THE REGULATORY FUNCTIONS OF ICAN AND ICAO:

a comparative study

by

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PREFACE

While many volumes have been written about international governmental organizations, few have comprehensively explored their constitutions on a comparative basis. Yet the constitutions of inter-governmental organizations, such as the specialized agencies of the United Nations, offer a fascinating field of study. This is particularly true with reference to their regulatory functions which are of a legislative or quasi-legislative nature, and which involve, most importantly, the amendment of their constitutive conventions, and the preparation, adoption and promulgation of international regulations concerning technical matters of world-wide application.

The purpose of this study is a comparative review of the regulatory activities of the International Civil Aviation Organization (ICAO, established by the Chicago Convention of 1944) and of its predecessor, the International Commission for Air Navigation (ICAN, established by the Paris Convention of 1919). The analysis of the twenty-four years of experience of ICAN and the almost twenty years of experience of ICAO provides sufficient ground for determining whether or not the new procedures of the Chicago Convention brought an improvement in comparison with the Paris procedures. The study, however, does not purport to offer an exhaustive description of all aspects of the regulatory and related activities of ICAN and ICAO. In order to keep our study in a readable size, we confine

our survey to the study of the regulatory functions of ICAN and ICAO as prescribed by the Paris and Chicago Conventions.

The administrative and judicial functions of both organizations, as well as their organizational structures are therefore not included in our analysis. The rules of procedure of the various organs which participate in the law-making process, are similarly omitted. Moreover, references to historical and political background are provided only to that extent as it seems necessary for the understanding of the main topic, even if this self-limitation may deprive our survey of some enlivening aspects. On the other hand, relevant publications are indicated throughout, and special emphasis is given to all the facts and aspects which demonstrate the influence of the Paris Convention and the experiences of ICAN upon the drafting of the Chicago Convention.

The general introduction is designed to outline the development of international organizations, define the term "international legislation", and accentuate the problems which in the survey will be illustrated by the examples of ICAN and ICAO. The substance of the study is divided into two parts, one dealing with the regulatory functions of ICAN, and the other dealing with those of ICAO. Both parts are introduced by a brief description of the historical background of the Paris and Chicago Conventions. The conclusions are given at the end of each section, i.e. after the examination of the procedures and practices in amending the Conventions, and those governing the adoption of international regulations. The final appraisal, summarizing our observations from a comparative point of view,

appears at the end of the study.

The author wishes to thank Professor Rosevear, the former Director of the Institute of Air and Space Law, and its present Director, Professor Cohen, and also the personnel of ICAO, and the German Academic Exchange Service (DAAD) for their help in one or another form. For consistent help in comment and criticism the author is especially grateful to Professor Vlasic. Both he and Mr. Jasentuliyana provided helpful assistance in improving the author's English. Finally, the author feels greatly indebted to Professor McWhirney of the University of Toronto for having initially encouraged him to undertake research at the Institute of Air and Space Law.

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PART 2 REGULATORY FUNCTIONS OF ICAO

LIST OF ABBREVIATIONS

Bowett	The Law of International Institutions (1963)
Cheng	The Law of International Air Transport (1962)
Documentation	Documentation Internationale, vol. 8 (1931)
Festschrift	Festschrift fuer Alex Meyer, Beitraege zum internationalen Luftrecht (1954)
File	Cooper, File of Documents (Institute of Air and Space Law)
Hearings	US Senate, Hearings before the Committee on Foreign Relations, 79th Congress (Feb./March 1945)
Hudson	International Legislation, vol. 1-7 (publ. 1931 and 1941)
Litvine	Précis Elémentaire de Droit Aérien (1937)
Mateesco-Matte	Traité de Droit Aérien Aéronautique (2nd ed., 1964)
Meyer	Die Freiheit der Luft als Rechtsproblem (1944)
Pignochet	L'Organisme le plus évolué du Droit International: La Commission Internationale de Navigation Aérienne (1935)
Proceedings	Proceedings of the International Civil Aviation Conference, vol. 1 and 2 (publ. 1948)
Riches	Majority Rule in International Organization (1940)
Roper	La Convention Internationale du 13 Octobre 1919 portant Réglementation de la Navigation Aérienne (1930)
Rosenmoeller	Die Internationale Organisation der Zivilluftfahrt (thesis Muenster, 1959)
Saint-Alary	Le Droit Aérien (1955)
Schenkman	International Civil Aviation Organization (1955)
Shawcross & Beaumont	Air Law (2nd ed., 1951)
Tombs	International Organization in European Air Transport (1938)
Wilcox	The Ratification of International Conventions (1935)
Wijesinha	Legal Status of the Annexes to the Chicago Convention (thesis McGill, 1960)

KEY TO SYMBOLS FOR ICAO AND ICAO DOCUMENTS

A1-31	First Assembly, Resolution No. 31
A2-Rec. 8	Second Assembly, Recommendation No. 8
AC 3, 27	Actions of Council, Third Session, p. 27
A1-CP/12	First Assembly, Commission on Constitutional and General Policy Questions, 12th Meeting
A12-EX/1	12th Assembly, Executive Committee, 1st Meeting
A14-P/20	14th Assembly, Plenary Session, Reference No. 20
AN-WP/889	Air Navigation Commission, Working Paper No. 889
C/208	Council, Reference No. 208 to Council Minutes x)
C/814-2	Council, Reference No. 814 to Council Minutes, 2nd Meeting of the Session concerned.
C-WP/3456	Council, Working Paper No. 3456
LC/80	Legal Committee, Reference No. 80
TE/3	Technical Committee, Reference No. 3

x) Except ICAO Doc. 7225-C/834, containing the Proceedings of the 4th Session of the Assembly.

GENERAL INTRODUCTION

INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL LEGISLATION

GENERAL [redacted]TION

INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL LEGISLATION

I) International Organizations

1) The term "international organization"

The term "international organization" embraces two quite different kinds of institutions, the "inter-governmental organization" and the "non-governmental organization". According to ordinary accepted usage, "inter-governmental organization" means an organization where States or governments are members, whereas the term "non-governmental organization" means an organization whose members are private persons or associations.[1]

This survey deals only with inter-governmental organizations which are also called "public international organizations", "international governmental organizations", or "interstate organizations".

With reference to the definition of the term"inter-governmental organization" it may be noted that the International Law Commission, during its work on the codification of the law of treaties, was con-

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[1] The Yearbook of International Organizations (9th ed. 1962/63), enumerates 147 inter-governmental organizations and 1326 non-governmental organizations.

cerned with this problem. But it could not agree upon any one of the proposed formulas which have been advanced by some of the members of the Commission.[2]

According to Brierly "an international organization is an association of States with common organs which is established by treaty"[3]. Hudson's proposal reads as follows: "An international organization is a body established by a number of States, having permanent organs with capacity to act within the fields of its competence on behalf of those States"[4]. According to Alfaro "an international organization is an association of States which exercises political or administrative functions concerning vital common interests of the associated States and which is constituted and recognized as an international person"[5]. In the final draft, Lauterpacht called international organizations laconically "organizations of States"[6].

2) History of inter-governmental organization

The history of public international organization hardly begins before the 19th century. Up to that time the intercourse between States

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[2] Yearbook of the International Law Commission vol. 1, 78-85, (1950).

[3] Id. vol. 2, 223, (1950).

[4] Id. vol. 1, 84, (1950).

[5] Id. vol. 1, 85, (1950).

[6] Id. vol. 2, 90, (1953).

did not necessitate the elaborate co-operation of numerous States, and was therefore handled by diplomatic channels, at the very most by conferences of the heads of State[7].

The beginning of inter-governmental co-operation in the form of permanent public Commissions, Offices, Bureaux, and Unions dates back to the year 1815 when the "Rhine Commission was created at the Congress of Vienna[8]. In 1838 the "Conseil Supérieur de Santé" was established in Constantinople, and in 1856 another river commission, the "Danube Commission", was created[9]. While both river commissions were conferred with certain legislative powers[10], the Health Council in Constantinople performed only administrative functions.

The technical progress in the development of international communications and transport led to the establishment of other permanent organizations. In 1864 the "International Telegraphic Conference" was convened in Paris, and international institutions in the fields of postal service, railway and air navigation followed: the "Universal Postal Union" (UPU)

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[7] E.g. the conferences of the sovereigns of the "European Concert" in the 19th century.

[8] Hudson dates this development back to 1864; Hudson, vol. 1, at 18 of the introduction. Woolf states 1838 as the beginning; International Government, 163 (1916).

[9] In the words of Ch. de Visscher, the Danube Commission was "la doyenne de toutes des institutions internationales"; see Le Droit International des Communications 63, (1924).

[10] Bowett, at 6; Wilcox, at 286.

in 1874, the "Central Office of International Transports" in 1890, and the "International Commission for Air Navigation" (ICAN) in 1919.

Besides these and the League of Nations, many other inter-governmental organizations were established after World War 1, among which the "International Labour Organization" (ILO) was the most important. This development of international organization was retarded during the time of World War 11. However, after World War 11 this tendency of States to create international organizations, was once more followed. Besides the United Nations a great number of new or succeeding "specialized agencies" of universal character were established, among which the "International Civil Aviation Organization" (ICAO) which is the successor of ICAN, took pride of place.[11] Since then the tendency has been towards the establishment of regional organizations: military pacts, free trade zones, custom unions, development organizations, etc.

The need for co-operation in technical, cultural and social matters guarantees the success of these specialized agencies[12] which an American writer called "prophetic examples of future world unity"[13]. On the other

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11 Besides ICAO, ILO and UPU, there are the following specialized agencies: the Food and Agriculture Organization (FAO), the Intergovernmental Maritime Consultative Organization (IMCO), the International Telecommunications Union (ITU), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Health Organization (WHO), the World Meteorological Organization (WMO), and the World Bank(consisting of four different organizations).The International Atomic Energy Agency (IAEA), which has an autonomous status, also works in close co-operation with U.N.

12 Despite his extremely critical attitude, Ross recognizes the success of a functional approach in international law; see Am.Soc'y Int'l.Proc., 208, (1956).

13 Wilcox, at 286.

hand, in the purely political field[14], the League of Nations did not survive all its crises, and the United Nations may one day share the same fate[15].

3) International Constitutional Law

An inter-governmental organization is created by treaty or agreement between States[16]. The only exception to this principle is the Nordic Council which was created by parallel legislation in the Scandinavian countries and Iceland[17]. By virture of such international convention, or by parallel national legislation, certain powers -- signifying the synonyms of "competence", "jurisdiction" and "authority" -- are delegated from the contracting States to the international organization.

As a rule such an international convention contains also the constitutional provisions under which the international body is to work. These

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14 But Scelle stresses the political implications for every international organization: "La distinction entre conventions d'ordre politique et d'ordre économique ou social...est de nature arbitraire". See "La Révision dans les Conventions générales", 42 Annuaire de l'Institut de Droit Int'l, 18 (1948).

15 At the 1953 meeting of the Academy of Political Science, the question on the agenda was "UN: success or failure?". It is characteristic that many speakers dealt with non-political co-operation in order to prove success. See 25 Acad. Pol. Sci. Proc. (1953).

16 The terminology as used herein follows the American practice. The word "treaty" means an agreement ratified by Parliament or Senate and includes any agreement when so ratified. The word "agreement" includes all other forms of agreement between States which are also called "executive agreements". See Hearings, at 49.

17 See Sorensen, "Le Conseil Nordique", 59 Rev. Gén. Dr. Int'l Publ., 65/66 (1955).

provisions are determined by the aims and purposes of the convention.

Juridical research concerning the constitutions of international organizations is called the study of "international constitutional law"[18]. It covers such matters as the legal status of the organization and its personnel, membership, composition and structure of the organs, their competences and procedures, rights and obligations of member States, financial questions, etc.

The most striking feature in the development of international organizations in this connection is the decline of the rule of unanimity which is inherited from the classical form of inter-state relations. This principle -- an expression of the doctrine of State sovereignty -- was substituted by the majority rule, enabling the new international bodies to achieve their tasks independently of the consent of every member State. This progress is of great importance for the procedures which govern the normative functions of such organizations.

The introduction of the rule of majority decisions in inter-governmental organizations meant that the States to a certain extent subscribed to a limitation of their sovereignty. In principle, however, State sover-

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[18] But Opsahl suggests to use "more modest terms"; see "An international constitutional Law"? 10 Int'l Comp. L. Q., 784 (1961).

eignty in fact is still maintained as the States may at any time withdraw from the obligations imposed by the convention.[19]

II) International Legislation

The delegation of certain powers from the States to these intergovernmental organizations, coupled with the introduction of the majority rule, justifies the application of the term "international legislation" to the work of some of these institutions which possess not only administrative but also legislative powers.

1) The term "international legislation"

To avoid misunderstanding, it must be noted that the term "international legislation" is often used in a metaphorical sense and not in the proper meaning of the word "legislation". This term, for instance, is very vaguely applied by Hudson who identifies the totality of all international treaties and multilateral agreements as "International Legislation". He says that "the term international legislation seems to describe, more accurately than any other, the contribution of international conferences at which States enact a law which is to govern their relations"[20].

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19 Wilcox, at 308. Potter, An Introduction for the Study of International Organisations 192 (5th ed., 1948). See also von der Heydte, Voelkerrecht vol. 1, 100 (1958).

20 Hudson, vol. 1, at 13 of the introduction.

Brierly, Briggs, Cooper, Eagleton, and Merle confirm the same way of application of the term[21]. Also McNair follows this terminology, although he is well aware of the metaphoric meaning of such an application of the term[22].

There seems, nevertheless, to be no compelling reason for following this application of a clear term. The term "international legislation" should be applied only to the normative functions of international organizations which have power to enact rules -- in relation to their constitutive conventions and technical annexes -- when such rules are binding on all the parties to the Convention, whether they assent to it or not.[23]

Although this restrictive use of the term does not find support among the leading writers, there are some legal scholars who have made extensive research in the field of international constitutional law, prefer such a restrictive application of the term[24].

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21 Brierly, The Law of Nations 96, (6th ed. 1963); and The Basis of Obligations in International Law 214, (1958); Briggs, "The UN and international Legislation", 41 Am. J. Int'l L. 435, (1947); Cooper, "Air Transport international Legislation", Collected Papers, vol. I, No. 11; Eagleton, International Government 191/192 (2nd ed. 1948); Merle, "Le Pouvoir réglementaire des Institutions Internationales", 4 Annuaire Franç. Dr. Int'l 342 (1958).

22 McNair, "International Legislation", 19 Iowa L. Rev. 179 (1934).

23 Contra Brierly, op. cit., at 96, who states that "an international legislature, in the sense of a body having power to enact new international law binding on the States of the world or on their peoples, does not exist".

24 Jones, "Amending the Chicago Convention and its technical Standards: Can Consent of all Member States be eliminated?", 16 J. Air L. & Com. 186/187 (1949); Mankiewicz, "Le Rôle du Conseil de l'OACI comme Administrateur des Services de Navigation Aérienne", 8 Rev. Franç. Dr. Aér. 223 (1954); Pignochet, at 103; Potter, op. cit. supra note 19, at 209; Riches, at 59.

Following the restrictive interpretation of the term "international legislation", this term should not be applied to international treaties and agreements, since they are enacted at diplomatic conferences where States give freely and voluntarily their consent. This kind of law-making may, if at all, be called "quasi-legislative"[25]. The same applies to the activities of international organizations which have certain regulatory powers without legislative competence. This type of regulatory authority can be called "quasi-legislative"[26] or "pre-legislative".

2) Specialized agencies with quasi-legislative competence

The distinction between legislation and quasi-legislation is of relevance for two important normative functions of international organizations: the amendment of their constitutive conventions, and the promulgation of international regulations.

Legislative authority of international organizations is more the exception than the rule. Most of the specialized agencies apply the "consent principle"[27] which deprives them of true legislative competence.

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25 Gascon y Marin, "Les Transformations du Droit administratif international", 34 Recueil des Cours de l'Acad. Dr. Int'l 27 (1930).

26 Morellet, Legal Officer of ILO, as quoted by Gascon y Marin, id. at 31. Contra Scelle, Organisation Internationale du Travail et le Bureau International du Travail, 31 (1930).

27 Bowett, at 330-332.

This principle means that amendments and regulations when adopted by a certain majority (as a rule a two-thirds majority), are not binding on dissenting members.

Amending the constitutive convention

With regard to the amendment of the constitutions of the specialized agencies, only the constitution of ILO (Art. 36) prescribes the consent principle for all amendments[28]. The ICAO (Art. 94 para. a) and the IMCO (Art. 52) are supposed to apply the consent principle as a rule. Most of the specialized agencies use the consent method for amendments which involve new obligations for their members: the FAO (Art. 20), UNESCO (Art. 13), UPU (Art. 29), and WMO (Art. 28). The consent principle which is the general rule of international law for the revision of treaties, is also applicable to ITU's amending procedure as its constitution is silent on the matter (Art. 4).

Adoption of international regulations

With regard to the adoption of international regulations, most of the specialized agencies apply exclusively the consent principle which makes these regulations only recommendatory. However, they have different legal effects and as such they may be categorized into three kinds. One category consists of mere recommendations which may or not be accepted at the discretion of each State: the FAO (Art. 4),

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[28] Rasch, Das Verhaeltnis der Internationalen Arbeitsorganisation zu den Mitgliedsstaaten (Diss. Heidelberg) 70 (1960). Contra Schwelb, "The amending Procedure of Constitutions of international Organizations", 31 Brit. Yearb. Int'l L. 58 (1954).

IAEA (Art. 3), IMCO (Art. 16). Another category contains regulations which must be brought before the competent legislative or executive authorities of the States: the ILO (Art. 19), UNESCO (Art. 4), and concerning conventions and agreements also the WHO (Art. 20). The third category consists of regulations which need notification if they are to be disregarded by the States[29]: the ICAO (Art. 37/38)[30], WHO (Art. 21/22), WMO (Art. 7/8). All the above agencies -- except ICAO under Article 12 of the Chicago Convention -- do not possess legislative power in their regulatory functions. Their regulations are recommendations for parallel national legislation.

The regulations of the ITU and UPU which do not fall into one of the above categories, are of a special nature. The constitution of the ITU seems to confer on its regulations the character of international legislation (Art. 14, para. 2, and Art. 21, para. 1/2). However, the regulations become binding only when they receive the signature of the member States, and in signing them the member States may make reservations to the regulations.[31] It is therefore contended that ITU's regulations also have only the character of quasi-legislation.

With regard to the UPU it is quite difficult to determine whether its regulatory "Acts" fall within the category of quasi-legislation. On

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[29] This device is called "contracting-out" or "opting-out".

[30] Contra Bowett, at 125.

the other hand its Acts must be signed and ratified by the member States (Art. 25, para. 1), and the Convention of UPU provides that notwithstanding the refusal of any member State to ratify the new Acts, they will be valid among those States that have ratified them (Art. 25, para. 4). These two features seem to identify UPU's regulations as quasi-legislation. On the other hand, the Convention provides that the new Acts supersede the earlier Acts (Art. 25, para. 3). Thus the decision of the majority overrules the dissenting members. These last do not have the option of ratifying the new Acts or continuing to be bound by the old Acts now superseded. One may therefore say that the regulatory activities of the UPU fall short of international legislation.

3) Specialized agencies with legislative competence

International legislation is made by virtue of the "legislative principle"[32]. This principle means that amendments or regulations when adopted by a certain majority, are binding on all members, dissenting members included.

Amending the constitutive conventions

With regard to the amendment of their constitutions, some of the specialized agencies apply the legislative principle. There are two

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[31] Despite the wording of Art. 21, para. 1/2 of the Convention.

[32] Bowett, at 330-332.

agencies which have legislative competence in amending all the provisions of their constitutions: the IAEA (Art. 18) and the WHO (Art. 73)[33]. Most of the agencies apply a combination of the legislative principle and the consent principle, depending on the importance of the amendment, as was shown earlier.

However, the ICAO (Art. 94, para. b) and the IMCO (Art. 52) possess a device which -- if applied -- creates a defacto and not a de-jure binding force. These two agencies, when amending their constitutive conventions, in certain cases could confront their members with the alternatives of either ratifying or withdrawing from the organization.

Adoption of international regulations

With regard to the adoption of international regulations, only a few international organizations apply the legislative principle. The most progressive organization was ICAO's predecessor, the "International Commission for Air Navigation" (ICAN), which was called by a French writer "l'organisme le plus évolué"[34].

At present the ICAO constitutes the only specialized agency with legislative competence in its regulatory functions, and that too is only

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[33] Concerning the WHO, see Arbab-Zadeh, Das Verhaeltnis der Weltgesundheitsorganisation zu den Mitgliedstaaten 94. (Diss. Heidelberg, 1962).

[34] Pignochet, [illegible].

under the exceptional case of Article 12 of the Chicago Convention. It was shown earlier that ICAO's regulations are subject to the approval of its members, and as such it possesses only a quasi-legislative competence. But this is true only in regard to the application of the regulations as far as the national airspace is concerned. In regard to the airspace over the High Seas, the provisions of Article 90 in conjunction with Article 12 make ICAO's regulations effective without any additional approval by the member States. This combination of majority rule and binding force upon all member States makes the ICAO an international legislature in respect of the "Rules of the Air" for civil aviation over the High Seas[35].

4) Implementation of international legislation

The expressions "binding force" and "binding upon member States" do not imply that internationally enacted rules -- amendments to the constitutive conventions and international regulations -- are ipso facto law of the country in the States concerned.[36]

The mere delegation of legislative power to an international authority can only result in an obligation under international law to implement those amendments and regulations[37]. For that reason all

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35 See p.142 infra.

36 Legislation "pro foro interno" in the words of Kunz, "General international Law and the Law of international Organizations", 47 Am. J. Int'l. 460 (1953).

37 Bowett, at 120. Contra Dehousse, La Ratification des Traités, 37-39 (1935). See also his bibliography.

international legislation requires the additional act of transference from the international level to the national level. Such procedure could be called "implementation" which embraces "transformation" and "adoption"[38]. "Transformation" means incorporation of international law by the creation of parallel norms of municipal law, while "adoption" means incorporation of international law as it is by an "order of application"[39]. This act of implementation is an indispensable part of the procedure of international legislation in order to give these internationally enacted norms the necessary legal force within the boundary of the States concerned, even if the norms are self-executing in character[40]. Only supra-national institutions can enact rules and regulations which have ipso-facto municipal force[41].

However, the States are utilizing two different devices which make ad hoc implementation of each amendment or regulation unnecessary. Such simplifications of the implementing procedure facilitate

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[38] In French "acte-condition". The terms "specific reception" and "acception" are also used.

[39] Seidl-Hohenveldern, "Transformation or Adoption of international Law", 12 Int'l Comp. L. Q.8(1962).

[40] "Self-executing" or "self-executory" means a regulation complete in itself which requires no further action by the legislative or executive body to clarify it or render its provisions operative.

[41] It seems that Bowett applies the term "international legislation" only to supra-national legislation. Bowett, at 120.

greatly the rapid execution of international regulations which helps to bring the international standards and practices up-to-date.

The first method concerns States whose domestic laws make international legislation municipally effective[42]. For such States the ratification of the basic treaty constitutes a blanket approval and as such an anticipated implementation of all further regulations which will be elaborated by the international organization under that treaty. No further action by the national legislature or executive body is then required. In such cases the international regulations need only a mere official announcement to render them binding on the public in general. This requirement is necessary because no legal norm can be binding on any citizen of any State unless duly published in the official gazette of the State concerned[43].

The other method is to delegate legislative power to the executive which implements the international regulations by Order in Council or statutory orders. This method was applied by most of the member States of ICAN and is continued to be applied by most member States of ICAO as far as its regulations are concerned.

Since the States utilize different methods in implementing international legislation, the question whether in a particular State an

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42 See Seidl-Hohenveldern, "Relation of international Law to internal Law in Austria", 49 Am. J. Int'l L. 468 (1955).

43 Except in the case where the constitution prescribes the direct application of the general principles of international law (Art. 25 West Germany; Art. 9 Austria; Art. 10 Italy).

amendment or international regulation has an automatic municipal force in addition to the international binding effect, must be ascertained by an examination of the constitution and the laws of the State concerned.

In conclusion therefore, it is noted once more that in any case international legislation needs implementation into national law. Even the so-called "ipso facto" or "automatic" municipal force of international legislation is based upon an implementation which is done a priori for that purpose. Consequently one may contend that even supra-national legislation is qualified by this rule, for the treaty which creates such organization, embodies an a priori implementation of the succeeding legislation.

An explanation of the legal terms described above was considered imperative for an analysis of the regulatory functions of the two universal inter-governmental organizations in the field of aviation. Having attempted to fulfil this necessary task, a study of ICAN and ICAO may now be undertaken in the light of the foregoing legal definitions.

PART ONE

REGULATORY FUNCTIONS OF ICAN

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A) The Paris Convention and ICAN

In 1910 a first attempt had been made by 19 European States to draft an international air convention; but unanimous agreement on a definitive text could not be reached. The idea to lay down the principles to serve as the basis for uniform national regulations was revived at the Peace Conference of 1919. A special Aeronautical Commission of the Peace Conference was appointed[1], consisting of two representatives of each of the Big Powers France, Great Britain, Italy, Japan and the USA, and of one representative of each of the following States: Belgium, Brazil, Cuba, Greece, Portugal, Roumania and Yugoslavia. This Commission prepared the final draft for the "Convention for the Regulation of Aerial Navigation" which was approved -- with three minor alterations -- by the Supreme Council of the Peace Conference on October 13, 1919.[2]

In 43 Articles the Convention dealt with general principles regulating air navigation, nationality of aircraft, certificates of airworthiness and competency, admission of aircraft of contracting States above

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[1] Also called the "Aeronautical Conference".

