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# SEARCH AND RESCUE OPERATIONS OF AIRCRAFT IN AFRICA: SOME COMPELLING ISSUES

**Ruwantissa I.R. Abeyratne**  
**Montreal, Canada**

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## ABSTRACT

The world aviation community has felt the compelling need for a well-coordinated global programme for search and rescue operations of aircraft ever since commercial aviation was regulated in 1944. Guidelines and plans of action for search and rescue have therefore been considered critical in the event of an aircraft accident. This fact is eminently brought to bear in the continental regions of Africa and South America in particular, where vast expanses of land are still uninhabited or sparsely populated and controlled flight into terrain (CFIT-where an aircraft may crash on land while still under the control of technical crew) is a common occurrence. There are numerous guidelines that have been adopted under the umbrella of the International Civil Aviation Organization which are already in place for the provision of search and rescue operations pertaining to aircraft. However, when an accident occurs in the territory of a State, there are sensitivities involving the State in which the aircraft concerned was registered and issues of sovereignty which have to be considered. Additionally, issues such as the voluntary nature of the search and rescue services offered, confidentiality, timeliness of such operations, fairness and uniformity all play a critical role. This article addresses the issue of search and rescue operations in Africa and examines in some detail where the world aviation community is right now and where it is headed in this important field of human endeavour.

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Ruwantissa Abeyratne has worked in the field of international relations for over twenty years. He commenced his career with Airlanka in 1981, where he worked as the airline's Chief Coordinator and Head of International Relations and Insurance, holding both positions concurrently. During his tenure at Airlanka, Dr. Abeyratne was also affiliated with the Faculty of Law, University of Colombo and the Chartered Institute of Transport (Sri Lanka Branch) as visiting lecturer.

The author is a senior official at the International Civil Aviation Organization. He has written this article in his personal capacity. In 1990, he joined the International Civil Aviation Organization as Technical Officer, Facilitation Section, and over the past five years has been working as the Organization's Coordinating Officer of Air Transport. He is also Chairman to the Advisory Joint Appeals Board of ICAO.

Dr. Abeyratne holds the degree of doctor of civil laws (DCL) from McGill University (1996). He is a law graduate of the University of Colombo, Sri Lanka (LL.B. 1978), and a masters graduate in law of Monash University, Victoria, Australia (LL.M 1981), where he specialises in international law and air law. He is a Fellow of both the Royal Aeronautical Society and the Chartered Institute of Transport. He is also a member of the British Association of Aviation Consultants and the International Law Association, in which he serves as member of both the Association's International Trade Law Committee and the Space Law Committee.

## INTRODUCTION

At the 16th Plenary Session of the General Assembly held in Cairo from 21-26 April 2001, the African Civil Aviation Commission (AFCAC) adopted Resolution S16-7 calling African States to participate in the AFCAC Search and Rescue (SAR) technical cooperation programme. The Commission, through this resolution, also instructed the AFCAC Bureau, *inter alia*, to work, through appropriate means, toward the improvement of SAR services in Africa, in close cooperation with the International Civil Aviation Organization (ICAO). The ICAO is a specialized agency of the United Nations responsible for the regulation of international civil aviation.

After the events of 11 September 2001, it is only natural to assume that there is heightened awareness of the possibility of aircraft being used as weapons of destruction in the future. From a social and political perspective, the world has to prepare for eventualities leading up to SAR of aircraft that may need to be located without loss of time and with the passengers and crew rescued. There are already two international treaties on the subject. The Brussels Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft at Sea, established September 29, 1938, has unfortunately not been ratified by the requisite number of States and has therefore not come into effect. The Brussels Convention contemplated only assistance and salvage operations at sea. The other Convention is the Chicago Convention of 1944, which requires the 187 Contracting States of the ICAO to fulfil their obligations under Article 25 which provides:

Each Contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. Each Contracting State, when undertaking search for missing aircraft, will collaborate in coordinated measures which may be recommended from time to time pursuant to this Convention. (ICAO, 2000a)

Annex 12 to the Chicago Convention elaborates on this fundamental requirement by qualifying that Contracting States shall arrange for the establishment and provision of SAR services within their territories on a 24-hour basis. Contracting States are further requested to delineate the SAR process under Annex 12 on the basis of regional air navigation agreements and provide such services on a regional basis without overlap (ICAO, 1975). A SAR region has been defined in Annex 12 as “an area of defined dimensions within which SAR service is provided” (ICAO, 1975,

Standard 2.2.1) where boundaries of SAR regions should, insofar as practicable, be coincident with the boundaries of corresponding flight information regions.

