Articles

The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions

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INTRODUCTION

It appears strange that the Assembly of the International Civil Aviation Organization (ICAO), composed of all member States, has no powers in connection with the principle functions of the Organization, i.e., the formulation of Standards and Recommended Practices, nor any over the appointment and creation of the Organization's principle officers and sub-organs. Stranger yet, is the fact that even the little and insignificant powers that the ICAO Assembly possesses are easily and constitutionally/conventionally "*usurped*," or interfered with, by the limited thirty-three member Council of the Organization. More puzzling is the fact that the limited membership Council, which normally answers to the Assembly, runs the Organization's entire business exclusively as it sees fit. The remaining one-hundred-fifty or more States have no means of checking it. The result is that the majority of States cannot contribute to the advancement of the international aviation cause as they might have if the universal organ had the voice and say it now lacks.

The entire constitutional and political set-up of ICAO is hardly justified in schools of democracy and its corollary - the supremacy of international organization Assemblies. There is need for a serious and meaningful re-evaluation of the ICAO framework and working methods in order to remedy this anomaly.[1] The existing awkward situation readily

1. *See* Michael Milde, *Chicago Convention – 50 Years Later: Are Major Amendments 'Necessary' or 'Desirable'?* 19-1 ANNALS AIR & SPACE L. 401, 429 (1994); *see also* Christopher T. Tourtellot, *Membership Criteria for the ICAO Council: A Proposal for Reform*, 11 DENV. J. INT'L L. & POL'Y 51 (1981); W. Guldimann, *The Chicago Convention Revisited: Possible Improvements After 50 Years*, 19-2 ANNALS AIR & SPACE L. 347 (1994); Ernesto V. Rocha, *Toward A New International Civil Aviation Convention?*, 19-1 ANNALS AIR & SPACE L. 477 (1994); Nicolas M. Matte, *The Chicago Convention- Where From and Where To ICAO?*, 19-1 ANNALS AIR & SPACE L. 371 (1994).

lends credence to critics who hold that the ICAO Assembly provides an interesting focus for study not for the powers it has, but for those it does not. The actualization of that proposition comes from the angle of that organ's sessions. This paper clarifies a number of points on the unique international body called ICAO.

Fifty-three years ago, fifty-two nations[2] met at the Chicago Convention to establish the ICAO. The ICAO would serve as the medium through which international understanding and agreement on civil aviation would be attained. The Chicago Convention resulted from great concern for the safe and orderly development of international civil aviation, as well as the desire to avoid friction and promote cooperation between nations and peoples upon which the peace of the world depends.[3]

The reference to ICAO as "an outstanding instrument for better international understanding"[4] is understandable in the light of the aims and purposes of the Chicago Convention, but the nature of international air transport that ICAO was created to carter for is enough cause for concern. The ICAO has legal capacity of its own[5] and is composed of an Assembly, a Council, and such other bodies as may be necessary.[6] It must fulfill its goals through the formulation of principles and other associated arrangements geared towards the safe and orderly development of international civil aviation. This process, in turn, should ensure that international air transport services are established on the basis of equality[7]

2. The Organization, like all other similar organizations, has, since its inception, experienced a dramatic membership growth. It has doubled, tripled, and quadrupled until 1996, when it stood at 183 Member States. For a discussion of membership growth, see Michael Milde, *Chicago Convention- 45 Years Later: A Note on Amendments*, 14 ANNALS AIR & SPACE L. 203, 204-05 (1989) [hereinafter *Note*]; Lucius Caflisch & Roberto Ago, *Preface* to VICTOR-YVES GHEBALI, THE INTERNATIONAL LABOUR ORGANISATION: A CASE STUDY ON THE EVOLUTION OF UN SPECIALISED AGENCIES (1989). THOMAS BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 13 (1969); *see also* SAMUEL SHIH-TASI CHEN, THEORY AND PRACTICE OF INTERNATIONAL ORGANIZATION 33 (1971).

3. *See* Convention on International Civil Aviation, December 7, 1944, 15 UNTS 195; ICAO Doc. 7300/6, [hereinafter Chicago Convention], Preamble; Knut Hammarskjold, *One World Or Fragmentation: The Tool of Evolution in International Air Transport*, 9 ANNALS AIR & SPACE L. 79, 103 (1984); *see also* R.I.R. Abeyratne, *The Economic Relevance of the Chicago Convention- A Retrospective Study*, 19-2 ANNALS AIR & SPACE L. 3 (1994).

4. Honorable Lionel Chevrier's, (then Canadian Minister of Transport), Address of the Welcome to the Sixth Session of the ICAO Assembly on May 27, 1952, ICAO Doc. 7297 A6-P/21 [hereinafter Sixth Session] at 3.

5. *See* Chicago Convention, *supra* note 2, at Article 47.

6. *Id.* at Article 43. This Article represents one of the unique features of ICAO; it creates only *two* principal organs for the Organization, with the Secretariat being completely ignored.

7. The sovereign equality principle, unrealistic and objectionable as it seems, is already well entrenched in public international law. *See Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*, at Preamble, and Articles 2, 4(1), 6(1), and 11(4), U.N. Doc. A/RES/34/68 (1979); The 1967 Treaty on Principles Governing the Activities of States on the Moon and Other Celestial Bodies, 610 UNTS 205, Preamble and Articles I and II; KNUT

of opportunity and are operated soundly and economically.[8]

The Chicago Convention, reflecting the preamble, sets out the avowed aims and purposes of ICAO, developing principles and techniques of international air navigation and fostering 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; (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; and (i) promote the development of all aspects of international civil aeronautics.[9]

The controversy surrounding the extent to which these purposes extend or restrict ICAO's jurisdiction[10] falls outside the scope of this paper. Nevertheless, if there is any truth in a reading of ICAO's powers in Chicago Convention's Article 37,[11] which describes the organization as "the supreme world aeronautical organization,"[12] there is little or none in re-

JACOBSEN, THE GENERAL ASSEMBLY OF THE UNITED NATIONS - A QUANTITATIVE ANALYSIS OF CONFLICT, INEQUALITY, AND RELEVANCE 26 (1978); *see also* HENRY FIELD HAVILAND JR., THE POLITICAL ROLE OF THE GENERAL ASSEMBLY (1978); HERBERT GEORGE NICHOLAS, THE UNITED NATIONS AS A POLITICAL INSTITUTION (2nd ed. 1963); A.J.R. Groom, *Reflections on a Changing System*, *in* GLOBAL ISSUES IN THE UNITED NATIONS FRAMEWORK 285 (Paul Graham Taylor & A.J.R. Groom et al. eds., 1989); THEODORE COLULOUMBIS & JAMES HASTINGS WOLFE, INTRODUCTION TO INTERNATIONAL RELATIONS: POWER AND JUSTICE 24-27 (2nd ed. 1982); ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD (1986).

8. *See* Chicago Convention, *supra* note 2, at Preamble.

9. *Id.* at Article 44.

10. *See* 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, 410- 16; PAUL STEPHEN DEMPSEY, LAW AND FOREIGN POLICY IN INTERNATIONAL AVIATION 7-16 (1987); Tourtellot, *supra* note 1, at 51 n.2 (where some authorities are cited, including BUERGENTHAL, *supra* note 2).

11. Article 37 of the Chicago Convention gives ICAO powers to adopt international standards and recommended practices and procedures on a wide range of aviation-related matters: (a) communications systems and air navigation aids, including ground marking; (b) characteristics of airports and landing areas; (c) rules of the air and air traffic control practices; (d) licensing of operating and mechanical personnel; (e) airworthiness of aircraft; (f) registration and identification of aircraft; (g) collection and exchange of meteorological information; (h) log books; (i) aeronautical maps and charts; (j) customs and immigration procedures; (k) aircraft in distress and investigation of accidents; and other matters concerned with the safety, regularity, and efficiency of air navigation as may appear appropriate.

12. Mr. Luis Chafardet of Venezuela, Fourth Session of ICAO Assembly: ICAO Doc. 725-C/834 at 37. This description is further explained as signifying that this Organization is "the chief

ferring to the Assembly as "the highest body of ICAO."[13] An organ is sovereign or supreme "if other organs in the same institution are subordinate to it, and it is itself not responsible to any other entity or body in the exercise of its functions and powers."[14] This strikingly illusory feature of the ICAO, while enormously contributing to the unique distinctiveness of ICAO within the community of international intergovernmental organizations, is reinforced by certain other unique structural and constitutional dispositions of the remarkable 1944 Chicago Convention. These include ICAO's two-organ nature, its two top officer structure, and the fact its Assembly must be convened principally, if not only, by the Council. These curiously distinguishing characteristics combine to practically transform the ICAO Assembly, supposedly supreme, into what can be termed the most un-supreme of supreme organs in the United Nations system. It is now an unnecessary appendage which ought to be, as some critics suggest, restricted to a minimal role.

It is common for people born with infirmity (like the ICAO Assembly) to make up for it by developing in another less suitable area. The ICAO Assembly, it seems, is denied an opportunity to adaptively develop due to the untimely alteration in the frequency of sessions. The important question arises: Is a medical doctor entitled to deprive a person of his arms, even if this person has no use of his legs, just because the person can be *transported* around despite the malformity? If in the affirmative, is it not tantamount to saying this person is not entitled to movement, unless someone else (the transporter) desires?

The ICAO Council provides very interesting responses to this whole query. The Council, as this modest analysis demonstrates, equates an individual's lameness at birth with the creator's intention of no movement at all, not even with crutches. Such an individual, therefore, must not *move* unaided. Nothing, it seems, is more flawed than such an argument. The creator might never intend *normal* movement for the lame, but such intention about *movement with crutches* cannot be accepted without question.

Moreover, if we are legally entitled to take away the crutches (per-

instrument for the promotion of civil aviation in the world." Cameroon's Chief Delegate, 29th Session of the ICAO Assembly: ICAO Doc. 9601 A29-Min P/1-14 at 117. ICAO's Special Committee on Future Air Navigation Systems (FANS) reiterated "that ICAO is the only appropriate body to establish technical standards for international aeronautical communications and surveillance services." Report of the Third Meeting of the Special Committee on Future Air Navigation Systems, November 6, 1986, *cited in* Dr. Wolf D. Von Noorden, *Space Communications to Aircraft: A New Development in International Space Law (Part II)*, 15 J. SPACE L. No.2 147, 158 (1987).

13. Count. F. Franco, Chief Delegate of Italy, 6th Session, *supra* note 4, at 10.

14. Ebere Osieke, *Unconstitutional Acts in the International Organizations: The Law and Practice of the ICAO*, 28 INT'L & COMP. L. Q. 1, 19 (1979).

haps because, in using them to move, one *violates* others' rights of moving without worrying about colliding with someone), it is surely not through illegal or unconstitutional means or methods. The *ex turpi rule* ought to apply and invalidate the end which fails to justify the means. Otherwise, why are there entrances and doors specifically adapted for those in wheel-chairs? Of course, they cannot be denied access to the building because they cannot walk upright.

This paper does not argue as much against *the abandonment* of annual sessions in ICAO, as it does against *the means* by which abandonment is achieved. While doctors are entitled to amputate, they cannot do so without the patient consenting to and being well counseled about what is involved in the operation. To the ICAO Assembly, such an operation seems to have taken place in Montreal at the Eight Ordinary Session, during the first half of June 1954.

ICAO Assembly sessions are of two main categories: ordinary and extraordinary. The United Nations General Assembly (UNGA) uses other expressions such as *regular, special, and emergency special* to cover both situations.[15] Whatever the terminology, it is worth pointing out that "[t]he influence of the [ICAO] Assembly was considerably reduced by the introduction of triennial cycles of the Assembly; [which means now that] the Assembly meets only every three years in a regular session of less than three weeks' duration."[16] Those sessions are now analyzed below, beginning with the ordinary (Part 2), and followed by the extraordinary (Part 3).

II. ICAO Assembly Ordinary Sessions

Both the Chicago Convention and the Assembly's Standing Rules of Procedures, requires the ICAO Assembly to "meet not less than once in three years" and "convene . . . at a suitable time and place."[17] These are the *two arms* of Article 48(a) and the famous Standing Rules of Procedure - though mostly sitting when it ought to be standing. The first arm is a post-Chicago innovation; the other arm is not.

Prima facie, this provision effectively means that the Assembly can in theory[18] meet as many times in three years as it desires. Even though the practice is for this Assembly to meet once in three years,[19] nothing in

15. *See* Jacobsen, *supra* note 7, at 21.

16. Milde, *supra* note 1, at 429-30.

17. Chicago Convention, *supra* note 2, at Article 48(a); Standing Rules of the Assembly of International Civil Aviation Organization, as amended in 1980: ICAO Doc. 9317 [hereinafter Assembly Procedure], Rule 1.

18. One cannot be sure of the practice since an established ICAO practice seems to be that practice should be at variance with theory. *See* Osieke, *supra* note 14, at 1.

19. *See generally* Buergenthal, *supra* note 2, at 43, 226-28; *see also,* Milde, *supra* note 2, at

Article 48(a) (the first arm), *per se,* is capable of prohibiting meeting more than once within that time frame. The only stumbling block in that regard is perhaps, *certeris paribus,* the convenor's argument of "unsuitability" of time and place under the second arm. One already visualizes the importance of "two" always replacing "one" in the ICAO *modus operandi.* This issue is developed later on.

Meanwhile, this unique ICAO *modus operandi* (the uniqueness is explained under section II C of this paper - Convention of the Sessions), while strengthening the position and influence of the ICAO Council, also consolidates the helplessness of its Assembly. Critics have attributed this *strategy* to the conversion of Council status to that of "a primary rather than secondary source of authority."[20] One is thus demonstrating that this result was attained through (a) the change in the frequency of Assembly sessions, (b) the vagueness of the new sessions provision, and (c) the method of convening those sessions.

A. Frequency of Sessions

The frequency of an organ's sessions is an important indicator of its powers, influence and stature. This section first examines the effect of less sessions. Next, this section examines the arguments for and against such curtailment. Last, is an examination of the actual drama which installed "more frequent sessions" in ICAO.

1. *Effects of Change in Frequency of Sessions*

Increasing the duration between sessions of a non-permanent organ is shown to achieve at least one of three things: (1) a fall in the level of representation; (2) a change in the *nature* of representation; and (3) a *decline in influence* of the organ, and a rise in favor of the executive organ or branch.[21]

While all these factors are significant, the third factor is accentuated in international organizations because assemblies (or their "supreme organs") are often composed of "all the contracting States." It is not difficult to imagine the damage done to organizations whose supreme organ loses both luster and respectability.[22] Perhaps the point is clearer if one

208-09. This fact, while distinguishing ICAO, ought to serve as a useful caveat to the "frequently dazzling exercises in statutory interpretation" which are common to comparative studies that merely analyze and juxtapose "the provisions found in the consecutive instruments and resolutions of a host of organizations as if they were fungible commodities." BUERGENTHAL, *supra* note 3, at 1.

20. Tourtellot, *supra* note 1, at 56.

21. *Report of the Committee to Consider the Improvement of Practical Methods of Working of the International Labour Conference*, in GHEBALI, *supra* note 2, at 153 n.3.

22. Could this be a possible explanation of the apparent lack of respect ICAO often faces

takes a compendious look at all three components. Both *level* and *nature* of representation in an organization are merged in its membership. The importance attached to an organization's members cannot be overemphasized.