[2] The Convention entered into force on July 11, 1922.

the territories of other contracting States, rules to be observed on departure, when under way and on landing, prohibited transport, general arrangements to be made by all the contracting States to further the development of international air navigation, possible disagreements and their mode of settlement.

Appended to the Convention were eight Annexes for the regulation of the following matters: display of nationality and registration marks on all aircraft (Annex A), certificates of airworthiness (Annex B), log-books (Annex C), lights and signals, and rules for air traffic (Annex D), certificates and licences for pilots (Annex E), international air navigation maps (Annex F), collection and dissemination of meterological information (Annex G), and customs formalities (Annex H).

The Convention also provided for the creation of the "International Commission for Air Navigation" (ICAN). The Commission met at the commencement of its activities every four months, then every half-year, and finally about every ten to twelve months. It was charged with ensuring the application of the Convention and its evolution by proposing in due course to the contracting States the amendments called for by the development of international air navigation, and with adopting the technical regulations to the requirements of air traffic. Most of the preparatory legal and technical work was done by several Sub-Commissions which were composed of experts designated by the representatives on the Commission. The Sub-Commissions met in the intervals between the sessions of ICAN to prepare the material for adoption in the Commission. The Secretariat of ICAN with its seat in Paris did all the administrative work. One of its major tasks was the collection and dissemination of information, a knowledge of which was indispensable for international air transport.

B) Amending the Paris Convention

I) The Provisions of the Paris Convention for Amendment

There were four draft-Conventions before the Aeronautical Commission of the Peace Conference of 1919: the American, British, French and Italian drafts[3]. Neither the French nor the Italian proposals contained provisions for the establishment of a permanent civil aviation organization with regulatory powers. Only the American and British drafts conceived the idea of a permanent Commission, following the pattern already set in 1910 by the first international aeronautical conference.

1) The adoption procedure

The British proposal which was closest to the final text of the Paris Convention, contained in Article 24 of the first draft (Art. 23 of the revised draft) provisions concerning the amendment of the Convention. According to the British proposal, the Commission "shall be empowered to receive proposals from and to make proposals to any of the contracting States for the modification or amendment of, or for additions to, the provisions of the present Convention, and to notify alterations adopted".

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[3] Pignochet, Riches and Roper are the only writers who have dealt with the travaux préparatoires of the Paris Convention. However, none of them mentions the Italian draft. For the English translation of the Italian draft, File No. 1395 (C-6). For the English translation of the French text, see id. (C-3).

These proposals "must receive the unanimous assent of the contracting States before they are adopted as alterations to the present Convention". They "shall be treated as though they formed part of the present Convention"[4]. It seems that the British proposal -- while applying the classical consent principle -- did not only envisage the adoption of proposals, but also of the amendments themselves, without the requirement of further ratification.[5]

The American draft corresponded to the British concept in applying the consent principle. According to Article 25 and 26 of the US draft, "this Commission is empowered...to examine proposals for any modification of the provisions of this convention, to recommend such modifications as may seem necessary...". "The provisions of this convention...may be modified at any time after agreement between the Contracting States"[6]. However, during the discussions at the Aeronautical Conference the American delegation advanced the idea that the proposals for amendments should be adopted by majority vote in the Commission.[7] It was feared

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[4] File No. 1395 (C-4, C-1). The First British draft (C-4) is erroneously filed as an American draft in the US National Archives and Records Service (Record Group No. 59), American Commission to Negotiate Peace).

[5] Jones, "Amending the Chicago Convention and its technical Standards: Can Consent of all Member States be eliminated?", 16 J. Air L. & Com. 198 (1949).

[6] File No. 1395 (C-5).

[7] Documentation at 60.

that the work of the Commission might be paralysed by one dissenting member State in a case where amending the convention would be desirable or even necessary in the opinion of all other member States.

The Aeronautical Conference followed the American approach and inserted in the final draft the majority rule which was qualified by the requirement of a two-thirdsmajority. This provision became part of Article 34 of the Paris Convention :

> "Any proposed modification of the Articles of the present Convention shall be examined by the International Commission for Air Navigation, whether it originates with one of the contracting States or with the Commission itself. No such modification shall be proposed for adoption by the contracting States unless it shall have been approved by at least two-thirds of the total possible votes".[8]

However, the consent principle was inserted in the ratification procedure in order to make the draft acceptable to every State:

> "All such modifications of the Articles of the Convention ...must be formally adopted by the contracting States before they become effective".

It was hoped that dissenting States would not stay outside the general acceptance of amendments adopted in the Commission.

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8 For the text of the Paris Convention, see Hudson, vol. 1., at 359.

2) The voting provisions

The provisions dealing with the distribution of the voting power are of special interest. The membership of the Commission would consist, according to the British proposal, of "two representatives each of the USA, the British Empire, France, Italy and Japan, with five representatives elected by the other contracting States (with delegates representing technical and local interests as required)"[9]. In such a manner a permanent majority for the five Big Powers was safeguarded. The American draft proposed the same composition of the Commission as suggested by the British draft convention.

Objections by the minor powers to their partial exclusion from the Commission led the Aeronautical Conference to modify these proposals[10]. The final draft subsequently guaranteed representation on the Commission for every member State:

> The Commission shall be composed of "two representatives of each of the following States: The United States of America, France, Italy, and Japan; One representative of Great Britain and one of each of the British Dominions and of India; One representative of each of the other contracting States" (Art. 34).

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9 Art. 23 of the revised draft. File No. 1395 (C-1).

10 The critical remarks of the representatives of Brazil, Portugal and Yugoslavia are summarized in Documentation, at 56.

However, in order to ensure a permanent majority for the Big Powers in the voting procedure, the following provisions were inserted in the Convention:

> "Each of the five States first-named (Great Britain, the British Dominions and India counting for this purpose as one State) shall have the least whole number of votes, which, when multiplied by five, will give a product exceeding by at least one vote the total number of votes of all of the other contracting States.
> All the States other than the first five named shall each have one vote" (Art. 34).

Since the United States never became member of ICAN, only four Powers shared more than one half of the votes.

3) Criticism of the voting provisions

Objections against this inequality in representation and especially in voting had been raised as early as 1919 by the delegate of Cuba, M. de Bustamante[11]. He correctly predicted the effect of these discriminatory provisions upon the former neutral States which, indeed, refused to join ICAN until they were accorded equal status with the Great Powers. In the words of Lycklama A. Nijeholt the preferential treatment of the Big Powers was "incompatible with the equality of sovereign States, which is the only sound basis of international intercourse"[12]. Schenkman called it "an un-

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[11] Roper, at 173.

[12] Lycklama A. Nijeholt, "Comments on the Aerial Navigation Convention 1919", I. L. A. Rep., 29th Conf., at 419 (1920).

happy mistake of this organization"[13], and F. de Visscher considered this stipulation as one of the reasons for the small membership which amounted to 22 States in 1927[14].

Indeed, the preponderance of the five great Powers constituted a serious obstacle for other nations to join ICAN. Although weighted representation and voting in international organizations is today throughout acceptable and accepted[15], such procedure must, nevertheless, be reasonable in the light of the responsibilities of the organization concerned. It seems quite understandable that the great Powers -- as the most advanced in aviation -- wanted to have a safeguard in respect of the legislative function of ICAN[16]. In fact, this legislative competence of ICAN was confined to the technical matters as will be demonstrated later, and did not embrace the procedure for the amendment of the Convention where the consent principle applied. The requirement of ratification by all member States was, of course, safeguard enough.

4) Necessary alterations in the voting provisions

Since the ex-neutral States[17] insisted upon revision of the voting

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13 Schenkman, at 42.

14 F. de Visscher, "Le Droit International de la Navigation Aérienne en Temps de Paix", 8 Rev. Dr. Int'l. Lég. Comp. 182 (1927).

15 "The principle one State one vote is thus not sacrosanct" says Sohn; "Multiple Representation in international Assemblies", 40 Am. J. Int'l. L. 98 (1946). See also "Weighting of Votes in an International Assembly", 38 Am. Pol. Sci. Rev. 1192 (1944). See furthermore Broms, The Doctrine of Equality of States as applied in International Organizations (1959); Koo, Voting Procedures in International Political Organizations, (1947); Renter, Institutions Internationales, 340 (1955).

provisions as condition for their adherence, in 1923 the Big Powers put an end to their privileged position. By the amending Protocol of June 1923, they consented to the following important modification of the Convention:

> "Each State represented on the Commission (Great Britain, The British Dominions and India counting for this purpose as one State) shall have one vote".[17a]

In order to preserve the control of the Big Powers in the legislative field, a veto-privilege was inserted in the voting procedure for the amendment of the Annexes. This alteration shall be dealt with, later.

A further step towards formal equality of ICAN members was achieved by the Protocol of June 1929 which prescribed that "each contracting State may have not more than two representatives on the Commission".[17b] Since no State had more than one vote, the new amendment did not change the voting powers in the Commission.

Final modification of the representation and voting provisions of the Paris Convention was brought about by the Protocol of December 1929

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[16] See p. 58 infra.

[17] Denmark, Finland, Netherlands, Norway, Spain, Sweden, Switzerland, and Estonia, Latvia and Monaco.

[17a] Hudson, vol. 1, at 381.

[17b] Id. at 387.

which put an end to the inferior status of the British Dominions and India. The new text of Article 34 granted them a completely equal status: "Each State represented on the Commission shall have one vote".[17b]

The above alterations have not been the only amendments to the Paris Convention. Certain provisions of the Convention necessitated revision soon after ICAN came into being, while some other provisions required revision for political or technical reasons at a later stage.

II) The Amendments to the Paris Convention

In this Chapter all amendments to the Convention will be reviewed. They will be dealt with under the point of view of whether the provisions for amendments of the Paris Convention satisfied the needs of such a Convention.

1) The Additional Protocol of May 1920

Already during the process of ratification an alteration of the Convention appeared to be unavoidable, should the former neutral States, which had been excluded from the Aeronautical Conference, ever become parties to the Convention. In November 1919, Switzerland filed the first

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[17c] Hudson, vol. at 391.

official criticism of the Convention[18], insisting upon an alteration of Article 5 which reads, in its original text, as follows:

> "No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State".

Switzerland wanted the right to conclude long-term bilateral agreements with neighbouring ex-neutral and ex-enemy States which were not parties to the Convention[19]. Under Article 5, however, if Switzerland became a member of ICAN, it could grant them ad hoc permits only. In December 1919, at a Conference in Copenhagen, six other ex-neutral States -- Denmark, Finland, the Netherlands, Norway, Spain, and Sweden -- joined Switzerland's criticism[20]. Estonia, Latvia, and Monaco also asked for the amendment[21].

As this time the Convention was not yet in force; in order to avoid delay, the Aeronautical Commission of the Peace Conference was reconvened. The Commission drafted an Additional Protocol which met

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18 Roper "L'Origine de la Convention Aérienne du 13 Oct. 1919, son Extension progressive de 1922 à 1928 et sa Révision", 13 Dr. Aér. 559(1929); "La Commission Internationale de Navigation Aérienne", Rév. Gen. Dr. Aér. 32 (1932).

19 E.g., with Germany, which as an ex-enemy State was practically excluded from ICAN (at least at this time): see Art. 42 of the Paris Convention.

20 Kroell does not mention Finland and the Netherlands; Traité de Droit international public aérien, 44 (1934).

21 These States are mentioned only by v.d.Berch van Heemstede, "Les Modifications apportées à la Convention aérienne internationale de 1919: sont-elles suffisantes?" 8 Rev. Jur. Int'l.Loc. Aér. 537 (1924).

the demands of the ex-neutral States. It should be emphasized that this action was quite unique considering that the Convention had not yet entered into force at the time of its alteration.

The Additional Protocol brought a rather unfortunate solution to the problem created by the strict provision of Article 5. An amendment of Article 5 was unfeasible at this time, since the Convention was still in the process of ratification. Therefore, the Additional Protocol did not change the wording of the original text but merely permitted derogations from the principle:

> "The High Contracting Parties declare themselves ready to grant, at the request of signatory or adhering States who are concerned, certain derogations to Article 5 of the Convention, but only where they consider the reasons involved worthy of consideration..."[22]

These derogations, however, had the same effect as an amendment to the Convention. They had thus to be submitted to the same procedure as an amendment of the Convention:

> "The International Commission for Air Navigation will examine each request, which may only be submitted for the acceptance of the contracting States if it has been approved by at least a two-thirds majority of the total possible number of votes...
> Each derogation which is granted must be expressly accepted by the contracting States before coming into effect..."[23]

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[22] Hudson, vol. 1, at 376/377. See also Roper, at 59-62; Tricaud, at 29.

[23] Ibid. See also 1 Off. Bull. 21 (1922).

The Protocol was ratified simultaneously with the ratification of the Convention. Both instruments entered into force on July 11, 1922. ICAN, which was established on the same day, was subsequently deluged with requests for derogations to Article 5, as can be seen from the Official Bulletin of ICAN for the years 1922 to 1926.

2) The Protocol of October 1922

To bring the complicated procedure introduced by the Additional Protocol to an end, the French delegation in 1922 proposed that Article 5 be amended "in order to hasten the ratification by signatory States or the adhesion by other States"[24]. Indeed, so many reservations to Article 5 were made and were still foreseeable that Article 5 never had much life[25] and its amendment seemed indispensable. Eventually, ICAN adopted the French proposal and modified Article 5 to read as follows:

> "No contracting State shall, except by a special and temporary authorisation, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special

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[24] 1 Off. Bull. 24 (1922).

[25] Hudson, "Aviation and International Law", 24 Am. J. Int'l. L. 232 (1930).

> convention must not infringe the rights of the contracting parties to the present Convention and must conform to the rules laid down by the said Convention and its annexes..."[26].

This modification of the original text now permitted the member States to enter into the long-term bilateral agreements with non-members.

Until the end of 1926, when the Protocol entered into force, the applications for derogations had still to be filed by the States, examined and approved by the Commission, and accepted by every member State by special notification. ICAN reported at each Session the progress of such acceptances and renewals[27]. Obviously, the sooner the amendment was ratified, the earlier the lengthy procedure under the Additional Protocol would have been avoided. But in spite of the importance of a speedy ratification, the amendment did not enter into force until December 1926. The four-years delay between adoption and ratification of the Protocol marked the beginning of a series of disappointing experiences for the Commission.

3) The Protocol of June 1923

As already indicated,[28] the strong criticism provoked by the voting

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26 Hudson, vol. 1, at 379 (underlined by the author). The Netherlands regarded the latter stipulation as a contradiction. They accordingly filed a comment when becoming a party to the Convention. See 13 Rev. Gén. Dr. 242 (1929).

27 See Off. Bull 1922 to 1926.

28 See p25 supra. The provisions concerning the amendment of the Annexes are quoted p37 infra.

provisions in the Convention resulted in a first amendment of Article 34 in 1923. The Commission's experience with the Protocol of 1923 was similar to that of the preceding Protocol of 1922: by March 1924 Bolivia and Persia had not yet signed both Protocols. The situation in regard to the ratification was even worse: only three States had ratified by then[29]. Diplomatic pressures on Bolivia resulted in its withdrawal from the Convention[30]. Only when Yugoslavia finally deposited its ratification, did the amendments of 1922 and 1923 enter into force. This was not earlier than December 1926[31].

4) The Protocol of June 1929

Subsequent to the amendments of the Articles 5 and 34, three of the ex-neutral States -- Denmark and Sweden in 1927, and the Netherlands in 1928 -- had joined ICAN. But most of the ex-neutral States and all the ex-enemy States still stood aside, although they manifestly took an interest in the regulation of international air navigation. The greatest danger to the universality of ICAN was, however, a splitting trend prevailing at that time: Spain had initiated the Ibero-American Convention (Madrid 1926), and the United States, the Pan-American Convention (Habana 1928). In the case of the Habana Convention, ICAN could not, of course, do much to stop such centrifugal tendencies. The emergence of this Convention, as will be demonstrated later, was not at all caused by the d i s s a t i s - f a c t i o n of the States c o n c e r n e d with the Paris

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[29] 6 Off. Bull. 19 (1924).

[30] 6 Off. Bull. 23 (1924) and 12 Off. Bull. 3 (1927).

[31] 12 Off. Bull. 17 (1927).

Convention. By contrast, ICAN could detect some relationship between Spain's action and the need for revision of the Paris Convention. From the inception of ICAN, Spain opposed the provisions which discriminated against the ex-neutral States. Although the Protocols of 1922 and 1923 had brought considerable improvement in this respect, Spain still seemed to be dissatisfied. Political considerations may have been the ultimate reason for Spain's continuous abstention from ICAN, especially in the light of the fact that Spain withdrew from the League of Nations and tried to form a bloc of States associated with the Spanish culture. Considering this background one may agree with R.Y. Jennings, in whose opinion the Madrid Convention was "little more than a political gesture of separatism"[32]. However, one can also say -- as did Roper and Le Goff -- that the Madrid Convention "would never have been concluded, had it been possible to revise the Paris Convention more rapidly".[33]

The publication of Germany's criticism of the Convention offered a welcome opportunity for ICAN to study the objections of the ex-enemy States[34]. ICAN became well aware of the need for a complete revision of the Convention, if the ex-neutral and ex-enemy States were to become

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32 R.Y. Jennings, "Some Aspects of the International Law of the Air" 75 Recueil des Cours de l'Acad. Dr. Int'l 518 (1949); the Convention is not dated under 1928 as Jennings did.

33 Roper, at 204; also "Recent Developments in Aeronautical Law", 1 J. Air L. 411 (1930). Le Goff, Traité théorique et pratique de Droit Aérien, 105 (1934).

34 Wegerdt, "Deutschland und das Pariser Luftverkehrsabkommen vom 13. Okt. 1919", 2 Zeitschrift fuer das gesamte Luftrecht 25 (1928); translations of this article in 1 J. Air L. 1 (1930) and 13 Dr. Aér. 169 (1929).

parties to the Convention. In the words of Roper, the situation in 1928/29 created a "real danger for the unification of air law"[35]. At the instigation of M. Giannini, ICAN invited all States engaged in aeronautics to a universal conference in Paris. The purpose of this conference of June 1929 was to examine the German proposals for modifications of the Convention.

The following countries participated as member States: Australia, Belgium, Bulgaria, Canada, Chile, Czechoslovakia, Denmark, France, Great Britain, Greece, India, Ireland, Italy, Japan, Netherlands, New Zealand, Persia, Poland, Portugal, Roumania, Saar Territory, Siam, South Africa, Sweden, Uruguay, Yugoslavia. With the exception of the Soviet Union, all invited non-member States participated in the discussions: Austria, Brazil, China, Colombia, Cuba, Estonia, Finland, Germany, Haiti, Hungary, Luxembourg, Norway, Panama, Spain, Switzerland, the United States and Venezuela.[36] These 26 member and 17 non-member States signed the final resolutions of the conference which recommended to ICAN certain amendments to the Paris Convention[37]. An extra-ordinary session of ICAN considered favorably the suggestions formulated by the Conference, and adopted them in the Protocol of June 1929.

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35 Roper, op. cit. at 402/403; see also Doering, "Vorschlaege fuer ein Weltluftverkehrsabkommen", I. L. A. Rep.,36th Conf., at 441 (1931).

36 Moller, The Law of Civil Aviation, 10 (1936).

37 "Session extraordinaire de juin 1929", 13 Dr. Aér. 633 (1929).

This Protocol amended again Article 34 of the Convention. According to the new text, equality in representation was established[38]. Another important amendment dealt with the procedure for amending the Annexes, where the veto-privilege of the Big Powers, which had been introduced by the Protocol of 1923, was abolished[39].

5) The Protocol of December 1929

Following an earlier discussion which was suspended at the extraordinary Session, the question whether to give voting power to the British Dominions and India, was once more examined, and in the new text, voting power was granted to the British Dominions and India.[40]

In the case of both Protocols of June 1929 and December 1929, the Commission was faced once more with the difficulty of bringing them into effect. During its sessions, ICAN had to draw the attention of its members to the necessity for a prompt ratification of the Protocols[41]. For, even at the beginning of 1932, the Protocol of June 1929 was still not ratified by Chile, Persia and Uruguay. Similarly, the Protocol of

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[38] The text was quoted earlier; see p27 supra.

[39] This point will be discussed later; see p59 infra.

[40] The text was quoted earlier; see p28 supra.

[41] "Compte-rendu de la 19me Session de la CINA", 15 Dr. Aér. 281 (1931).

December 1929 failed to receive the ratifications of the Netherlands, Persia and Uruguay[42]. It was only in 1933 that both Protocols of 1929 entered into force. Again the process of ratification had taken almost four years, from December 1929 to May 1933[43].

6) The Protocol of June 1935

During the years that followed, new amendments of technical nature became necessary. While adopting the modifications, the Commission decided not to urge ratification until more amendments were adopted[44]. The disappointing experience with the preceding amendments explains this attitude of the Commission.

Finally, at its 23rd Session in May/June 1935, ICAN approved two amending Protocols. The first Protocol which amended the Convention, contained the alterations which were formerly adopted by, but not yet submitted to, members for acceptance. The second Protocol introduced a complete revision of Annex H (customs).

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[42] 20 Off. Bull. 33-35 (1932). A resolution of May 1932 requested diplomatic pressure to be brought to bear upon Chile, Persia and Uruguay, to hasten ratification (20 Off. Bull. 35 (1932)). In consequence, Persia and Uruguay signed both Protocols (21 Off. Bull. 38 (1933)), and the Netherlands ratified the Protocol of December 1929. In 1933 Uruguay finally ratified (22 Off. Bull. 56 (1934)), but Persia denounced the Convention (21 Off. Bull. 36 (1936)).

[43] May 17, 1933 had been fixed by the Commission as the date of entry into force (22 Off. Bull. 56 (1934)). But the Protocols of 1929 could not be properly considered to be in force until April 1934, because Article 43 of the Convention prescribed a notice of one year for denunciation, and Persia gave this notice only in April 1933.

[44] E.g. Resolution #619; 20 Off. Bull. 57 (1932).

The process of ratification of the 1935 Protocols had a record even worse than that of its predecessors: they failed to receive sufficient number of ratifications and consequently never entered into force[45].

III) A Constitutional Deficiency

1) Interpretation of the term "contracting State"

Not only were the various amendments to the Paris Convention accompanied by inconvenient delay, but ICAN was also faced with a special legal problem in 1926. The provisions of the Convention required that amending Protocols "must be formally adopted by the contracting States before they become effective" (Art. 34). The Convention, however, did not define "contracting States". Two different interpretations were conceivable:

1) Contracting States were only those States which were parties to the Convention at the time when the amending Protocol was approved by ICAN.
2) Contracting States were all those States which were parties to the Convention at the time when the amending Protocol was to become effective.

The first interpretation obviously offered the advantage of a more speedy application of amendments, as they would have entered into force at an

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[45] 28 Off. Bull. 24 (1945).

earlier state. On the other hand, the application of the latter interpretation would have caused further delay in the process of ratification, as ratification by newly adhering States would have been required, in addition to ratification by the States of the former category.

Since both interpretations were in conformity with the wording of the Convention, it is not surprising that ICAN took the more pragmatic view, by adopting the first interpretation. This concept was first applied in the case of an interpretation of the Additional Protocol of 1922 which contained the following stipulation:

> "Each derogation which is granted must be expressly excepted by the contracting States before coming into effect"[45a].

ICAN adopted an interpretation according to formula 1:

> "Each derogation which is granted must, before coming into effect, be expressly accepted by the States parties to the Convention on the date on which the application for derogation shall have been approved by the International Commission for Air Navigation"[46].

Consequently, the acceptance by those States which became parties to

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[45a] Hudson, vol. 1 at 377.

[46] 6 Off. Bull. 23 (1924).

earlier state. On the other hand, the application of the latter interpretation would have caused further delay in the process of ratification, as ratification by newly adhering States would have been required, in addition to ratification by the States of the former category.

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Consequently, the acceptance by those States which became parties to

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[45a] Hudson, vol. 1 at 377.

[46] 6 Off. Bull. 23 (1924).

the Convention subsequent to the decision in the Commission was not imperative for the effectiveness of the approved derogation.

2) The final clauses of the amending Protocols

ICAN applied its interpretation of Article 34 of the Convention in the formulation of the amending Protocols as well. The Protocols of 1922, 1923 and 1929 accordingly contained the following provision in their final clauses:

> "The present Protocol shall remain open[47] for signature by the States which are now[48] Contracting Parties to the Convention...
> It will come into force[49] as soon as the States which are now Contracting Parties to the Convention shall have effected the deposit of their ratifications.
> States which become[50] Contracting Parties to the Convention may adhere to the present Protocol".[51]

The wording "States which are now contracting parties" excluded an interpretation according to formula 2 and was therefore clearer than the

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47 The French text was for all four Protocols "restera ouvert". But the English text shows several versions: "shall remain open", "shall be kept open", or as quoted above.

48 In French "actuellement". In English: "at present", or omitting the words "are now", or as quoted above.

49 "Il entrera en vigueur". English: "it shall come into force", "it will go into force", or as quoted above.

50 "Qui deviendront". English: "Which shall become", "which may become", or as quoted above.

51 "Présent Protocol". English: also "this Protocol".

laconic wording "contracting States" in Article 34.