Although, as discussed, the basic principles of SAR have been in place since 1952 (since Annex 12 was adopted by ICAO—AFCAC has, with considerable wisdom, recognized in its latest Resolution S16-7 that grave shortcomings exist in the African and Indian Ocean (AFI) region in the SAR field. The Commission was quick to recognize that there was a lack of human and financial resources in many African States, making it difficult for these States to comply with ICAO Standards and Recommendations, especially those of Annex 12.

The dilemma facing many States extending both to airports and airlines, relates to the lack of rapid response, adequate equipment and well-trained crews, all of which are critical to passenger survival in the event of an aircraft disaster. Although most States are particularly mindful of these compelling needs, they are by no means confined to a particular region. An example of this crisis can be cited with the 1980 incident of a Saudi Arabian Airlines L-1011 catching fire shortly after leaving Riyadh Airport. Although the pilot turned back for an emergency landing and made a perfect touchdown, nearly 30 minutes passed before firemen managed to go in, by which time all passengers and crew had perished. This could have been a survivable accident (Morrow, 1995). To the contrary, a hijacking incident involving a Boeing 767 aircraft on the shores of Comoros, in November 1996, when the aircraft crashed due to lack of fuel, showed how spontaneous reaction from even non-trained professionals at rescue efforts could help. In this instance, the quick response of tourists at the scene ensured that 51 of the 175 passengers on board were saved (Report, 1996).

This article will outline principles of responsibility of States and political, economic and humanitarian consequences pertaining to SAR of aircraft within their territorial boundaries. It is not the intent of this article to address issues pertaining to rights in recovery of costs incurred in SAR of aircraft and passengers. For this aspect of SAR see Kadletz, 1997.

## **POLITICAL ISSUES**

Annex 12 to the Chicago Convention requires Contracting States to coordinate their SAR organizations with those of neighbouring Contracting States (Recommendation 3.1.2.1) with a recommendation that such States should, whenever necessary, coordinate their SAR operations with those of neighbouring States (ICAO, 1975, Standard 3.1.1) and develop common SAR procedures to facilitate coordination of SAR operations with those of neighbouring States (Standard 3.1.2). These provisions collectively call

upon all Contracting States to bond together in coordinating both their SAR organizations and operations.

At the 32nd Session of the Assembly, held in 1998, ICAO adopted Resolution A32-14, Appendix O which addresses the provision of SAR services. This Resolution refers to Article 25 of the Convention in which each Contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable and to collaborate in coordinated measures which may be recommended from time to time pursuant to the Convention.

The Resolution mentions Annex 12 to the Convention which contains specifications relating to the establishment and provision of SAR services within the territories of Contracting States as well as within areas over the high seas. The resolution recognizes that Annex 12 specifies that those portions of the high seas where SAR services will be provided shall be determined on the basis of regional air navigation agreements, which are agreements approved by the Council normally on the advice of regional air navigation meetings. Annex 12 also recommends that boundaries of SAR regions should, insofar as practicable, be coincident with the boundaries of corresponding flight information regions.

Article 69 of the Convention, which is also outlined in the Resolution, specifies that, if the Council is of the opinion that the air navigation services of a Contracting State are not reasonably adequate for the safe operation of international air services, present or contemplated, the Council shall consult with the State directly concerned, and other States affected, with a view to finding means by which the situation may be remedied, and may make recommendations for that purpose; and the air navigation services referred to in Article 69 of the Convention include, inter alia, SAR services.

In taking into consideration the above facts, the Assembly resolves in A32-14 that the boundaries of SAR regions, whether over States' territories or over the high seas, shall be determined on the basis of technical and operational considerations, including the desirability of coincident flight information regions and SAR regions, with the aim of ensuring optimum efficiency with the least overall cost. If any SAR regions need to extend over the territories of two or more States, or parts thereof, agreement thereon should be negotiated between the States concerned.

