions. The systematic work on updating the Assembly resolutions is undoubtedly very

⁸⁴ Jones, *supra* note 17, at 208.

⁸⁵ The consolidation of Assembly resolutions is based on Resolution A 15-2 and was effected for the first time in 1968 by Assembly Resolution A 16-1. ICAO Doc. 8770 at 24-27 (1968).

useful for maintaining a clearly recognizable body of applicable ICAO guidelines and policies. Should not the same objective be pursued when these guidelines and policies are expressed not in the form of Assembly resolutions but in the form of Articles of the Convention?

Finally, in regard to the Convention itself, the *Repertory Guide* on "ICAO practice in regard to articles of the Convention on which action has been taken"⁹⁶ prepared by the ICAO Secretariat and published by authority of the ICAO Secretary General, represents an extremely useful compilation of practices which may be easily expanded and transformed in the future into an analytical basis for narrower or broader revisions.

It goes without saying that in spite of a number of specifics, ICAO as a U.N. Specialized agency, can benefit from the experience of other similar agencies inasmuch as amendments of their constitutions are concerned. It may well be that study of such experience of others, even if focused only on the constitutional provisions themselves, may help to balance the quite understandable opposition to any change.

⁹⁶ Foreword to ICAO Doc. 8900 (1971).