As a result, ICAN considered an amending Protocol to be effective after its ratification by those member States which had been parties to the Convention on the date of the adoption of the Protocol. The ratification by States which became parties subsequent to the adoption of the Protocol, consequently was not imperative for the effectiveness of the Protocol.

3) The situation with regard to newly adhering States

The adherence of States to the Convention was governed by Article 41 which in its original version prescribed that "States which have not taken part in the war of 1914-1919 shall be permitted to adhere to the present Convention...". This provision permitted the adherence "to the present Convention", but not to the Convention as amended. Thus the terms "come into force" (as used in the Protocols) or "become effective" (as used in Art. 34) are clarified: mere ratification of the Convention could only result in the adherence to the Convention in its original version of 1919. This explains why the stipulation "States which become Contracting Parties to the Convention may adhere to this Protocol" was inserted in the final clause of each Protocol. Such a provision enabled new member States to adhere to the Convention as amended by the various Protocols.

New member States followed [redacted] invitation and -- as a rule -- ra-

tified the Convention and the Protocols at the same time. The only exception to this practice was the case of Uruguay which suddenly showed that nothing in the Convention provided for a situation where a new member declared its adherence in accordance with Article 41 of the Convention, but refused to ratify the amendments in addition to the ratification of the basic treaty.

4) The case of Uruguay

At the time when the Protocols of 1922 and 1923 (amending the Articles 5 and 34) were adopted, Uruguay was not yet member of ICAN. Due to the ratification by all States which had been members of ICAN at the time of the adoption of the Protocols, both Protocols entered into force in 1926. It is clear that Uruguay, which became party to the Convention subsequent to the adoption of the Protocols, could not prevent this by withholding its own ratification. From 1926 on we find therefore that only Uruguay still belonged to the Convention in its original version of 1919, while all the other members of ICAN -- the old and the new members -- which all had ratified the Protocols were parties to the Convention as amended. Nevertheless, the Commission worked in accordance with the new wording of Article 34, and the member States concluded long-term bilateral agreements with non-member States according to the new wording of Article 5.

It would appear that Uruguay may have had some grounds for objection: it still belonged to a Convention which neither allowed the conclusion of

bilateral agreements, nor provided for the voting power of each member State in the Commission. Furthermore, all new technical regulations were prepared under a procedure to which Uruguay had never expressly consented to. However, Uruguay never objected to the application of the amended Convention to which it was not a party. It took its voting right in the Commission for granted and co-operated accordingly. It also considered the technical regulations as binding and implemented them internally. Only in 1933, when the Protocols of 1929 (amending again the Articles 5 and 34) became effective, did this dubious legal situation come to an end.[52]

5) The final clause of the Protocols of 1935

It seems that ICAN drew some conclusions from its experiences with Uruguay. The stipulation "States which become Contracting Parties to the Convention may adhere to the present Protocols" which had been used in the final clauses of all preceding amending Protocols, was replaced by the following new provision: "The above modifications shall ipso facto become integral parts of the Convention".[52a]

In consequence, there was no invitation for adherence to the Protocol any more. ICAN in doing so obviously intended to apply the leg-

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[52] See Secretary General's Report in 22 Off. Bull. 55 (1934).

[52a] Hudson, vol. 7, at 80.

islative principle with binding effect vis-à-vis newly adhering States. However, the question might have arisen as to whether this procedure was lawful. The question is, of course, purely academic, because the Protocols of 1935 never received the required number of ratifications to enter into force.

6) A critical analysis of the 1935 formula

Had the Protocols of 1935 received the necessary ratifications during the period 1935 to 1944, the situation would have been as follows:

i) With regard to States which had been members of ICAN by 1935: The Protocols of 1935 would have been binding upon the 29 States which had been parties to the Convention by 1935.

ii) With regard to States which became members of ICAN subsequent to the adoption of the Protocols of 1935: Five States became parties to the Convention after 1935: Spain, Latvia and Peru in 1937, Estonia in 1938, and Paraguay in 1939. These States had ratified the Convention of 1919 along with all the Protocols of 1922, 1923 and 1929. With respect to the Protocols of 1935, the provision of Article 41 is of decisive relevance. Article 41 of the Convention prescribed that "Any State shall be permitted to adhere to the present Convention".[53] This stipulation clearly confined the effect of adherence to the present Convention. In other words, adherence to the Convention as amended required the

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[53] This is the wording according to the amendment of 1929.

additional ratification of the amending Protocols. In consequence, the five newly adhering States would have been bound by the Convention in the form as ratified by them, but not by the Protocols of 1935, despite the new formula in the Protocols.

A study of the attitude of the five new members of ICAN to the Protocols of 1935 reveals how these States considered the legal effect of the Protocols. Particularly interesting is the case of Spain. Full of good will to join ICAN and to bury the remainders of the Madrid Convention, Spain signed in 1936 the Protocols of 1935. In 1937, when ratifying the Convention of 1919 (the Protocols of 1922, 1923 and 1929 had been ratified already by 1935) it did not include the Protocols of 1935 which it had signed already. This exception may have been made because of the Spanish understanding that ratification of the Protocols was not necessary.

With regard to the other new members of ICAN, Latvia, Estonia and Paraguay never ratified the Protocols of 1935. Only Peru which became a member of ICAN in 1937 ratified them by 1938. It is quite possible that Peru did so for reasons dictated by its constitution, and with the understanding than on the international level this ratification would have had mere declaratory effect.

However, there remains an intriguing question: how could ICAN bind new members by amendments which entered into force subsequent to the adherence of those States? This will be discussed in the following Chapter.

7) Possible solutions of the constitutional problem

The dubious legal situation which had resulted from the non-ratification of the Protocols of 1922 and 1923 by Uruguay, is an example of what could result if amendments to a convention which serves as the constitution of an international organization, are not binding upon all member States. It has been shown above that the new formula of the Protocols of 1935 "The above modifications shall ipso facto become integral parts of the Convention" could not solve the problem without an additional amendment of the Convention.

a) The legislative method with municipal effect

The following wording of Article 41 of the Paris Convention may be suggested as a formula which may have solved the problem: "Any State shall be permitted to adhere to the Convention as amended". An additional stipulation in Article 34 would clarify the intended legal effect of binding force vis-à-vis new member States: "All amendments to the Convention shall ipso facto become integral parts of the Convention and consequently bind also new member States".

Only by virtue of such an amendment to the Convention itself, the formula of the Protocols of 1935 could have produced the desired binding effect of the amendments. Thus the amending Protocols would have been binding not only internationally but also internally, even without ad hoc ratification of

the Protocols. This is so, because the ratification of the Paris Convention as suggested would have constituted a blanket approval of the amendments[54] and as such an a priori incorporation into municipal law. But one should bear in mind that two conditions had to be fulfilled in this particular case: firstly, that ICAN approved the amendment prior to the adherence of a State, and secondly, that this amendment entered into force subsequent to such adherence. Consequently those five States which became members of ICAN after the adoption of the 1935 Protocols, would have been potential candidates for membership to an amended convention which they neither had to sign nor to ratify. In all other cases of amendment, the ratification was imperative anyhow (Art. 34 of the Convention).

b) The legislative method without municipal effect

The above legislative method of binding new member States by amendments may have been no more practicable in 1935 than it is today, since States believe more in the doctrine of sovereignty than in the idea of supra-national co-operation.

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[54] This kind of "anticipated ratification" was discussed on p. 16 supra. With reference to its legality, see Seidl-Hohenveldern, "Transformation or Adoption of International Law into Municipal Law" 12 Int'l Comp. L. Q. 109 (1963).

Another device might have been more appropriate, to achieve the desirable effect of uniform membership to the amended constitution of ICAN. The following stipulation could have been inserted in the Convention: "A new member State shall be obliged to ratify amendments which enter into force subsequent to its adherence".

This moderate solution would have brought about only an international binding effect of the amendments which still required implementation in order to receive municipal force. Furthermore, the suggested wording would have clarified the meaning of "contracting States" in Article 34 of the Convention according to ICAN's interpretation of this term.

IV) The Impracticability of the Ratification Requirements

1) Causing considerable delay

In order to be comprehensive, the above analysis which was devoted to the provisions for the amendment of the Convention, requires some additional critical remarks. One of the deficiencies of the Convention -- namely the problem of uniform application of constitutional amendments -- was discussed above with suggestions for remedying this lacuna in the Convention.

Another deficiency of the Convention, a more serious one, became obvious when the history of the numerous amending Protocols was discussed.

The requirement that amendments to the Convention had to be ratified by all member States before they could become effective, caused a considerable delay for their entering into force. The Protocols of 1922 and 1923 entered into force in 1926, the Protocols of 1929 by 1933, and the Protocols of 1935 never received the required ratification by all member States.

This was so, despite the remarkable fact that good-will and readiness for close co-operation were prevailing among the members of ICAN, since all Protocols had been adopted unanimously[55]. The factors responsible for the slowness of ratification were many and diverse, including the busy schedule of Parliaments and Senates, their frequent dissolutions coupled with new elections, changes in government, and especially the absence of sufficiently influential pressure groups.

2) Impeding the adoption procedure

The requirement that amendments to the Convention had to be ratified by all member States before they entered into force, had still another negative effect. Although the amendments could be adopted by a qualified majority, the advantages of such a progressive solution of the adoption procedure were paralysed by the fact that the consent principle was applied to the ratification procedure. Thus, for instance, in 1923 the British

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55 Oct. 1922: 20 Off. Bull. 26 (1932); June 1923: Roper, at 91; June 1929: id. at 108; Dec. 1929: id. at 109; June 1935: 23 Off. Bull. 95 (1935).

delegation withdrew a Canadian proposal for an amendment to Article 16 of the Convention (cabotage), because this proposal was opposed by some States[56].

Furthermore, opposition of one single State could prevent the adoption of any amendment, as illustrated by action of Japan in regard to an amendment already agreed upon by ICAN in 1929[57]. The proposed amendment dealt with "Aircraft for the League of Nations" which consequently would have been permitted "to enjoy all the rights accorded to State aircraft of the contracting States...". The opposition of Japan which began with the formulation of a reservation by 1919[58] clearly indicated the impossibility to bring this amendment into force. Since Japan's ratification was essential for the effectiveness of the amendment, the process of ratification was not initiated at all -- it would have been a vain effort.

V) Conclusions

Taking into account the experience of ICAN and the alterations to the Convention suggested earlier, the following can be stated:

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[56] 5 Off. Bull. 25 (1924).

[57] 17 Off. Bull. 25 (1930), 18 id. 36 (1930), 19 id. 67 (1931), 20 id. 48 (1932), 21 id. 54 (1933), 22 id. 74 (1934), 23 id. 79 (1935).

[58] 17 Off. Bull. 25/26 (1930).

1) The requirement that amendments to the Convention had to be ratified by all member States proved to be impracticable.

A better solution would have been to make a specified number of ratifications sufficient for the coming into force of the amendments. Three alternative solutions may be suggested: amendments duly adopted by ICAN and then ratified by the required number of States

a) take effect internationally and internally in respect of all member States. This would be so despite the fact that the amendments did not receive ad hoc ratification by each member State;

b) take effect — internationally and internally -- in respect of States which ratified them. In addition, the amendments would be binding internationally upon States which had not yet ratified them. In the case that those States did not fulfil their obligation to ratify the amendments, they would automatically be excluded from the organization;

c) take effect -- internationally and internally -- in respect of States which ratified them. But States which wanted to remain bound by the original text of the Convention, would be under no obligation to ratify the amendments.

Formula (a) applies the legislative method with municipal effect. It imposes thus a considerable limitation to the sovereignty of the member States. Only States with a homogeneous political and economic structure will agree upon such a supra-national pattern. But the members of ICAN probably would

never have accepted this formula[59].

Formula (b) applies the legislative method without municipal effect. In its practical consequences it is almost as rigid as solution (a), since it imposes an obligation on dissenting member States. But its legal consequences are quite different and, therefore, it may not provoke the same criticism as solution (a)[60].

Formula (c) applies the consent principle. It meets the limited readiness of States for international co-operation, preserving the full sovereignty of the member States[61]. However, a rather undesirable side-effect of this solution should not be overlooked: there will be States which remain parties to the original Convention, and States which are parties to Conventions as amended once, twice or even more. This disadvantage seems, nevertheless, to be acceptable in view of the considerable delay which is caused by the requirement that all member States have to ratify the amendments before they become effective. Therefore, formula (c) is comparatively preferable to the Paris formula, even if it has the tendency to multiply conventions as stated above.

2) The case of Uruguay showed that amendments to the constitution of ICAN should have had binding effect on all members. The uniform application of the amended constitution of ICAN -- i.e. all provisions of the Paris Convention which governed ICAN's activities -- was a necessary requirement

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59 However, ICAN seems to have accepted formula(a) by 1935 in respect of new members; see p. 40 supra.

60 See, for instance, Article 94 para. 2 of the Chic. Conv.

61 See, for instance, Article 94 para. 1 of the Chic. Conv.

for such an international organization. Two different solutions appear possible: The formula as discussed above under 1(a) offers the most effective device to preserve uniformity. But considering the reluctance of States to confer legislative powers on international organizations, its implementation might be difficult to achieve[62]. Therefore the more moderate solution as discussed above under 1(b) would seem preferable.

c) The Adoption of International Regulations by ICAN

I) The Provisions for the Adoption of Regulations

The Aeronautical Commission of the Peace Conference of 1919 was quite aware of the technical problems with which future civil aviation would be faced. While Word War 1 had brought a tremendous progress in aeronautical technology, the experience in this field was largely limited to fighters and reconnaissance planes; in relation to transport aircraft, no such experience was acquired. The transportation of passengers and cargo by civil aircraft was yet an unexplored field. It is, therefore,

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[62] However, this formula is applied by IAEA, and WHO; see p13supra.

quite natural that the questions of airworthiness[1] of flight instrumentalities[2] were considered of overriding importance. The question of facilitation of international aviation was also an important matter that had to be considered, if future civil aviation was to link different countries and continents. In view of this need for international regulation of safety and facilitation, the Aeronautical Conference elaborated a uniform set of international regulations which were embodied in eight Annexes dealing with these questions.

1) The Annexes to the Convention

The Annexes A to G contained the technical regulations: Annex A regulated the display of nationality and registration marks; Annex B the certificates of airworthiness; Annex C the log books; Annex D lights and signals, and rules for air traffic; Annex E the certificates and licences for pilots; Annex F air navigation maps; and Annex G meteorological matters. An additional Annex, Annex H, contained regulations for customs formalities. The regulations for civil aviation were thus elaborated internationally prior

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1 Cooper, "Air Transport and World Organizations", 55 Yale L. J. 1205 (1946).

2 Which was of special importance for the European air navigation, because the European States did not establish fixed air routes as it was done in the United States and the other members to the Habana Convention. See Warner, "The International Convention for Air Navigation and the Pan-American Convention for Air Navigation: A Comparative and Critical Analysis", 3 Air L. Rev. 300 (1932).

to that of national or local legislation[3].

Although separated from the Convention, the Annexes formed an integral part of the Convention:

> "The provisions of the present Convention are completed by the Annexes A to H which, subject to Article 34(c), shall have the same effect and shall come into force at the same time as the Convention itself"[4].

2) The adoption procedure

In view of the necessity of up-to-date regulations it was felt imperative to have a procedure which would permit rapid adjustment of the technical Annexes to changes in aviation technology. Therefore the provisions for the amendment of the technical Annexes had to be separated from the provisions concerning the amendment of the Articles of the Convention. Consequently the technical Annexes were made subject to a special amending procedure which avoided the formalities and complexities typical of multilateral instruments.

The Aeronautical Conference of 1919 did not follow the French proposal

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3. Malézieux, "Essai sur les Caractères et sur la Nature du Droit aérien", 2 Rev. Franç. Dr. Aér. 38 (1948). This fact seemed "curious" to some writers with Common Law tradition. See Kuhn, "International Aerial Navigation and the Peace Conference", 14 Am. J. Int'l L. 375 (1930).

4 Art. 39 of the Paris Convention. Hudson, vol. 1, at 374.

which envisaged neither a permanent Commission nor any procedure for the amendment for the proposed Convention[5], but instead accepted the Anglo-American concept of a permanent Commission with certain regulatory powers. The British draft provided for the establishment of a Commission which was to have the power "to modify, amend or add to any detailed provisions of a technical character contained in Articles 6 to 9[6] inclusive of the present Convention or in the Annexes thereto". These alterations "must receive the unanimous assent of the representatives of the contracting States constituting the ICAN before they are adopted as alterations to the present Convention". They "shall take effect three months" after the date of their notification to the contracting States, and "shall be treated as though they formed part of the present Convention"[7]. This British proposal had two main characteristics. While retaining the consent principle for the adoption of the alterations to the technical regulations, it expressly eliminated the need for ratification or any other further acceptance by the member States.

Originally the American draft, like the British, advocated the consent principle[8], but during the discussions at the Aeronautical Conference General

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5 Art. 13 of the French draft: "Technical conferences, convened at the request of not less than two-thirds of the contracting States, will proceed to the consideration of modifications to the rules appended to this convention". See File No. 1395 (C-3).

6 Relating to certificates, licences, flight regulations and the log book.

7 Art. 23 of the revised British draft. File No. 1395(C-1).

8 Art. 26 of the US draft: "To this convention there are attached regulations which have the same force and effect as the convention itself and which will be put in force at the same time. The provisions...of the attached regulations may be modified at any time after agreement between the contracting States". File No. 1395 (C-1).

Patrick, one of the representatives of the United States, departed from this proposal. He opposed the principle of unanimity and suggested the majority rule to be inserted in the draft[9]. Such a solution, it was felt, would secure greater effectiveness in the work of the proposed Commission. The Conference followed General Patrick's proposals and inserted the majority rule in the draft. At the same time the British proposal to eliminate ratification or any other form of acceptance of technical amendments was confirmed. Consequently Annexes A to G[10] were made subject to the following amending procedure:

> "The duties of the Commission shall be...to amend the provisions of the Annexes A to G.
> Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three-fourths of the total possible votes which could be cast if all the States were represented and shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States"[11].

M. d'Aubigny, one of the French delegates, rightly stated that this procedure for the amendment of the technical Annexes was "une grosse innovation en matière de législation internationale"[12]. This progressive solution

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9 See Documentation, at 60. See also the discussions in the Legal Sub-Cttee of the Aeronautical Commission; id. at 336 ss.

10 Annex H (Customs) excluded. See also p. infra.

11 Art. 34 of the Paris Convention. Hudson, vol. 1, at 371/372.

12 Documentation, at 336. Apparently a believer in the doctrine of predominant State sovereignty, he called the legislative method "dangerous"; id. at 581.

in applying the majority rule and the legislative method was possible because of the composition of the drafting Aeronautical Commission which consisted mostly of technical experts rather than professional diplomats[13], and was due to the readiness of the Supreme Council of the Peace Conference to accept its proposals. One could say that the aeronautical organs of the Peace Conference were looking into the future when they conferred legislative powers on the Air Navigation Commission.[14]

3) Alterations in the original provisions

It may be recalled that by virture of provisions for weighted voting Great Britain, France, Italy, Japan and the United States[15] held an absolute majority in the Commission. This preponderance of the five Great Powers was -- at least at this early state of ICAN's existence -- unavoidable, as otherwise it would have been impossible to entrust the Commission with its important legislative powers[16]. Under no circumstances would the five Big Powers have surrendered their national regulation of technical aviation matters to an international legislature where small countries with a possibly under-developed aviation could have overruled them. Even M. de Bustamante,

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13 Tombs, at 42; Schenkman, at 38.

14 Wilcox, at 304; See also Mateesco-Matte, at 153.

15 Since the United States never became a party to the Convention, this provision was always a lex imperfecta.

16 Latey, "The Law of the Air", 7 Transactions Grot. Soc'y 76 (1922); Mateesco-Matte, at 144.

who was strongly opposed to the privileged position of the Great Powers, seems to have given some consideration to this argument[17].

However, the criticism of the vote-counting provisions with respect to the amendment of the Convention was justified as has been shown earlier.[18] In this field, the privileged position of the Great Powers was completely abolished by the Protocol of 1923. The requirement of unanimous ratification of amendments to the Convention was considered as sufficient safeguard.

The Protocol of 1923 also abolished the weighted voting with respect to the procedure for the preparation of technical regulations, though it failed to establish equality for all members of ICAN. Moreover, the required three-fourths majority for the adoption of amendments to the technical Annexes had to include the votes of "at least three of the five following States: the United States of America, the British Empire, France, Italy, Japan"[19].

This qualified veto-privilege still safeguarded the preponderant position of the Great Powers, whose air navigation was most advanced[20].

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17 But in overlooking the legislative functions of ICAN -- "cette Commission ...n'a pour objet que de proposer des règles à soumettre a l'acceptation de chacun des parlaments nationaux" -- he did not draw the same conclusions. See Roper, at 174.

18 See. p26 supra.

19 Hudson, vol. 1, at 382. With respect to the United States, see note 15 supra.

20 Doering rightly stated that the legislative power of ICAN "devait trouver son correctif dans cette règle que les décisions de la Commission ne seront exécutoires qu'autant qu'elles auront obtenu...le consentement des Etats dont la navigation aérienne est suffisament développée". See "La Convention de Paris et les Etats", 12 Rev. Jur. Int'l Loc. Aér. 396/397 (1928).

The wording of Article 34 "three fourths of the total possible votes which could be cast if all the States were represented" had the effect of counting absent States as opposing States. With the growth of membership a new difficulty emerged: since small countries did not maintain permanent delegates to the Commission as the greater countries did, it became more and more difficult to bring the required three-quarters of the total possible votes together[21]. Riches shows in his study of the procedures of ICAN that in six of the first twenty-three Sessions, regulations could be adopted only by absolute unanimity of those present. In three other Sessions the vote of a single Great Power was sufficient to prevent an amendment from being carried. At its best the rule in operation merely gave the Commission power to amend the Annexes over the negative votes of a very few delegations[22]. Therefore, in fact, the required majority was made greater than theoretically provided for by Article 34.

These experiences were taken into account when in 1929 the final alterations were made to the amending procedures of the Annexes[23]. The new provisions required a majority of three-fourths of the votes of those present. The Protocol of 1929 established also complete equality in voting for all States which were parties to the Convention:

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21 Roper, at 176. Warner, op. cit. supra note 2, at 289. See also ICAN's considerations concerning the change of the rules of procedure in order to avoid such difficulty: 19 Off. Bull. 72 (1931).

22 Riches, at 93/95. His study is the only survey dealing with these constitutional aspects.

23 ICAN Minutes of the 16th Session, 81-85 (1929).

> "Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three-fourths of the total votes of the States represented at the Session and two-thirds of the total possible votes which could be cast if all the States were represented".[24]

The qualification of the three-quarters majority which had hence to include the vote of at least two-thirds of ICAN's members (instead of the former three-fourths of those present), was due to the reasonable consideration that ICAN's legislation should be supported by such a majority and not only by any fortuitous three-fourths majority present at the time of adoption[25].

The remunciation by the Great Powers of their privileged position may be explained as an indication of their increasing confidence in ICAN's legislative performance. In the words of Roper, "on peut mesurer à cette réduction l'importance du sacrifice consenti par les cinq grands Etats primitivement privilégiés et leur confiance dans la sagesse, déjà éprouvée, de la Commission"[26]. The Great Powers thereby also satisfied the demands of small States which had always insisted in equality in representation and voting.

4) Binding force without ratification

Having discussed ICAN's voting provisions in reference to the majority

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[24] Hudson, vol. 1, at 387/388.

[25] ICAN Minutes of the 16th Session, at 81-85.

[26] Roper, at 177.

rule, we now turn to examination of the binding force of its regulations. The drafters of the Paris Convention, it may bear emphasis, conceived ICAN as an international legislative organ for technical matters. The provisions of the Convention clearly demonstrate that the technical regulations, as laid down in the Annexes as amended by ICAN, were binding upon all member States. Thus the parties to the Convention were obliged under the treaty to perform their flights "in accordance with Annex..." (Art. 10),"in accordance with the conditions laid down in Annex..." (Art. 11, 12), "in accordance with the regulations established by Annex..." (Art. 13), and "in accordance with the provisions of Annex..." (Art. 6, Art. 19)[27]. In addition, ICAN's members had to adopt measures to ensure that their aircraft "shall comply with the regulations contained in Annex D"[28].

Contrary to the procedure adopted for amending the Articles of the Convention, the ratification of amendments of the technical Annexes was not required[29].

> "Such modification...shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States"[30].

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[27] See also Articles 4 and 15 of the Paris Convention.

[28] Annex D contained the "Rules for Air Traffic".

[29] An inconsistant statement by Meyer is clearly a mistake due to the inadvertance of the printer. See Meyer, at 52.

[30] Art. 34 of the Paris Convention. Hudson, vol. 1, at 371/372.

This principle of automatic effectiveness is mentioned again in another provision of the same Article:

> "All such modifications of the Articles of the Convention (but not of the provisions of the Annexes[31]) must be formally adopted by the contracting States before they become effective" (Art. 34).

5) Implementation into national law

The words "become effective" do not necessarily indicate that these technical regulations of ICAN would have had only international binding effect -- imposing on all member States the obligation to implement them[32]. Nor do these words necessarily mean that ICAN regulations had an additional municipal legal effect[33]. The question whether in a particular State such amendments or regulations automatically applied must of course be ascertained by an examination both of the constitution and the laws of the States concerned[34].

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31 Underlined by the author.