Two principles of membership in international organizations are: (1) universality (which is either permissive or compulsory) and (2) selectivity.[23] Universality, often preferred for the respectability and prestige it brings, is almost invariably tainted with the second. For instance, although ICAO (like most other intergovernmental organizations) claims universality,[24] it still has selective criteria and/or restrictions regarding certain states.[25]

Membership growth is not a bed of roses. The accompanying "new member majority" drags along challenges and problems.[26] The Fourteenth Session's Indian Chief Delegate recognized this fact when he cau-

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from other organizations? *See* Noorden, *supra* note 12, at 148-58. As several writers and experts point out, it is unrealistic to attempt to separate international (or external) politics from domestic politics; both are interrelated levels of political activity linked by a common need to reconcile the ideal of justice with the reality of power. *See* COULOUMBIS & WOLFE, *supra* note 7, at 26-27. It appears that an organization which is at home with undemocratic politics should not expect any sympathy at the external level when it vocally calls for democracy, equality, or respect for its jurisdiction. This admonition is usually only addressed to totalitarian states, however, with the necessity modification, it applies to ICAO (critics would point to the Council's undemocratic *modus operandi*) with even more force since its own "citizens" are also citizens of the greater international family of organizations. It is likely that the bulk of these "citizens", feeling alienated as most appear to be, would not behave like Athens in the Thucydidean dialogue in the event of the potential disputes which are common between ICAO and its sisters. *Id.* at 25.

23. *See* CHEN, *supra* note 2, at 35-36; HAVILAND, *supra* note 7, at 28-30.

24. Many ICAO Members consider the dramatic growth in membership as giving "it the aspect not merely of an international organization but of a universal institution." Z. Beydoun, the Chief Delegate of Lebanon, at the Fourteenth Session of the ICAO Assembly, ICAO Doc.8269 [hereinafter 14th Session] at 10. As the Temporary President of the Assembly, Mr. Walter Binaghi of Argentina, and the Chief Delegate of India, respectively pointed out during the same session, the great number of delegates present was not only "the highest in the history of our Organization," but also excellent proof that "ICAO can claim to be a representative body of almost all the independent States." *Id.* at 4-5.

25. *See* Chicago Convention, *supra* note 2, at Articles 91-93; Milde, *supra* note 1, at 433, declaring that "[d]uring any major review of the Convention Article 92 should be redrafted to remove dated provisions and Article 93 should be deleted." For further discussion of the various aspects of ICAO membership, see BUERGENTHAL, *supra* note 2, at 13-55. Even the UN Charter is under fire for "habitually" infringing the principle of universality "in another crucial sense" as it "reflects only partially the global system. The UN Charter begins with the words 'We the Peoples of the United Nations. . .' but there the matter ends. The UN system is above all a system of governments in which people are only allowed in through the tradesman's entrance to ECOSOC, and then in a highly circumscribed manner, under the aegis of Article 71 of the Charter." GROOM, *supra* note 7, at 287; *see also* NICHOLAS, *supra* note 7, at 2. Most of these criticisms of the Charter, especially those of Professor Groom, provide enough reason for ICAO and IATA to consider the merger suggestion made by Dr. Tourtellot, *supra* note 1, at 72.

26. For a discussion of some of them, see, e.g., GHEBALI, *supra* note 2, at 25-28, 204-10; Milde, *supra* note 1, at 404-05; Tourtellot, *supra* note 1, at 74.

tioned his colleagues with: "[o]ur responsibilities have also increased in the same proportion."[27] The question is: How, and to what extent, has the ICAO Assembly not partaken in its share of "increased responsibilities" due to the less frequent nature of its sessions?

Pursuant to the Chicago Convention, membership acquisition is either by ratification,[28] adherence,[29] or admission.[30] Such membership is terminated by either denunciation, expulsion,[31] or suspension.[32] These issues pose problems and challenges that the Chicago architects, although not specific in all cases,[33] placed at the charge of the Assembly. Because of the infrequent meetings, it is necessary for the Council to assume routine and unusual functions that the Chicago conferees may not have intended without the direct supervision of the Assembly.[34]

Infrequent sessions have thus necessitated the transfer of power to suspend a member at the UN's request (the implementation, though undecided by the conferees, was demonstrated by Dr. Buergenthal to fall within the Assembly's jurisdiction)[35] from the Assembly to the Council. The considerable delay in implementation that results from the Assembly's meeting once every three years has thus furnished justification. "To prevent such delay the Assembly might have to *delegate* to the ICAO

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27. 14th Session, *supra* note 24, at 5. Graphically illustrating the fact that, until 1981, the three amendments that were effected on the UN Charter, all dealt with membership. *See* INTERNATIONAL ORGANIZATION AND INTERGRATION: ANNOTATED BASIC DOCUMENTS AND DESCRIPTIVE DIRECTORY OF INTERNATIONAL ORGANIZATIONS AND ARRANGEMENTS (Paul J. G. Kapteyn et al. Eds., 1981) [hereinafter Kapteyn].

28. *See* Chicago Convention, *supra* note 2, at Article 91; *see also* BUERGENTHAL, *supra* note 2, at 14-15.

29. *See* Chicago Convention, *supra* note 2, at Article 92; BUERGENTHAL, *supra* note 2, at 16-18.

30. *See* Chicago Convention, *supra* note 2, at Article 93; BUERGENTHAL, *supra* note 2, at 18-24; Milde, *supra* note 1, at 442-43.

31. *See* Chicago Convention, *supra* note 2, at Article 93 & 95. *See generally* Osieke, *supra* note 14, at 14-17; BUERGENTHAL, *supra* note 2, at 35-46. For the UN position, see KAPTEYN ET AL., *supra* note 27, at 5. Withdrawal (which is denunciation in ICAO's vocabulary) is purposely not provided for in the Charter "to avoid a situation in which a member might explicitly be permitted and even encouraged to withdraw from the Organization. On the other hand, it was not intended explicitly to prohibit withdrawal." *Id.* Only Indonesia has withdrawn from the UN (on January 20, 1965), but it "resumed" its full participation on September 28, 1966. *Id.* at 6.

32. *See* Chicago Convention, *supra* note 2, at Article 68, 88 & 93. *See generally* H.G. SCHERMERS, INTERNATIONAL INSTITUTIONAL LAW VOL. II: FUNCTIONING AND LEGAL ORDER 584-586 (1972); BUERGENTHAL, *supra* note 2, at 46.

33. *See e.g.,* Chicago Convention, *supra* note 2, at Article 93, which does not make clear whether suspension is automatic, as is the case with expulsion; it also does not indicate (should it not be automatic) which ICAO organ effects it. *See* BUERGENTHAL, *supra* note 2, at 53.

34. Tourtellot, *supra* note 1, at 56. In other words, the Council's "power has become particularly significant in recent years, as the ICAO Assembly (the universal body corresponding to the United Nations General Assembly) has met less regularly." *Id.* at 52.

35. *See* BUERGENTHAL, *supra* note 2, at 52-53.

Council or the Secretary General the power to comply with the U.N. request in the event that it be received while the Assembly is not in session"[36] Critics then point to the fact that such transfer is not necessary but for the change in annual sessions.

As noted, the issue of delegation is one of many enumerated insignificant powers and duties of the Assembly; critics who think this type of delegation emanated solely from less frequent sessions might be surprised to learn that they are mistaken. The Council's creeping jurisdiction began as far back as the first session (in the heyday of annual sessions). It got its headway from Resolution A1-9,[37] which in turn, found its justification in the Specialized Agency Agreement between ICAO and the UN.[38] The Agreement provided for the immediate transmission by the ICAO, to the UN, of applications for membership by certain (enemy) states.[39] This immediacy required the Council, which is quasi-permanent in sessions, to be in a comfortable position to receive, process, and transmit them (or it) as required.

Along this line of reasoning, critics claim that the argument begs the question; the argument turns a blind eye to a weightier consideration. Critics point out that ECOSOC meetings (directly responsible for the Agencies) which take place several times a year, as well as annually by the UNGA, logically require that similar organs of the specialized agencies do the same. The former often discuss urgent matters needing speedy response from the latter.[40] In other words, this consideration should prevent thoughts of reducing Assembly sessions. That is why these agencies exist in the first place. Their proliferation is likened to "[t]he tendency of [national] governments to establish special departments or agencies to deal with newly perceived problems of national importance."[41]

Indeed, if the Assembly is to play a dominant role in the life of the

36. *Id.* at 53 n.170. Delegation (both mandatory and discretionary) of the Assembly's own powers and functions is one of the amusing little powers and functions in Article 49.

37. For the full text, *see* ICAO Doc.9558 [Assembly Resolutions in Force (as of October 6, 1989)] at 1-8.

38. For full text of the Agreement, see INTERNATIONAL AVIATION ORGANIZATIONS: CASES AND MATERIALS 42-44 (Michael Milde & M. Siciliano eds. 1994) [hereinafter Milde & Siciliano].

39. The ILO has a better deal with the UN. Professor Victor-Yves Ghebali indicates how its own

> establishment of links with the United Nations was a more protracted process, owing to a variety of major technical and political obstacles. The ILO was intent on preserving its independence and uniqueness [not in the ICAO sense]. This required delicate negotiations concerning the maintenance of its tripartite structure, less favorable than it enjoyed in the League days.

GHEBALI, *supra* note 2, at 23-24.

40. *See id.* at 152. The complexity of this issue is examined when the arguments for and against annual sessions are canvassed.

41. BUERGENTHAL, *supra* note 2, at 1.

Organization, the question regarding the alteration of the frequency of sessions must be carefully and meticulously studied. This homework appears to be dutifully performed by the UN Special Committee, a Committee that is vested by the General Assembly to look into the possibility of curtailing its sessions to save finances. Of course, for reasons evoked later, the proposals were shelved.[42] The reverse was the case in ICAO. This result is not surprising because, unlike the General Assembly, pursuant to the Charter, "[u]nder the present text of the [Chicago] Convention it would be hard to assert with any conviction that the Assembly is the *supreme* body of the Organization."[43]

The truism in the passage would be graphically brought out through a study of the rationale behind, or reasons for, the stripping of the Assembly of its annual sessions. All arguments, whether for or against annual sessions, easily play into the hands of ICAO's "anti-annualists." Given the ICAO's background, the function its various organs are intended to fulfill, its entire constitutional framework and its other unique characteristics, it is not surprising that the principal arguments of the "annualists" in other organizations are the greatest against their counterparts in ICAO. All this simply results from the illusory sovereignty of the Assembly in the latter organization. The ICAO Legal Bureau Director could not help exposing "the illusion of [the Council's] subordination to the universal body"[44] in Article 50(a)[45] when he addressed the Executive Committee of the Council:

> While in common parlance it was correct to say that the Assembly was sovereign, this was not legally so - This Assembly did not and could not exist except by virtue of the Convention that established the Organization and its various organs. The Assembly's powers and duties (both implicit and ancillary) were specified in Article 49 of the Convention, as were certain specific limitations on those powers - for example Article 49(k) . . . .[46]

This ineluctable but painful fact makes ICAO the unique inter-governmental organization within the family.

Dr. Thomas Buergenthal warned about the failure to recognize this fact about ICAO when he talked of certain "considerations [which] tend to be overlooked by many who have written on the law of international

42. *See UN General Assembly Report of the Special Committee on Measures to Limit the Duration of Regular Sessions of the General Assembly*, U.N. GAOR, 8th Sess., para. 9 [hereinafter UNGA] (1954), *as appended to* S.D. BAILEY, THE GENERAL ASSEMBLY OF THE UNITED NATIONS: A STUDY OF PROCEDURE AND PRACTICE 323-24 (1960).

43. Milde, *supra* note 1, at 430.

44. Tourtellot, *supra* note 1, at 56.

45. "The Council shall be a permanent body responsible to the Assembly . . . ."

46. ICAO Doc.A18-Min. Ex/1-16 at 61, *cited in* Osieke, *supra* note 14, at 18.

institutions."[47] Although specialized international organizations evince a great many structural and constitutional similarities, the doctor had to explain further that:

> each of them has, since its establishment, tended to develop an institutional personality or *modus operandi* of its own. This institutional personality is the product of a variety of factors. Among these the organization's history, its functions, its membership complexion, and the political or economic power that it commands probably predominate. The organization's *modus operandi in* turn has a significant effect on the manner in which the organization resolves legal problems or articulates the rules that are applicable to them.[48]

This explains why ICAO,[49] branded as "an agency that gave a strong voice to carrier interests"[50] is different from most other organizations such as its senior twin brother,[51] the International Telecommunications Union (ITU),[52] and the WTO (World Trade Organization), which is at-

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47. BUERGENTHAL, *supra* note 2, at 1.

48. *Id. See also* GROOM, *supra* note 7, at 289-90.

49. "One specialized international organization whose substantial law-making accomplishments have not received the attention they deserve." BUERGENTHAL, *supra* note 2, at 2. This might have been true in the 1960's when Dr. Buergenthal wrote, but it may not be so now. In regard to the ICAO Council's Annex 2 on Rules of the Air, Dr. Michael Milde, writing in 1988, noted that:

> [i]t is a *unique feature* in international law-making that an executive body of an international organization can legislate by a two-thirds majority vote with binding effect for all [183] . . . States with respect of the Rules of the Air applicable over the high seas which cover some 70 percent of the surface of the earth.

Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)*, 9 ANNALS AIR & SPACE L. 105, 106 (1986) [hereinafter *Misuse*].

50. Janda, *supra* note 10, at 413. This tendency is often frowned upon, even by some of the ICAO delegates. This is particularly the case during the 1962 Assembly Session in Rome where J.W.H. Backer of the Kingdom of the Netherlands blankly told his colleagues that:

> I am for good and close cooperation with our friends, the airlines; but forgive me if I ask you not to let them prick too many holes in the pie, because if they do, the pie will become dry and unsavory. And don't we say, with a slight variation, that the proof of the pie is in the eating? . . . Civil aviation has a mission to fulfil and I wish you wisdom to build a good and sound future for civil aviation, ICAO included.

14th Session, *supra* note 24, at 26-27. Could these airlines be arguing against their admission into the ICAO only through the tradesman's door or the aegis of Article 65 of the Chicago Convention?

51. Twin brother in regard to the perennial problem determining where airspace terminates and outer space begins. This is the natural habitat of the object of ITU's whole *raison d'etre* – the radio frequency spectrum (RFS) and geostationary satellite orbit (GSO). *See generally* S. Mishra & T. Palvlasek, *On the Lack of Bases for Defining a Boundary Between Air Space and Outer Space,* 7 ANNALS AIR & SPACE L. 399 (1982).

52. "[T]he oldest specialized agency of the United Nations. . .[which] has been a dynamic and pragmatic organization . . . [as] its members have always revised and up-dated its mandate and its organizational structure." R. S. Jakhu, *International Regulation of Satellite Telecommunications, in* LEGAL ASPECTS OF SPACE COMMERICALIZATION 78, 80 (Kunihiko Tatsuzawa ed., 1992). This Union provides the main for a for the drafting of international treaties dealing specifically with the use of radio frequencies for space services and the geostationary orbit. *Id.* at 80.

tempting the overthrow of ICAO in the Empire-building sphere.[53] In this way, ICAO strongly resembles France which is "without doubt, the most mysterious of the Western countries. It refuses, almost doggedly, to fit the framework of the rest of Western Europe and the Atlantic world."[54] The arguments regarding frequency of sessions would better prove or elucidate the point.

2. Arguments For & Against Less Frequent Sessions

Having explored and discovered the somewhat dire consequences of altering the frequency of sessions, what is the rationale for changing from annual sessions to less frequent sessions in ICAO? Before plunging into this issue, it must be indicated that financial considerations are almost invariably the *given* motivation for all attempts to reduce the frequency of Assembly sessions, even when larger political motives loom behind the scenes. In the history of the United Nations, and other international organizations,

> efforts at reform have been inspired, first, by the need to tackle problems which were not foreseen by the founders, second, to obtain existing goals more effectively, and third, to save money - *which has masked a determined attempt to reassert Western, and especially United States, dominance in the system.*[55]

This seems to be what happened in the ICAO with the reform of Assembly sessions.

Reduction of sessions of the Assembly in ICAO found justification in the need to lighten financial burdens, as well as the workload falling on both member governments and the Secretariat staff.[56] As a solution to

53. *See* DEMPSEY, *supra* note 10, at 302.