The Resolution also calls upon the providing State, in implementing SAR services over the territory of the delegating State, to do so in accordance with the requirements of the delegating State, which shall establish and maintain in operation such facilities and services for the use of the providing State as are mutually agreed to be necessary. Any delegation of responsibility by one State to another or any assignment of responsibility over the high seas shall be limited to technical and

operational functions pertaining to the provision of SAR services in the area concerned. Remedies to any inadequacies in the provision of efficient SAR services, particularly over the high seas, should be sought through negotiations with States which may be able to give operational or financial assistance in SAR operations, with a view to concluding agreements to that effect.

Furthermore, the Resolution declares that any Contracting State which delegates to another State the responsibility for providing SAR services within its territory does so without derogation of its sovereignty; and the approval by Council of regional air navigation agreements relating to the provision by a State of SAR services within areas over the high seas does not imply recognition of sovereignty of that State over the area concerned.

It is also stated in the Resolution that Contracting States should, in cooperation with other States and ICAO, seek the most efficient delineation of SAR regions and consider, as necessary, pooling available resources or establishing jointly a single SAR organization to be responsible for the provision of SAR services within areas extending over the territories of two or more States or over the high seas.

Finally, the Resolution calls on the Council to encourage States, whose air coverage of the SAR regions for which they are responsible cannot be ensured because of a lack of adequate facilities, to request assistance from other States to remedy the situation and to negotiate agreements with appropriate States regarding the assistance to be provided during SAR operations.

The legal validity of Resolution A32-14, as substantive law recognized under public international law, and therefore binding on States, is a relevant. They have also adduced reasons for recognizing resolutions adopted within the United Nations' system as affirmations of recognized customary law and as expressions of general principles of law recognized by States. Some confirmation of these arguments has been given by the ICJ when the Court, over a period of years, recognized the force of several declarations adopted within the United Nations (ICJ, 1970; 1975).

In practical application however, non-observance by States purportedly bound by such resolutions would render such States destitute of the desired legal effect. This would essentially be the case if there are negative votes or reservations attached to an Assembly resolution. In the case of A32-14, however, there is no question of reservation as the Resolution was adopted by consensus.

The real utility of an Assembly resolution lies in the fact that primarily it supplements the absence of law in a given area by filling a legal lacuna that has not been filled by a formal legislative process. Treaty law making is often long-winded and involves a cumbersome process. A resolution offers

a quick fix while embodying principles in a declaration that introduces legitimacy and validity to a given principle or group of principles. In this context, it would be correct to assume that the ICAO Standards and Recommended Practices (SARPs) referred to earlier in this paper on the subject of the implementation of Annex 12 are of equal persuasion. Together, the resolution and SARPs have a clear and substantial impact, reflecting the meticulous and thoughtful work that have gone with the development of these instruments and recognized importance of safety and efficiency of civil aviation (Joyner, 1997).

In the case of the Africa-Indian Ocean Region, the ICAO Regional Air Navigation Plan (1997), in Part V addresses issues of SAR by pointing to the provisions of the ICAO Search and Rescue Manual (Doc 7333), referring in particular to the need for aircraft to carry specified equipment (Section 3.1), carry out paper and communications exercises (Section 3.3.a) and, more importantly, for the need for States to pool their resources and provide mutual assistance in the case of SAR operations. The Plan calls for precise agreements between States to implement these measures (Section 4.1). The ICAO Regional Air Navigation Plan also calls upon States, in order to ensure compatibility between aeronautical and maritime SAR regions (SRRs), and aeronautical SAR authorities, to maintain close liaison with their maritime counterparts and the International Maritime Organization (IMO).

In 1985, ICAO signed a memorandum of understanding (MOU) with the IMO concerning cooperation with respect to safety of aircraft operations to and from ships and other marine vehicles and of aeronautical and maritime SAR activities. Both ICAO and IMO signed this understanding with a view to ensuring the best possible coordination of activities between the organizations in matters concerned with the safety of aircraft operations to and from ships and other marine vehicles and with aeronautical and maritime SAR operations, agreeing to make arrangements for consultations between the Secretariats of the two organizations in regard to these matters, with a view to ensuring consistency or compatibility between services and procedures in all cases where joint efforts or close cooperation may be required and in order to avoid any unnecessary duplication of efforts by them.