32 Contra Scialoja as quoted by Malintoppi, "La Fonction normative de l'OACI", 13 Rev. Gén. Air. 1050 (1950).

33 Contra St. Alary, at 28; Baldoni and Cacopardo as quoted by Malintoppi, op. cit. at 1051/52. However, another statement by Cacopardo does not commit him concerning this problem, when he wrote that ICAN's regulations were "automatiquement obligatoires pour les Etats contractants". See Cacopardo, "Principes du Droit International Public applicable aux Transports Aériens", Etudes sur la Navigation Aérienne Internationale, SDN, Organisation des Communications et du Transit, 161 (1930).

34 In accordance with Malintoppi, op. cit. at 1052. See also Chauveau, Droit Aérien, 334 (1951); Rosenmoeller, at 128.

With regard to States whose constitution permitted giving immediate effect to international legislation, the only requirement was an official announcement of ICAN's regulations to receive internal force[35]. The Italian Air Code of 1923, for instance, contained in Article 50 a provision which gave automatic municipal force to ICAN regulations:

> "All provisions of the Convention and its Annexes along with their amendments, even if not reproduced in the present Code, are executory, and they form part of the law of the country"[36].

Consequently the regulations of ICAN required no legislative action but mere official announcement, since the Air Navigation Act a priori attributed a municipal legal quality to them[37].

With regard to States whose constitution did not permit such an automatic municipal effect of international legislation, the regulations of ICAN required an addition to give them internal force. This was the case in most of the countries whose Air Navigation Act delegated legislative power to the executive, so that ICAN regulations would be implemented by Orders in Council or statutory orders issued by the executive[38].

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35 According to Prof. Pépin, there were only three such member States of ICAN (personal interview).

36 Free translation by the author.

37 By means of anticipated adoption; see p.6 supra.

38 So e.g. in Switzerland. See Guldimann, "Internationales Luftrecht 1950/51", 9 Annuaire Suisse 301 (1952).

II) Flexible Practice of ICAN

1) Need to avoid the rigid procedure

It is an undisputed fact that the binding effect of ICAN regulations was a great impetus towards the goal of securing uniformity in aviation law. Aviation by its very nature reguires international and uniform regulation. ICAN's legislative activities in the field of safety and facilitation in air navigation achieved this objective. On the other hand, the binding force of the regulations perhaps could have prevented ICAN from adopting new standards and practices, whenever obstacles to their implementation or application were anticipated. ICAN found a very practicable answer to this problem with which it was faced as a consequence of the rigid formula of Article 34. In such cases either the regulation was coupled with a departure clause, or the desirable regulation was issued in the form of a recommendation.

2) Departure clauses

The following examples may illustrate the device which permitted departures from established regulations. Annex D, containing both the "Rules as to Lights and Signals" and the important "Rules for Air Traffic"[39]

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[39] "Rules of the Air" in ICAO terminology.

provided in its Section "Lights and visual signals to be displayed by aircraft..." that certain standards had to be complied with, "except in so far as the authorities of any State...have fixed and duly published" other regulations[40]. In the Section dealing with "Special rules for air traffic on and in the vicinity of aerodromes open to public use", some standards were "subject to any special local regulation which may exist"[41]. The "Miscellaneous Provisions" contained a very general clause for departures from ICAN regulations:

> "Nothing in the provisions of the present Annex shall be considered as preventing a State, even by way of derogation from the rules of the said Annex, from establishing special regulations relative to the navigation of aircraft within its territory, in the vicinity of aerodromes or in other places, provided that such regulations are duly published and communicated to the International Commission for Air Navigation and that they are justified in each case by exceptional circumstances"[42].

Another general clause in the same Annex provided that nothing "shall interfere with the operation of any special rules made by any State"[43]. The governments concerned only had to give the necessary notice of their departures. In the Chapter dealing with "Regulations for the issue and renewal of licences..." in Annex E, member States were allowed to depart from the standards, but only in respect to national air navigation:

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40 Section I, subs. 1. For the complete text of the Annexes, see Convention on the Regulation of Aerial Navigation, published by the U.S. Gov. Printing Office (1944).

41 Section V, B subs. 39.

42 Section VII subs. 53.

43 Section 1, A subs. 3.

> "Nevertheless, each contracting State will be entitled to issue or renew licences subject to such less stringent conditions as it may deem adequate to ensure the safety of air navigation. The said licences will not, however, be valid for flight over the territory or another contracting State"[44].

In the Chapter dealing with "Composition of operating crew" in the same Annex, the States were again entitled to depart from ICAN's standards: "each State shall be entitled, in respect of national navigation, to make conditions less stringent than those of these Sections"[45].

3) Recommendations

As already pointed out, the Annexes sometimes contained provisions which gave full freedom of action to the States. Under Annex F concerning "Aeronautical Maps and Ground Signs" the States had a free choice in publishing their national aeronautical maps: "No rules are laid down for the publication of national aeronautical maps which will be compiled by the different countries on the scales and in the form which they consider most suitable"[46]. The States were also free in the choice of their own system of certain ground signs: "Each State may adopt the system of aeronautical ground signs which it deems most appropriate"[47].

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44 Chapter 1, Section 1 para. 1.

45 Chapter 111, Section 1 para. 32.

46 Section 1 B subs. 5.

47 Section 11 subs. 1.

Some other provisions of interest in this connection are to be found in a publication of ICAN where it is stated that "the authorities of the State concerned...may grant derogations from...the rules in respect of long-range aeroplanes"[48]. In an introductory note by the Secretary General of ICAN to this publication, foreseeable difficulties in the application of certain regulations were taken into account: ICAN "invited the contracting States to notify to it any difficulties they may meet with in the application of the new provisions of these regulations, in order that the Commission may have such difficulties studied by its competent Sub-Commissions"[49]. As a consequence of this practice of inviting States to report their difficulties, the Commission had sometimes to revise its regulations. This was the case when the regulations had "given rise to objection on the part of certain experts". ICAN subsequently declared those regulations as not to be "considered as definitive"[50].

These illustrations of the flexibility of ICAN in its legislative function warrant Wilcox' observation that "while some of the resolutions ...are in the form of recommendations to the contracting governments, many of them are legal precepts prescribing what shall and what shall not be done"[51].

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[48] Regulations concerning the Minimum Requirements for Airworthiness Certificates, 7 (1938).

[49] Id. in the introductory note.

[50] Id. at 14.

[51] Wilcox, at 304.

III) Problems in Interpretation

1) Adoption of new regulations

The Paris Convention conferred on the Commission the power to amend the provisions of the Annexes A-G (Art. 34). But no provision can be found dealing with the question whether ICAN had power to adopt new rules for the Annexes. Since this involved the legislative power of ICAN, it had to be handled with caution.

The Commission took, on one hand, a pragmatic view. At its 15th Session it decided the following:

> "The Commission considers that the terms of Article 34 of the Convention...give to the Commission the power not only to modify the original text of Annexes A to G, but also to complete it, taking into account the progress made in aeronautical technics and the development of air navigation"[52].

On the other hand, ICAN gave a restrictive interpretation of the provision concerned:

> "The Commission being required, however, in this work, which forms one of its most important duties, to remain always within the general framework of the Convention"[53].

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[52] 15 Off. Bull. 37 (1929).

[53] Ibid.

In consequence of which ICAN adopted new regulations within the framework of the existing Annexes A to G. Their validity was never in question.

2) Adoption of a new Annex

But when the Commission at its 23rd Session decided to introduce a new Annex, the situation was quite different. It was the understanding of ICAN that this Annex could only come into force after the amendment of the Convention itself. Therefore the Protocol of 1935 provided for the insertion of some additional provisions in the Convention. It prescribed inter alia that the contracting States shall co-operate concerning "the use of radio-electritity in air navigation, the establishment of the necessary radio-electric stations, and the observance of regulations concerning international radio-electric services, referred to in Annex 1"[54]. Article 39, also, was amended by including Annex 1. In addition, the Commission was empowered to amend the regulations of the new Annex (Art. 34).

The Protocol of 1935 together with the new Annex 1 never came into force. However, the planned regulations concerning radio-electric installations were submitted to the States in the form of recommendations. They were subsequently implemented by parallel national legislation.

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[54] Hudson, vol. 7, at 79/80.

IV) Annex H (Customs)

1) The special status of Annex H

A survey of the regulatory powers of ICAN would not be complete without reference to the special nature of Annex H. This Annex dealt exclusively with regulations relating to customs formalities and its purpose was the facilitation of international air navigation.

The comment that "aeronauts and customs-house officers are adversaries by nature[55] may well have been in the minds of the delegates at the Aeronautical Conference of 1919 when they drafted this Annex. Since matters relating to customs have always been considered to be within the domain of national regulation, Annex H was excluded from the legislative competence of ICAN, which was confined to the technical Annexes A to G. The special legal status of Annex H was expressed in Article 36 of the Paris Convention as follows:

> "General provisions relative to customs in connection with international air navigation are the subject of a special agreement contained in Annex H to the present Convention"[56].

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55 Wurth, "Aéronautique et Administration douanière", 3 Rev. Jur. Int'l Loc. Aér. 65 (1921).

56 Hudson, vol. 1, at 373. In view of these provisions it seems rather odd to read a statement by Lycklama A. Nijeholt at the 29th Conference of the Int'l Law Ass'n, according to which the ICAN was "absolute master" in customs matters ("Comments on the Aerial Navigation Convention 1919", I.L.A.Rep., 29th Conf., at 419/420 and 422 (1920)). The same objection applies to Garner, "La Réglementation Internationale de la Navigation Aérienne", 4 Rev. Dr. Int'l Lég. Comp. 390 and 647(1923).

2) The amendment of Annex H

Apart from Article 36 of the Paris Convention, there is no specific provision in the Convention dealing with Annex H. In particular, there is no reference at all to the amendment of this Annex. Riches is of the opinion that changes in the draft by various Sub-Commissions and the Aeronautical Commission itself may explain why provisions for the amendment had been "forgotten"[57].

ICAN considered this questions at its very first Session:

> "Annex H to the Air Convention (customs) is regarded as a special agreement according to the terms of Article 36 of the Convention. Further, it does not figure in the list of Annexes (Art. 34c) which the Commission has the right to amend. Accordingly, any alteration to this Annex, whether proposed by the International Commission for Air Navigation or by a State, can only by made by means of a convention, necessitating the agreement of all the contracting States"[58].

At a later Session, it was decided to adopt the procedure for the amendment of the Convention to the amendment of Annex H. This was in accordance with the above resolution:[59]

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[57] Riches, at 92.

[58] 1 Off. Bull. 21 (1922).

[59] Riches, however, notes a widening of a "narrow view". Riches, at 92.

> "The Commission has decided; to propose, in accordance with the provisions of Article 34, para. 8 of the Convention and Resolution No. 17 of the Commission (O.B.1, 27), the acceptance of this modification by the contracting States in the form of a special Protocol adopted by the Commission..."[60].

Subsequently a "Protocol concerning Amendments to Annex H of the Convention..." was adopted. This Protocol of June 1935 was open for signature and ratification separately from the other Protocol of June 1935 which contained amendments to the Articles of the Convention.

Foreseeing the delay caused by the lengthy process of ratification, the Commission advised the contracting States to implement the changes by national legislation or by special agreement with other States, independently of the stage of ratification of the Protocol[61]. Such a procedure which had been suggested as early as 1931 by the Special Committee for Customs Regulation[62], was quite necessary in order to render the proposed changes effective, because the Protocols of 1935 never entered into force.

V) World-wide Application of ICAN Regulations

ICAN's success in bringing uniformity to air navigation through

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[60] 23 Off. Bull. 82 (1935).

[61] 5 Rev. Aéro. Int'l 213 (1935) and 25 Off. Bull. 102 (1937).

[62] 1 Rev. Aéro. Int'l 153/154 (1931).

international legislation is particularly impressive if one takes into account the fact that certain States with highly developed air traffic (e.g. Germany, China, the Soviet Union, the United States) remained outside the Paris Convention. Even though it failed to attain its goal of universal membership, nevertheless, ICAN's influence extended throughout the world. By parallel legislation non-member States implemented to a remarkable extent the rules and regulations of ICAN. Hence it is not surprising that many national Air Navigation Acts followed the principles of the Paris Convention and the regulations as elaborated by ICAN[63].

Apart from certain distinct concepts, the American States also followed in their Habana Convention and in their national legislation the principles of the Paris Convention and its technical Annexes[64]. In this connection the delegate of Brazil to the extraordinary Conference on Commercial Aviation, held in Lima in June 1937, rightly stated that "les Annexes de la Convention de Paris correspondent à l'orientation de la grande majorité des Etats americains"[65]. Hotchkiss confirmed this view when he stated that the Paris rules were "repeated in the Habana Convention"[66]. Concerning the United States Hotchkiss stated further that the pattern of the Civil Aeronautics Act of 1938 and its regulations issued thereunder (the Civil Air Regulations) followed closely that of

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63 Ambrosini, "L'Universalité du Droit Aeronautique et ses Exigences sous le Rapport de la Législation interne", 3 Rev. Aéro. Int'l 187 (1933); Hudson, "Aviation and International Law", 24 Am. J. Int'l L. 232 (1930); and 1 Air L. Rev. 188 (1930); Schaerer, "L'Unification internationale du Droit aérien", Cour d'Introduction au Droit Aérien, 27 (1959); Tombs at 52; Wegerdt, "La Réglementation internationale de la Navigation aérienne", 3 Rev. Aéro. Int'l 52 (1933). With reference to Germany, See Grossmann, "Present Status of German aeronautical Law", 9 Air L. Rev. 143 (1938);

the Paris Convention and its Annexes[67].

Similarly, the bilateral agreements throughout the world followed in general the pattern of the Paris Convention[68]. The same could be said with respect to the agreements reached at the "International Aeronautical Conferences" which were held each year in Europe[69]. These Conferences were attended by governmental aviation officials from both member and non-member States of ICAN[70]. According to a statement of the Secretary General of ICAN, the resolutions of these conferences have always been in conformity with the Paris rules and regulations[71].

The close co-operation between ICAN and two other regional Conferences,

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however it should be noted that Germany was under a special obligation in this regard which resulted from the Peace Treaty of 1919: See Cooper, The Right to Fly, 74 (1947); Hazeltine, "International Air Law in Time of Peace", I.L.A. Rep., 29th Conf., at 398 (1920).

64 Tricaud, at 13; contra Litvine, at 33.

65 Quoted from Pépin, "La Commission Américaine Permanente d'Aéronatique", 7 Rev. Aéro. Int'l 370 (1937); see also Tricaud, at 110.

66 Hotchkiss, Treatise on Aviation Law, 9 (1938).

67 Id. at 61/62; see also at 9.

68 Cacopardo, op. cit. supra note 33, at 193/197; Roper, at 69; Tricaud, at 11.

69 Ide, International Aeronautic Organization and the Control of Air Navigation, 10 (1935); Tombs, at 143/144.

70 The United Kingdom, France, Belgium, the Netherlands, Switzerland; later also Czechoslovakia and Germany; and then also Austria and Denmark.

71 13 Off. Bull. 38 (1927).

namely the "Mediterranean Aeronautical Conference"[72] and the "Aeronautical Conferences of the Baltic and Balkan States"[73], promoted standardization and unification of air law also in these regions.

VI) Conclusions

1) The success of ICAN in its legislative work

The foregoing survey of ICAN's practices in the adoption of technical regulations demonstrates that the flexibility in the work of this international organization met all foreseeable difficulties which may have faced some governments in regard to the implementation of certain regulations. Thus, the possible disadvantages of the rigidity of the binding force of the regulations were well out-weighed.

If some States did not become members of ICAN, it may have been due to the obligations that arose from the Convention rather than from the Annexes. In this connection Prof. Pépin mentions Brazil which was a signatory to the Paris Convention[74]. She had shown a great interest in joining ICAN, but was faced with her vast regions devoid of any sufficient means of communications, rescue and police services. The same reasons

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[72] France, Greece, Italy and Spain. See Ide, op. cit., at 11; Tombs, at 144/145.

[73] Bulgaria, Estonia, Finland, Greece, Latvia, Poland, Rumania. See Ide, op. cit., at 11; Roper, "The Organization and Program of the ICAN", 14 Am. J. Int'l L. 370 (1930); Tombs, at 145.

[74] Pépin, op. cit. supra note 65, at 370.

may have caused China's abstention from ICAN. Apart from political considerations, the above reasons may also have influenced Russia's decision to stay outside the Paris Convention, as well as today with regard to the Chicago Convention[75].

The achievements of ICAN in its regulatory role were quite unique. The phenomenon of international legislation in technical matters marked an important phase in the institutionalized co-operation between sovereign States, and a model for supra-national integration. It seems rather doubtful, however, as Roper points out, whether the Commission would have received the same powers, had the Convention been drafted at a later stage[76]. The authority accorded ICAN must be attributed to the spirit prevailing at the conclusion of World War I, when the élan of the drafters and the optimism of the ambassadors at the Peace Conference of 1919 had created a high degree of mutual confidence among the former allied and associated Powers. Fortunately, the performance of ICAN, which Tombs calls "the most impressive and the most hopeful single development in international air organization"[77], lived up to the expectations of its founders. In the ultimate analysis, therefore, one can say that the principal value of the Paris Convention lay in its Annexes and in the legislative work of its Commission.

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[75] But see the Russian textbook on International Law, 351 (2nd ed., 1957).

[76] Roper, at 181.

[77] Tombs, at 201.

2) The policy of the United States towards ICAN

The refusal of the United States to ratify the Paris Convention and the subsequent establishment of a regional treaty, the Pan-American Convention of Habana, 1928, merit some special consideration in this context[78]. Constitutional difficulties are usually cited as the main obstacle to the ratification of the Paris Convention by the United States. If this appraisal is correct, the Paris procedures for the elaboration of technical regulations must be found quite deficient. The Paris Convention should not have created any constitutional difficulty as its objective was universality. Therefore, the question has to be analysed whether the character of ICAN as an international legislature did create any constitutional difficulty which prevented the United States from joining it.

First, it should be remembered that it was the American delegation to the Aeronautical Conference of 1919 which proposed the insertion of the majority rule in the Convention. At the same time this delegation agreed with the British proposal that technical regulations should not require ratification by the member States.

Second, one should note that neither the American government nor the Senate objected to the regulatory powers of ICAN as provided for in

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78 Already in 1923 Pittard stated that "l'abstention des Etats-Unis d'Amérique...n'ont pas manqué de renforcer un doute bien compréhensible sur la vitalité de la Convention". See "L'Adhésion des Neutres à la Convention Internationale de la Navigation Aérienne du 13 Oct. 1919", 7 Rev. Jur. Int'l Loc. Aér. 5 (1923).

Article 34 of the Convention. The US reservations were only directed to Annex H[79] and to the relationship of ICAN with the League of Nations[80]; other reservations had become obsolete after the amendment of the Convention.

Third, at the extra-ordinary Session for the revision of the Convention in 1929, the US delegation only objected to an extension of ICAN's legislative powers but not to the existing legislative powers. This is manifestly clear from the statement made by the US delegation at this Session:

> "If it is designed to give the Commission further authority to promulgate rules and regulations of a wide scope which would be binding on the contracting States, it may be said that this Government could not well agree thereto"[81].

Fourth, it should also be noted that the only criticism of the US government in this context makes no reference to any legal implications. Thus, an advisory opinion of the Department of Commerce states:

> "It may be doubtful whether some of ICAN regulations could be suitable to conditions existing in this continent"[82].

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79 2 Off. Bull. 32 (1922) and 16 Off. Bull. 36 (1929). See also Warner, "The International Convention for Air Navigation and the Pan-American Convention for Air Navigation: A Comperative and Critical Analysis", 3 Air L. Rev. 263 and 294 (1932).

80 2 Off. Bull. 32 (1922) and 16 Off. Bull. 36 (1929). See also Warner, op. cit. at 290. See further Cassidy, "Does the Havana Aerial Convention fulfil a Need?", 2 Air L. Rev. 42/43 (1931).

81 Foreign Relations of the United States, 505 (vol. 1, 1929).

82 Foreign Relations of the United States, 145 (vol. 1, 1926).

The conclusion, therefore, seems obvious that no serious constitutional difficulties existed on the part of the United States. There may have been, indeed, a certain dislike of international legislation, but this was based on political and not on legal grounds, It is contended, therefore, that political reasons were exclusively responsible for the abstention of the United States. This US attitude was due to the fact that a well-organized group of opposing Western politicians was able to influence the public opinion and the majority in the Senate. According to these isolationist politicians, the Paris Convention had to be considered "comme l'enfant de la Société des Nations, conçue par les pratiques macchiavéliques des unionistes internationaux de l'Europe"[83].

The view that political and not constitutional factors had caused the abstention of the United States, is shared by a number of eminent writers[84]. However, a study of the legal literature reveals that a great number of commentators hold that the opposite is true. This is a rather surprising allegation considering the known facts which do not support such conclusions. While most of the writers mention rather vaguely

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[83] Senator MacCornick as quoted by Cangardel, Les Transports Aériens aux Etats-Unis, note 9 at 117 (1937).

[84] Cassidy, op. cit. supra note 80, at 42; Doering, "Vorschlaege fuer ein Weltluftverkehrsabkommen", I.L.A. Rep., 36th Conf., at 440 (1931); Hackworth, 4 Digest of International Law, 362-365 (1942); Lacombe & Saporta, Les Lois de l'Air, 18 (1953); La Pradelle, "La Conférence de Chicago", 9 Rev. Gén. Air 111 (1946); Litvine, at 33; Mance, Frontiers, Peace Treaties and International Organization, 99 (1946); Mateesco-Matte, at 169; Schenkmann, at 47.

"constitutional difficulties" without giving any explanation thereto[85], only Shawcross & Beaumont explain their view. They state that:

> "revision of the Annexes of the Paris Convention by the ICAN involved delegated legislation, which created a constitutional difficulty in the United States of America, since treaties which are self-executory, and revisions of such treaties, require the approval of the President and a two-thirds majority of the Senate"[86].

However, their reasoning does not seem convincing. First, one should note that in the United States there is in fact a delegation of legislative powers, although this practice is not identified as a delegation. The normative function of the executive is called "implementation", i.e. application or execution, within the framework of existing law. The regulations issued in such a manner correspond to the British "Orders in Council" and to the continental "statutory orders", and they are considered as administrative acts.[87] This doctrine is necessary to bring the division of powers into line with the necessities of effective administration. Therefore, the principle that the Congress cannot delegate legislative power is a legal fiction. Second, it may be recalled that the requirement of ratification can be fulfilled by anticipated ratification of the basic treaty[88]. In this case further changes do

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85 Chauveau, Droit Aérien, 31 (1951); but see also at 334; Mankiewicz, "L'Adoption des Annexes à la Convention de Chicago par le Conseil de l'OACI", Festschrift Ripp; Pollaczek, "The United Nations and Specialized Agencies", 40 Am. J. Int'l L. 605 (1946); Warner, Hearings, at 258; and "La Conférence de Chicago", 9 Rev. Gén. Air 173/174 (1946); but see also op. cit. supra note 79, at 287 and 290.

86 Shawcross & Beaumont, note (a) at 197.

87 See, e.g., Gibson, "International Commission for Air Navigation: Structure and Functions", 5 Temp. L.Q. note 31a at 571 (1931).

88 See p. 6 supra.

not require any ad hoc ratification. However, ICAN's technical regulations did not require ratification. Third, one should further note that ICAN's technical regulations were not necessarily self-executory. This question is determined in each case according to the municipal law of the country concerned[89].

The only apparent constitutional ground which could have justified the United States for not joining ICAN, would have been delegation of police powers to ICAN. But there was, of course, no such delegation involved[90]. One can say, in conclusion, that the Paris Convention neither "played havoc with excellent juristic theories", as one American writer stated[91], nor did it create insuperable constitutional difficulties that should prevent any State from joining it. The abstention of the United States from the Paris Convention was caused, as was shown, exclusively by political reasons.

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89 See p.16 supra.

90 Bouvé, "Regulation of International Air Navigation under the Paris Convention", 6 J. Air L. 314/315 (1935). With regard to the constitutionality of the delegation of certain legislative, administrative and judicial powers to international organizations, see Snow, "International Legislation and Administration," 7 Acad. Pol. Sci. Proc. 244 (1918); see also Corwin, The Constitution and World Organization, 5/6 (1944).

91 Lee, "The International Flying Convention and the Freedom of the Air", 33 Harv. L. Rev. 38 (1919).

PART TWO

REGULATORY FUNCTIONS OF ICAO

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A) The Chicago Convention and ICAO

Having examined ICAN, the world-wide international organization of pre-war civil aviation, we may now proceed to examine the events which led to the establishment of a new international organ for the regulation of air navigation.

1) The situation after World War II

The universal Paris Convention

As the Second World War neared its end, ICAN was prepared to resume its normal activities. As a matter of fact, it had never completely ceased to function, despite the war and a four year occupation of France by the German troops[1]. Thirty-three States continued to be parties to the Paris Convention: twenty-two European States, four States from Latin-America, Canada from the North-American continent, three States from Asia, the Union of South Africa from the African continent, Australia and New Zealand[2].

The geographical scope of the Paris Convention was, however, widened

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1 Roper, "La Convention Internationale du 13 Oct. 1919: Peut-elle permettre le plein Développement de la Navigation Aérienne de demain?", Exposé, 10(1944).