54. J. Blondel, *The Government of France*, in INTRODUCTION TO COMPARATIVE GOVERNMENT 115, 117 (M. Curtis, ed., 1985). *See also* THOMAS M. MAGSTADT, NATIONS AND GOVERNMENTS: COMPARATIVE POLITICS IN REGIONAL PERSEPCTIVE (1991).

55. TAYLOR & GROOM, *supra* note 7. Such dominance does not only occur through reform, it is often seen in the stiff opposition to proposed reforms. As Black and Falk indicate, "the dominance of the United States in the quarter-century after 1945 . . . was [so] exceptional" that a reduction in its role, often regarded as a "decline" is instead a misperception. *Introduction, in* CYRIL EDWIN BLACK & RICHARD FALK, THE FUTURE OF INTERNATIONAL LEGAL ORDER: RETROSPECTIVE AND PROSPECT 60 (1982).

56. At the Sixth Session of the ICAO Assembly, the Portuguese Delegation, headed by J. De Brito Subtil, while registering the obvious "result of so many meetings in Montreal", took the time to also note that this entailed "a complete disregard of the expense which a large number of Sates must incur in coming here." Subtil further noted that "in 1950, 1951, and 1952, an average of less than 50% of the Contracting States were represented at all Divisional meetings held in Montreal." Sixth Session, *supra* note 4, at 6. Subtil's comment should not be taken as against "so many meetings"; he would simply be *contre all* such Divisional meetings being held only in Montreal. ICAO is not alone in this practice. Only four ILO Conference Sessions were, until 1989, held outside its Geneva Headquarters since World War II. GHEBALI, *supra* note 2, at 153.

the financial problems that bisected the Organization, problems "due mostly to causes which are completely irrelevant to the activities of the Organization,"[57] Mr. Subtil made the following alternative proposals through which to address the problem: (1) curtail the activities of the Organization, thereby reducing expenses, *or* (2) curtail or eliminate various budget expenditures (not necessitating a reduction in the activities of the Organization), which would entail (a) moving the headquarters from Montreal to avoid the Canadian national and Quebec provincial taxes, (b) abolishing the permanent status of the Council, which would meet only once a year for a few weeks prior to the session of the Assembly, (c) eliminating some of the regional offices, (d) considering the possibility of eliminating or postponing Divisional meetings at which fifty percent of the Contracting States are not represented, (e) reducing the activities of the Air Navigation Committee to technical matters that prove urgency, and (f) holding sessions of the Assembly only once every three years, with the budget approved for that period.[58] The last alternative is the only one that ICAO adopted at the Eighth Session of the Assembly. Why?

The considerations to be examined, in answering the question, are counterpoises to such a move, weighing all given possibilities and seeing what best suit(s) or suited the needs of the organization concerned. Professor Ghebali's statement, that those in support of continuing annual sessions are "both numerous and weightier"[59] must be taken with caution as one plunges into the various arguments. These arguments are conveniently termed (a) the legislative, (b) the status, (c) the amendment, and (d) the financial.

(a) The Legislative Arguments

There is the *Legislative Argument*, exemplified by the ILO Director-General's Report, arguing, unsuccessfully, against annual sessions and its consequent "regular rhythm of legislative action which exceeds present needs," and suggesting the use of Committees and Commissions.[60] The

57. Sixth Session, *supra* note 4, at 6.

58. *Id.* at 7-8. Even the somewhat innocuous and benevolent Portuguese proposals are loaded with the principal vision of Lisbon replacing Montreal as the International Aviation City.

59. GHEBALI, *supra* note 2, at 152.

60. For details of the proposal, see ILO Director-General's Report of the Practical Methods of Working of the Conference, submitted to the 137th Session of the Governing Body, para.136, *cited in* GHEBALI, *supra* note 2, at 152 n.1. This argument weights against the permanent status of the ICAO Council; a similar argument is already directed. *See* Milde, *supra* note 1, at 433. As to the strong and weak points in the use of global conference in lieu of Assemblies, *see* GROOM, *supra* note 7, at 293-95; E.D. DuCharme, R.S. Jakhu, & W.G. Longman, *State Sovereignty in the International regulation of Radio communication*, 10 ANNALS AIR & SPACE L. 327, 334, 338 (1985).

argument was countered, *inter alia,* by the fact that altering the frequency inevitably results in shorter discussions of the standards and, therefore, results in low quality (or "sub-human") standards.[61]

While the above reasoning is tasteless to ILO annualists, it is of much flavor to anti-annualists in ICAO. The latter is quick to indicate that the ICAO Assembly has no such research nor legislative powers which would be the sole prerogative of the Council. The ICAO Council and its subordinate bodies never made any illusion about this. Thus, in rejecting proposed amendments to the INMARSAT Convention, which purportedly infringed ICAO's prerogative in the area, the Council vehemently indicated that "the specific terms of any amendments should unequivocally respect *the exclusive right of the ICAO Council to establish international standards,* [and] *recommended practices and procedures in the field of aeronautical communications.*"[62]

It is also gleaned that these legislative considerations accord much weight against the incessant calls for the abolition of the permanent status of the Council; these calls are still being made.[63] But the Council, it seems, remains adamant (and perhaps rightly so?) when it comes to anything that adversely affects its unduly prestigious position. The ICAO Council, since it is the legislative organ, seems to find authority buttressing its disputed permanent stature (apart from Article 50 of the Convention) in the very arguments of the annualists. It also seems that any recommendations or suggestions for the abolition of that Body's permanency is meaningless unless they go hand in hand with those for an independent Secretariat as a third or fourth (including the Legal Committee) principal organ of ICAO. For the moment, ICAO is essentially a two-organ organization. This unique "Two-Organ" ICAO needs a

61. GHEBALI, *supra* note 2, at 152.

62. Michael Milde, *Amendments to the Convention on the International Maritime Satellite Organization, in* SPACE LAW APPLICATIONS COURSE MATERIALS 217 (R.S. Jakhu ed., 1995). *See also supra* notes 22 & 46. For an incisive discussion of the binding force of ICAO's legislation, see Noorden, *supra* note 12, at 154-60.

63. *See generally* Milde, *supra* note 1, at 433.

> The permanent nature of the ICAO Council was justified at the time of the creation of the Organization, when the Council faced massive work to prepare a wide range of Standards and Recommended Practices.... [But today, s]horter and less frequent sessions of the Council would attract high level participation from States or participation by top level experts in a particular field in which a decision is to be made, the quality and level of decision making would improve and the States' and ICAO's budgets would achieve considerable savings.

Guldimann, *supra* note 1, at 354. There is even a specific call for the reform of Article 50 "to reduce the number of members, which has reached a level detrimental to decision-making, not to mention what it costs the organization and therefore its member states." Rocha, *supra* note 1, at 478. To Dr. Tourtellot, the answer to improving the representative quality of the Council does not lie in trying to achieve or regain the original ration of members to Council seats, but rather in revising the method of filling the existing positions. Tourtellot, *supra* note 1, at 74.

little more elaboration (done under the next argument). It is stressed that advocating the non-permanency of the ICAO Council (in the form it is) entails that activities of ICAO cannot go on during that period of dormancy.

It is otherwise only if the Council loses one of its two heads in the form of an independent Secretariat, a Secretariat which not only assumes contested permanent status, but is also at the disposal of all other organs of the Organization.[64] In this way, it has a status of its own, acting, as it is supposed to, as a moderator or middle person between the other two (or three) principal organs - the Assembly and Council *proper.* In the absence of this, the status argument clearly has no place in the present ICAO framework.

(a) The Status Arguments

Financial considerations greatly influence decisions in several organizations that consider trimming Assembly sessions. Confronted by even heavier financial and economic pressures and arguments, the UN Special Committee, after their seasoned studies, came to a conclusion - if the General Assembly fulfilled the high responsibilities placed upon it by the Charter, and if the people of the world are to look with increasing respect and confidence to that body as the highest forum of the international community, all questions relating to the manner in which it functions must be resolved primarily from the standpoint of their effect on the General Assembly. In the opinion of the majority of the members of the Special Committee, therefore, the unnecessary lengthening of the regular sessions "detract from the stature of the Assembly in the eyes of the world."[65] The Special Committee, consequently, acknowledged that financial and other difficulties related to the duration and frequency of the regular sessions should not be resolved at the expense of either the effectiveness of the General Assembly, or the right of any representative to express freely and explain their government's attitude on problems before the Assembly.[66]

For ICAO anti-annualists (who must side with the advocates of the Council's permanent status), all would not float for a number of reasons. First, the ICAO Assembly lacks similar responsibilities under its own Convention, which, on the contrary, expressly inhibits it from performing a lot of crucial or "critical duties" such as (1) convening itself, (2) electing or appointing the President of the Council, (3) appointing the Secretary

64. The fact is that "the Council is often generating its own work and vast Secretariat resources are geared specifically to serving the Council." Milde, *supra* note 1, at 433.

65. UNGA, *supra* note 42, at para. 9.

66. *Id.* at para. 13

General, (4) adopting technical standards (which is the key function of ICAO), (5) settling disputes, and (6) creating subordinate organs of ICAO.[67] In view of the sixth factor, one can quickly dismiss Mr. Subtil's proposal regarding the ANC. The Assembly has no *locus standi* for making such a recommendation. Article 49(k) clearly estops the Assembly from interfering with activities of this Commission, whose formation is completely out of reach. It cannot even ask questions as to how it was constituted, let alone venture near the Commission's field of activities. This sub-body is entirely one of the Council's "14 mandatory and 5 permissive functions outlined in Articles 54 and 55 of the Convention respectively."[68] The case of appointment to this sub-body not only proves the point,[69] but also indicates in the clearest fashion, that the ICAO Council, like the French President, "is beyond the reach of Parliament [or the ICAO Assembly]."[70]

Second, because the Assembly has no stature to defend, no independent Commissions of its own,[71] and no independent Secretariat to

67. *See* Article 49(k); *see also* Milde, *supra* note 1, at 430-31. For further discussions of this unfortunate ability, see Tourtellot, *supra* note 1, at 56; DEMPSEY *supra* note 10, at 274 n.9, 275-76. At this stage, one wonders just what is the role of the Assembly.

68. DEMPSEY, *supra* note 10, at 274 n.9. The situation here is different from that of the Charter, which places the creation of such bodies on the General Assembly and the three Councils. *See* S.D. BAILEY, THE UNITED NATIONS: A SHORT POLITICAL GUIDE 30 (1963) [hereinafter GUIDE].

69. For a discussion of this appointment aspect, *see* Osieke, *supra* note 14, at 5-8.

70. MAGSTADT, *supra* note 54, at 106. In fact, it appears that a necessity for any safeguards did not really count in Chicago. For instance, Article 10 of the UN Charter states: "the result of many of the smaller States' firm determination to develop and expand the Dumbarton Oaks proposals in order to strengthen the role of the Assembly in the political field", has been rightly hailed by Herbert V. Evatt of Australia as "one of the most important achievements of the San Francisco Conference and one of the main democratic safeguards of the United Nations Organizations." HAVILAND, *supra* note 7, at 11; H.V. EVATT, THE UNITED NATIONS 20 (1948) *cited in* HAVILAND, *supra* note 7, at 13. It must be noted that all the contributions of smaller or medium powers, both at Dumbarton Oaks and San Francisco, towards strengthening the General Assembly, were motivated by the fact that the Soviets were not only on the *Big Three* side, but because the most vocal and insistent call for a U. N. Assembly of the ICAO model came from them. This was bound to prick Western fears of what the Reds might have behind such a scheme. Even the other major Western powers had to, every once in awhile, abandon the Big Colleague and side with their smaller colleagues in the matter. But all this did not arise in the absence of the Soviets in Chicago; the West could easily agree on focusing and pinning all authority within the Council. To Canada, Australia, New Zealand, and others who stood for a strong UN General Assembly, the ICAO Assembly was not an organ worth standing up for since it was not the Soviets, but Mother Britain and Big Brother U.S.A. with whom they hoped to deal - their exalted seats in the Club guaranteed as a matter of course. To the States in Chicago, it was a matter of waiting patiently while Mother and Big Brother settled their petty dispute before they could all comfortably settle down around the table of the Club with no threat. For an account of the talks between these Big-Two powers, see Marc L. J. Dierikx, *Shaping World Aviation: Anglo-American Civil Aviation Relations, 1944-46*, 57 J. AIR L. & COM. 795 (1992). Maybe ICAO got its "two-gene" from here?

71. The Assembly's most influential Executive Committee even comes under the firm grip

turn to, it cannot possibly effect any seasoned studies on the matter in question.[72] Because this matter is not an election for "membership in the Council[,] . . . and states are [only] keen at following and participating in its activities,"[73] the Assembly simply rubber-stamps when it meets every three years to carry out its primary task - electing a new Council.

ICAO seems in love with "two" and all its derivatives. Its *dual* Constitution,[74] the so-called outstanding Chicago Experiment in the Codification of International Law,[75] of which each ICAO Contracting State is a party, uniquely creates (contrary to the thinking of some experts)[76] two principal organs: (1) an Assembly of all the Contracting States and, (2) a Council of limited membership, with its various subordinate bodies, including the Secretariat.[77] One immediately notes that this ICAO *modus*

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of the Council. It does so through its permanent President as "Temporary" President. *See* Assembly Procedure, *supra* note 17, Rule 8; Chicago Convention, *supra* note 2, Article 49(a).

72. All proposals for the change of the Assembly's annual sessions originated from the Council. This fact, while vividly contrasting with both the UNGA Special Committee, and the ILO's Director-General reports, also corroborate the point on the ICAO Council's status as embodying the Secretariat.

73. DEMPSEY, *supra* note 10, at 274 n.9.

74. *See* Milde, *supra* note 2, at 205.

75. The Chicago Convention is a remarkable legal instrument. By today's standards and experience in the codification of international law it is hard to believe that it was drafted within 37 calendar days, without any significant previous multilateral consultation and without a draft text consulted by the participants prior to the opening of the Conference. During many of the 37 days of the Conference, no formal meetings were held and groups of delegations discussed informally in the seclusion of their hotel rooms.

Milde, *supra* note 1, at 402. One may think, however, that these Chicago conferees, like their San Francisco counterparts, had a lot of sources (e.g. the 1910 and 1919 Paris Conferences, and the 1928 Havana Conference), and particularly ICAN to copy. Nicholas, who demonstrates how the San Francisco conferees tactically and pointedly omitted any reference to the League (in the same way as Chicago did to the 1919 ICAN - International Commission for Air Navigation) - "as if even a word of allusion might set the ghost of Woodrow Wilson's failure walking the San Francisco Opera House" - comes down with: "In fact. . .they copied it." NICHOLAS, *supra* note 7, at 14. The absence of the Legal Committee in the Chicago Document until 1947 proves the point. Until that time, the Comite International Technique d'Experts Juridiques Aeriens (CITEJA), created in May 1926, performed the functions that the ICAO Legal Committee essentially took over.

The Convention does not provide for its [Legal Committee's] existence, the Chicago Convention avoided the question of the legal work of the Organization because in 1944 it was hoped that the CITEJA would be brought into relations with ICAO and the Conference did not wish to touch the vested interests some States had in CITEJA.

Milde, *supra* note 1, at 444.