In determining the allocation of responsibilities of the two organizations to ensure safety of aircraft operations to and from ships and other marine vehicles, the following principles are applied:

1. All matters which are directly connected with the design, construction, equipment and operation of aircraft in general, and of helicopters in particular, should be regarded as falling primarily

within the field of responsibility of ICAO.

2. All matters which are directly connected with the design, construction and equipment of ships and other marine vehicles and their operation should be regarded as falling primarily within the field of responsibility of IMO.
3. Matters which do not fall clearly within sub-paragraphs 1 and 2 above should be regarded as the responsibility of both organizations and dealt with by appropriate collaboration between them.

In determining the allocation of responsibilities of the two organizations in respect of SAR in maritime areas, the following principles are applied:

1. All matters which are directly connected with SAR by aircraft in general, and with air SAR facilities and operating procedures in particular, should be regarded as falling primarily within the field of responsibility of ICAO.
2. All matters which are directly connected with SAR by marine craft in general, and with marine SAR facilities and operating procedures in particular should be regarded as falling primarily within the field of responsibility of IMO.
3. Matters which do not fall clearly within sub-paragraphs 1 and 2 above should be regarded as the responsibility of both organizations and dealt with by appropriate collaboration between them.

The MOU also provides that any draft amendment to Annex 12 to the Convention on International Civil Aviation (ICAO, 1975) being considered by ICAO or any amendment to the Technical Annex to the International Convention on Maritime Search and Rescue (ICAO, 1979) being considered by IMO and related to matters covered by this MOU will be communicated by the organization proposing the amendment to the other organization. Similarly, draft amendments to the ICAO SAR Manual or to the IMO SAR Manual which are related to matters covered by this MOU will be communicated in due time to the other organization with a view to keeping both manuals aligned as closely as possible.

The consultations referred to above should also take place with respect to matters falling primarily within the responsibility of one or the other organization, so that each organization may, when it deems it necessary, safeguard its responsibilities and interests in these matters and thereby ensure effective cooperative action whether carried out by one or the other or both organizations.

In practice, the two Secretariats are required to take all available steps to ensure that the consultations referred to in paragraph 1 are undertaken before either organization proceeds to take definitive action on matters subject to this MOU. The two Secretariats are also expected to make available to each other relevant information and documentation prepared for meetings at which matters covered by this MOU are to be considered.

Both Organizations have also agreed to take appropriate steps to ensure that relevant advice from other organizations and bodies are made available in matters covered by this MOU, in accordance with the regulations and procedures of the respective signatory organization.

All the above mentioned documents cited bring to bear the compelling need for the critical link between the legislative nature of the documentation and implementation of State responsibility. All the law making and guidance material, declarations and resolutions would be destitute of effect if there was no element of State responsibility to give legitimacy to the instrument by complying with and adhering to the instruments.

When discussing principles of State responsibility in the field of SAR, it is an uncontrollable fact that the provisions of the Chicago Convention, as an international treaty, are binding on contracting States to the Convention and therefore are principles of public international law. The ICJ, in the North Sea Continental Shelf Case (1970), held that legal principles that are incorporated in treaties, such as the common interest principle, become customary international law by virtue of Article 38 of the 1969 Vienna Convention on the Law of Treaties (United Nations General Assembly, 1969). Article 38 recognizes that a rule set forth in a treaty would become binding upon a third State as a customary rule of international law if it is generally recognized by the States concerned as such. Obligations arising from *jus cogens* are considered applicable *erga omnes* which would mean that States using space technology owe a duty of care to the world at large in the provision of such technology. The ICJ (1974) in the Barcelona Traction Case held:

[A]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis a vis another State in the field of diplomatic protection. By their very nature, the former are the concerns of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. (p. 269-270)

The International Law Commission (1976) has observed of the ICJ decision:

[I]n the Courts view, there are in fact a number, albeit limited, of international obligations which, by reason of their importance to the international community as a whole, are—unlike others—obligations in respect of which all States have legal interest. (p. 29)

The views of the ICJ and the International Law Commission, which has supported the approach taken by the ICJ, give rise to two possible conclusions relating to *jus cogens* and its resultant obligations *erga omnes*: a) obligations *erga omnes* affect all States and thus cannot be made inapplicable to a State or group of States by an exclusive clause in a treaty or other document reflecting legal obligations without the consent of the international community as a whole; and b) obligations *erga omnes* preempt other obligations which may be incompatible with them.