2 Argentina, Australia, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Estonia, Finland, France, Great Britain and Northern Ireland, Greece, India, Iraq, Ireland, Italy, Japan, Latvia, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Rumania, Spain, Sweden, Switzerland(including Liechtenstein), Thailand, Union of South Africa, Uruguay, Yugoslavia.

as the colonies of the European countries formed part of the membership of the Paris Convention systems. Accordingly the Paris Convention governed, for instance, the entire air navigation over the African continent. The alleged character of the Paris Convention as an European affair[3] becomes meaningless[4] in the light of its actual world-wide nature.

The Regional Habana Convention

In the American Hemisphere, the Pan-American Convention of Habana was still in existence. This Convention[5] had introduced regionalism into the field of international aviation administration, possibly in order to preserve a US hegemony on the continent[6]. By a curious coincidence the preliminary draft of the Convention predicated on the assumption that the aviation problems of the Western and of the Eastern Hemispheres should be viewed as entirely different, was completed on the very day on which Lindbergh left Roosevelt Field on the flight that was the first to link the American and European continents by a non-stop passage of heavier-than-air craft[7].

As early as 1930, Roper had foreseen the failure of such a regional concept. He rightly pointed out that so long as the US aerial expansion

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3 Le Goff, "The Present State of Air Law, 12 (1956); and Manuel de Droit Aérien 206 (1954).

4 Roper, "Regulation and Organisation of International Air Navigation", File #903, 9 (1947).

5 J.B. Scott, The International Conferences of American States 1889-1928, 277 (1931).

6 Cassidy, "Does the Habana Aerial Convention fulfil a Need?" 2 AirL.Rev.42 (1931) Warner, "The International Convention for Air Navigation and the Pan-American Convention for Air Navigation: A comparative and critical Analysis", 3 Air L. Rev. 223(1932). See also Goedhuis, Ideas and Interest in International Aviation, 13 (1947).

aimed only at extension to South America, the Pan-American Convention may still suffice, but that with the establishment of regular trans-atlantic services the adherence to the Paris Convention would have been necessary[8].

However, even in its own regional sphere, the Habana Convention remained rather ineffective[9]. This Convention was administratively so inadequate that it became imperative to supplement it by a special resolution of the Lima Inter-American Technical Aviation Conference of 1937[10]. But the suggested permanent co-ordinating commission, the "Commission Aeronautica Permanente Americana" (CAPA) was never established. One may therefore agree with a Latin-American writer who -- in comparing the Habana Convention with the still-born Madrid Convention -- stated that both conventions "produced no result whatsoever"[11].

This also explains why many writers, both European and American,

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8 Roper, "Recent Developments in aeronautical Law", 1 J. Air L. 413 (1930). See also Le Goff, Traité théorique et pratique de Droit Aérien 106 (1934).

9 Le Roy, "International Aviation: Post-War Possibilities" 11 J. Bar Ass'n Colum. 76 (1944); Warner, "Convention Internationale et Convention Pan-Américaine", 2 Rev. Aero. Int'l 490 (1932).

10 See J.B. Scott, The International Conferences of American States 1933-1940, 77 (1940). See also Rhyne, "Legal Rules for international Aviation", 31 Virginia L. Rev. 277(1945); Warner, Hearings, at 256.

11 Belfort de Mattos Fils, La Création d'une Juridiction Internationale dans le Droit Aérien, 7 (1955).

urged that the United States should join ICAN[12]. Warner, for instance, emphatically stated "if two or more distinct conventions are to be maintained in different parts of the world, the burden of demonstrating the necessity of so troublesome arrangement rests upon those who uphold it"[13].

The rapid spread of inter-continental aviation during the World War 11 had made it increasingly evident that the amalgamation of the Paris and Habana Conventions into one world-wide convention was necessary[14]. Perhaps the most convenient way to achieve such universality would have been for the parties to the Habana Convention to join the Paris group[15].

However, the United States was not ready to join ICAN. This was so mainly because it would have meant reversing its former position, a course which would have affected its prestige; and not because the

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12 Cacopardo, "The collective aeronautical Conventions and the Possibility of their Unification", 2 Air L. Rev. 216 (1931); Corbett, International Air Navigation and Anglo-American Relations, File #4, 18 (1943); Mance, Frontiers, Peace Treaties and International Organization 99 (1946), Lee, "The International Flying Convention and the Freedom of the Air", 33 Harvard L. Rev. 38 (1919); Warner, op. cit. supra note 7, at 307.

13 Warner, id. at 224; see also the critical remarks by Hudson, "Aviation and International Law" 24 Am. J. Int'l L. 234 (1930).

14 Mance, op. cit. supra note 12 at 99; International Air Transport, 8(1944). Incorrect Eagleton, International Government 395/396 (2nd ed.; 1948), who contended the existence of three groups.

15 Roper, op. cit. supra note 1; see also supra notes 12 and 13.

United States considered the Paris Convention and ICAN as "outmoded"[16] or "out-of-date"[17], as Morgan contended. Instead of acceding to ICAN, the United States proposed a new world organization in place of both the Paris Convention with ICAN and the Habana Convention with CAPA (which was not yet established). This course was followed in the agreements signed at Chicago in 1944.

2) The Chicago Conference

The Chicago Conference was convened by the government of the United States acting in concert with the governments of some other countries in order to "make arrangements for the immediate establishment of provisional world air routes and services"; to "set up an interim council to collect, record and study data concerning international aviation and to made recommendations for its improvement"; and to "discuss the principles and methods to be followed in the adoption of a new aviation convention"[18].

The conference took place from November 1 to December 7, 1944 and was attended by 54 nations which were either a) members of the United Nations, or b) associated with the United Nations, or c) neutral States.

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16 Morgan, "International Aviation Problems", 12 Dept. State Bull. 701 (1945).

17 Morgan, "The International Civil Aviation Conference at Chicago and what it means to the Americas", 12 Dept. State Bull. 33 (1945).

18 Proceedings, at 12.

Among the invitées to the conference was the Soviet Union which, however, at the last minute refused to participate[19]. Those not invited were the enemy States. While the Paris Conference of 1919 had attached especial importance to technical aspects of Aeronautics, the Chicago Conference of 1944 was mainly concerned with the exchange of commercial rights in international aviation. As one of the Australian delegates stated, "the technical problems of air transport are largely solved. The only real problems remaining to be solved are political in character"[20].

In view of the immense experience in aviation technology which had been gained during World War II, agreement on the technical questions was easily reached. But the Conference was engaged in lengthy discussions on the commercial questions, where no final agreement satisfactory to all could be achieved. As a consequence, such problems as transit and transport rights were not included in the Convention, but were put in two separate agreements, the Air Transit Agreement and the Air Transport Agreement.

3) PICAO

As already mentioned, the Chicago Conference agreed on the establishment of a new and world-wide organization for international aviation.

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19 Apart from the USSR, the other absentees were Argentina and Saudi-Arabia; see R.Y. Jennings, "Some Aspects of the international Law of the Air", 75 Recueil des Cours de l'Acad. Dr. Int'l 520 (1949).

20 Proceedings, at 83.

The members of ICAN sacrificed their well-tested organization with great reluctance, since they would have preferred the preservation and extension of the Paris Convention. However, the attitude of the United States vis-à-vis the Paris Convention destroyed any hope for the universality of ICAN[21].

In addition to the Convention which provided for the creation of the permanent organization, the International Civil Aviation Organization (ICAO), an agreement on the establishment of a provisional organization, the Provisional International Civil Aviation Organization (PICAO) was signed. This was done because the process of ratification of the Convention was expected to take some time[22]. Since the provisional organization was given only advisory powers, the PICAO Agreement could be treated as an executive agreement which did not require ratification by the signatory States[23].

Having received the necessary 26 signatures, the Interim Agreement entered into force and PICAO started on August 15, 1945, its activities. Much of its work was devoted to the completion and refining of the technical annexes which were drafted by the Chicago Conference. Further emphasis was laid on arrangements for the improvement of air navigation facilities. Thus PICAO was not a mere preparatory organization[24]; it

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[21] See p. 78 supra.

[22] In the case of the Paris Convention, it took almost three years.

[23] But this was quite controversial in the United States. See (cont'd).

performed a variety of useful functions for twenty months, until the Chicago Convention had received the necessary 26 ratifications (Art. 91 b of the Convention).

4) ICAO

On April 4, 1947, the Chicago Convention entered into force and ICAO came into existence. The principal objectives of the organization are outlined in Article 44 of the Convention:

> "to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:
> a) Insure the safe and orderly growth of international civil aviation throughout the world;
> b) Encourage the arts of aircraft design and operation for peaceful purposes;
> c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
> d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
> e) Prevent economic waste caused by unreasonable competition;
> f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
> g) Avoid discrimination between contracting States;
> h) Promote safety of flight in international air navigation;
> i) Promote generally the development of all aspects of international civil aeronautics".

Report of the American Federation of Labor on the Proposed "Freedom of the Air" Policy as approved by unanimous vote by the executive Committee, File #43, 2 (1945); US Senate, Public Policy in Postwar Aviation, Report on Public Policy in Postwar Aviation, 79th Cong., Doc. No. 56, 14-18 (1945); New York State Bar Ass'n, Lawyer Service Letter No. 100, "Agreements on International Aviation", File #108, 409 (1945); Exchange of letters between Senator Bilbo and Acting Secretary Grew, 12 Dept. State Bull. 1101 (1945); Latchford, 12 Dept. State Bull. 1104 (1945); Opinion of the Attorney General, "Validity of Commercial Aviation Agreements", 15 Dept. State Bull. 1076 (1946).

24 R.Y. Jennings, "International Civil Aviation",23 Brit, Yearb. Int'l L. 358 (1946).

The Organization consists of an Assembly which convenes at least once every three years[25]; a permanent governing body, the Council; and a permanent Secretariat with its seat in Montreal. While each member State is entitled to be represented and to vote in the Assembly, the Council consists of only 27 members which are elected for a three-year term by the Assembly[26].

Concerning the regulatory functions of ICAO, one of the major duties of the Council is to adopt international regulations which are incorporated in the Annexes to the Convention, whereas the Assembly is competent for the amendment of the Convention. A special Commission of experts, the Air Navigation Commission does all the preparatory work in connection with the technical regulations, while the preparatory work concerning the Facilitation Annex (Annex 9) falls within the competence of one of the committees of the Council, the Air Transport Committee.[27]

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[25] According to the amendment of 1954.

[26] According to the amendment of 1961.

[27] With reference to the Air Navigation Commission, see the study by Sheffy, "The Air Navigation Commission of the International Civil Aviation Organization", 25 J. Air L. & Com. 281 (1958).

B) Amending the Chicago Convention

I) The Provisions of the Chicago Convention for Amendment

The delegates to the Chicago Convention had before them two draft conventions submitted by the United States[28] and by Canada[29] respectively, and also a White Paper on International Air Transport submitted by the United Kingdom[30].

All these proposals envisaged the establishment of a permanent international organization for civil aviation which was to be given certain regulatory functions, including amendment of the Convention.

1) The draft submitted to the Chicago Conference

Discussions at Chicago were mainly centered on the draft submitted by the United States, which contained in Article 24 the following provisions concerning the amending procedure:

> "...The duties of the Executive Council shall be:... To initiate or receive proposals for the modification or amendment of the articles of the present Convention. Any proposed modification of the articles of this Convention shall be examined by the Council which, with the approval of three-fourths of the votes present, shall submit it to the Assembly. No such modification shall be referred to the Contracting States for their consideration unless it shall have been approved by a majority of the total possible votes of the Assembly. All such modifications of the articles of the Convention...must thereafter be formally approved by all the Contracting States before they become effective"[31].

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[28] Proceedings, at 554.

Two features of the American proposal merit our attention. First, one should note that this draft provided for the approval of proposed amendments by two organs of the Organization, namely by the Council and the Assembly. Second, ratification by all contracting States was required before the amendments could become effective. Thus the unworkable formula of the Paris Convention was once more embodied in the American draft.

Fortunately, the Conference did not follow the American proposals, but accepted the formula advanced by Canada[32]. Canada unlike the United States, a member of ICAN, was well aware of the difficulties that may arise from the requirement of unanimous consent in the ratification procedure. The delay in coming into force of ICAN's amendments due to this procedure was still vividly recollected[33]. Canada therefore advanced a formula which would make effective the amendments soon after the ratification by a certain number of contracting States:

> "Amendments to the articles of this Convention shall be examined and adopted by the Assembly. All such amendments must be ratified by...of the member states before they become effective"[34].

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29 Id. at 570.

30 Id. at 566.

31 Id. at 563.

32 The British proposals did not contain any provision for the amending procedure.

33 See p. supra.

34 Proceedings, at 590.

In further contrast to the US proposals, the Canadian draft also provided for the adoption of the proposed amendments only by one organ, namely the Assembly. There was, of course, no need at all for the proposed amendments to be approved by two different organs of the Organization.

The Canadian proposal attempted not only to improve the Paris formula in respect of the required number of ratifications of the amendments, but also seems to have contemplated the binding force of such amendments. This conclusion may be drawn from the words "become effective" which may be interpreted to mean that the amendments, when effective, bound all member States, dissenters included. Thus the uniformity of the treaty was safeguarded, and situations similar to the "Uruguay-case" under the Paris Convention, were avoided[35].

2) The proposals advanced at the Conference

In view of the importance of the amending procedure for an international organization, and especially in the light of the different proposals submitted it is surprising to note that a later draft jointly submitted by the United States, the United Kingdom and Canada did not contain any provision as to amending procedures[36].

Fortunately, the drafting Committee of the Chicago Conference gave adequate consideration to this question. While following in principle the

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35 See p42 supra.

36 Proceedings, at 418.

Canadian proposal, the Committee clearly excluded the interpretation of the term "become effective" suggested above.

The first[37] and second drafts[38] of the drafting Committee contained the following provision:

> "Amendments to this Convention must be approved by a two-thirds vote of the Assembly and shall come into force in respect of ratifying states when they have been ratified by...member States"[39]

Canada, however, wanted her suggestions to be given more weight, as they were based on ICAN's experience. She therefore asked with the support of the United Kingdom and Australia[40] who were also members of ICAN, for a reconsideration of these provisions. This was felt necessary due to "possible constitutional difficulties"[41], that may arise, similar to those of the "Uruguay-case" of ICAN.

The drafting Committee subsequently included two alterative proposals in its third draft[42]. The first alternative form repeated the earlier proposals, whereas the second alternative form met with the demands of Canada.

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[37] Id. at 404.

[38] Id. at 391.

[39] Id. at 417 and 403 respectively.

[40] Id. at 490 and 654. See also Latchford, "Comparison of the Chicago Aviation Convention with the Paris and Habana Conventions", 12 Dept. State Bull. 419 (1945).

[41] Little, "Commentary of the Development of the individual Articles of

1) Amendments to the Convention may be proposed by the Assembly by a two-thirds vote of those present. A proposal for amendment adopted by the Assembly shall be submitted to such contracting state for ratification in accordance with the constitutional practices of the state. An amendment shall take effect one year after it has been ratified by two-thirds of the contracting states. This two-thirds majority shall include two-thirds of the member states of the Council.

2) At any time during the six months following the ratification of an amendment by the necessary majority any contracting state which has not ratified the amendment may inform the Council that it dissents therefrom; in that case it shall not be found by the amendment but shall cease to be a member of the Organization as soon as the amendment takes effect, notwithstanding anything to the contrary elsewhere in this Convention"[43].

When the third draft was discussed, it was suggested that the second alternative be changed, so that a State would not be excluded from the organization for failure to ratify an amendment of minor importance.[44]

This suggestion was taken into account when the third draft was revised.[45] After discussion, this was further revised[46] and became part of the Chicago Convention.

3) The Chicago Formula

The provisions for the amendment of the Chicago Convention are laid

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the Convention on International Civil Aviation", Proceedings, at 1297.

[42] Proceedings, at 375.

[43] Id. at 389.

[44] Id. at 1297.

[45] Id. at 641.

[46] Id. at 645.

down in Article 94 of the Convention and read as follows:

> "a) Any proposed amendment to this Convention must be approved by a two-thirds vote of the Assembly and shall then come into force in respect of States which have ratified such amendment when ratified by the number of contracting States specified by the Assembly. The number so specified shall not be less than two-thirds of the total number of contracting States.
>
> "b) If in its opinion the amendment is of such a nature as to justify this course, the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention".

It will be observed that these provisions express three major principles: the majority rule, the consent principle, and the legislative principle. Amendments could now be adopted by a qualified majority of ICAO members. It was shown in Part 1 of this survey that the application of this rule is a general feature of modern international organizations.[47]

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[47] See p. 6 supra. One would therefore disagree with Warner who called such a majority rule "a new system"; See Warner, "La Conférence de Chicago", 9 Rev. Gén. Air 174 (1946).

Further, ICAO as a rule is required to apply the consent principle[48]. While this principle has been criticized as "a most unsatisfactory position in a treaty of this kind",[49] one should note, however, that the resulting loss of uniformity is counterbalanced by the advantages of such a procedure, as was shown in Part 1[50].

The most interesting feature of Article 94 of the Convention is the optional device which could be used at the discretion of the Assembly[51]. Thus the Assembly may apply the legislative principle, so that important amendments will be binding upon all member States, unless the dissenting State leaves the Organization. This device is of great importance for amending those provisions of the Convention which relate to the constitution of ICAO, because it provides a guaranty that all members of the Organization will be bound by one single constitution.

It is now convenient to examine more closely the amending procedures of the Convention. This examination will try to determine whether and to what extent the provisions for the amendment of the Chicago Convention remedied the deficiencies of the Paris Convention.

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[48] The term "consent principle" means that amendments are only binding upon members who ratify them; see p.9 supra.

[49] R.Y. Jennings, op. cit. supra note 19, at 561.

[50] See p.2 supra.

[51] Scelle commented on this feature that "par les dispositions de ce genre, on revient à un système autoritaire camouflé"; see Scelle, "La Revision dans les Conventions générales", 42 Annuaire de l'Institut Dr. Int'l 185 (1948). Yakemtchouk, however, stated that Art. 94(b) aims at "l'uniformité en tant qu'idéal"; see "La Révisions des Traités multilatéraux en Droit international", 60 Rev. Gén. Dr. Int'l. Publ. 398 (1956).

II) The Amendments to the Chicago Convention

In reviewing the history of the Protocols amending the Chicago Convention, one should bear in mind the fact that the adoption of one of the amendments, that of 1947, was motivated entirely by international politics and was not otherwise required. Therefore this amendment should not be used as a test case to determine whether the Chicago Convention offers an amending procedure superior to that of the Paris Convention. However, the 1947 amendment merits to be mentioned here not only for completeness, but also because it created a rather complicated legal situation.

1) The Protocol of May 27, 1947

By June 1946 PICAO started negotiations with the Economic and Social Council of UN (ECOSOC) in order to establish ICAO as a specialized agency of UN. Agreement was eventually reached and was subsequently approved by the General Assembly of UN in December 1946 and by the First Assembly of ICAO in May 1947.

UN's approval, however, was subject to the condition that "ICAO complies with any decision of the General Assembly regarding Franco-Spain"[52].

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[52] For the history of Article 93 bis of the Chicago Convention see: Bernadet, L'OACI: Service Public International 58-60 (thesis Paris, 1952); R.Y. Jennings, op. cit. supra note 19, at 566-569; Meyer, "Die internationale Organisation fuer die Zivilluftfahrt", 2 Archiv des Voelkerrechts 432-434 (1950); "Report of the Secretary of State", 17 Dept. State Bull. 175/176 (1947); Rhyne, "International Law and Air Transportation", 47 Michigan L. Rev. 49 (1948); Schenkman, at 132.

In order to fulfil this condition, an amendment was passed at the First Session of the ICAO Assembly, on May 27, 1947, and became Article 93 bis of the Convention[53]. This new Article complies with the terms set out by the UN General Assembly in that it provides for the automatic termination of the ICAO membership of any State a) that has been expelled from membership in the UN, or b) the General Assembly of UN has recommended debarred from membership in the specialized agencies.

According to Article 94(a) of the Convention the 1947 Protocol could come into force only after having received the required number of ratifications. But before it received the required 28 ratifications, the General Assembly of UN repealed Spain's expulsion from membership in specialized agencies(in November 1950). In consequence,when the Protocol entered into force in 1961, it did not change Spain's status as a member of ICAO, because by 1961 Spain was no longer debarred from membership in the specialized agencies[54]. Hence Spain never ceased to be a member of ICAO[55].

Had the Protocol of 1947 received the necessary ratifications prior to November 1950 -- the date of revocation of the General Assembly's resolution concerning Spain -- a delicate situation would have been created.

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53 ICAO Doc. 7570 (Protocol of 1947).

54 Spain became member of UN in 1955.

55 Cheng, at 33 and 36; Guldimann, "Internationales Luftrecht 1950/51", 9 Annuaire Suisse Dr. Int'l 280 (1952); Schwenk, "Problems arising from the Amendments to the Chicago Convention", 11 Zeitschrift fuer Luftrecht und Weltraumrechtsfragen 125 (1962); see also Shawcross & Beaumont, at 55.

The intention of the ICAO Assembly was clearly that the amendment should apply to Spain. But in order to be binding on Spain, it was, under Article 94 (a) of the Convention, necessary for Spain itself to ratify the amendment, and this was very unlikely to happen. Consequently Spain would have remained a member of ICAO vis-à-vis those States that also would have abstained from ratifying the amendment. The expulsion of Spain would only have had the effect vis-à-vis those States that had ratified the Protocol of 1947. Thus Spain would never have lost its membership, but would have only changed its full membership into a "relative membership"[56].

2) The Protocols of June 14, 1954

The ICAO Assembly, at its Eighth Session in June 1954, approved several constitutional amendments to the Convention which were embodied in two separate Protocols. The first Protocol is concerned with the amendment of Article 45 of the Convention which deals with the permanent seat of ICAO[57]. This Protocol came into force on May 16, 1958.

The other Protocol contains amendments to Articles 48, 49 and 61 of the Convention[58]. It permits the Assembly to meet less often than annually, but not less than once in every three years. This Protocol became effective on December 12, 1956.

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[56] Schwenk, op. cit., at 125.

[57] ICAO Doc. 7675 (Protocol of 1954).

[58] ICAO Doc. 7667 (Protocol of 1954).

3) The Protocol of June 19, 1961

Another constitutional amendment involves Article 50 of the Convention. This amendment, embodied in a Protocol approved by the Assembly of ICAO at its 13th Session in June 1961[59], provides for the increase of membership of the ICAO Council from 21 to 27 States. The enlargement of the Council was deemed necessary due to the growth in number of members of the organization. Furthermore, it was felt that such an increase in the size of the Council would enable representation in the Council of all major geographic areas of the world. The required 56 ratifications were received within one year so that the amendment entered into force on July 17, 1962.

4) The Protocol of September 15, 1962

The most recent Protocol amended Article 48 once more[60]. This Protocol of September 1962 increases the minimum number of States which could request an extra-ordinary session of the Assembly, from ten to one-fifth of the total number of contracting States. This amendment was felt necessary due to the increased membership of ICAO. Also, an extra-ordinary session convened at the request of only ten States would mean that there would exist the risk of not establishing a quorum as less than half of the entire members would in all probability respond to such a request[61]. The new Protocol which is still in the process of being ratified, will come into force only

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59 ICAO Doc. 8170.(Protocol of 1961). See also Mankiewicz, "Augmentation du Nombre de Membres du Conseil de l'OACI", 7 Annuaire Franç. Dr. Int'l 445(1961).

60 ICAO Doc. 8268, A14-P/20, at 32.

61 Mankiewicz, "Organisation de l'Aviation Civile Internationale", 8 Annuaire Franç. Dr. Int'l 681 (1962).

when it receives 66 ratifications[62].

III) Some constitutional Problems created by the Amendments

The Assembly of ICAO in adopting the above changes, has not resorted to Article 94(b) of the Convention. Instead of doing so, it applied Article 94(a) of the Convention, in consequence of which, the amended text is in force in respect of only those States that have ratified the Protocols. In respect of those States that have not ratified the amendments, the original Chicago text of 1944 continues in force.

In reviewing the Paris Convention, a similar constitutional problem was indicated. The "Uruguay-case" demonstrated that a State which joined ICAN during the period when an amendment to the Convention was in the process of being ratified, was not under any obligation to ratify the said amendment, nor did such amendment have any binding effect on the newly-adhering State. Consequently to a new member State the Convention in its original form applied, while the other members of the organization were bound by the amended text. The drafters of the Chicago Convention, aware of the legal difficulties which may arise from such a situation, provided ICAO with a device embodied in Article 94(b) of the Convention. This device, if applied, would preserve the uniformity of the Convention.

It is obvious that all amendments to the Chicago Convention would have required the application of Article 94(b), since they all refer to

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[62] The Protocol of 1962 has received 22 ratifications up to date (March 15,1964)

constitutional provisions of the Convention[63]. But the Assembly of ICAO preferred merely to urge the voluntary ratification of the amendments.

1) The amendment of 1947

The legal difficulties which might have arisen in the Spanish case have already been discussed. However, if a State is excluded from the UN, such legal problems may occur in reality. Furthermore, in view of the small number of ratifications that the Protocol of 1947 received[64], it may be said that the automatic effect of Article 93 (bis) would terminate the contractual relations of the excluded State with less than half of the member States of ICAO. Hence, such exclusion would not affect contractual relations with the rest of the member States which are at present in a majority. Such peculiar membership vis-à-vis ICAO which would result from this situation, would exist even if the State to be excluded is the last State that refused to ratify Article 93 (bis) of the Convention.