76. *See, e.g.*, CHEN, *supra* note 2, at 144. Chen states: "The principal organs of ICAO are an Assembly composed of all member states, a Council composed of twenty-seven [now thirty-three] members elected by the Assembly for three-year terms, and a Secretary-General with a staff of about 600." *Id.*

77. For example, the IMO Constitution goes further than the Charter by creating Sevens. Its Article 11 states that the Organization is to consist of (i) an Assembly, (ii) a Council, (iii) a Maritime Safety Committee, (iv) a Legal Committee, (v) a Maritime Environmental Protection

operandi, which makes the Secretariat an exclusive subordinate arm of the Council,[78] subordinates the Assembly to the whims and caprices of that Council. There is thus hardly a difference between the subordination here, and the French Parliament subordination to the presidential will under General de Gaulle's Fifth French Republic Constitution. In fact, it is fascinating to note that the ICAO Assembly is like the French Parliament in many important respects. To Professor Thomas M. Magstactt of the Air War College, each of the two organs "is more interesting for the powers it does *not* have than for the powers it has."[79] Due to the lack of essential powers, the present paper cannot join in any chorus that advocates a non-permanent Council in ICAO without similarly calling for a

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Committee, (vi) a Technical Co-operation Committee and such subsidiary organs as the Organization may at any time consider necessary, and (vii) a Secretariat. *See* K.R. SIMMONDS, THE INTERNATIONAL MARITIME ORGANIZATION 55 (1994). Guldimann condemned the absence of a Maritime Environmental Protection Committee from the ICAO. Guldimann, *supra* note 1, at 356. Article 11 expressly tells us that the necessity of "subsidiary organs" is business for the consideration of "the Organization". The equivalent Article of the Chicago Convention is silent on this issue. The ITU is made up of (i) the Plenipotentiary Conference, (ii) Administrative Conferences, (iii) the Administrative Council and (iv) four permanent organs, viz., (a) the General Secretariat headed by a Secretary General, (b) the International Frequency Registration Board (IFRB), (c) the International Radio Consultative Committee (CCIR), and (d) the International Telegraph and Telephone Consultative Committee (CCITT). *See* Jakhu, *supra* note 52, at 80-81. In 1989, the Telecommunications Development Bureau (BDT) was established with a status similar to that of other permanent organs of the Union. *Id.* at 81. The later formation and status of this BDT contrast vividly with those of ICAO's Legal Committee, also formed later. Article 7(1) of the UN Charter establishes the principal organs of the United Nations as, (i) a General Assembly, (ii) a Security Council, (iii) an Economic and Social Council (ECOSOC), (iv) a Trusteeship Council, (v) an International Court of Justice (ICJ), and (vi) a Secretariat (headed, of course, by the renowned UN Secretary General). *See* U.N. CHARTER art. 7; *see also,* BAILEY, *supra* note 68, at 142-47. The ILO Constitution of October 9, 1946 creates three principal organs: the Conference, the Governing Body, and the Labour Office (headed by the Director-General, who is the single head of the Organization). *See* 15 UNTS 35; see also CHEN, *supra* note 2, at 142-47, for further indications of other similar organizations, all having more than two principal organs.

78. "Apart from the conference and language services for the Council, the Secretariat produces vast amount of documents *geared directly only to the Council* and frequently prepared at its request." Milde, *supra* note 1, at 433 n.112 (emphasis added). Even the Legal Committee, subsequently created and regulated by Assembly Resolutions A7-5 and A7-6, could still be regarded as the Council's subordinate body. Resolution A7-5 states that it is "a permanent Committee of the Organization, constituted by the Assembly . . . [but] responsible to the Council", which is not responsible to an Assembly. There have been several unheeded calls from high quarters for revision of the Chicago Convention; the unheeded calls ask the Convention to mention this Committee, which "has attained the status of a principal organ of ICAO through accomplishment and necessity." *Id.* at 444; Guldimann, *supra* note 1, at 356. It is "desirable to include in the revised Convention the basic elements of the mandate of the Legal Committee." *See* Tourtellot, *supra* note 1, at 56-58, for this Committee's history or evolution. *See also,* Guldimann, *supra* note 1, at 356-57 for a review of ICAO's other subordinate organs. For those of the UN, *see* BAILEY, *supra* note 68; JACOBSEN, *supra* note 7, at 21-22.

79. MAGSTADT, *supra* note 54, at 106.

distinct Secretariat in particular, and an entire re-evaluation of the Assembly's status as the supreme body of the Organization?

This ICAO two-organ phenomenon appears to put it and its Assembly in a different and strangely interesting class within the UN system. The inevitable consequence is that, just like "the British [who] are at home with [a theory of separation of powers that the Americans, Montesquieu, and others would consider illegitimate] since 1688,"[80] ICAO seems comfortable with the solution frowned upon by the UN Special Committee and several other organizations. This is further corroborated by the next argument which is based on amendments.

(c) The Amendments Consideration

The Amendment Argument is also utilized to prevent the altering of Assembly annual sessions. As Ghebali argued, a change in the frequency of ILO Conference sessions is a cumbersome process which involves amendments to both the Constitution and Financial Regulations. This particularly affects Articles 3(1), 7(5), and 22 of the ILO Constitution,[81] a document that is described as an outstanding constitutional exception to the notion that the peoples of the world are enfranchised, if at all, only through governments insofar as the UN system is concerned.[82]

The "cumbersomeness" seems to be unheard of in ICAO since Article 94(a) of the Constitution gives ample room for each State have its cake and eat it too. The idea is that "the principle of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized."[83] No one denies the recognition of these principles - they are generally understood with treaties, especially in view of their *raison d'etre* or the underlying idea behind them.[84] It is, however, wondered just how far the

80. The Right Honorable Lord Halishman of St. Marylebone, *The Separation of Powers and the Office of the Lord Chancellor*, 8 CIVIL JUSTICE QUARTERLY 308, 310 (1989). ICAO thus appears to be a real chameleon. It resembles Britain to the distaste of the Americans and both Frenchmen Montesquieu and Jean-Jacques Rousseau. However, one also finds it sleeping with France – as a sort of a compromise? Between the two (U.K. and U.S.), both of whom incarnate the one culture against which France gathered its siblings form around the globe, but in particular "*une partie de l'Afrique. . .dans une guerre.*" Blaise-Pascal Talla, *Editorial: Le poids de nos Etats*, 173 JEUNE AFRIQUE ECONOMIE NO. 3 (1993). Maybe ICAO ought to have all these colors in order to not be surprised by the Southern Lilliputians? In the matter of elections and entering into force of its resolutions or amendments, one may also find ICAO comfortably wearing the suit of Hitler's Germany with the Mother UN playing Chamberlain's Britain.

81. GHEBALI, *supra* note 2, at 153.

82. GROOM, *supra* note 7, at 287.

83. Vienna Convention on the Law of Treaties, May 23, 1968, 1155 Units 331, Preamble.

84. The political or ideological philosophy underlying the main innovations of the Vienna Convention are: first, the introduction of restriction on the previously unfettered freedom of States from deviating from certain central core principles of international values, whether States concerned are big or small, powerful or weak; second, a democratization of international legal

consent principle should be extended. The Vienna rules ought not to be applied indiscriminately, otherwise they defeat their own purpose, as they do in ICAO.

For example, some of the ICAO members cannot explain why they go to Montreal triennially even though they have never "consented" to this Montreal formula, and should rather be going there every year. The Members under such international duress are: Albania, Armenia, Azerbaijan, Bangladesh, Barbados, Belarus, Belize, Benin, Bhutan, Bosnia and Herzegovina, Botswana, Brunei Darussalam, Burundi, Cambodia, Cape Verde, Colombia, Comoros, Cook Islands, Djibouti, Equatorial Guinea, Eritrea, Gabon, Georgia, Grenada, Guinea-Bissau, Guyana, Haiti, Kiribati, Kuwait, Kyrgyzstan, Latvia, Liberia, Lithuania, Maldives, Marshall Islands, Micronesia (Federated States of), Monaco, Mongolia, Mozambique, Namibia, Nepal, Nigeria, Oman, Paraguay, Qatar, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Sierra Leone, Slovakia, Slovenia, Solomon Islands, Suriname, Tajikistan, The former Yugoslav Republic of Macedonia, Togo, Tonga, Trinidad and Tobago, Ukraine, United Arab Emirates, Vietnam, Yemen, and Zimbabwe.[85] How is Vienna realized here?

Moreover, as Ghebali argues, drawing up budgets for a period exceeding a year, requires a revision of the Financial Regulations.[86] This happened in ICAO and the situation's awkwardness that such an amendment created[87] does not seem to attract attention from the purely avia-

relations, unlike the previous oligarchical structure under which Great Powers were allowed to formally impose treaties upon weaker or lesser States. Not only is this practice frowned on but the right of veto, often used by some States to hamper others from participating in treaties, has been done away with; and third, there is the enhancement of international values as opposed to national claims: the interpretation of treaties must now emphasize their potential rather than give pride of place to States' sovereignty. CASSESE, *supra* note 7, at 287.

85. *See* ICAO, 1994 ANNUAL REPORT OF THE COUNCIL 95-97 (1994) (Doc. 9637) [Hereinafter 1994 ANNUAL REPORT]. For discussion of amendments and their entry into force in ICAO, see Milde, *supra* note 2.

86. GHEBALI, *supra* note 2, at 287.

87. To the States of note 85 above, the so-called triennial budget is still an annual budget, by virtue of Article 94(a) of the Chicago School, a school which stubbornly refuses to emulate the Schools of Philadelphia, San Francisco or other cities. This illustrates how a blind insistence on the consent principle (a corollary of the well-entrenched sovereignty principle of Article 1 of the Chicago Convention) defeats the ideal of "the determination of the peoples of the United Nations to establish conditions under which justice and *respect for the obligations arising from treaties can be maintained*", a principle which is found in these same Vienna Convention's preamble (emphasis added). Vienna Convention, *supra* note 83, art. 5. Of course, one is expressly made to understand that it "applies to any treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization." *Id.* Vienna Convention, *supra* note 83, art. 5. But a distinction ought to be made between those which are an initial ratification of constituent instruments of organizations (to gain membership) and subsequent amendments.

tion-oriented distinguished members of ICAO.[88] This is so, because the wasteful election of Council members seems to be their sole preoccupation when they come to His Worship Jean Dore's "International Aviation City."

In applying the consensual theory, two different types of treaties must be distinguished and treated accordingly. They are: (1) treaties adopted within an international organization generally,[89] and (2) treaties so adopted but which are the constituent instruments of international organizations. Article 93 *bis* of the Chicago Convention has two other bis followers - 83 *bis* and 3 *bis*.[90] Of the two, the latter justifies the application of the Vienna Consensual rule, however the former, which is found in the Constitution portion of the document, does not. Article 3 *bis*, properly falling within "treaty adopted within an international organization," adequately illustrates (apart from the controversy it engendered)[91] the folly in attempting to codify the almost uncodifiable in the same international document which is also the constitution of an international organization.[92]

The consensual theory, it is submitted, ought to only apply to the *initial* decision whether or not to become a member of an international organization, and not to subsequent modification of its constituent document. In other words, it must be limited to that stage, so that once passed, no member can thereafter raise the question of consent regarding any modification in the constitution - provided the amendment is the result of the decision of the required member majority as embodied in the Constitution assented to (with full knowledge of the provision) by the

88. As Professor Dempsey puts it, the bulk of them have "been selected for their knowledge in aviation rather than for their experience in the law, making them not the best qualified group to resolve complex legal issues." DEMPSEY, *supra* note 10, at 310. *See* Guldimann, *supra* note 1, at 353, 55; Milde, *supra* note 1, at 433.

89. For a catalog of the bulk of them, *see* 17 ANNALS OF AIR AND SPACE LAW, PART II (1993); and ICAO, MANUAL ON THE REGULATION OF INTERNATIONAL AIR TRANSPORT, CH. 3.2 (Doc. 9626).

90. Protocol Relating to an Amendment of the Convention on International Civil Aviation, October 6, 1980, ICAO Doc. 9318; Protocol Relating to an Amendment to the Convention on International Civil Aviation, May 10, 1984, ICAO Doc. 9436.

91. *See e.g.*, Milde *supra* note 49. *See generally*, Dr. Farooq Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COM. 555 (1984); J.W.E. STORM VAN GRAVESANDE & A. VAN DER VEEN VONK, AIR WORTHY 45 (1985), *citing* Professor Bin Cheng, *The Destruction of KAL Flight 007 and Article 3 Bis of the Chicago Convention*.

92. For the sapient realization of this folly by the "dynamic and pragmatic" ITU, and the subsequent efforts toward separating its Constitution from Convention, see Ram S. Jakhu, *The 1989 Nice ITU Plenipotentiary Conference: Some Important Decisions on Legal Issues*, 1989 REPORT FOR THE CANADIAN DEPARTMENT OF COMMERCE at 5; Fleming, *et al.*, *supra* note 60, at 334.

disputing State.[93] Otherwise, there is no need requiring any voting on the issue or any majority at all, since an amendment would mean a completely new organization with all the States being required *de novo* to assent to becoming members or not.[94]

The ICAO Council's answer to the paradoxes created by its general disregard for legality and uncontrollable urge for indiscriminate amendments and their untenable results (as long as they serve its purpose) all have debilitating effects on the Assembly's powers and functions. Most of them cannot be exhaustively canvassed in this paper. For now, note that the overall effect is to deprive the Assembly of the exercise of its "drastic action of expelling non-ratifying States under Article 94(b)."[95] This non-ratifying act could touch any aspect, including the Organization's finances.

(d) The Financial Arguments

All proposals for curtailing sessions are predicated on financial considerations. The Special Committee of the UN acknowledged that financial and other difficulties related to the duration of the regular sessions should not be resolved at the expense either of the effectiveness of the

93. It is in accordance with this view that the response of the other States (championed by Canada) at Nice to the argument of the USA, Japan, and some Latin American States (that the provisional application of any treaty might not be permitted by domestic laws of certain countries) could be considered as very weighty: "In response to these concerns, it was stated by the other delegations that express ratification or accession to the Nice Constitution, containing a provision for provisional application of the Administrative Regulations, *also includes express consent to be bound to the provisional application of revisions of such Regulations.*" Jakhu, *supra* note 92, at 12 (emphasis added). Also buttressing the theory advanced here, is the example of the European Community. After deciding to join the Community, it would be nonsensical should Norway, for instance, say that legislation duly adopted by the European Parliament does not bind it simply because, in the vote that gave this legislation legitimacy, its representative(s) voted in opposition – and knowing that there was room for majority voting in such a decision. For a similar demonstration of the supranational powers of the organs of the European Union, see Rocha, *supra* note 1, at 479.

94. Carried to its logical end, if there is any logic in ICAO at all, the consensual theory means that a "third State", which "means a State not party to the treaty", could ratify the amendment alone, thereby becoming entitled to benefits conferred by the original treaty. Vienna Convention, *supra* note 83, art. 2. How does that tie in? Moreover, when one over insists on the rule of consent, does one forget international organizations such as the ILO whose Conferences and Governing Bodies are not composed only of States? Must not the Workers and Employers there also agree to be bound, even though they are not States? Must the principles of the Vienna convention be carried to unreasonable limits, even when "only some of its provisions attest to existing customary law, or give rise to rules belonging to the corpus of general [international] law [so that] . . . for the time being, the Convention as a whole does not yet constitute general international law?" CASSESE, *supra* note 7, at 189. In addition, is "The 'New' Law", "to a large extent 'codified'" as a result of "strong pressure from the socialist and Third World countries" now permitted to supercede the 'old reason'? *Id.*

95. ICAO Doc. 7505 A8-P/10, at 53.

General Assembly or of the right of any representative freely to explain their government's attitude on problems before the Assembly. The best interests of the organ, not the frequency of its sessions as such, must remain the overriding consideration in any study to limit its regular sessions. The question, the Special Committee concluded, is not to be judged solely on technical grounds or on grounds of efficiency.[96]

This point of view seems to be refuted by ICAO, which cannot survive without those technical and efficiency grounds. ICAO

> has entered adulthood with vigour and enthusiasm tempered by wisdom gained over the years. That is what enables ICAO to carry its functions with such serene efficacy . . . . The serenity comes from the fact that this Organization, your Organization . . . [is] a fundamental technical organization . . . [which] must ensure that its regulations reflect that order, equity and justice without which material and scientific progress would fail to achieve their goals. Serenity and efficiency . . . are cardinal virtues in our times, when the geopolitical world is constantly changing, conflicts of interests prevail . . . .[97]

Other cynics indicate that weighty political considerations should not be sacrificed by the Council in the name of privileges, its members, or for the pleasure of an Olympian affirmation of its own power.[98] Some even suggest that the Council's continued persistence in this somewhat incoherent stance, rather than put ICAO on the track of promoting air transport, adds only to the stifling of growth of international air transport.[99] Some of these critics go as far as arguing that, though the Chicago Convention defines the Assembly's powers, it cannot exist except by virtue of this instrument. It "does not mean . . . that the Assembly is not sovereign, for it has long been accepted that sovereignty connotes supreme rather than absolute power and could be limited by a constitution and positive

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96. UNGA, *supra* note 42, para.8.