One might also argue, as Cheng did, that a State threatened with expulsion would be entitled to demand that the other members of ICAO fulfil their contractual obligations according to the original terms of the Convention[65]. Should the matter be brought before the International Court of Justice under Article 84 of the Chicago Convention, it is difficult

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63 Cheng, at 117.

64 Among the 103 members, only 45 States have ratified it up to date (March 15, 1963).

65 Cheng, at 36.

to see how the Court could avoid sustaining such a contention. As Cheng remarked, "such an absurd result merely shows the possible consequences of the apparent reluctance of the ICAO Assembly to make use of Article 94(b) of the Chicago Convention, 1944, when amending the Convention"[66].

The reluctance of the ICAO Assembly to apply Article 94(b) in the case of the Protocol of 1947, was mainly due to the unpopularity of the amendment. Spain has always been a country of considerable importance in international civil aviation and a loyal member of ICAO. Furthermore, the insistence of the UN upon the expulsion of Spain was deemed to be an unwarranted introduction of politics into an essentially technical organization and so was opposed. A two-thirds majority for the application of Article 94(b) could not therefore be expected.

2) The amendments of 1954

Other legal difficulties may arise in connection with the amendments of June 1954. As the practice of ICAO is to act pursuant to constitutional amendments as soon as the required number of ratifications has been achieved, it may be observed that those ICAO members who have not ratified the amendments may have a right to object to their implementation[67]. These States may, for example, be entitled to insist on resumption of annual sessions of the Assembly, or to object to any decision of the Assembly concerning the site of permanent seat of ICAO[68].

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66 Cheng, at 36/37.

67 ICAO C-WP/3456, at 21. This was also the view of the British delegate: "The minority could...object, but could not effectively prevent the operation of the will of the majority"; id. at 8.

68 Cheng, at 117. See also Mateesco, at 233.

Even though no objections have so far been raised to the application of the amendments[69], it is nevertheless necessary to call attention to these constitutional deficiencies. For, in the amendment of 1961, ICAO was concerned with these problems, and discussed them at length in the Assembly and the Legal Bureau of ICAO.

3) The amendment of 1961

The amendment of 1961 provided for the increase of the Council's membership from 21 to 27 States. According to Article 94(a) of the Convention, the amendment became effective only between States which ratified the Protocol, whereas the non-ratifying States remained bound to the Convention in its original form. After the amendment entered into force, the Assembly met at Rome for its 14th Session in summer 1962. Among the States that were represented at this Session, there were thirty States which had not until then ratified the Protocol of 1961. As Schwenk pointed out, the question was whether the Council had to be elected with a membership of 21 or 27 States[70]. Furthermore, how should the Council be composed to appoint the Secretary General? Were all member States obliged to accept the new Secretary General or could it be claimed that he had been chosen by the Council constituted contrary to the version of the Convention valid for this member?[71] One also wonders

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69 But there has been yet no occasion to act upon the amendment of Art. 45 (permanent seat of ICAO).

70 Schwenk, op. cit. supra note 55, at 125. See also Mateesco, at 233.

71 Schwenk, op. cit. at 125.

whether the regulations adopted by the Council of 27 members have the same legal effect vis-à-vis those States that did not ratify the Protocol of 1961. It would seem that any decision made by the enlarged Council may be objected to by the non-ratifying States.

Some of these problems were discussed in the Executive Committee of the Assembly, before the amendment for the increase of the Council's membership was voted upon at the 13th Assembly. The major question under consideration was, if, after the coming into force of the amendment, a State that had not ratified the amendment was entitled to vote for more than 21 candidates when the new Council was to be elected. In this connection the question was raised as to whether such States had the right to be elected after 21 seats had been filled[72].

The Executive Committee followed the opinion of the Director of the Legal Bureau of ICAO who stated that "there is nothing in the Convention making the exercise of voting power by a Contracting State, or eligibility for election to the Council, dependent upon the fulfilment of such a condition as ratification of an amendment"[73]. The Committee unanimously agreed that States should have the right to stand for election and to vote whether they had ratified the amendment or not.[74] One should note, however, that

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[72] ICAO Doc. 8167, A 13-P/2, at 17.

[73] ICAO C-WP/3456, at 22.

[74] ICAO Doc. 8270 A 14-EX/31, at 3. See also 17 ICAO Bull. 193 (1962).

this decision could not solve all the above mentioned questions which would arise in this connection.

At the 14th Session of the Assembly, the amendment was implemented by the election of 27 members to Council seats. No objections were raised by the non-ratifying States against the application of the amended text of the Convention, and the States that had ratified the amendment, did not object to the voting and the election of non-ratifying States. It, is, therefore, possible to contend that the new structure of the Council has been accepted expressly or impliedly by all ICAO members, although the amendment has not been ratified by all. Nevertheless, the legal basis is not without doubt, and constitutional difficulties may arise at a later stage.

4) The amendment of 1962

Still another problem may arise when the amendment of 1962 enters into force. Whereas under the terms of the original Convention, ten States are entitled to request the convening of an extra-ordinary session of the Assembly, under the terms of the Convention as amended one-fifth of the total number of contracting States is required for such a request. Consequently it is conceivable that ten ICAO members who have not ratified the amendment, may request the convening of an extra-ordinary session, and it seems rather difficult for the Secretary General of ICAO to refuse to act upon such a request.

IV) The Proposals to amend Article 94 of the Chicago Convention

Discussions concerning the implications of Article 94 of the Convention began in 1947 in a special committee reviewing the Convention[75] and later continued in the Assembly of ICAO up to its Fourth Session, in June 1950[76]. Two different types of amendments were suggested: firstly, a complete change in the amending procedure; and, secondly, the addition of a provision regarding the newly-adhering States.

1) Proposals to alter the existing provisions

It was suggested that any amendment agreed by a two-thirds vote of the Assembly and ratified by two-thirds of the member States should bind all the members of ICAO, reserving the rights of dissenting States to withdraw from the Organization[77]. Thus the legislative method would be applied in that the two-thirds majority could impose its will on the dissenting minority.

Another suggestion was to distinguish between "important amendments to the Convention, namely, amendments involving new obligations on the part of the members of the Organization"[78], and "amendments not involving

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75 This Committee was established by the Interim Council of PICAO. PICAO Doc. 2048, C/208, and PICAO Doc. 2085, C/217. See also Jones, "Amending the Chicago Convention and its technical Standards: Can Consent of all Member States be eliminated?", 16 J. Air L. & Com. 203-209 (1949).

76 1st Assembly: ICAO Doc. 4039, A1-CP/12, at 8-11; 2nd Assembly: ICAO Doc. 5227, A2-P/11; 4th Assembly: ICAO Doc. 7225, C/834, at 199.

77 ICAO Doc. 6014, LC/111, at 3 et seq. ICAO Doc. 6024, LC/121, at 75 et seq. ICAO Doc. 5089, LC/80.

78 ICAO Doc. 4039, A1-CP/12, at 8 (para. 10. 1.).

new obligations on the part of the Contracting States"[79]. The former would require ratification according to the consent principle, whereas the latter would become effective ipso-facto when adopted by a two-thirds vote of the Assembly. It was felt that there was "no harm in dispensing with the ratification" of amendments which were of a "purely procedural or organizational character"[80].

It is not surprising that these amendments failed to win support because the same results can be achieved by applying Article 94(b) of the Convention[81].

The Assembly of ICAO therefore decided that "Article 94 of the Convention should be maintained in its present form"[82] and, in addition, that any proposed amendment to the Convention must satisfy two tests before being voted upon by the Assembly: "1) when it is proved necessary by experience; 2) when it is demonstrably desirable or useful"[83].

2) Proposals to supplement the existing provisions

Under Article 94(a) of the Convention, an amendment which has come into force is binding only upon those States that have ratified it. No contracting State is under any obligation to ratify the amendment and

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79 Ibid. (para. 10. 2).
80 Ibid. (para. 10. 2).
81 Colclaser, "Civil Aviation: current legal Problems in the international field", 12 Fed. Bar J. 89 (1951). See also R.Y. Jennings, op. cit. supra note 19, at 562.
82 ICAO Doc. 7017, A4-P/3; at 3.
83 Id. at 2.

this applies also with respect to States that adhered to the Convention after an amendment has become effective. The Committee on the Convention on International Civil Aviation of PICAO found this situation as unsatisfactory in regard to newly-adhering States, because their adherence relates to the Convention in its original form and is not deemed to relate to the amending Protocols. The PICAO Committee therefore suggested that Article 94 of the Convention be supplemented with the following paragraph:

> "No State shall become a party to the Convention until it has deposited instruments of ratification of all amendments which have been in force during one hundred and eighty days"[84].

The Legal Committee of ICAO recommended a re-draft of the proposed amendment to read as follows:

> "After an amendment subject to the ratification has been in force for more than one hundred and eighty days, any ratification or adherence to this Convention shall be deemed to constitute ratification of or adherence to the Convention as amended"[85].

The Assembly of ICAO, however, took no action and decided at its Fourth Session that Article 94 of the Convention should be maintained in its original form[86]. The refusal to act upon the proposed amendment is re-

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[84] ICAO Doc. 5089, LC/80, at 7.

[85] Id., at 10.

[86] See supra note 82.

grettable since its adoption would have improved the amending provisions of the Convention.[87]

Furthermore, the proposed amendment would have avoided legal problems that may arise in the future under the present text. If, for instance, an amendment is adopted under Article 94(a) of the Convention and ratified by all contracting States; it might be argued that the original text of the Convention is completely replaced by the amended text. As a consequence, a newly-adhering State could no longer adhere to the original Convention, but only to the Convention as amended. Such a conclusion, however, seems to be incompatible with the terms of Article 94(a) which prescribes that amendments would come into force "in respect of States which have ratified such amendments"[88].

V) Minor Problems of Interpretation

1) Number of votes required

Under Article 94(a), the adoption of amendments to the Convention requires the approval "by a two-thirds vote of the Assembly". Some doubts

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87 Cheng stated that "so far the Organization appears to have paid little heed to this problem" (the problem of uniform application of amendments vis-à-vis new members); see Cheng, at 118.

88 ICAO C-WP/3456, at 27.

concerning the interpretation of this provision arose as early as 1947 when the insertion of Article 93(bis) was discussed[89]. Four different possible interpretations were discussed:

> "a) 'Two-thirds of the Assembly' would mean 'two-thirds vote of the States entitled to be represented in the Assembly', i.e. 'of the Contracting States'.
>
> b) 'Two-thirds vote of the Assembly' would mean 'two-thirds vote of the States represented at a meeting (in the sense of 'session') of the Assembly'.
>
> c) 'Two-thirds vote of the Assembly' would mean 'two-thirds vote of the States represented at the Assembly meeting on the day of vote'.
>
> d) 'Two-thirds vote of the Assembly' would mean 'two-thirds of the votes cast in a meeting of the Assembly where a quorum had been established according to Article 48(c) of the Convention'"[90].

The interpretation agreed upon by the First Assembly and subsequently applied to the other amendments, is at present embodied in Rule 54 of the Standing Rules of Procedure of the Assembly. This rule follows the fourth alternative interpretation prescribing a "two-thirds of the total number of Contracting States represented at the Assembly and qualified to vote at the time the vote is taken"[91]. Rule 54 was confirmed by a resolution adopted at the Ninth Session of the Assembly which stated:

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89 ICAO Doc. 4802, LC/504, at 9.

90 ICAO Doc. 7601, LC/138, vol. 2, at 69.

91 ICAO Doc. 7600 (Standing Rules of Procedure of the Assembly).

"1) that under the practice of the Assembly as expressed in Rule 54, the words 'two-thirds vote of the Assembly' in Article 94 mean 'a two-thirds vote of the Contracting States represented at the Assembly at the time of the vote', and

2) that practice does not violate any relevant article of the Convention"[92].

2) Number of ratifications required

According to Article 94(a) of the Convention, the number of ratifications required for the amendment to come into force must be specified by the Assembly when approving such amendment. "The number so specified shall not be less than two-thirds of the total number of Contracting States". When Article 93(bis) was discussed, the First Assembly pointed out that if the Assembly adopts the draft resolution of amendment, it would have to specify at what time the minimum number of two-thirds of the contracting States should be counted[93]. In this regard two alternative interpretations of the provisions of Article 94 were indicated:

a) 'The total number of Contracting States' would mean 'the total number of Contracting States at the time of the adoption of the amendment'.

b) 'The total number of Contracting States' would mean 'the total number of Contracting States at the time when the amendment comes into force'.

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92 ICAO Doc. 7596, A9-P/13, at 4. According to Schwenk, the correctness of this interpretation was beyond any doubt. See Schwenk, op. cit. supra note 55, at 129.

93 ICAO Doc. 4117, A1-CP/24, at 3.

The First Assembly established a precedent in applying the first alternative to the Protocol of 1947[94]. The subsequent amending Protocols of 1954, 1961 and 1962 follow the same pattern[95]. Thus the Assembly took a pragmatic approach, for this interpretation keeps the required number of ratifications as low as possible, so that the amendments may come into force as early as possible. One may, however, argue that the second alternative would have better satisfied the ratio legis of the provisions concerned[96].

VI) Conclusions

Apart from some minor questions of interpretation, the wording of the provisions on the amendment of the Chicago Convention is clear and does not present serious difficulties. It would seem that the difficulties experienced by ICAN enabled the delegates to the Chicago Conference to draft a new convention which avoided the shortcomings of the Paris Convention. In this connection, three features of the Chicago provisions for the amendment of the Convention are of particular importance. First, the Chicago Convention makes it possible for amendments to become effective without being ratified by all member States. Thus the lengthy procedure under the Paris Convention has been eliminated. The rapid ratification of the Protocol relating to the increase of the number of Council members has demonstrated the superiority of the Chicago formula; even with a large membership of 84 States, the minimum re-

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94 ICAO Doc. 7570 (Protocol of 1947).

95 ICAO Doc. 7667(Prot. of 1954), 7675(Prot. of 1954), 8170(Prot. of 1961); 8268, A14-P/20, at 32.

96 Schwenk, op. cit. supra note 55, at 129.

quirement of two-thirds of the total number of contracting States was fulfilled within the short period of one year.

Second, the Chicago Convention provided ICAO with an excellent device which could safeguard the uniform application of important amendments to the Convention. In the light of ICAN's "Uruguay-case", this legislative device seems useful for preserving the uniformity of those provisions of the Convention which regulate the activities of ICAO. Oddly enough, review of the amending Protocols reveals that this discretionary power has not yet been used, although it would have been the appropriate course to follow[97]. This reluctance on the part of the ICAO Assembly to resort to Article 94(b) of the Convention could have been due to the fear that in so doing it might have lost some of its members who did not ratify the amendments in time. As a result, ICAO is presently faced with the same constitutional difficulties as ICAN was faced in regard to Uruguay for several years. One should bear in mind,however, that the shortcomings of ICAO are caused by the refusal of the Assembly to apply the optional device that could be used at its discretion, and not by a deficiency in the amending procedure as was the case under the Paris Convention.

Furthermore it was demonstrated that it is unreasonable to believe and unadvisable to propose that such default in ICAO's practice could be remedied by an amendment of Article 94 of the Convention itself. On the contrary, it was felt that Article 94(b) of the Convention could have been an efficient

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[97] Cheng, at 117.

device to retain the uniformity of the Convention. One can, therefore, only hope that in future ICAO will use this provision when adopting new amendments which affect the composition, structure or functioning of the organization and its organs[98]. However, it should be pointed out that under the terms of Article 94(b) the Assembly is entitled to apply this device only when adopting the amendments. A subsequent application of Article 94(b) to an amendment which had been adopted under Article 94(a) and already submitted to the contracting States for ratification, would clearly be unconstitutional[99].

While the amendment of Article 94 of the Convention was considered as extremely inopportune, the insertion of a provision to make amendments binding on newly-adhering States was thought to be an appropriate device to preserve a higher degree of uniformity of the Convention. Such a provision would also avoid the problem which arises where an amendment had been adopted under Article 94(a) and ratified by all contracting States.

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98 Schwenk draws the same conclusions in his survey; see Schwenk, op. cit. supra note 55, at 137. But see also Rosenmoeller, at 165.

99 Schwenk, op. cit. at 131.

C) The adoption of Technical Regulations by ICAO

I) The Drafting of the Chicago Convention

One of the objectives of the Chicago Conference has been to set up an international organization which would, on a world-wide basis, continue the successful work of ICAN in adopting international regulations. In order to achieve this objective, the delegates to the Chicago Conference provided for the establishment of ICAO which was empowered with regulatory functions in technical matters and facilitation of international air travel. However, in doing so, the drafters of the Chicago Convention departed remarkably from the Paris model. To what extent and why the new provisions are different from those of the Paris Convention, and whether the new regulatory procedures have stood the test of time, will be analysed in the following pages.

1) The drafts submitted to the Chicago Conference

The US draft

The discussions in drafting the Chicago Convention were mainly centered on the draft submitted by the United States[1]. Article 24 of this draft

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[1] Proceedings, at 553. See also Jones, "Amending the Chicago Convention and its Technical Standards: Can Consent of all Member States be Eliminated?" 16 J. Air L. & Com. 190-192 (1949).

provided for the establishment of an "Executive Council" which was designated to collect and communicate technical data relating to international air navigation. Each contracting State was required to furnish such technical material. One of the major tasks of the Council was to make studies in the economic, technical and legal fields of international aviation. The studies of the technical matters, however, had to be undertaken "with the view to the standardization of the procedures and practices referred to, and the establishment of uniform regulations fixing minimum standards (including the modification of the Annexes to this Convention) by the International Aviation Assembly"[2]. Although such regulations did not require ratification, i.e. express acceptance by the contracting States, they could, nevertheless, be rejected by them:

> "Such regulations shall become effective within a prescribed time after their submittal to each State member of the Assembly, unless a majority of the States members of the Assembly have registered their disapproval"[3].

This provision clearly indicated the intention of the United States to depart from the binding force of ICAN's regulations which it considered inadequate from the point of view of its civil aviation policy[4].

The British proposals

The British proposals as embodied in a White Paper[5] spoke in broad

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[2] Id. at 554.

[3] Ibid.

[4] See p.78 supra.

[5] Proceedings, at 566.

terms of an "Operational Executive" "to give effect to the provisions of the Convention..."[6], to "administer the provisions of the Convention governing such matters as safety standards and ground organisations; and prescribe minimum requirements for international aerodromes and ancillary facilities"[7]. It is conceivable that the United Kingdom, being a member of ICAN, had in mind the application of the same regulatory procedures which were successfully applied under the Paris Convention.

The Canadian draft

This conclusion, however, can be drawn with certainty in regard to the Canadian draft[8]. The Canadian proposals contained an express provision concerning the legal status of the Annexes which was in substance identical with Article 39 of the Paris Convention. Article 45 of the Canadian draft prescribed that

> "The provisions of the present Convention are completed by the Annexes...which shall have the same effect and shall come into force at the same time as the Convention itself".

With regard to the amendment of the Annexes, the Canadian draft contained in Article 50, Section 2, the following provisions:

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6 Id. at 569.

7 Id. at 570.

8 Ibid.

> "Amendments to the Annexes of this Convention can be proposed by either the Assembly or the Board. An amendment shall be binding on the member states as soon as it is adopted by the Assembly by at least two-thirds of the total possible votes".

This provision was in substance identical with amending procedure of ICAN under Article 34 of the Paris Convention. However, the strict binding force of the regulations as prescribed by Article 45 of the Candian draft, was modified by a number of Articles dealing with technical matters. Three categories of regulations could be distinguished in the Canadian proposals. Firstly, there were the regulations of strict binding force. For example, Articles 20 to 23 of the Canadian draft provided that certain technical regulations "shall" be complied with. This wording indicates that States had no choice but to implement such regulations. Secondly, certain other technical regulations were to be implemented only as far as "possible" (Art. 41). The word "possible" introduced the element of discretion to be used by the States and thus indicating that States could depart in their national legislation from the international regulations. Thirdly, with regard to the customs regulations one should note that the wording "member states will comply" was used instead of the word "shall" as employed in reference to the technical regulations (Art. 42). This change in the wording also seems to leave States to an element of discretion.

In modifying the rigid binding force of the regulations, the Canadian proposals incorporated the practice of ICAN in regard to its regulatory

activities. This practice, as was shown earlier[9], is characterized by the pragmatic and flexible approach of ICAN in order to meet any difficulties that may have arisen (in) the implementation of its technical regulations. Thus ICAN had promulgated regulations which contained departure clauses, and regulations, which were mere recommendations.

2) The proposals advanced at the Chicago Conference

The tripartite draft

The joint draft submitted by the United States, Canada and the United Kingdom constituted a compromise between the American and Canadian proposals[10]. Although this tripartite proposal closely followed the Canadian draft, it nevertheless showed remarkable differences. The joint draft embodied Article 45 of the Canadian draft as its Article 17 and also employed largely the wording of the Canadian provisions relating to the amending procedure. However, the American concept favouring an international regulatory authority with consultative powers, rather than legislative powers as provided in the Canadian draft, was maintained and inserted in the draft. Furthermore, anticipating a universal membership in the future organization, the joint draft conferred the regulatory functions on a small executive body, the "Board of Directors"[11], so as to secure efficiency in this field.

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9 See p.65 supra.

10 Proceedings, at 418.

11 Art. 4 of the tripartite draft; id. at 421.

> "Amendments to the annexes of this Convention may be adopted by the Board by a two-thirds vote of those present and shall then be submitted by the Board to each member state. An amendment shall become effective within such time after its submission to the member states as the Board may prescribe, unless in the meantime a majority of the states register their disapproval with the Board"[12].

The work of the drafting Committee

The deliberations that followed at the Chicago Conference were based on the above tripartite draft. The drafting Committee of the Conference incorporated Article 17 (legal status of the Annexes) and Article 19 (amending procedure) in their first two drafts[13]. However, Article 17 was eliminated from the third draft[14] due to the special status which the Annexes were expected to have in the final document of the Conference. This was because of the fact that the technical Committee of the Conference[15] was pressed for time in completing the twelve Annexes[16], in a form which was acceptable to all States participating in the Conference[17]. The technical Committee, therefore, suggested that the "draft technical annexes" should be "accepted by the participating States for immediate and continuing study",

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[12] Art. 19, Section 3 of the tripartite draft; id. at 429.

[13] Id. at 404 (first draft) and at 391 (second draft).

[14] Id. at 375.

[15] Committee II of the Conference dealing with technical standards and procedures.

[16] The draft Annexes related to: Air traffic control, airways systems, airworthiness, communications, customs, licensing, logbooks, maps and charts, meteorological protection, registration and identification marks, rules of the air, search and rescue.

[17] See the statement of Mr. Morgan before the US Senate, Hearings, at 177.

and that they "shall be accepted as constituting models of the desirable scope and arrangement of the several annexes", and finally that they should be studied by the Interim Council "for the purpose of acceptance of the documents in their final form for attachment to a permanent international convention"[18]. As a consequence of these suggestions the drafting Committee replaced the eliminated Article 17 of the previous drafts by Article 4, Section 5 of the third draft. Therefore the technical regulations were designated in the third draft as Annexes to the Convention only for reasons of "convenience"[19].

The above provisions of the third draft, dealing with the legal status and the amendment of the Annexes, were in substance inserted in the final draft[20]. They were completed by a set of provisions which prescribed in detail the legal force of the technical regulations as laid down in the Annexes. This was due to the suggestions of the technical Committee of the Conference which had pointed out the need for such a clear description "of the obligations which may be imposed under the various technical documents" attached to the Convention[21]. However, the feeling of this technical Committee with regard to the legal force of the technical regulations was that there could be no universal rule

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18 Proceedings, at 702.

19 Id. at 380.

20 Id. at 616.

21 Id. at 704.

as to their status; "universal standardization in some matters is necessary to the safety of international air navigation; while it is equally clear that in other respects such standardization may be desirable merely as a convenience or a measure of economy"[22]. "The most that the committee feels it possible to hope for in those instances, at least through the medium of any readily amendable documents attached to a general convention, would be the acceptance of recommendations and an undertaking by the participating states to conform to such recommendations as far as their particular situations may permit"[23].

This concept of depriving the regulations of their binding force and thereby reducing them to the status of mere recommendations, formed the basis of the Chicago provisions relating to the legal force of the regulations in general, and certain Articles of the Convention dealing with technical matters in particular.

II The Provisions for the Adoption of Regulations

Two aspects of the regulatory functions of ICAO will be studied here: the categories of ICAO's regulations and their procedure for adoption. The obligatory nature of the regulations and the questions concerning their incorporation into national law will be dealt separately.

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[22] Id. at 703.

[23] Id. at 704.

1) The categories of international regulations of ICAO

The Chicago Convention provides for three different sets of regulations: "Standards", "Recommended Practices" and "Procedures". The "Standards" and "Recommended Practices", in ICAO language abbreviated to "SARPS", form the major part of ICAO's regulations. They are embodied in the fifteen Annexes to the Chicago Convention[24] in contrast to the "Procedures" which are supplementary regulations of minor or only regional importance, remaining outside the Annexes. However, the Chicago Convention does not contain any definition of these terms. Moreover, certain Articles of the Convention do not employ these terms in a clear manner. Other terms are alsoused, as e.g. "rules" (Art. 12, 28) "regulations" (Art. 12), "practices" (Art. 23, 28), or "coordinated measures" (Art. 25), and the term "procedure" is used with reference to Annex material (Art. 26).