97. ICAO Doc. 9550 A27-MIN P/1-16, at 1-2. Other authorities seem to refute the idea that serenity and efficiency effectively do away with conflicts, thus making discussions inappropriate. For example, it is held that the plain "fact is that conflicts and discussions cannot be simply swept under the carpet [of serenity and efficiency]. They resurface again no matter how skillfully they are glossed over." CASSESE, *supra* note 7, at 395. Moreover, it could easily be pointed out that the so-called serenity and efficiency have

> been acquired only through a political system which is very different from those of other . . . [international organizations] in that it gives the president not merely executive powers but a [total] dominance over the whole system which exceeds by far the authority of . . . [any other] president.

Blondel, *supra* note 54; *see also* P.W. Rodino, *Living in the Preamble*, 42 RUTGERS L. REV. 685, 694 (1990); P. ARCHER & L. REAY, FREEDOM AT STAKE 9 (1949); NEAL REIMER, POLITICAL SCIENCE: AN INTRODUCTION TO POLITICS ch.12 (1983) *quoting* the dissent of Justice Brandeis in Meyers v. U.S. 52 U.S. 272, 293 (1926).

98. R. BRODY, ATTACKS ON JUSTICE: THE HARASSMENT AND PERSECUTION OF JUDGES AND LAWYERS JULY 1989 – JUNE 1990 5, *quoting*, Brazilian Supreme Court Judge Jose Francisco Rezek.

99. Janda, *supra* note 10, at 414.

law."[100]

Those weighty considerations, the "annualists" point out, include such things as great value in the maintenance of close personal relations between those with comparable responsibilities in the different countries and organizations. Furthermore, an annual conference fulfills a real need as it has an industrial or aviation relations function which is more effectively discharged through annual meetings.[101] It is evident that this need for an annual Assembly is even more exacting in the field of aviation relations because, as Dr. Enrique Loaeza of Mexico stated at the Sixth Session of the Assembly, "air transport, both national and international, is of the utmost importance in the economic development of nations and in the interests of peace. Civil aviation, as an instrument of peace and harmony, should be given the greatest possible support, even at the cost of sacrifices in other respects."[102]

It is further argued for the ILO (described as the model of what international co-operation should be),[103] that lengthening the interval between conference sessions weakens the position of the ILO in the United Nations system.[104] Is this view shared by the entire family?

Certainly not by the ICAO Council, to whom the position of ICAO as a whole seems not to matter as long as the Council enjoys the enviable status it undeniably has *in ICAO*. To the Council, annual sessions are no good and all the same arguments enormously play into the hands of ICAO anti-annualists as the concrete "headquarters" and "two-headed" examples show.

(i) Moving Headquarters and Abolishing Regional Offices?

One Sixth Session proposal concerned permanently moving ICAO's headquarters. When the Chicago Convention was signed on December 7,

100. Osieke, *supra* note 14, at 19. This theory, while not entirely espoused by this study, would somewhat tie in with the one proffered previously in the analogy of the lame person. It is discussed at a later stage.

101. Ago Report, *supra* note 14, para.41, *quoted in*, GHEBALI, *supra* note 2, at 152 n.4.

102. Sixth Session, *supra* note 4, at 11. Those other respects do not exclude the Council's Olympian affirmation of its own powers which may be precisely the root cause of ICAO's rising expenses which have occasioned the relentless calls for restructuring of this Council and the hotly contested permanent status of the same "dichotomous" or "two-headed" Council. But this can only be possible if the Secretariat becomes an autonomous body and not an extended arm of the Council.

103. NICHOLAS, *supra* note 7, at 6.

104. GHEBALI, *supra* note 2, at 152. Furthermore, any savings resulting from biannual sessions would be reduced, or even offset, by the alternative arrangements needed to carry out the functions normally exercised by the ILO Conference. *Id.* All these arguments meditated against the suggested change of the annual sessions of the ILO conference (as in the UNGA); this remained so notwithstanding that such changes were advocated "as part of the 'package' of savings inevitably necessitated by the United States withdrawal. *Id.* at 153 n.2.

1944, it made provision for the permanent seat of the Organization to be at a place to be determined at the final meeting of the Interim Assembly of the PICA0[105] - the ICAO's predecessor and/or trustee. The PICAO (Provisional International Civil Aviation Organization) decided the matter on June 6th, 1946, determining that the Organization's permanent seat be at Montreal, Canada – "a city where two of the three working languages of the Organization are spoken"[106] – and "a country that is somewhat remote from those areas of the world which are . . . so much disturbed by economic and political difficulties."[107]

Sapiently realizing that circumstances arise under which it is desirable to transfer the permanent headquarters elsewhere, the ICAO Assembly, by two Resolutions on June 14th, 1954 (Eighth Session), approved an amendment to Article 45.[108] The Assembly resolved, in view of the importance that all contracting States have a full opportunity to give adequate consideration to any proposal to move the seat of the Organization,

105. Chicago Convention, *supra* note 2, art. 45. Another possible strange paradox of the concealed unanimity rule in Article 94(a) of he Convention could be that, while other states are having a session in Montreal, others (though still attending in Montreal) would be having it elsewhere. This is a possible result of the mating of Article 94(a) and the Headquarters Article. The group, the largest of all, could be championed by the United States and the Russian Federation, if one has to assume, for instance, that the amendment effected during the 8th Session moved headquarters. For a list of states that refused to ratify the amendment, see 1994 ANNUAL REPORT, *supra* note 85. In such a situation, one might ask why these states, especially those who are *de facto* Council members, are in Montreal, when logically, from the consensuality theory, by refusing to ratify that amendment they are saying that they would not be bound by the end result of the amendment. Can they really eat their cake and have it too? Would this not be making a mockery of the whole theory of prior consent to be bound before being bound?

106. Sixth Session, *supra* note 4. The appropriateness of the choice of the headquarters of international organizations can also be gleaned from Nicholas who, after indicating the importance of national diversity in their secretariats, made this remark: "From this point of view the location of U.S. Headquarters in New York, a city famous for its comprehensiveness and conspicuous for its capacity to involve even the stranger in its strenuous crusading, may well have advantages which outweigh certain obvious drawbacks." NICHOLAS, *supra* note 7, at 164. One of such "obvious drawbacks" that almost cost Canada and Montreal the prestigious "Home of International Civil Aviation" was the existence of both the "GST" and "PST", in large measure, responsible for the charge of high expenses "due mostly to causes . . . completely irrelevant to the activities of the Organization." Sixth Session, *supra* note 4, at 6. Canada's answer was in the form of the exemption of the Organization from these items of expenses. See Milde & Siciliano, *supra* note 38, at 51-62 for the Headquarters Agreement and other protocols between the various administrations and the ICAO.

107. Sixth Session, *supra* note 4, at 3. Montreal fought extremely hard (thanks to their influential southern neighbor and mother-sister Britain) to prevent this Chicago Institution from crossing the Atlantic like most of its sisters and brothers. One should note that the Organization has regional offices in Bangkok, Cairo, Dakar, Lima, Mexico City, Nairobi, and Paris.

108. Resolution A8-4. This substituted the full stop at the end of the original text with a comma and added the following: "and otherwise than temporarily by decision of the Assembly, such decision to be taken by the number of votes specified by the Assembly. The number of votes so specified will not be less than three-fifths of the total number of contracting States."

that no proposal to move the permanent seat of the Organization should be considered by any future session of the Assembly unless notice thereof, with all pertinent documentation, has been dispatched to all the Contracting States at least one hundred and twenty days prior to the convening of such session of the Assembly.[109]

The headquarters provisions amendment was effected at the same Assembly session as the one amending the sessions provisions discussed later. What happens to the argument that ICAO should lose a top officer in order to save finances and curtail expenses?

(ii) Ridding ICAO of One of its Heads?

Another proposal, though not specifically included in those proffered at the Sixth Session, concerns the abolition of one of ICAO's "two top officers."[110] The position is sure to remain uncertain, and continue despite all calls for reform and change - all predicated on the fact that "ICAO no longer has any need for the duality of its chief officials."[111] ICAO purposely seems to be a two-headed dragon - appearing to make heed to those calls unlikely.[112]

Since the European World Wars, control of international aviation has become strategic[113] and vital to a state's hegemonic and economic interests.[114] It is thus not surprising that the attention of all major powers in Chicago was focused primarily on the Council which they were deter-

109. Resolution A8-5. Some years later, the Council was requested to give careful attention to suggestions or invitations of Contracting States to hold triennial ordinary sessions of the Assembly from the Headquarters of the Organization, taking into account the benefits to be derived by the Organization, the nature of the offers to defray all, or a portion of, the additional expense to the Organization, and all pertinent considerations. Resolution A16-1.

110. There are several advocates of the elimination of "this dichotomy of top officials at ICAO [which] *has only served to increase costs, and perhaps prestige.*" Guldimann, *supra* note 1, at 355 (emphasis added).

111. Milde, *supra* note 1, at 437. The author even suggests limitation of terms for the eventual single new head (a Director-General) so as "to safeguard rotation in the senior positions and to keep bringing in fresh knowledge and competence." *Id.*

112. The chief officers of ICAO's two principal organs are: the ineffectual President of the Assembly, and the President of the Council and Secretary General. Both the latter are in effect President and Secretary General of ICAO.

113. Sir Walter Raleigh's reputed observation that "he who controls the seas, controls the trade. He who controls the trade controls the wealth. He who control the wealth controls the world" holds true for aviation, with the necessary substitution of words, since "[t]hese days, airways have replaced oceans and airports have replaced seaports in importance." Paul Stephen Dempsey, *Airlines in Turbulence Strategies for Survival*, 23 TRANSP. L.J., 15, 84 (1995).

114. Aviation, while exhibiting some strange and virtually contradictory qualities, is thus more than any of the other spheres of activity, the best tool of (i) national security, (ii) economic power and advancement, and (iii) foreign policy, and therefore, domination. *See generally*, DEMPSEY *supra* note 10; Raldev Raj Nayer, *Regimes, Power, and International Aviation*, 49 INT'L ORG. 139 (1995).

mined to make the sole and principal center of influence.[115] The letter sent out by the United States of America "on its own initiative,"[116] inviting the other States to the convention, made no illusion about the intent. It told them the intended convention was in order "to make arrangements for the immediate establishment of provisional world air routes and services"[117] and "to set up an interim *Council* to collect, record and study data concerning international aviation and to make recommendation for its improvement,"[118] as well as "discuss the principles and methods to be followed in the adoption of a new aviation convention."[119] ICAO, an established political institution with a right to examination in terms of its processes, as well as its products, and a right to be understood through its politics as well as its constitution,[120] cannot be understood apart from the interest groups that shape it; an institution is not buildings, tables, and chairs, but rather those very interests which act collectively for certain specified purposes.[121]

The strange nature of ICAO is understood only in these terms, and not because of any so-called technicality. There appears to be organizations, such as ITU, which deal with more technical phenomena than those of ICAO. But again, ITU is spared the contradiction called sovereignty,[122] solely on account that its subject-matter is incapable of national appropriation.[123]

Against this background, the two-heads of the ICAO monster are easily understood. Non-Council member States are not a part of the "nucleus" or "club." Their presence is only needed to give it the universality *decorum*; and they have to be restricted from the aviation business that is solely the Club's. To ensure this, the heads of this organ, its President and Secretary General, must be the effective heads of the entire Organi-

115. HAVILAND, *supra* note 7, at 6. The nature of those interests are gleaned from the intention of the drafter of the Chicago Convention.

116. Abeyratne, *supra* note 2, at 3.

117. Proceedings of the International Civil Aviation Convention, Chicago, IL, Nov. 1 – Dec. 7, 1944.

118. *Id.*

119. *Id.*

120. *See* NICHOLAS, *supra* note 7, at Foreward.

121. HAVILAND, *supra* note 7, at 3. The nature of those interests can thus be gleaned from the intention of the drafters of the Chicago Convention.

122. Abeyratne, after quoting President Roosevelt's admonition to the Chicago conferees to the effect that 'the air which God gave everyone shall not become the means of domination over anyone', then saw the apparent 'two contrary reactions' when he stated: "Ever since, the fate of economic regulation of international air transport has been relegated to the status of an obdurate dilemma which posed the question as to how States could avoid dominance by others without protecting themselves." Abeyratne, *supra* note 3, at 3.

123. Fleming, *et. al, supra* note 60, at 331-33; *See also,* Ram S. Jakhu, *The Legal Regime of the Geostationary Orbit*, 7 ANNALS OF AIR AND SPACE LAW 333 (1982).

zation. The result is the so-called "dichotomy of top officials": a *modus operandi* fashioned solely to permit the two-headed Gulliver of Politics to resist being tied down (while one head sleeps)[124] by the Lilliputians in the Assembly.

The strategy described above is illustrated during an examination of the Council-orchestrated adoption of session provisions. "The merit of this amendment may be questioned [not only] because the role of the Assembly has been considerably reduced [by it] in favor of the Council and the working methods of the Organization were thus dramatically changed";[125] and because of the unconstitutional methods employed in its regard. The circumstances surrounding that *referendum*[126] consequently require passing through an examination.

3. The Installation of "More Frequent Sessions"

As noted previously, people born with infirmity tend to develop in other areas to make up for their deficiency. It *seems* at first that the ICAO Assembly hardly attempted to make good of its own limitations (especially when considering the manner in which the Assembly today unwittingly tows the line). But that is not entirely so. This Assembly, it appears, now lives with its situation only because the individual states, and not the institution, as indicated earlier, are the real policy-makers. Those such as Canada, Australia, and New Zealand, that would salvage it through their regular or usual balancing role, simply see no need to do so because their entrenched places in the Club are guaranteed; no institution is understood apart from the interest groups that shape it. Again, an institution is not buildings, tables, and chairs, but those very interests acting collectively for certain specified purposes.

Some events of this assembly's Montreal session from May 27th to June 12th, 1952, give us an idea of what is involved. At this Sixth Session,

124. The important role played by the UN Secretary General during periods that the Security Council, being tied down by Gulliver of Politics, could not perform its Charter responsibilities attest to this interpretation. Had the UN Secretary-General been a part and parcel of the Security Council, he would, of course, not be capable of doing that, quite apart from the fact that he would then be an interested party. More importantly, most of his powers would have devolved to the president of the Security Council, as is the case in ICAO.

125. Milde, *supra* note 1, at 428.

126. An example of how President de Gaulle used (and abused) this power was the 1962 referendum

> on the direct election of the president. De Gaulle decided somewhat belatedly that it would strengthen the hand of the president (namely De Gaulle) to be directly elected to a seven-year term of office. (At the time the president was indirectly elected to a shorter term by an electoral college.) The referendum passed after de Gaulle announced that he would resign if it failed. Thus he gave the French voters [at least] the choice of granting his wish or losing his leadership. The referendum had the effect of amending the Constitution by clearly unconstitutional means!