The Interim Council of PICAO was therefore faced with the task of defining these terms, when completing the draft Annexes of the Chicago Conference. The distinction made by the Interim Council between "Standards" and "Recommended Practices" was as follows:

> "A 'Standard' is any requirement, procedure or practice in respect of which a high degree of international uniformity is desirable and likely to be attainable;

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24 The Annexes related to: Personnel Licensing, Rules of the Air, Meteorology, Aeronautical Charts, Units of Measurement to be used in Air-Ground Communications, Operation of Aircraft (International Commercial Air Transport), Aircraft Nationality and Registration Marks, Airworthiness of Aircraft, Facilitation, Aeronautical Telecommunications, Air Traffic Services, Search and Rescue, Aircraft Accident Inquiry, Aerodromes, Aeronautical Information Services.

> A 'Recommended Practice' is a desirable requirement or procedure that either cannot be adopted sufficiently widely to become general practice or cannot be adequately achieved in the actual state of technical development"[25].

The First Assembly of ICAO altered the above definitions which in their amended form are still valid, as was recently affirmed by the Air Navigation Commission[26] and by the ICAO Council[27].

The "Standards" and "Recommended Practices"

"Standards" and "Recommended Practices" as redefined by the Assembly, read as follows:

> "'Standard' means any specification for physical characteristics, configuration, material, performance, personnel, or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention. The full name of this class of specifications will be 'ICAO Standards for Air Navigation'. The current abbreviation will be 'STANDARDS'.
>
> 'Recommended Practice' means any specification for physical characteristics, configuration, materiel, performance, personnel, or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity, or efficiency of international air navigation, and to which Member States will endeavour to conform in accordance with the Convention. The full name of this class of specifications will be 'ICAO Recommended Practices for Air Navigation'. The current abbreviation will be 'RECOMMENDED PRACTICES'".[28]

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[25] Foreword to Facilitation of International Air Transport (FAL), (1946), at 5.

[26] C-WP/3370.

[27] ICAO Doc. 8192, C/934, at 102/103.

[28] A1-31(ICAO Doc. 7670, at 25/26). Underlined by the author.

Thus a "Recommended Practice" is defined in the same terms as a "Standard" with four important differences. First, a "Recommended Practice" is not recognized as necessary, but desirable to be implemented into national law and regulations. Second, "Recommended Practices" also relate to the efficiency of international air navigation. Third, member States are not required to conform, but only to endeavour to conform in accordance with the Convention. Fourth, the compulsory notification of departures as provided for in Article 38 of the Convention is not mentioned[29]. These differences demonstrate that the two categories of Annex regulations are of different nature. Since the "Standards" are considered to be of vital importance for the safety and regularity of aviation, they possess a higher legal status which is indicated by the requirement of compulsory notification of departures from "Standards", unlike the "Recommended Practices", and as such the latter are of somewhat lesser importance and possess a lower legal status[30].

To ensure consistency in differentiating between "Standards" and "Recommended Practices", the Air Navigation Commission and the Council observe especial drafting rules. A "Standard" contains a statement specifying an obligation by means of "shall". If there are circumstances in which the obligation is modified or does not apply, subsidiary statements "may" and "need not" are applied. With reference to a "Recommended Practice", the word "should" is used instead of "shall"[31]. Furthermore,

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29 This will be dealt with later. See p. 36 supra.

30 Sheffy, "The Air Navigation Commission of the International Civil Aviation Organization", 25 J. Air L. & Com. 430 (1958).

31 Moreoever, the word "recommendation" is used at the beginning of each "Recommended Practice".

"Standards" and "Recommended Practices" are printed in different letters, so that the distinction is clearly indicated.

The "Procedures"

In addition to the above Annex Regulations, the Chicago Convention provides in Article 37 the establishment of "Procedures". Since Article 54(1) of the Convention mentions only "Standards" and "Recommended Practices" to be inserted in the Annexes, the "Procedures" remain outside the Annexes[32]. There are two different sets of "Procedures", the world-wide "Procedures for Air Navigation Services" (PANS), and the "Regional Supplementary Procedures" (SUPPS).

With reference to "PANS", they are described as follows:

> "Procedures for Air Navigation Services (PANS) are approved by the Council for world-wide application. They comprise, for the most part, operating procedures regarded as not yet having attained a sufficient maturity for adoption as International Standards and Recommended Practices, as well as material of a more permanent character which is considered too detailed for incorporation in an annex, or is susceptible to frequent amendment, for which the procedures of the Convention would be too cumbersome".[33]

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[32] Art. 54(1) of the Chicago Convention reads as follows: "The Council shall...adopt...international standards and recommended practices; for convenience, designate them as Annexes to this Convention...".

[33] ICAO Doc. 8143-AN/873, at 14.

"PANS" are promoted to "SARPS" and incorporated in the Annexes as soon as they have become sufficiently stable[34]. Annex 15 (Aeronautical Information Services), for example, was established by this method.

With reference to "SUPPS" it should be noted that they are developed by ICAO Regional Air Navigation Meetings. "SUPPS" are considered as essential to the safety and regularity of international air navigation in a specific Region. They are also made on the presumption that there are no rules regulating such matters on a world-wide basis. They are, therefore, supplementary to the "SARPS", the "PANS" and, in the case of meteorology, to the "Specifications for Meteorological Services to Air Navigation". "SUPPS" are, like the "PANS", approved by the Council after review by the Air Navigation Commission. These regionally developed "Procedures" are promoted to world-wide "Procedures" as soon as they have eliminated procedural differences between various Regions, and have been found suitable for classification as "PANS" for universal application[35].

2) The adoption procedures

The competence of ICAO to adopt "Standards", "Recommended Practices" and "Procedures" is laid down in Article 37 of the Chicago Convention. There are eleven items enumerated, in relation to which the regulations

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[34] A4-7 (ICAO Doc. 7670, at 135.)

[35] Sheffy, op. cit. supra note 30, at 438.

are to be framed[36]. However, by virtue of a general clause in the above Article, the Organization is also empowered to adopt regulations dealing with any other matters "concerned with the safety, regularity, and efficiency of air navigation". As a consequence of this "compétence en puissance"[37], the ICAO could even establish new Annexes without the requirement of an amendment to the Convention itself, as was the case under the Paris Convention. Article 54(b) of the Convention prescribes the above regulatory functions as mandatory when it states that "the Council shall...discharge the duties and obligations which are laid on it by this Convention".

Adoption of "Standards" and "Recommended Practices"

The adoption of "Standards" and "Recommended Practices" is governed by Articles 54(l,m) and 90(a) of the Convention. Under Article 54(l),one of the mandatory functions of the Council is to

> "Adopt, in accordance with the provisions of Chapter VI of this Convention, international standards and recommended practices; for convenience, designate them as Annexes to this Convention; and notify all contracting States of the action taken".

In the case of amendments to existing Annex material, the Council is bound to take into account the recommendations of the Air Navigation Commission;

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[36] There are ten technical items and one non-technical item (customs and immigration procedures).

[37] Le Goff, "L'Activité des Divisions Techniques au Sein de l'OACI", 14 Rev. Gén. Air 430 (1951).

> "The Council shall...consider recommendations of the Air Navigation Commission for amendment of the Annexes and take action in accordance with the provisions of Chapter XX"[38].

Article 90(a) of the Convention prescribes that the adoption of such Annex material requires a special meeting and the vote of two-thirds of the Council:

> "The adoption by the Council of the Annexes described in Article 54, subparagraph (1), shall require the vote of two-thirds of the Council at a meeting called for that purpose and shall then be submitted by the Council to each contracting State".

Adoption of "Procedures"

In contrast to the above provisions, the Chicago Convention does not make any specific provision for the adoption of "Procedures" which are not part of Annex material. Hence the method of adopting "PANS" and "SUPPS" was developed independently, and was modelled to some extent on the lines of the "SARPS". However, one important difference should be mentioned, namely that all "Procedures" are approved by the Council under Article 52 of the Convention, i.e. by a simple majority[39].

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[38] Art. 54(m) of the Convention.

[39] Art. 52 first sentence of the Convention reads as follows: "Decisions by the Council shall require approval by a majority of its members".

III) The legal Force of ICAO Regulations

In comparing the legal status of the Chicago regulations with that of the Paris regulations, one notes a remarkable departure from the Paris model. While the Paris Convention imposed a strict obligation upon the members of ICAN to implement its technical regulations, by contrast, the regulations made under the Chicago Convention have no such binding force[40]. This feature of the ICAO regulations will be discussed in the following pages.

1) The collective disapproval

Once the Annex material is adopted by the Council, before it becomes effective the contracting States are offerred the opportunity to register their opposition:

> "Any such Annex or any amendment of an Annex shall become effective within three months after its submission to the contracting States or at the end of such longer period of time as the Council may prescribe, unless in the meantime a majority of the contracting States register their disapproval with the Council"[41].

According to this provision members of ICAO could reject regulations which have already been adopted by a two-thirds majority in the Council.

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[40] Except under Art. 12 (Rules over the High Seas); see p.142 infra.

[41] Art. 90(a), second sentence, of the Chicago Convention. Underlined by the author.

However, only the opposition of the majority of contracting States will frustrate the enactment of the proposed regulations.

2) The escape clauses

Apart from the possible collective disapproval of Annex material under Article 90(a) of the Chicago Convention, the member States of ICAO may individually depart from these international regulations when implementing them. It is within the discretion of each member State to implement the regulations of ICAO only "to the greatest possible extent". (Art. 12), or "so far as its law permit" (Art. 26). Other escape clauses require that the regulations be implemented only in so far as the States "may find practicable"[42].

An example from the United States practice may serve as an indication of how far the States' discretion is extended. The implementation of ICAO regulations into the law of the United States is considered to be "impracticable" because of any of the following reasons: "(a) Implementation would be detrimental to the national interest; (b) Implementation cannot be effected without obtaining new or amended legislation; (c) necessary funds are not available; (d) Implementation would work a substantial hardship on the various aviation activities of the United States; (e) existing national practices provide a greater degree of safety"[43]. It

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[42] Identical or comparable phrase appears in Art. 22, 23, 25, 28, 37, of the Chicago Convention.

[43] International Civil Aviation, 1948-49, Second Report of the Representative of the USA to the ICAO, 5(1949). Air Coordinating Committee,

is easy to imagine, how much the uniformity of aeronautical legislation will suffer, if all member States of ICAO apply similar criteria for the test of "practicability".

3) The obligation to notify departures

The member States of ICAO, having the right to implement ICAO regulations at their discretion, are nevertheless under the obligation to notify ICAO of their departures in the case of "Standards". Article 38 of the Convention prescribes that

> "Any State which finds it impracticable to comply in all respects with any such international standard or procedure, or to bring its own regulations or practices into full accord with any international standard or procedure after amendment of the latter, or which deems it necessary to adopt regulations or practices differing in any particular respect from those established by an international standard, shall give immediate notification to the International Civil Aviation Organization of the differences between its own practice and that established by the International standard.
>
> In the case of amendments to international standards, any State which does not make the appropriate amendments to its own regulations or practices shall give notice to the Council within sixty days of the adoption of the amendment to the international standard, or indicate the action which it proposes to take.
>
> In any such case, the Council shall make immediate notification to all other states of the difference which exists between one or more features of an international standard and the corresponding national practice of that State"[44].

Annual Report to the President, 1950, at 10; See also Ljostad, "Chicago-Konvensjonens Tekniske Annekser", 1 Arkiv for Luftrett 49 (1958). No subsequent statement to the contrary is recorded.

44 Paragraphed by the author.

In spite of the reference to "procedures" at the beginning of the above Article, it must be noted that the obligation is only to notify departures in the case of "Standards" and not in the case of "Recommended Practices" or "Procedures"[45]. This conclusion can be drawn both from the first sentence which prescribes the notification of departures from regulations "established by the international standard", and the two sentences that follow which also speak exclusively about "international standards". This interpretation is confirmed by the definition of the "SARPS" according to which the notification of departures is compulsory only with reference to "international standards"[46].

There is, however, in practice not much difference between "Standards" and "Recommended Practices". For that reason ICAO invited its members to notify their differences also in respect to "Recommended Practices" dealing with technical matters[47], and "Procedures"[48], "when the knowledge of such differences is important for the safety of air navigation". In

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45 See also Pépin, "ICAO and other Agencies dealing with Air Regulation", 19 J. Air L. & Com. 155 (1952). With reference to "Recommended Practices": Pépin corrected in the above article a previous wrong statement in "Le Droit Aérien", 71 Recueil des Cours de l'Acad. Dr. Int'l 504 (1947). With reference to "Procedures": Contra Pos, "Le Pouvoir législatif international de l'OACI et ses Modalités", 16 Rev. Gén. Air 31 (1953); Wijesinha, at 114.

46 See p. 128 supra.

47 AC 11, vol. 2, 33; AC 18, 33.

48 "Specifications" (supplementary regulations for meteorological services) included. AC 11, vol. 2, 34; A4-7 (ICAO Doc. 7670, at 135). Underlined by the author.

the case of "Recommended Practices" dealing with non-technical matters (Annex 9, Facilitation), this invitation is not only confined to differences important for the safety of aviation, but also relating to "any differences" whatsoever from the Annex material[49].

Since even "Standards" do not have a strict binding force, it would seem that member States may at any time depart from "Standards" or from any other regulation of ICAO[50]. This was, indeed, the understanding of the Council when it invited the States "to keep the Organization currently informed of any further differences that may arise"[51].

The non-notification of departures

In this connection the question arises as to whether the non-notification of departures could be considered as an approval of the regulation by the member States. It is true that under Article 90 of the Convention the non-notification of disapproval may be considered as a tacit acceptance of Annex material.[52] However, as was shown earlier, all regulations of ICAO, even the "Standards", have only a recommendatory status, so that the acceptance under Article 90 means merely the acceptance of Annex material as recommendations to be implemented nationally. Even if one accepts the non-disapproval under Article 90 as a tacit approval

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49 Foreword to Annex 9(Facilitation),4th ed., 1960, at 5. Underlined by the author.

50 Cheng,"Centrifugal Tendencies in Air Law",10 Curr. Leg. Probl. 205(1957).

51 AC 18, 33. Underlined by the author. This invitation is inserted in the Forewords to each Annex (under the heading 'Action by Contracting States').

of Annex material, it does not follow that the same reasoning must apply to Article 38 of the Convention. Article 38 is only concerned with the obligation of States to notify their intention as to whether they would comply with the "Standards" or not[53]. Consequently, the non-notification of possible departures could mean either approval of the "Standard", or non-fulfilment of the obligation to notify the departures. The Council which did not share this view in the early years of ICAO, changed its mind in 1950 and commented that the previous practice of "accepting non-notification of differences as evidence of compliance with an Annex was regarded as unsound"[54].

4) The discretion to conform

The above review thus indicates that the majority of member States may prevent the Annex material from coming into force, that each member State may use its discretion in implementing ICAO regulations, and also that at any time the member States are entitled to depart from ICAO's regulations[55]. The only express obligation without an escape clause appears to be the requirement that departures from "Standards" must be notified to the Organization (Art. 38). Our conclusion is, therefore, that

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52 Ros, op. cit. supra note 45, at 27; Sheffy, op. cit. supra note 30, at 431. Wijesinha, at 119.

53 ICAO Doc. 7464, C/871, at 103. Incorrect Jeantet, Les Juridictions Internationales, 423 (1958).

54 ICAO Doc. 7037, C/814, at 38. Contra Rosenmoeller, at 153.

55 Except under Art. 12 (High Seas).

the regulations of ICAO are mere recommendations. However, the analysed provisions of the Convention must be read along with those Articles of the Convention which impose on the contracting States the obligation to co-operate in good faith and to apply ICAO's regulations[56]. Articles 12 and 22-42 of the Convention clearly refer to the Annexes and "Procedures" which have to be implemented by each member State. It would seem that this obligation is legal and not only "purely moral"[57], in consequence of which, not only the failure to notify departures from "Standards", but also the non-fulfilment of the discretionary obligation will constitute a breach of the Convention. The non-execution of such duties may entail action by the Council under Article 54(j) and (k)[58]. In case of a dispute, the Assembly may even suspend the voting power of those States that fail to comply with a decision of an arbitrator or judicial organ[59]. Moreover, contracting States may refuse permission to a foreign aircraft to enter their airspace, if such aircraft or its personnel fail to satisfy international "Standards" (Art. 33, 39 and 40).

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56 "Obligation générale", "devoir général" in the words of Malintoppi, "La Fonction 'normative' de l'OACI", 13 Rev. Gén. Air 1052/1053(1950). Ross also speaks of a "devoir général"; op. cit. supra note 45, at 34.

57 But See St. Alary, at 29; see also Schenkman who speaks at 262 of "an entirely voluntary basis".

58 Art. 54: "The Council shall...(j) Report to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council; (k) Report to the Assembly any infraction of this Convention where a contracting State had failed to take appropriate action within a reasonable time after notice of the infraction".

59 Art. 88: "The Assembly shall suspend the voting power in the Assembly and in the Council of any contracting State that is found in default under the provisions of this Chapter" (the title of this Chapter being "Disputes and Default").

Quasi-legislative power of ICAO

Even if it is conceded that there is an obligation on the part of the member States to implement such regulations, it does not necessarily follow that such regulatory powers elevate ICAO to the position of an international legislature. At the beginning of this survey, it was pointed out that the use of the term "international legislation" is justified only if a majority is allowed to impose its will upon a dissenting minority which is bound to follow the majority decision. The examination of the relevant provisions of the Chicago Convention, however, has shown that the contracting States are free to a considerable extent to depart from ICAO regulations. In consequence, ICAO's regulations are mere recommendations and as such ICAO's regulatory power is only of a "quasi-legislative" character[60]. This view, while shared by some distinguished participants of the Chicago Conference[61], has also its opponents. Thus, certain commentators contend that ICAO regulations possess a binding force and therefore ICAO is a true international legislature[62]. But one should note that a great deal of controversy on this question might be attributed to the confusion which exists in regard to the proper use of the term "international legislation".

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60 "Legislation minus quam perfecta" in the words of Ros, op. cit. supra note 45, at 29; Rosenmoeller, at 156.

61 Latchford, "Comparison of the Chicago Aviation Convention with the Paris and Habana Conventions", 12 Dept. State Bull. 420(1945); Morgan, "International Aviation Problems", 12 Dept. State Bull. 702(1945); Pogue, Hearings at 197; Warner, id. at 257; and "The Chicago Air Conference", Blueprint for World Civil Aviation, 27(1945).

62 Ambrosini as quoted by Ros, op. cit. supra note 45, at 25; Le Goff, The Present State of Air Law, 14(1956); Mankiewicz, Festschrift, at 91.

5) International legislation over the High Seas

In the introductory analysis of the term"international legislation" it was argued that ICAO possesses legislative power with reference to the regulation of flights over the High Seas. According to our definition of "international legislation", the regulatory activity of international organizations acquire the status of "international legislation" only if the regulations are adopted by a majority decision and are binding on all member States, dissenting members included. The first condition is fulfilled in view of Article 90(a) of the Chicago Convention which permits the adoption of regulations by vote of a qualified majority[63]. The requirement that the regulations would come into force only if they are not rejected by a majority of contracting States, also reflects the majority rule. The second condition, namely the binding force of ICAO regulations, is fulfilled by virtue of a stipulation in Article 12 of the Convention which reads: "Over the high seas, the rules in force shall be those established under this Convention". Accordingly, the rules of flight and manoevre over the High Seas as established by ICAO are binding on all ICAO member States. In view of this exceptional binding force of ICAO regulations, the Council inserted an explanatory statement in the Foreword to Annex 2 (Rules of the Air) as follows:

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63 "Majority decision" - statement made by Carroz in his survey "International Legislation on Air Navigation over the High Seas", 26 J. Air L. & Com. 158 (1959), is inexplicably translated as "(einfachen) Mehrheitsbeschluss" in "Die internationale Gesetzgebung fuer die Luftfahrt ueber hoher See", 8 Zeitschrift fuer Luftrecht, 4 (1959).

> "Flight over the high seas -- It should be noted that the Council resolved, in adopting Annex 2 in April 1948 and Amendment 1 to the said Annex in November 1951, that the Annex constitutes Rules relating to the flight and manoevre of aircraft within the meaning of Article 12 of the Convention. Over the high seas, therefore, these rules apply without exception"[64].

The "Rules of the Air" (Annex 2) for flights over the High Seas must be applied in their original form as established by ICAO, and no departure from them is permitted. On the other hand, each State is free to apply its national regulations in addition to Annex 2 if such regulations are not in conflict with Annex 2, and are compatible with the principle of the "freedom of flight over the High Seas"[65].

In connection with the above principles -- the binding force of Annex 2 and the freedom of flight over the High Seas -- it is of interest to consider briefly the problem of certain national regulations relating to the

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[64] Foreword to Annex 2 (Rules of the Air), 4th ed., 1960, at 5. For the discussion which took place prior to the adoption of this clause, see ICAO Doc. 5701-C/672, at 57-60.

[65] This principle could be concluded by argumentum e contrario from Art. 1 and 2 of the Chicago Convention and appears to be implied in Art. 12. It is codified expressly in Art. 2 of the Convention on the High Seas (1958), re-affirmed in Art. 3 of the Convention on the Continental Shelf(1958), and could be concluded by argumentum e contrario from Art. 24 of the Convention on the Territorial Sea and the Contiguous Zone (1958). One should note that the Soviet doctrine, too, considers aviation above the High Seas as free (Textbook on International Law, 2nd ed., 1957, at 241). With regard to Soviet practice, see the diplomatic note of Feb. 11, 1961, as published in 65 Rev. Gén. Dr. Int'l Publ. 607 (1961).

identification of foreign aircraft in oceanic areas not subject to national sovereignty[66]. These identification rules were established in 1950 by the United States[67], in 1951 by Canada[68], and in 1956 by France[69]. The US "Air Defense Identification Zone" (ADIZ) and the "Canadian Air Defense Identification"(CADIZ) over the Pacific and Atlantic are still in existence, whereas the French "Zone d'Identification" over the Mediterranean has been abolished. Apart from the question as to whether such national regulations are in accordance with general international law, the question arises as to whether these national regulations are compatible with the rules of Annex 2 and thus with Article 12 of the Chicago Convention. There can be no doubt that those national regulations which are applicable over the High Seas and which are in conflict with the "Rules of the Air" of Annex 2, are

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66 Cooper attributes "a very debatable validity" to these regulations (as quoted from a lecture given in Nov. 1963 at the Institute of Air and Space Law). MacKneson refuted in his thesis the allegation of Murchison (The Contiguous Air Space Zone in International Law 77 (1957))that the American and Canadian zones are compatible with international law; Freedom of Flight over the High Seas 57 (thesis McGill, 1959). Also Martial is of the opinion that "it may be difficult to reconcile Canada's attitude in the application of these regulations with Article 12 of the Chicago Convention and the Principles of freedom of seas"; 30 Canad. Bar. Rev. 268 (1952).

67 At present "Security Control of Air Traffic", Part 99 of the Federal Aviation Regulations (1963).

68 At present "Control of Air Traffic Order", Air Navigation Order, Series V, No. 14 (1961).

69 See 65 Rev. Gén. Dr. Int'l Publ. 607/608 (1961); and McDougal, Lasswell, & Vlasic, Law and Public Order in Space 310 (1963).

violative of the provisions of the Convention and should be objected to by the contracting States[70].

One should note, however, that according to the principle "pacta tertiis nec nocent nec procunt" the legislative authority of ICAO is necessarily confined to member States and does not have force over non-contracting States[71]. This is particularly true considering that ICAO's legislative power is of a delegated nature and not original[72]. This was rightly pointed out by Cooper when he said that "the parties to the Convention as sovereign States having each the right to regulate the flight of its own aircraft over the high seas, have together delegated that right to the International Civil Aviation Organization created by the Convention"[73].

6) Implementation into national law

In the beginning of this survey it was pointed out that the implementation of international regulations into municipal law forms an indispensable part of the process of international law-making. In ICAN's law-

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70 As Calkins Jr. pointed out, under the American and Canadian rules, for example, the adherence to the flight plan with a fixed cruising altitude is mandatory. This could very easily conflict with the international rules of Annex 2, which call for cruising at a constant indicated altitude at a fixed barometric setting of the altimeter. See Calkins, Book Review of Murchison, in 24 J. Air L. & Com. 373 (1957).

71 But see Drion, The Second Chapter of Part 1 of the Chicago Convention: An analytical Comment, (Research Paper McGill, 1953), at 102.

72 Contra Mankiewicz who considers it as a "pouvoir originaire du Conseil"; see "Le Rôle du Conseil de l'OACI comme Administrateur des Services de Navigation aérienne", 8 Rev. Franç. Dr. Aér. 223 (1954).

making process we saw an illustration of this principle. In examining the process of implementation of ICAN's regulations, the meaning of the words "become effective", as appeared in the Paris Convention was analysed. It was seen that such regulations became effective only on the international level, and that they created an obligation for the member States to implement them. Therefore the regulations had no "automatic" legal effect on the municipal level. This conclusion was confirmed when we examined the practice of the member States of ICAN, who, in order to avoid ad hoc implementation of each regulation, implemented them by referring to them a priori.

The same is true with regard to the regulations which are promulgated under the Chicago Convention. Following the Paris pattern, ICAO's regulations do not require ratification by States[74]. However, as pointed out before, they become effective municipally only after implementation into national law.[75]

The requirement of implementation was made clear when the Council urged the contracting States to "introduce the text of such regulatory standards

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[73] Cooper, "Passage of Spacecraft through the Airspace", Paper submitted for discussion at the International Institute of Space Law, 6th Colloquium, Sept. 1963, at 7/8.

[74] Le Goff, "L'Organisation provisoire de Chicago sur l'Aviation civile", 9 Rev. Gén. Air 6-4 (1946). It appears inexplicable that Le Goff states in a later study the contrary; see "Les Annexes techniques à la Convention de Chicago", 19 Rev. Gen. Air 153 (1956).

[75] St. Alary, at 28. Ros rightly stated that "l'acte interne est toujours nécessaire"; see Ros, op. cit. supra note 45, at 34. Contra Le Goff who stated that "les modifications aux annexes s'incorporent immédiatement à la législation de chaque Etat"; see Le Goff, op. cit. (1956), at 153.

into their national regulations, as nearly as possible, in the wording and arrangement employed by ICAO"[76].

In our previous discussion it was shown that the requirement of implementation was under the Paris Convention met by various methods. The method used by most of the member States of ICAN was the delegation of legislative powers to the executive organs which were authorized to implement such regulations by "Orders in Council", "statutory orders", or "executive orders". The same method is applied by the majority of ICAO States whose air navigation acts authorize the Minister of Transport or the Director of Civil Aviation to implement ICAO regulations.[77]

An interesting example of this method is the incorporation of Annex 2 (Rules of the Air) with regard to its application over the High Seas into national law. This may be illustrated by an examination of the Canadian law. The Canadian Minister of Transport is empowered "to make regulations to control and regulate air navigation" and in this capacity has extended the application of Annex 2 to flights of Canadian aircraft over the High Seas:[78]

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76 AC 3, 26. Underlined by the author. A similar clause is inserted in the Foreword to each Annex (under the heading 'Action by Contracting States').

77 For example, in France Annex 2 (Rules of the Air)is incorporated by a"Décret", Annex 6(Operation of Aircraft -- International Commercial Air Transport) by "Arrêtés", and Annex 14(Aerodromes)by a simple instruction issued by the Minister of Aviation;see Merle, "Le Pouvoir réglementaire des Institutions internationales", 4 Annuaire Franç. Dr. Int'l 357(1958);see also Dinh, "La Constitution de 1958 et le Droit international", Rev. Dr. Publ. & Sci. Pol. en France & Etranger 55 (1959); Ministère Publ. et Administr. des Douanes vs. Schreiber et Air France, 11 Rev. Franc. Dr. Aér. 355 (1957).

78 Section 4, para. 1 of the Aeronautics Act;Revised Statutes of Canada 18 (1952).

> "All Canadian aircraft in flight over the high seas shall comply with the Rules of the Air contained in Annex 2 to the Convention as amended from time to time"[79].

The stipulation that Annex 2 as amended is applicable over the High Seas, constitutes an a priori incorporation of all further amendments to Annex 2 into Canadian law.

IV) Problems of Interpretation

Although the Chicago Convention provides a very flexible device for the fulfilment of ICAO's regulatory functions, one should note that its wording is not always clear. The Convention was not drafted with that degree of care that could, on the one hand, avoid inconsistencies in the use of certain terms, and on the other, provide the necessary links between Chapters and articles.[80] ICAO has, therefore, since its beginning, been faced with the task of interpreting the Convention whenever doubts arise. In this task it relies more on the ratio legis of the provisions concerned (and thus on the travaux préparatoires) than on the mere text which is sometimes rather confusing; it applies the functional method of interpretation and not the literal method.

1) Adoption of Standards under Articles 25, 26 and 35

In the articles of the Convention dealing with technical matters,

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79 Section 500 of the Air Regulations; 95 The Canadian Gazette 52 (1961). Similar provisions appear in the Federal Aviation Regulations of the USA (Part 91, Sect. 1) of 1963 and in the Air Navigation Regulations of Australia (Section 6 Paragraph 4B) since 1952.

two different words are used. In those cases where ICAO is empowered to promulgate "Standards", the term "established" is applied[81], whereas in the case of "Recommended Practices" the term "recommended" is applied[82]. Thus the question arises as to whether ICAO is entitled to establish "Standards" under Articles 25, 26 and 35 of the Convention, where only the word "recommended" has been used. According to the literal interpretation, the answer should be in the negative[83]. However, it might be said that under the general terms of Article 37, the Organization in any given case is entitled to adopt either "Standards", "Recommended Practices" or "Procedures". But this argumentation could not change the conclusion drawn from the literal interpretation, since the principle "lex specialis derogat legi generali" is a rule of treaty interpretation.

The only way to reject such reasoning, is to refuse the association of the word "recommended" with that of "Recommended Practice". Such view would appear justified in the light of the legal status of ICAO's regulations which in any case have a mere recommendatory force[84]. "Standards" as well as "Recommended Practices" are thus binding upon a contracting State only if that State is willing to be so bound. The promulgation of

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80 See Drion, op. cit. supra note 66.

81 Art. 12, 23, 28, 33, and 38.

82 Art. 23 and 28 in addition to Art. 25, 26 and 25. For the sake of completeness one should note that the word "prescribed" is used in Art. 29 and 34.

83 Cheng, at 147/148. He is the only writer dealing with this question.

84 Except under Art. 12 (High Seas).

"Standards" under Articles 25, 26 and 35 therefore does not interfere with the sovereignty of the States, nor does it constitute an exercise of regulatory power ultra vires. It seems that the Council of ICAO took the same position when it adopted "Standards" for Annex 12 (Search and Rescue) which relates to Article 25, and "Standards" for Annex 13 (Aircraft Accident Inquiry) which relates to Article 26.

2) The amendment of Annex Material

The references made in Article 54(l) and (m) to Article 90, and in Article 90 to Article 54(1), constitute one of the most poorly drafted cross-references in the Chicago Convention. It should be recalled that the first sentence in Article 90(a) prescribes the procedure for adopting Annex material which requires a two-thirds majority at a special meeting of the Council[85]. This first sentence of Article 90(a), however, mentions only the adoption of Annex material, whereas the second sentence in Article 90(a) and Article 90(b) clearly distinguishes between the adoption and the amendment of Annex material. Moreover, the first sentence in Article 90(a) refers only to Article 54(1) which deals only with the adoption of the Annexes, and no reference is made to Article 54(m) which deals with the amendment of the Annexes[86].

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85 For the text of Art. 90(a), see p. 133 supra. Art 90(b) reads as follows: "The Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto".

86 For the text of Art. 54 (e and m), see pp. 132/133 supra.

It might, therefore, be concluded that only the adoption of new Annex material requires the procedure as laid down in the first sentence of Article 90(a), whereas the amendment of existing Annexes may be done under Article 52 which requires only a simple majority[87]. However, this interpretation cannot be supported[88], as there are three arguments against it. Firstly, the travaux préparatoires clearly contradict such an interpretation[89]. Secondly, Article 54(m) does not prescribe at all the procedure for the adoption of amendments to technical regulations, but only obliges the Council to "consider recommendations of the Air Navigation Commission for amendments of the Annexes". Thirdly, Article 54(m) refers expressly to the procedure of Chapter XX which consists of Article 90. One must therefore agree with the prevailing opinion[90] also supported by the practice of the Council[91] according to which amendments to the Annexes

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87 For the text of Art. 52, see note 39 supra.

88 This interpretation is advocated by Cheng, at 65/66; Mateesco-Matte, at 196; Rosenmoeller, at 140.

89 See p.119 supra.

90 Bowen, "Chicago International Civil Aviation Conference", 13 George Wash. L. Rev. 314 (1945); R.Y. Jennings, "Some Aspects of the International law of the Air", 75 Recueil des Cours de l'Acad. Dr. Int'l. 552 (1949); Oppenheim-Lauterpacht, International Law 1013 (8th ed., 1955); Parry, "Constitutions of international Organizations", 23 Brit. Yearb. Int'l L. 460 (1946); Riese, Luftrecht 118/119 (1949); Ros, op. cit. supra note 45, at 27; Shawcross & Beaumont, note h at 48; Wijesinha, at 110.

91 AC 21, 12; AC 40, 123; AC 50, 71.

are subject to the procedure of Article 90(a) in toto[92].

3) The number of votes required under Article 90

As we have seen, according to Article 90(a) of the Convention, the adoption of Annex material requires "the vote of two-thirds of the Council". But it is not clear as to whether the two-thirds majority required is that of those present and voting, or of the total membership of the Council. In examining this question, one should bear in mind the responsibility of ICAO in exercising its legislative and quasi-legislative power to adopt the important Annex material which in fact will impose a burden on its members. The importance of this law-making function is illustrated by the requirement of a special meeting of the Council for the adoption of such material. It appears appropriate therefore to require a two-thirds majority of the total possible vote of the Council[93]. This is, indeed, the interpretation given by the Council which decided that

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92 The following statement by the Council seems to contradict our conclusions: "Amendments to the Annexes should be carried or lost by a simple majority of those present and voting" (AC 3, 27). This confusing statement could be understood only if one reads the Minutes of this Third Session of the Council which took place in 1948. At this Session, the Council had to adopt five new Annexes, and not one single amendment to existing Annexes (ICAO Doc. 5701, C/672, at 12/13). The above statement, therefore, referred only to amendments which were suggested by Council members in order to improve the wording of the regulations as recommended by the Air Navigation Commission.

93 Rosenmoeller, at 138/139.

"'The vote of two-thirds of the Council' required under Article 90 for the adoption of an Annex should be interpreted as the vote of two-thirds of the total membership of the Council"[94].

4) The date of applicability

It will be recalled that the ICAO regulations become effective on the national level only after they are implemented municipally. Consequently the wording "become effective" in Article 90(a) refers only to the legal effect of the regulations on the international level[95]. In this connection the question arises as to whether the different wording in Article 90(b), namely, that "the Council shall immediately notify all contracting States of the coming into force of any Annex or amendment thereto", refers to the same date as above, or to a later date[96]. It would seem that the Council when acting under Article 90(b), is referring to the non-disapproval as required under paragraph (a) and thus to the same date as envisaged therein. The contrary interpretation could be upheld only if paragraph (b) is interpreted as "coming into force" on the municipal level. Such legal effect, however, requires action by each member State. Only the States, and not the Council, could render ICAO regulations applicable

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94 ICAO Doc. 5701, C/672, at 12; AC 3, 27.

95 The text of Art. 90(a) is quoted on p.133 supra.

96 This question was discussed at length by ICAO. Council study group: C-WP/1380; C-WP/1411; Legal Bureau: C-WP/1414; Air Navigation Commission: AN-WP/889; C-WP/1319; Secretariat: C-WP/1335; C-WP/1442; for the discussions in the Council, see ICAO Doc. 7328, C/853, at 169-172, 181, 193/194, and ICAO Doc. 7361, C/858, at 161-168.

municipally[97]. In view of the fact that the Council has no power to determine the effectiveness of its regulations on the municipal level, paragraph (b) of Article 90 is also concerned with the legal effect on the international level. It follows, therefore, that Article 90(a) and (b) of the Convention refer to one and the same date.

The interpretation provided by the Council confirms the above reasoning which is in accordance with the view taken by the Legal Bureau of ICAO[98]. However, in addition to the dates of adoption and effectiveness, the Council invented a third date, the "date of applicability". While the period between adoption and effectiveness is meant for filing of possible disapproval[99], the period between effectiveness and applicability is meant for the implementation into national law and the filing of possible departures. This period between the date of effectiveness and the date of applicability varies from two and a half months to five months[100].

5) Problems under Article 12 of the Convention

In examining the legislative role of ICAO over the High Seas, we dealt previously with the third sentence of Article 12 and assumed that "the rules in force" over the High Seas are those as established by Annex 2 (Rules of the Air). However, the reading of Article 12 as a whole raises certain doubts in this respect. Article 12 reads as follows:

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97 The delegates of the UK rightly pointed out this aspect. ICAO Doc. 7328, C/853, at 193. See also ICAO Doc. 7361, C/858, at 161/162.

98 See note 90 supra.

99 A2-Rec. 8 (ICAO Doc. 7670, at 103).

> "Each contracting State undertakes to adopt measures to insure that every aircraft flying over or manoevering within its territory and that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoevre of aircraft there in force. Each contracting State undertakes to keep its own regulations in these respects uniform, to the greatest possible extent, with those established from time to time under this Convention. Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the protection of all persons violating the regulations applicable."

It may be argued that the interpretation of the scope of the wording "rules in force" is limited, if one relates such rules only to Annex 2.

If such a limited interpretation is not followed, then a possible consequence will be that the provisions relating to the rules over the High Seas should be interpreted to refer to all the rules and regulations whatsoever which have been established by ICAO for the international operation of civil aircraft. This view, which appears to be held only by Professor Meyer[101], cannot be supported. It would be contrary to the principles of interpretation to isolate the third sentence of Article 12 from its context, particularly since Article 12 has not been sub-divided into paragraphs[102].

Another possible consequence of rejecting the limited scope of application is that the wording "rules in force" should be interpreted to refer

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100 The periods are indicated in the Foreword to each Annex (under the heading 'Historical Background'). See also A7-9 (ICAO Doc. 7670, at 209). ICAO Doc. 7464 - C/871, at 96. (also in AC 21, 11), and C-WP/3884.

101 He includes, for instance, the regulations relating to the registration of aircraft, and the licences of personnel and airworthiness. See Meyer, "Strafbare Handlungen an Bord von Luftfahrzeugen in Hinblick auf den Bericht des Unterausschusses des 'Legal Committee' der ICAO", 6 Zeitschrift fuer Luftrecht 178 (1957); French translation id. at 179.

to the "rules and regulations relating to the flight and manoever of aircraft" as mentioned in the first sentence of Article 12. Thus the question is raised whether certain provisions of Annex 11 (Air Traffic Services), dealing undoubtedly with "the flight and manoever of aircraft", form part of the "rules in force" over the High Seas. The answer to this question appears to be in the affirmative[103]. This is so because the third sentence of Article 12 clearly deals with the same kind of rules as the first sentence thereof. Hence, the relevant regulations of Annex 11 should be applied in toto and without possible departures over the High Seas. Here a special problem arises: States which provide air traffic services over the High Seas would have two different sets of air traffic services regulations, one applicable to their national airspace (probably with departures from ICAO rules), and the other to the airspace over the High Seas where they provide air traffic services (without departures from ICAO rules). It may be said that such a situation would create certain difficulties for the States concerned. The Air Navigation Commission therefore suggested that a State departing from certain provisions of Annex 11, should be able to continue to do so while providing air traffic services over the High Seas[104]. The Council followed the view of the Air Navigation Commission and inserted the following clause in the Foreword to Annex 11:

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102 Carroz, op. cit. supra note 63, at 163.

103 ICAO Doc. 7037-2, C/814-2, at 29 (para. 81).

104 ICAO Doc. 7037-2, C/814-2, at 29 (para. 77).

> "The Standards and Recommended Practices in Annex 11 apply in those parts of the airspace under the jurisdiction of a Contracting State wherein Air Traffic Services are provided and also wherever a Contracting State accepts the responsibility of providing Air Traffic Services over the high seas or in airspace of undetermined sovereignty. A Contracting State accepting such responsibility may apply the Standards and Recommended Practices in a manner consistent with that adopted for airspace under its jurisdiction"[105].

This provision corresponds to the clause in the Foreword to Annex 2, which identifies the "rules in force" over the High Seas with the rules as embodied in Annex 2[106]. This decision of the Council, though it departs from the wording of Article 12 of the Convention, was never contested by any of the members of ICAO. This may be due to the fact that the Council appears to be entitled to restrict the scope of the application of its regulations, if the promotion of safety and efficiency of international aviation requires such action. As the Chief of the Legal Bureau of ICAO stated, the rules and regulations relating to the flight and manoeuvre of aircraft are any rules that the Council designate as such[107].

V) Problems in the Process of Implementation

In addition to the problems of interpretation, ICAO is also faced with the problem of those States which fail to notify their departures or refuse to implement the regulations at all[108]. With the adherence of States

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105 Foreword to Annex 11 (Air Traffic Services), 4th ed., 1960, at 5.

106 See p143 supra.

107 ICAO Doc. 7037-2, C/814-2, at 29. (para. 81).

108 A7-WP/27 TE/3; A7-9(ICAO Doc. 7670, at 208/209) and A7-10(id. at 209). See also A10-29 (ICAO Doc. 7707, A10-P/16. at 45/46).

from the developing areas of the world, this problem became even more urgent[109]. The factors responsible for the unsatisfactory implementation of ICAO regulations would seem to include the lack of effective machinery within a State for administering civil aviation, lack of funds, and lack of trained personnel, both at the managing and operating levels[110]. In view of these difficulties with which some member States of ICAO are faced, ICAO advanced its program of technical assistance, and the Council established a special "Implementation Panel" for controlling the implementation of its regulatory material[111].

One should note, however, that the above difficulties are by no means a criterion for the evaluation of the Chicago Convention in comparison with the Paris Convention. On the contrary, the difficulties would have arisen in an even more serious form under the Paris Convention where -- as a rule -- the regulations were strictly binding, and only in exceptional cases recommendatory.

Had the Paris Convention survived the Chicago Conference and achieved universality, it is virtually certain that, because of the large membership of developing countries, the regulations of ICAN also would have lost to a large extent their binding force.

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109 A14-WP/51, TE/2, at 7 and 9.

110 A10-WP/18, TE/4, at 7.

111 Memorandum on ICAO, 2nd ed., 1960, at 17; and 4th ed., 1963, at 20-22. The importance of controlling the implementation rather than promulgating new regulations was emphasized by Resolution #8 of the 7th Assembly which established directives for the regulatory policy of the Council; A7-8(ICAO Doc. 7670, at 208); see also A10-27(ICAO Doc. 7707, A10-P/16, at 43/44); ICAO Doc. 7966, A12-EX/1(Report of the Implementation Panel); A12-16 (ICAO Doc. 7998, A12-P/3, at 28/29).

VI) Conclusions

For the sake of completeness we have discussed in this survey certain provisions of the Chicago Convention both of minor and major importance. In most of the cases we followed an interpretation that clarified the text of the Convention in reference to the intentions of the travaux préparatoires. Thus an interpretation was avoided that would be contrary to the intentions of the drafters. The Council, too, applied the same functional method of interpretation, and refused to rely only on the text of the Convention for purpose of interpretation. It was further shown that the Council restricted the scope of its international legislation when it confined the binding force of its regulations over the High Seas only to Annex 2 (Rules of the Air), because such action appeared opportune in order to procure safety and efficiency in international aviation.

Apart from the problems which arise from the inexact wording of the Chicago Convention, and despite certain difficulties in the process of implementation, the procedure that was adopted at the Chicago Conference for the preparation of international regulations, appears to constitute an excellent device in the hands of the Council for the fulfilment of its regulatory functions. The success of ICAO in these functions is manifested in the high degree of uniformity which has been achieved in the various national legislations throughout the world. Another indication of ICAO's success is its almost universal membership, the USSR and

some other States of the Eastern bloc being the only abstainers[112].

One should recall that such a world-wide membership was not attained under the Paris Convention because of political obstacles. This was an important reason for convening the Chicago Conference and explains why this Conference departed from the Paris model, when it replaced the legislative authority of ICAN by a quasi-legislative competence of ICAO. In doing so, the Chicago Conference took into account the reluctance of some States, particularly that of the United States[113], to delegate legislative powers to an international organization.

From an academic point of view, one may regret that such a retrograde step was taken which sacrificed the most progressive machinery of international law-making, and thereby replaced international legislation by international quasi-legislation. It is therefore not surprising to find a good deal of criticism on this aspect of the Chicago Convention[114]. However, the price of sacrificing the legislative method had to be paid in

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112 There are presently 103 member States. The abstention of the USSR is commented in the textbook on International Law, 2nd ed., 1957, at 244, by the following passage: "The 1944 Convention in many respects contradicts state sovereignty over air space and gives legal force to the domination of international air routes by these capitalist countries -- above all the United States -- which have a more highly developed aviation."

113 Jones, "Amending the Chicago Convention and its technical Standards: Can Consent of all Member States be eliminated?", 16 J. Air L. & Com. 189(1949); Latchford, "Comparison of the Chicago Aviation Convention and the Paris and Habana Conventions", 12 Dept. State Bull. 420 (1945); Warner, Hearings, at 259.

114 Jenks, "Some constitutional Problems of international Organizations", 22 Brit. Yearb. Int'l L. 68(1945); Le Goff, "L'Organisation provisoire de Chicago sur l'Aviation civile", 9 Rev. Gén. Air 604(1946); Malézieux, "Essai sur les caractères et sur la nature du Droit aérien", 2 Rev. Franç. Dr. Aér. 41(1948); Riese at 111; Scelle, "La Révision dans les Conventions générales" 42 Annuaire de l'Institut Dr. Int'l 28 (1948).

order to achieve universality which is the fundamental objective of the Chicago Convention. Hence, the new procedure under which ICAO promulgates its regulations, does not appear necessarily as a regression, but seems rather to form an improved technique of international co-operation based on optional acceptance of States[115].

That is by no means the only improvement achieved in Chicago. As indicated in an earlier chapter, the regulatory competence of ICAN was of a revisionary nature only. Owing to this limitation, ICAN was faced with the necessity of amending the Convention when it desired to prepare a new Annex which was not provided for in the Paris Convention. In contrast to restrictions imposed upon ICAN's competence, the Chicago Convention authorizes the Council of ICAO to promulgate any regulation dealing with any matter "concerned with the safety, regularity, and efficiency of air navigation"[116]. It is difficult to imagine an aspect of international aviation which would not fall within this general clause, since even economic matters are related to the aspect of efficiency of air navigation. However, the Council has shown commendable self-restraint in its work and promulgated regulations only in such fields where universal or regional uniformity was felt necessary or highly desirable.

The thorough preparation of ICAO regulations, particularly the consultation of each member State during their preparatory stage, made it

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115 Schwarzenberger, "Reflections on the Law of international Institutions", 13 Curr. Leg. Probl. 283 (1960).

116 Art. 37 of the Chicago Convention.

possible that until now none of the Annexes or amendments or any part thereof has been disapproved by a majority of contracting States or even by a large number of States[117]. Moreover, the good co-operation between ICAO and its members made it possible that most of the departures filed by the contracting States relate to aspects of minor importance only, whereas the essential contents of the regulations remain intact and are implemented without deviations[118].

One could conclude in the light of the foregoing that the non-binding force of ICAO regulations is no serious handicap for unifying the law of international civil aviation. Since the quasi-legislative nature of ICAO's regulatory powers seemed to be the appropriate basis for the universality of the Organization, this feature of the Chicago Convention appears even advantageous in comparison with the Paris Convention. This conclusion is confirmed by the fact that the youngest among the specialized agencies of the United Nations, the Inter-governmental Maritime Consultative Organization (IMCO), is contemplating the adoption of ICAO's regulatory procedure in a new Convention on Facilitation of Maritime Traffic.[119]

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117 Memorandum on ICAO 18 (4th ed., 1963).

118 The departures from ICAO regulations are attached as supplements to the Annexes, PANS and SUPPS.

119 Erler, "Regulatory Procedures of ICAO as a Model for IMCO," 10 McGill L. J. (1964) to be published in No. 3.

CONCLUDING OBSERVATIONS

Although the regulatory functions of ICAN and ICAO have already been summarized and commented upon at the end of each section, a few final remarks, indicating the principal differences between the Paris and Chicago systems, would seem appropriate.

It may be recalled that in regard to the amending procedures, the amendments to the Paris Convention in order to be effective required ratification by all member States, whereas the amendments to the Chicago Convention take effect upon receiving only a certain number of ratifications. As a result, ICAN (even with its limited membership of about thirty States) was faced in contrast to ICAO with considerable delay in bringing its amending Protocols into force. To illustrate the point it will suffice to mention that the member States of ICAO were able to bring the amendment of 1961 into force within one year, in spite of the fact that its membership at the time embraced more than eighty States.

Another noteworthy change concerns the legislative device embodied in Article 94(b) of the Chicago Convention, which is to be used at the discretion of ICAO for the purpose of preserving the uniformity of the Convention. However, this improvement appears to be only of theoretical and not of practical value, since the Assembly of ICAO never resorted to this new device.

Concerning the adoption of international regulations it was previously observed that the Paris Convention provided for a binding effect of ICAN's regulations, whereas the Chicago Convention adopted a procedure which is based on the optional acceptance by the contracting States. This change from international legislation of ICAN to quasi-legislation of ICAO may be regretted from a purely theoretical point of view. But nothing better could be expected in view of the United States' attitude toward international legislation in general and the Paris Convention in particular. Moreover, the uneven development of aviation throughout the world constituted another important factor which made a system of non-binding regulations preferable. One could therefore contend that even if ICAN had survived the Chicago Conference and gained universality, it would have been forced to adopt the concept of non-mandatory regulations. Such non-binding regulations, indeed, had already been established by ICAN in some exceptional cases, by resorting to recommendations or escape clauses, where difficulties in the process of implementation had been foreseeable.

One of the most interesting features of the Chicago Convention is the legislative competence of ICAO to regulate flights over the High Seas. Only within this limited field, ICAO constitutes an international legislature. It was shown that ICAO confines its legislative competence to the "Rules of the Air" as embodied in Annex 2 to the Chicago Convention, with a result that all other rules and regulations for flight over the High Seas may be established by States unilaterally.

While it is true that the wording of the Chicago Convention created some problems, nevertheless, the Convention on the whole provides ICAO with an adequate instrument for the performance of its regulatory functions. This is clearly manifested by the virtual universality of ICAO' membership and its success in achieving world-wide uniformity of aeronautical laws and regulations.

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