MAGSTADT, *supra* note 54, at 102.

the Assembly, in effect, attempted an assertion of its supremacy in spite of all the limitations noted. Mr. Subtil of Portugal, (*tourjours lui*), invoked Assembly Resolution A5-6 concerning principles of apportionment of the expenses of the Organization among contracting States. Specifically referring to that Resolution, Subtil rebuked the Council, which "instead of taking itself the responsibility for this important matter . . . once again relegated the problem to a level [Secretary-General's] consider inappropriate."[127] In this graphical statement, support is found both for, and against, the theory that the Secretariat is part and parcel of the Council, (however, the former appears weightier). Again, it represents what can be regarded as the Assembly "acting unconstitutionally"[128] in a sense, as the Council appears to be the sole judge as to what it does in discharging its exclusive mandatory function in Article 54(b). This provision requires the Council to carry "out the directions of the Assembly and discharge the duties and obligations which are laid on it by this Convention."

The Council cannot, however, get away with such an argument here. This is a Chapter XII (Finance) matter regarding the same Convention (in Articles 49(e) and (f), 62, and 61) that gives the Assembly authority to know what is going in its regards. How can one validly vote a budget without being aware of how it came about, and/or what it is all about - except that its presenter or defender wants to vote too? Even failing that (and surely it would not fail), the Assembly might have attempted to act in accordance with the interpretation of supremacy given above.[129] The Council must have sensed this imminent and in-coming storm, as was made exceedingly pellucid by Mr. Subtil. Before this statement now discussed, Mr. Subtil prefaced this statement thus:

> It rests with the Assembly to appraise and criticize the work done by the Council, and the Delegations here present should be fully aware of their responsibility and of the necessity and interest for [the] Council to receive their criticisms and advice. We consider it our duty to place before the Assembly, the problems which . . . are unsolved or unsatisfactorily solved, and which, *due to their particular importance and to the consequences which they entail, must be studied and solved, one way or another, by the Assembly.*[130]

These are strong words indeed, pointing unambiguously to the Assem-

127. Sixth Session, *supra* note 4, at 5.

128. Professor Michael Milde, a former ICAO Legal Bureau Director, and current director of McGill University's renowned Institute of Air and Space Law, stated some four years ago that the Assembly would be constitutionally acting *ultra vires* if it were to act on matters which are an exclusive prerogative of the Council. Milde, *supra* note 1, at 430.

129. Osieke, *supra* note 14, at 19.

130. Sixth Session, *supra* note 4, at 5 (emphasis added).

bly's use of its budgetary powers to keep the heady Council disciplined, *one way or another.*

The Council, evidently reading between the lines and sensing danger it never thought Lilliputians could pose, moved faster than the Assembly.[131] Therefore, at the controversial Eighth Session, even Article 61 (which gives the Assembly powers to vote the budget "with whatever modification it sees fit to prescribe") received the fatal triennial blow. Of course, only the last of Subtil's Sixth Session proposals, giving the Council additional significant advantages and powers, appears to be extracted from the whole set and nicely couched in an ambiguously attractive phrase.

This paper has no quarrel with the movement to change the frequency of Assembly sessions. The arguments so far, coupled with the existence of an amending formula in the Convention, *may* prove its logic. What is strongly questioned, however, is the manner of achieving that end. The plain fact is that the proposal to amend the session provision was neatly camouflaged and presented for adoption by the uninformed Lilliputians in the Assembly. Moreover, the usual or established procedure appears to be by-passed, perhaps, for fear of rejection through passing through it. These considerations, therefore, seem to grossly taint the entire process, taking it into the all-too-familiar realm of Ebere Osieke's "Unconstitutional Acts of the ICAO."[132]

The Assembly is said to be ignorant and uninformed due to three important considerations. First, the members of that "highest body of ICAO" might be handicapped by their lack of legal experience.[133] This was further complicated by the enticingly disastrous phraseology of the amendment. To the unwary, that phrase easily gives the impression of "more frequent sessions."[134]

Third, it seems that many of those distinguished non-Council members had neither complete facts on what they were voting, nor the necessary time to effect the seasoned study that the circumstance required.

131. Especially since the next speakers merely exposed their ignorance of "the particular importance" and the "consequences" of the issue of discussion by unnecessarily diverting from the issues, as illustrated by Count Franco of Italy who, rather than contribute to the point, would take us and the entire Assembly on one of those voyages of irrelevance or "mere exercises in rhetoric". CASSESE, *supra* note 7, at 396; Sixth Session, *supra* note 4, at 11. Michael Dummett expressed disappointment at such an attitude when he held that "Failure on the part of [most of the consensus] politicians to understand the possible effects of adopting one or another . . . procedure amounts to ignorance of the tools of their trade." M. DUMMETT, VOTING PROCEDURES 13 (Oxford: Clarendon Press) (1984).

132. *See* Osieke, *supra* note 14.

133. *See supra* text accompanying note 88.

134. This illusion is elaborated later under subsections B (Clarity and Specificity) and C (Convening the Sessions).

They also did not receive counselling[135] before the fatal unanimous "voting in favor" of reducing the frequency of Assembly sessions. The Council bulwarks lend preponderant support (perhaps without even realizing it) to the thesis developed in this paper.

According to Mr. J. W. Stone, the Australian Chief Delegate, there was "no opportunity for second thoughts."[136] The French Delegate (Mr. H. Bouche), too, graphically indicated how there was such "haste" in the whole matter that Rule 10(d) of the Rules of Procedure was suspended.[137] This is certainly one of those several instances of "pricking too many holes in the pie."[138] An attitude, the French Delegation "had not considered . . . advisable"[139] as it "did not appear to give the necessary consideration to the rights of each State and to the efficiency of the Organization as a whole, such as there should be in a large international organization."[140]

Clearly, the unabashed suspension of the Rule, like General de Gaulle's imposed 1962 French referendum, had the effect of amending the constitution by unconstitutional means. Moreover, the Delegate of "the United States as the chief supplier [of rights] to the rest of world"[141] stated, that his Delegation:

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135. If the non-Council members received counseling, they could turn to the Secretariat because the Secretariat is an interested party.

136. 8th Session, *supra* note 95, at 56.

137. Rule 10(d) states that proposals for the amendment of the Convention, together with any comments or recommendations of the Council, must be communicated to the Contracting States so as to reach them at least ninety days before the opening of the session.

138. *See supra* note 50.

139. 8th Session, *supra* note 95, at 55. The United Kingdom Delegate states that:

> as a matter of principle . . . there should be some safeguards in the application of the amended Article 45 and . . . . in no circumstances should the removal of the Headquarters be decided by a majority vote of the Assembly . . . in these circumstances there seemed to be no prospect of the substantial unanimity which was so desirable on amendments to the Convention, and for this reason, and because his Delegation could see no urgency in this matter, he would vote against the resolution.

Id. at 53. South Africa and New Zealand naturally followed the British stance. *Id.* at 53-54.

140. *Id.* at 55. The "rights of each State and the efficiency of the Organization" seem to only matter when those of a major power are concerned; thus illustrating what Eugene Sochor calls "the conflicting interests of states" and what Segaller demonstrates as "double standards." *See* E. SOCHOR, THE POLITICS OF INTERNATIONAL AVIATION 54-55 (1991); S. SEGALLER, INVISIBLE ARMIES: TERRORISM IN THE 1990s 9-10 (1987).

> The political agenda of terrorism consists simply in states failing to condemn the terrorism . . . of their allies or of special interest groups close to their strategic political interests; and in denouncing the terrorism of their enemies . . . [which] is a dangerous hypocrisy, for as soon as moral relativism enters into the debate there opens a gap into which some terrorists are able to run for cover.

Id.

141. U.S. Congress, Office of Technology Assessment, *International Cooperation and Competition in Civilian Space Activities*, 33 (1985), *reprinted in* I.A. VLASIC, SPACE LAW AND INSTITUTIONS: DOCUMENTS AND READINGS 58 at 65-66 (1991).

did not think that the Convention of the Organization should be amended in haste and in an emotional atmosphere and without adequate information having been given to all the States of the Organization, particularly the non-Council Member States. The Council had not acted on this matter until April 16th, barely two months ago. The documentation had not reached many of the States until just before the Assembly. Such documentation as there had been contained very little information. *States had been asked to come here and vote on an amendment without really knowing what the facts were or the background of the proposed action. This confusion* had certainly been borne out in the discussions and by the number of abstentions in the meetings.[142]

All of these delegations were the sole brains behind the move in the Council. Without realizing how betraying it was, they all took to the defense of Canada's interest by opposing the proposal to amend the Headquarters Article at the same session that the fatal amendment Resolution A8-1 was adopted by forty-three affirmative votes, with only one abstention (Chile). Yet, as the British Delegate said, this is something about which a "substantial unanimity . . . was so desirable." Maybe the forty-three affirmative votes of the Assembly constituted a substantial unanimity? Be that as it may, that is not the only point.

While vehemently opposing the resolution on amendment to Article 45 of the Convention (permanent seat of the Organization), these entrenched ICAO Council members also exposed the Council's nasty linen. Resolutions A8-1 and A8-3 (both amending the frequency of sessions), adopted "unanimously" or "overwhelmingly," also dealt with *an amendment to the Convention* and embodied in the Council documentation now being attacked as inadequate, deceitful, hasty, and, therefore, null and void by its own authors. Is this another illustration of the plethora of the Council's hoodwinking devices? Who ever said that when the interests of a major power are in issue, illegality is not legitimized at all costs? Where are the democratic safeguards (such as those put in place within the UN Charter) toward the interests of smaller and weaker States? Do they not have interests that need protection?

The Charter of Paris for a New Europe reads:

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person. Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.[143]

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142. 8th Session, *supra* note 95, at 54 (emphasis added).

143. *See* Theo van Boven, *Contemporary International Law Issues: Sharing Pan-European and American Perspectives - Proceedings of the Joint Conference Held in the Hague,* THE AMERI-

It seems that these principles are merely for window-dressing, especially in international organizations, where the democratic West seems to ignore their own principles. Some factors may explain this reverse phenomenon. First, there are the limitations noted earlier.[144] Second, because ICAO is "simply the culmination of efforts to create a technical framework for managing the political rivalry and commercial competition among nations engaged in international civil aviation,"[145] it is hard for States to avoid dominance while protecting themselves; competitive goals are difficult to agree on, since there is no incentive for the side that anticipates losing to agree to compete or concede the possible existence of competition.[146]

It seems that the change from annual sessions is not the only aspect giving the Assembly its unsavory status. The vagueness of the provision also contributes to this status.

B. Necessity for Clarity and Specificity

Since the change from annual sessions, it seems that the Assembly can have as many sessions as it wishes within three years. One authoritative source argues that "the wording of [the present] Article 48 allows for such an eventuaiity."[147] This is only one of the several fallacies rife in the ICAO.

The relevant portion of the original unamended text of Article 48(a) provides that "[t]he Assembly shall meet annually and shall be convened by the Council at a suitable time and place." The phraseology of "*shall meet annually*" is, of course, preferred to "*shall meet not less than once in three years*" for a number of logical and sensible reasons. First is the as-

can Society of International Law & Nederlandse Vereniging Voor Internationaal Recht 133 (1992) [hereinafter *Contemporary Issues*]; Kurt Tatlor Gaubatz, *Democratic States and Commitments in International Relations* 50 Int'l Org. 109 (1996).

144. *See supra*, note 7.

145. Dempsey, *supra* note 10, at 273; Sochor, *supra* note 140, at 182-92.

146. D. Deudney, *Forging Missiles into Spaceships*, 2 World Policy J. 271, 276 (1985). This would certainly explain Western suspicion of what they call the "mechanical majority", especially as exemplified in the United Nations General Assembly - which "now increasingly indulges in the highly questionable practice of begetting ever greater number of resolutions, as if to conjure up problems and provide for their solution on paper served to settle them in real life." Cassese, *supra* note 7, at 396. Much as one may sympathize with the weaker States, it should be remembered that most of these Third World States would voice concern for sovereign equality only when it involves rights-taking but easily turn around and cry out loud how poor they are when it comes to shouldering responsibilities. See their attitude on the so-called "Common Heritage of Mankind", which, in effect, means they have to be given the legal right to reap where they have never sown. *Id.* at 376-92. Could the West, and the United States in particular, not be entitled to be in control, since they have much at stake that has been sown?

147. Guldimann, *supra* note 1, at 353.

surance in the number of meetings, and second is to curb the possibility of the Council abusing its enormous powers.

The attempts by smaller nations at Dumbarton Oaks and San Francisco are in line with this suggestion. Their aim was to bring the Security Council under control and strengthen the Assembly through making criteria for the Council's actions more specific.[148] To the contrary, the easy realization of the Americano-British dream of such an enfeebled ICAO Assembly could be pitched on the unfortunate Soviet absence in Chicago. Their presence would set into motion the same East-West Big-Power tangle that was evidently at work both at Dumbarton Oaks and San Francisco. This would necessitate the striking of a balance from the medium Westerners, who consider themselves as being relegated to "outsiders" by this excessive show of Big-Power dominance." But, as that was not the case, it was not deemed necessary to prevent illusions and vagueness, nor curb the possibility of abusing powers.

1. No Home for Illusions

The former provision *(shall meet annually)* gives no room for illusions. In the first place, it *assures* three meetings in three years, while the latter, with all its potential for more meetings, does not. This mirage might lead the Director-General of the ILO into thinking (as he did when unsuccessfully arguing for similar changes in his Organization) that "[t]he plenary bodies of UNESCO, the FAO, ICAO had dropped annual in favor of biannual sessions."[149] Similarly, the point was missed when the African Civil Aviation Commission's (AFCAC) ordinary Plenary session (held every two years) was amended in 1981 by the Seventh Plenary Session in Dakar, Senegal, which passed Resolution 57-26 changing the session to every three years "to be in line with the ICAO cycle."[150] AFCAC is also wrong, but they might be right in their construction. How is that?

The expression "*not less than once in three years*" is not necessarily the synonym for "once in three years." It means that within three years the Assembly must have at least one session. So the Assembly may decide to have three hundred and sixty-five *times* three meetings within the three-year period in question and still be meeting or holding the sessions

148. HAVILAND, *supra* note 7, at 29.

149. ILO Director-General's Report on the Improvement of the Practical Methods of Working of the Conference, submitted to the 137th Session of the Governing Body, para. 140, *cited in* GHEBALI *supra* note 2, at 152 (emphasis added). He even talks of biannual and would not be wrong. This gives more weight to the proposition, namely, the illusory and vague nature of the provision. It can be interpreted to mean just anything; from zero-annual to 365-annual and more.

150. *See* S.B. Rosenfield, *African Civil Aviation Commission*, *in* REGIONAL AVIATION ORGANIZATIONS - SELECTED READINGS, CASES AND MATERIALS 182, 183 (IASL, McGill Univ., 1991).

constitutionally. What a Constitution! Paradoxically, the change from *shall meet annually* to *not less than once in three years* is predicated solely on saving expenses supposedly involved in holding annual sessions. But it could logically end up leaving us with potentially 365 sessions in 365 days. Is this another generation of the "two contrary reactions" so common in international aviation?

No one doubts the potential for abuse that vagueness in the law furnishes.[151] "This ambiguity [of Article 48(a)] may have been deliberate, but it gives rise to a potential constitutional crisis if the two . . . [organs] are not on parallel tracks."[152] Of course, the demonstration from our hypothetical example is a possible and logical outcome, even though the reaction of many people is to say that such a case is unlikely to occur, therefore, the question is of no practical importance.[153] This might be insofar as other lesser-placed enactments of the Organization are considered (for the case of 365 sessions), and the fact that the Assembly is not incapacitated by this provision only.

The Director of the ILO, the AFCAC, and others have misinterpreted the provisions of Article 48(a) only insofar as that provision of the Convention is considered in isolation. But they are correct in stating that Assembly sessions in ICAO are triennial. In September 1968, in Buenos Aires, the Assembly decided that the triennial arrangement of ordinary sessions of the Assembly should be regarded as the normal practice of the Organization, with the further understanding that intervening ordinary sessions might be convened by the decision of the Assembly or Council.[154] This presents problems. Any student or researcher of international organizations is entitled to assume that the Organization's Constitution represents the supreme law of the organization,[155] although

151. *See* GROOM, *supra* note 7, at 285. The more precise the law, the easier it becomes for evil-doers to skate around it. But, as the renowned criminal law professor, Glanville Williams, indicates, the wider and more imprecise the law, the greater the possibility of someone being caught who was not meant to be caught. Moreover, because a vague penal law is an evil for citizens who want to know how they stand, the modern tendency is to have laws defined with relative precision. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 5-6 (1978); *see also* R.A. SILVERMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 149-53 (6th ed. 1994). To have a precise (criminal) law does not, however, mean that (sentencing) judges' discretion must disappear. It only means having clearer, more straightforward, and less inconsistent principles and offenses.

152. MAGSTADT, *supra* note 54, at 102.

153. DUMMETT, *supra* note 131, at 3. It may be of no practical importance to the extent that the interests of a principal power have not yet been affected. Otherwise, would it be the same?

154. G.A. Res. A16-13, U.N. GAOR, 16th Sess. This was done after a review of its Resolutions A4-6 (second sentence of Resolving Clause 4) and A14-4 which it then decided, pursuant to Resolution A15-2, to consolidate and then cancel.

155. The Constitution of . . . [an organization] is a statement of the will of . . . [its Members] to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It

not "a fungible commodity."[156] It is really surprising for the student to be told that their sound interpretation of the Constitution of the Organization is faulty because of the questionable existence of some inferior or lesser text which contradicts that constitution. This point of view even adds to the aggravated ambiguities and inconsistencies of the wording of the section of the Convention in question.

It is a common and indisputable fact that "[i]n legal relations, international as well as national, public as well as private, there is everything to be said for clarity, consistency and knowability."[157] Amending Article 48(a) to reflect Resolution A 16-13 is an effective step in that direction. Until that is done, there is no way the Council can check if it decides to abuse powers by not convening an additional desired ordinary session within the three-year period.

2. *An Abuse of Powers Curbing Device*

The second advantage with "*shall meet annually*" lies both in its clarity and in its making the convenor's judgment a matter of course, as opposed to *not less than once in three years* where it is extremely decisive. This point becomes more pellucid when the convening aspect is examined below. In this matter, the Chicago Convention could have emulated the initiative-taking IMO whose Constitution clearly orders regular sessions to "take place once every two years."[158] This will not satisfy the demands of "annualists," but it does have merits of *clarity.*

However, that does not permit the ICAO Assembly to ride high. The Assembly is weakened through both the frequency of its sessions, and the convening of those sessions – one arm preventing escape from the grip of the other arm.

C. Convening the Sessions

The ICAO Assembly cannot convene itself. Furthermore, its convention by the Council is so vague and dependent on the latter's discretion there seems to be nothing anyone can do about it. The catch-all phrase here is "at a suitable time and place."

> is, as s.52 of the [Canadian] Constitution Act, 1982 declares, the '*supreme law*' of the . . . [organization], unalterable by normal legislative process, and *unsuffering of laws inconsistent with it* . . . .

The Manitoba Reference [1985] S.C.R. *cited in* Chief Justice B. Dickson, Address to the Canadian Bar Association 9-10 (Aug. 21, 1985) (emphasis added). Such a constitution must be a proper one, "one in which no one organ has unlimited power and in which there is legal machinery to prevent violation." H.W.R. Wade, Constitutional Fundamentals 77 (1980).

156. Buergenthal, *supra* note 2, at 1.

157. Vlasic, *supra* note 141, at 50-51.

158. *See* IMO Constitution, Article 13 *reprinted in* Simmonds, *supra* note 77.

1. A Suitable Time and Place

A suitable time and place - what does it actually mean? Only the Council[159] knows. It has different meanings and significance, depending on the particular type of provision with which it is dealing. Confronted with *shall meet annually*, this expression is not as decisive as it seems now that *not less than once in three years* is the inefficient adversary. This is because there must be some suitable time and place before the expiration of the one year period, during which time, if the Council does not convene the meeting, it is validly questioned.[160] Mr. Evatt of Australia is reputed to have "led another revolt by insisting that the General Assembly" decide for itself when the Security Council actually "exercis[es] the functions assigned to it."[161] The Assembly is thus assured (through *shall meet annually)* of three meetings in the three-year period. This assurance carries the idea that the Assembly keeps its hands on the governance of the Organization.

159. Minus the so-called Developing States. Developing States are handicapped even when they are in this Council. They simply cannot participate competently and extensively in the preparation of drafts, as they do not have large enough delegations to keep pace with the deliberations and the developments in the various committees and working groups. The result is, their lack of exertion or any influence over the decisions taken. *See* R.S. Jakhu, *Evolution of the ITU's Regulatory Regime Governing Space Radiocommunication Services and the Geostationary Satellite Orbit*, 8 ANNALS OF AIR AND SPACE L. 381, 400-01 (1983). Perhaps this is what led the "benevolent . . . an[d] enlightened despot . . . to flatly declare in an address to his fellow Third World colleagues that "the Third World nations did not shape the world's institutions of production and exchange and have virtually no say in them. But we are dominated by them." Mwalima Julius K. Nyerere, President of the United Republic of Tanzania, address to the Fourth Ministerial meeting of the Group of 77, (Feb. 12-16, 1979), *reprinted in* K.P. SAUVANT, THE GROUP OF 77: EVOLUTION, STRUCTURE, ORGANIZATION 131, 132 (Oceana, 1981). To His Excellency, "The present system has been developed by the industrialized States to serve their purpose." *Id.* But can complaining like this *per se* help them influence the course of these institutions? It seems that the only solution could be for these states (especially those of Africa) to seriously and frankly consider several important proposals for coming together in political federation(s). *See e.g.*, TIXIER, A COMPARATIVE STUDY OF THE ECONOMIC POLICIES OF THE CAMEROONS AND IVORY COAST 87 (International Institute for Economic Research 1974); Talla, *supra* note 80; Bechir Ben Yahmed, *La maladie des grands*, JEUNE AFRIQUE 4 (1993). No one can doubt the strength of great numbers-in-unity. Is this not one of the principal reasons for the U.S. greatness? And is that not the reason for the European Union? When is Africa going to wake up from its induced slumber?

160. It might have been precisely for such reasons of accountability that the other States could not buy the Big Three's idea put across through Senator Vandenberg's explanation. He had indicated that the U.N. "Council would be a representative body of the Assembly, just as the Assembly would be representative of the various countries" and that, therefore, the latter should not be able to "encroach" on the former since "it was inconceivable that any action of the Council would be contrary to the wishes of a majority of the Assembly." *See* UNCIO, Documents IX, at 296 & 316, *cited in* HAVILAND, *supra* note 7, at 15-16.

161. HAVILAND, *supra* note 7, at 16. Altogether fourteen countries, including France and Canada, submitted amendments along these general lines, with the result that the compromise found itself as Article 12(1) & (2) of the Charter. *Id.* at 16-17.

On the other hand, under the present wording of the *not less than once in three Years* provision, there seems to be no way the Assembly can have more than one meeting in three years if the Council (as it seems inclined to do) looks upon it with disfavor; especially if its so called election is already validated. The Council acts perfectly within the *constitutional* will: provided it already convened one session which validated both its membership and its triennial-annual budget. In view of this, the present study disagrees with the submission "that the present formulation of Article 48(a) is flexible enough to allow for Assembly meetings to be convened at appropriate times . . . [and that, consequently] amendment efforts should be concentrated [only] on other areas of the Convention."[162] Ernesto V. Rocha could be right in suggesting that "an entirely new Convention . . . be drafted."[163] In such exercise there are a lot of lessons to be learned by ICAO from other organizations.

2. *Necessary Lessons from Other Schools*

In fact, ICAO (or the Chicago School) needs some seasoned lessons from the Philadelphia School (the ILO). This Organization compels attention due to (1) its concept of social justice which is the very basis of its constitutional mandate, (2) its rare skills at reconciling idealism with realism in the planning of its programs, and (3) its flexibility yet straightforwardness in its modes of operation.[164] Consequently, it is now the lone survivor of Versailles and "one of the most advanced of the United Nations agencies."[165] What can it offer ICAO?

The Constitution of this Organization, regarding the vexed issue of Assembly sessions, authoritatively stipulates in Article 3(1) that meetings of the Conference shall be held from time to time, as occasion may require, and at least once every year.[166] And, it is trite that, since 1919 the Conference has, with the exception of 1940, 1942, and 1943, met each

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162. Guldimann, *supra*, note 1 at 352-53.

163. Rocha, *supra* note 1, at 477. This is very likely to be opposed with all strength by those whose position is adversely affected by such a move. *See* Jakhu, *supra* note 159, at 384-85; Deudney, *supra* note 146, at 275 *declaring*:

> The new order must grow alongside the old order, and reach a certain level of vitality before people will abandon the old order, no matter how dangerous and disliked it may be. Human nature is too resistant to change for a scenario involving the sudden demolition of the old order, followed by a reconstruction along boldly improved lines, to have much appeal. People living in a rickety old firetrap of a house are not likely to leave it until some other shelter becomes available, no matter how clearly they perceive the dangers of living in the old home.

Compare M. MANELI, PERELMAN'S NEW RHETORIC AS PHILOSOPHY AND METHODOLOGY FOR THE NEXT CENTURY 7, 9, 11 (Kluwer Academic Publishers, 1994).

164. GHEBALI, *supra* note 2, at xvi & 268.

165. *Id.* at 269.

166. *Id.* at 151 n.6.

year (not counting the special maritime sessions held in addition to the ordinary ones).[167] All this took place in the ILO in spite of the "large assembly, unwieldy and growing more so (in June 1984 the record figure of some 1,850 delegates was reached) [which] was already giving cause for concern in the mid-fifties, when the question of a change in its annual periodicity was raised."[168] At the close of the Philadelphia Lecture, what is the expected Chicago Response? A simple one indeed.[169]

Since the Chicago Assembly cannot convene itself,[170] what can it do if it desires an ordinary session and the Council does not convene it? Does it call for an extraordinary one? The existence of extraordinary sessions in the Convention *seem* to suggest the affirmative.

III. ICAO Assembly Extraordinary Sessions

Section A looks at the rationale for having these kinds of sessions. Section B explains the modes of convening the sessions. The two sessions that the Chicago Convention provides for are: (1) sessions at the call of the Council, and (2) sessions at the request of one-fifth of the total number of members.

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167. *Id.*

168. *Id.* at 151.

169. It could hypothetically run as follows: That is a very interesting expose sir, but we find it sort of strange for a number of reasons. First, we might have been naive, as they say, but we were not that complicated to flirt with the "foolish" idea of attempting to be both idealistic and realistic. There was simply no reason for us to be - were we not lucky to be spared the horrifying presence of the Reds? We even hear that their presence at Dumbarton and San Francisco was so scary to our Boys that they had to jump, even at you, for being in the same camp with those Soviets! Thank God they refused to come to our Chicago Club as initial members. Pragmatism alone is the thing we are accustomed to. Second, as you can see, we are dealing with the "most technical" aspect of the Universe. This demands "the highest degree possible" of "serenity and efficiency" which were the cardinal virtues in our times in Chicago. There we saliently foresaw that the imminent change in the geopolitical world was going to seriously conflict with our prevailing interests, which we were determined as ever to protect. So we took all the care in the world not to be booted out or even encumbered later by the "mechanical majority" of the Lilliputians-to-be (as the experiences of several of you of the other Schools, but more particularly of the Mother school, can attest to) closed. Therefore, in accordance with the intelligent saying, "To be forewarned is to be forearmed", we wise Chicago People closed all possible avenues of surprise attacks. We mean to say that we tied down the Lilliputians before they could do, or attempt doing the same to us. You can then see that those of us in Chicago Universal have no use for your preaching. Thanks for the effort though.

170. If ICAO thought its sister, the ILO, might misconceive the whole thing, did it think in a like manner that even its Mother also suffered from misconception? Why has it not already said so? The UN General Assembly sessions are annual and charged with a lot of specificity and clarity. Regular sessions of the General Assembly are held every year, commencing on the Third Tuesday in September. And these are held at Headquarters unless convened elsewhere by a decision taken at a previous session or at the request of a majority of the members of the UN. *See* Kapteyn, *supra* note 27, at Dir. I.A.; U.N. CHARTER art. 20; GEN. ASSEMBLY R. P. 1.

A. Rationale for Extraordinary Sessions

This category of sessions is employed or convened for urgent issues and "address[es] a specific problem or group of problems but do not play the full constitutional role of the supreme body with overall responsibility."[171] How does this tie in with *not less than once in three years?* It is of course, incompatible with the present wording of the first arm of Article 48(a). Nonsensical, is it not?

1. *Extraordinary Sessions' Incompatibility*

It is trite that this kind of session is utterly inappropriate in the event that the *not less than once in three years* provision actually intends to serve its purpose - because there is no need to provide for extraordinary sessions where sessions can be held "any time that circumstances warrant." This seems the most reasonable and normal interpretation of "shall meet not less than once in three years."

The ILO, (*toujours egal a lui-meme*), shows the way (which ICAO appears to not want to follow) once more. Its provision on the issue makes room for sessions any time circumstances so require; at least once every year. It thus has no need for extraordinary sessions, however, it was not oblivious enough to go ahead and make provisions like ICAO does. Failure to grasp this cunning ICAO provision must have led Werner Guldimann to the faulty submission indicated above. If the present text of the disputed Article 48(a) were flexible enough to permit Assembly meetings to be convened at appropriate times, there is no need for extraordinary sessions, whose presence must be nonsensical. It must be these sessions that the ILO refers to as "special maritime sessions."

This organ (the ICAO Assembly) does not play any constitutional role since it is neither supreme, nor endowed with responsibility; even during its own sessions. How could it play a full constitutional role at extraordinary sessions, unless there is some ulterior design?[172] A graphical or particularly poignant illustration may suffice. This also indicates the rationale (for these extra-sessions), as making no sense to the ICAO Council.

2. *Does Rationale Make Sense to the ICAO Council?*

The 25th Session (Extraordinary) meeting in Montreal from April 24 to May 10, 1984, came in the aftermath of the destruction of the Korean

171. Milde, *supra* note 1, at 430.

172. After all, Theo van Boven indicated, "although you may have a facade of democracy there are power factors at work which do not have their basis in democratic structures, like . . . certain economic powers, that frustrate in fact the whole process of democracy and decision-making by those who are elected." *Contemporary Issues*, *supra* note 143, at 134.

Airlines Flight KAL 007 on September 1, 1983.[173] The incident profoundly shocked the international aviation community and immediately prompted an Extraordinary Session of the prestigious ICAO Council which opened – "just a few days before the regular session of the ICAO Assembly"[174] - at the behest of the Republic of Korea and Canada.

The second of three Resolutions adopted at the Extraordinary Session of the Council (on September 16, 1983), reached a decision to convene an Assembly Extraordinary Session to consider an amendment to the Chicago Convention, to flesh it with an undertaking by Members to refrain from resorting to use of weapons against civil aircraft. At the Extraordinary Session of the Assembly, there was an unanimous adoption[175] of an amendment to the Convention popularly known as Article 3 *bis.*[176]

173. This incident was described by observers as "a black mark in the history of international civil aviation . . . [which] ranks among the worst man-made aviation catastrophes and is a painful reminder and illustration of the cruelty, callousness, lawlessness and inhumanity in the Cold War attitudes of the former USSR." MILDE & SICILIANO, *supra* note 38, at 291.

174. *Id.*

175. The most remarkable achievement in this instance is that the 25th Session of the Assembly should have been held at all and that, moreover, agreement was reached on Article 3 *bis* and this by consensus and even acclamation, without a single adverse vote. In the process, the world has shown with sufficient deliberation, solemnity and ritual (in what may perhaps be described as some form of tribal dance or religious rites collectively to exorcize the evil spirit) its feeling on what happened to KE007, or perhaps more accurately, on what happened to the 269 lives on board, that were abruptly 'terminated' at dawn on 1 September 1983, and its insistence that, in future, at least greater humanitarian consideration should be shown in such circumstances . . . . The essential thing is that in the process of elaborating this document, the message appears to have got through. Indeed, if this exercise in the wake of the KE007 tragedy succeeds in subduing henceforth the 'trigger-happiness' of States, at least in the field of international civil aviation, so that the 'international standard concerning the taking of human life' referred to in *Garcia* and *Garza* will from now on be steadfastly upheld at all times by all nations, the dead may yet not have died in vain.

Cheng, *supra* note 91, at 74. This incident is important here because of Article 3 *bis*, and the fact it brings out Western hypocrisy or double-standards mentioned earlier. It also confirms an earlier point about the absence and presence of the Reds in Chicago and elsewhere respectively. Just a few years later the U.S. committed the same (even worse) savage act on Iranian Airbus 655 with all 290 persons on board killed. But rather than come out again "with sufficient deliberation, solemnity and ritual" and perform the "tribal dance or religious rites collectively to exorcize the evil spirit" as before, the same ICAO Council instead adopted an innocuous resolution which deplored the incident and reaffirmed ICAO's policy condemning the use of weapons against civil aircraft *without*, however, *referring specifically to he United States.*" SOCHOR, *supra* note 140, at 142. As Sochor rightly put it, "the Council should have done no less in the Iranian affair than in the earlier KAL incident regardless of the United States' apology and its admission of blunder." *Id.* Moreover,

> [t]o destroy a harmless civilian object and murder innocent civilians, and then to attempt to justify such a cowardly act on the ground of self-defence, self-protection, or national security, is to add insult to injustice, not to mention the agony and sufferings of the injured victims and their bereaved families.

Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 LOY. L.A. INT'L & COMP. L.J. 513, 515 (1994).

176. *Supra* note 90.

Article 3 *bis* lays down guidelines on the interception of civil aircraft by state or military aircraft.[177] Much controversy surrounds this provision but this paper does not contemplate joining in the exercise of making or reversing Article 3 *bis*.[178]

The amendment retains our attention because its adoption came through an Extraordinary Session of the venerated ICAO Assembly. Extraordinary Sessions are meant to deal with unforeseen fortuitous incidents that arise and demand some measure of urgency for tackling them. In fact, this particular Extraordinary Session deserves the very name it bears. The KAL 007 incident took place on September 1, 1983, one expects that a supreme Assembly would convene any time on, or before, September 20, 1983 (the date of its 24th Ordinary Session). When an Extraordinary Session had to be convened regarding the same incident seven months later (and with an Ordinary Session in-between), it mocks both the very concept of an Extraordinary Session and the Organ holding it. Why was a session not held when it should have been held? The response is certainly found in the convenor's non-exercise of its gear-like powers or non-performance of its duties - namely convening.

B. Convening the Extraordinary Sessions

An extraordinary session is convened by either the Council, or by the request of one-fifth of ICAO membership addressed to the Secretary General.[179] This paper addresses both.

1. By the Council

Placing the Council option before the Members' option goes its own length towards weakening the already too slackened position of the Assembly. The IMO, for instance, does not ridicule its own supreme organ in the same manner. Its extraordinary sessions (as per its Article 13 already seen above) are convened (1) after a notice of sixty days whenever one-third of the Members give notice to the Secretary General that they desire a session to be arranged; or (2) at any time if deemed necessary by the Council, after a notice of sixty days. The answer to the KAL incident inquiry could thus be explained that the supreme Council never wanted it: an open Olympian affirmation of its powers and privileges. On its own, the immature and lame ICAO Assembly is helpless to such an extent that it needs to be "tossed about" by the Council. Why did it not employ the one-fifth formula (meant to "force the convening of an ex-

177. Milde, *supra* note 49, at 107.
178. For further discussion, see *Id.*; *see also supra* note 91.
179. Chicago Convention, *supra* note 2, Art. 48(a); Assembly Procedure, *supra* note 17, Rule 2.

traordinary session of the Assembly?")[180]

2. The One-Fifth Formula

Through this seemingly available escape-door, are placed hurdles in the nature of those members who never ratified the *not less than once in three years* amendments. In this ICAO *modus operandi*, one visualizes the all too familiar constitutional set-up of several dictatorial "democracies" of the 80s and 90s, characterized by an unholy imbalance of power - always, of course, in favor of the Executive - so neatly camouflaged that only the wary are, *prima facie,* aware that the document's importance lies more in what is not stated than what is. There is no point in giving one organ of an international organization unbridled powers and discretion as to render the other(s) helpless or useless; except for rubber-stamping.

Antonio Cassese, after studying the political set-up of Third World Countries, made the following remarks:

> Third World countries have two other factors in common: a concept of law which, while differing from one culture to the other, is always profoundly distinct from that predominating in the West, and a tendency towards authoritarian structures in their respective domestic legal systems . . . [with 'highly centralized and basically autocratic systems of government which tend to rely on power structures where law is easily disregarded whenever it suits the ruling group.[181]

This also holds true for the West or North in international organizations in general[182] and ICAO in particular. This is especially true for an organ like the ICAO Council which, in several respects, seems to be a "Club" of permanent or semi-permanent members.

It is conceivable that, should the Assembly attempt to request a session that the Council disfavors, the latter might block it by raising the question of constitutionality. A question it may neatly and easily

180. Milde, *supra* note 1, at 428.

181. CASSESE, *supra* note 7, at 117-18.

182. This obvious contradiction led Asif Hasan Qureshi to ponder aloud:

> Is democracy a Western mechanism for the imposition of its own value system? This question is relevant because if one is concerned about tensions between countries which have democratic systems and those that do not, one must address the question whether that is, in part, a cause. If one is to make the institution of democracy attractive, one must deal with the possible suspicion that the avocation of democracy is in fact a disguised call for the imposition of Western value systems. If the institution of democracy is to be sold, then it must come across as though it is not an imposition of a value system. I do not think that it is too far-fetched to be suspicious of these calls for democracy, given that Western international lawyers and Western governments are not too eager to talk about democracy when it comes to the United Nations [and other international organizations].

Contemporary Issues, *supra* note 143, at 138-39; *see also* BAILEY, *supra* note 42, at 6-7. One can also ask why these Third World States should be entitled to democracy in international institutions when they do not practice the same at home. *See supra* note 22.

shelve.[183] This particularly concerns election of its members who have not ratified the amendment increasing its size. The second limb (i.e. the request) of Article 48(a) includes the phrase "not less than one-fifth of the total number of contracting States."[184] This creates the same difficulties as those from the composition of the Council;[185] the same potential for conflict between the two organs exists, as previously indicated regarding the phrase *not less than once in three years*. For instance, the phrase, "not less than one-fifth of the total number of contracting States" violates the dictates of the much-cherished principle of Article 94(a) the concealed unanimity rule with far-reaching consequences[186] - when it purports to include those members who do not endorse this formula. Those members can be quite numerous. Would "one-fifth of the total number of contracting States" of ICAO now have to exclude those 70 or more States still adhering to the ten-contracting-States convening formula? Either way there is a violation. The Council is served well; even though its President permanently and strategically presides over these extraordinary sessions,[187] the Council is the one that decides the meaning to attach.

Further illustrations are not hard to find. The 28th Session (Extraordinary) of the Assembly met in Montreal from October 22 to October 26, 1990, with 399 participants from 114 Contracting States and fourteen Observer delegations. Dr. Assad Kotaite, President of the Council, was "elected" President of the Assembly. There were three Committees or Commissions, with the Executive Committee (the most important of the Assembly's so-called subordinate organs) under the Chairmanship of Dr. Assad Kotafte, President of the Assembly and President of the Council.[188] Extraordinary indeed. But that was not all. True to its name, This Extraordinary Assembly, adopted resolutions, *inter alia,* (1) *amending the Chicago Convention to increase the size of the Council*

183. Accused of unconstitutionality, the Council boldly declares that "While in common parlance it was correct to say the Assembly was sovereign, this was not legally so." *See* Osieke, *supra* notes 14 & 18.

184. The original unamended text of the Convention read: "(a) The Assembly shall meet annually and shall be convened by the Council at a suitable time and place. Extraordinary meetings of the Assembly may be held at any time upon the call of the Council or at the request of *any ten contracting States* addressed to the Secretary General" (emphasis supplied). At the controversial 8th Session of the Assembly, the first sentence became *not less than once in three years* while the second was unaffected (entry into force was on December 12, 1956). *See supra* note 95. At the 14th Session on September 14, 1962, the ten-member formula received its burial while *not less than once in three years* came to full unencumbered life (as was demonstrated above) and took full force on September 11, 1975. 14th[h] Session, *supra* note 24.

185. Which creates in the Council "ghost members", "recalcitrant States", "triennial-but-annual states", and other weird paradoxes.

186. Milde, *supra* note 3, at 207.

187. *See supra* note 71.

188. *See* 28th Session, Plenary Meetings, Resolutions and Minutes, ICAO Doc. 9563, at 44.

from thirty-three to thirty-six members; drawing up a protocol to that effect which comes into force upon ratification by 108 Contracting States; (2) establishing a worldwide policy toward operating restrictions on subsonic jet aircraft requiring them to meet the noise certification standard specified in Volume 1, Chapter 2, of Annex 16 to the Chicago Convention, but not the standard of Volume 1, Chapter 3, of Annex 16; (3) *approving an increase of 14.78 million U.S. dollars in the ICAO Budget for 1990 through 199,* resulting from economic factors such as inflation and actual increases in costs, variations in exchange rates and decisions stemming from United Nations General Assembly Resolution 44/198 with respect to salaries and pensions; and (4) (which must certainly have furnished the excuse for such a meeting) condemning the violation of the sovereignty of the airspace of Kuwait and the plunder of Kuwait International Airport by Iraqi armed forces, including the seizure and removal to Iraq of fifteen aircraft of Kuwait Airways and their purported registration by Iraq.[189]

Yet, one has been told that an extraordinary session is not supposed to exercise full constitutional role(s) not having overall responsibility. This only confirms what this study already indicates; namely, that talk of reducing the membership of the ICAO Council is falling on nailed ears. What else could be the justification for such unruly behavior of this servant Council? In fact, the proceedings in this case, as in the 17(A) Extraordinary Session, "raise some very important questions concerning the sovereignty of the Assembly of the ICAO; the extent to which it may by unanimity vote, override or circumvent the express provisions of the Convention, and the right of absent contracting States with respect to decisions adopted by the Assembly."[190] This does not augur well for the stature of the Organization.

IV. Conclusion

Successful patterns for furthering cooperation, advancing accommodation, and handling political conflicts at all levels requires: (1) agreement on certain constitutional fundamentals, (2) meaningful opportunities for the expression of needs, interests, and desires, (3) sound mechanisms for the wise selection of priorities, (4) acceptable ways for legitimating public policy choices,[191] (5) effective governance, and (6)

189. Annual Report of the Council - 1990, ICAO Doc. 9568, at 107 (emphasis added). In 1993, the 30th Session (Extraordinary) of the Assembly also met to elect a Contracting State to fill a vacancy created on the Council, on January 1, as a result of the dissolution of Czechoslovakia on December 31, 1992. *See* Annual Report of the Council – 1993, ICAO Doc. 9622, at 90.

190. Osieke, *supra* note 14, at 19.

191. [L]egitimacy is a quality of a rule which pulls subjects of the rule towards voluntary compliance because of qualities of the rule itself. In other words, that rule is perceived

regular and effective control on government.[192] Professor Neal Riemer of Drew University, after explaining each of these six factors, concludes that for "there . . . [to] be regular and effective controls on government, there must be constitutional mechanisms to ensure that government is a wise and limited servant and not a tyrannical and authoritarian master."[193] To achieve this, the constitutional framework should limit power and require this limited power to be in separate hands,[194] otherwise it is "the very definition of tyranny."[195] Power corrupts, and absolute power corrupts absolutely.

The ICAO Assembly is not a sovereign organ and, in spite of all attempts by some commentators to give it that status, it was never intended to be one. As a consequence, the ICAO Council, being the linchpin of the Organization and home to the creators, could have been entitled to legally strip it of the only one source of its semblance of authority -annual sessions. But the somewhat illegal or unconventional mechanism employed to acquire less frequent Assembly sessions would taint the whole process with nullity in the law. The Council would hardly succeed in illegally effecting the (legal?) change, but for the fact that the Assembly, not being sovereign *ab initio,* (i) is convened only by the Council, and (ii) is strategically "temporarily presided" over by the Council, through both its President and Secretary General, both of whom are also President and Secretary General of ICAO. Why have two main organs in ICAO?

There is no convincing reason why the ICAO Assembly should not convene itself. Reform in this direction, as in several others, seems desirable. It seems that there is every reason for the ICAO Assembly to revert to annual sessions. Should less frequent sessions be justified, the amendment instituting them requires redrafting to render it clear and specific. In addition, the ICAO Assembly ought to exercise general supervisory authority over certain crucial activities of the Organization. The continued existence of Article 49(k) is anomalous and must be seriously reconsidered. There is a need for an ICAO Secretariat distinct

> to have certain qualities which make it advisable or advantageous for those to whom the rule applies to carry out the rule absent police force. In fact, most of our domestic law turns on that perception of legitimacy because no state – even the most Draconian dictatorship – has the police power to enforce all laws. But, in international law, the concept of legitimacy becomes absolutely central because of the . . . absence of police enforcement mechanisms. Therefore, the perception of legitimacy of a rule as a way of pulling states and people towards voluntary compliance becomes of great importance. Thus, the topic seems to me to be a particularly poignant one at this moment.

Contemporary Issues, supra note 143, at 136.

192. RIEMER, *supra* note 97, at 242; *see also* Gaubatz, *supra* note 143, at 116-18.

193. *Id.* at 243.

194. *Id.* at 248.

195. Rodino, *supra* note 97, at 695.

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from, and independent of, the ICAO Council. This means having a single head of the Organization in the person of a Secretary General (or Director-General). Following closely is the need for ICAO Assembly sessions to be conducted solely by the Assembly without the Council President interfering. Until these changes are effected, there is no use talking about the supremacy of the ICAO Assembly, or any of its powers/functions – this is so because it has none.

APPENDIX
ICAO ASSEMBLY SESSIONS

Session	Site	Dates
Interim	Montreal	21/5-7/6/46
1st	Montreal	6-27/5/47
2nd	Geneva	1-21/6/48
3rd	Montreal	7-20/6/49
4th	Montreal	30/5-20/6/50
5th	Montreal	5-18/6/51
6th	Montreal	27/5-12/6/52
7th	Brighton	16/6-6/7/53
8th*	Montreal	1-14/6/54
9th	Montreal	31/5-13/6/55
10th	Caracas	19/6-16/7/56
11th	Montreal	20/5-2/6/58
12th	San Diego	16/6-9/7/59
13th**	Montreal	19-21/6/61
14th*	Rome	21/8-15/9/62
15th	Montreal	22/6-16/7/65
16th	Buenos Aires	3-26/9/68
17th**	Montreal	16-30/6/70
17th-A**	New York	11-12/3/71
18th	Vienna	15/6-7/7/71
19th**	New York	27/2-213/73
20th**	Rome	28/8-21/9/73
21st	Montreal	24/9-15/10/74
22nd	Montreal	13/9-4/10/77
23rd	Montreal	16/9-7/10/80
24th	Montreal	20/9-10/10/83
25th**	Montreal	24/4-10/5184
26th	Montreal	23/9-10/10/86
27th	Montreal	19/9-6/10/89
28th**	Montreal	22-26/10/90
29th	Montreal	22/9-8/10/92
31st	Montreal	19/9-4/10/95

* Sessions at which the frequency of sessions was amended.

** Extraordinary sessions.