Some examples of obligations *erga omnes* cited by the ICJ are prohibition of acts of aggression, genocide, slavery and discrimination. It is indeed worthy of note that all these obligations are derivatives of norms which are *jus cogens* in international law.

International responsibility relates both to breaches of treaty provisions and other breaches of legal duty. In the Spanish Zone of Morocco Claims case, Justice Huber observed, “Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation” (RIAA, 1925, p. 641).

It is also now recognized as a principle of international law that the breach of a duty involves an obligation to make reparation appropriately and adequately. This reparation is regarded as the indispensable complement of a failure to apply a convention and is applied as an inarticulate premise that need not be stated in the breached convention itself (Re. Chorzow, 1927). The ICJ affirmed this principle in 1949 in the Corfu Channel Case by holding that Albania was responsible under international law to pay compensation to the United Kingdom for not warning that Albania had laid mines in Albanian waters which caused explosions, damaging ships belonging to the United Kingdom. Since the treaty law provisions of liability and the general principles of international law as discussed complement each other in endorsing the liability of States to compensate for damage caused by space objects, there is no contention as to whether in the use of nuclear power sources in outer space, damage caused by the uses of space objects or use thereof would not go uncompensated. The rationale for the award of compensation is explicitly included in Article XII of the *Liability Convention* which requires that the person aggrieved or injured should be restored (by the award of compensation to him) to the condition in which he would have been if the damage had not occurred. Furthermore, under the principles of

international law, moral damages based on pain, suffering and humiliation, as well as on other considerations, are considered recoverable (Christol, 1991).

The sense of international responsibility that the United Nations ascribed to itself had reached a heady stage at this point, where the role of international law in international human conduct was perceived to be primary and above the authority of States. In its Report to the General Assembly, the International Law Commission (1949) recommended a draft provision which required that, "Every State has the duty to conduct its relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law" (p. 21).

This principle, which forms a cornerstone of international conduct by States, provides the basis for strengthening international comity and regulating the conduct of States both internally—within their territories—and externally, towards other States. States are effectively precluded by this principle of pursuing their own interests untrammelled and with disregard to principles established by international law.

### **ECONOMIC ISSUES**

Economic aspects of SAR operations related to aviation have been on the agenda of ICAO for a considerable time. At ICAO's Conference on the Economics of Airports and Air Navigation Services (ICAO, 2000b) held in Montreal from 19 to 28 June 2000, the Conference considered that, in 1996 a recommendation had been made by an ICAO Air Navigation Services Economics Panel, that existing policy be amended to allow for costs of SAR services performed by establishments other than permanent civil establishments such as military, to be included in the cost basis for air navigation services charges. The ICAO Council had not approved the Panel's recommendations pending a Secretariat Study of the implications concerned. A subsequent survey carried out by the ICAO Secretariat of Contracting States had resulted in only a limited number of responses, precluding a conclusion as to the wishes of States on this issue. The Conference therefore agreed that there was a need for follow-up of the Secretariat Study, as well as information from many States that had not responded to the survey in the first instance.

The Secretariat drew attention to the humanitarian aspects of SAR operations where States did not wish to charge for services rendered spontaneously and on an emergency basis. The Conference noted that under the International Convention on Maritime Search and Rescue, States were obligated to render gratuitous assistance to any person in distress and

that there was no attendant cost-recovery mechanism in SAR in the maritime field. Based on the above deliberations, the Conference recommended that ICAO undertake further study as to the position of States and the implications of amending ICAO policy with regard to recovery of costs for civil aviation related to SAR services presided by other than permanent civil establishments (ICAO, 2000b, Recommendation 23). As for further work on the subject, the Conference recommended that ICAO develop guidance on the establishment of organizations at the regional level for SAR activities and conduct a study on the establishment of regional or sub-regional SAR mechanisms and how they might be funded as regards civil aviation (Recommendation 24).

ICAO's policies on charges for airports and air navigation services were revised consequent to the Economics of Airports and Air Navigation Services Conference in 2000. These policies were published by ICAO in 2001. As a fundamental principle, the Council considers that, where air navigation services are provided for international use, the providers may require the users to pay their share of the related costs; at the same time, international civil aviation should not be asked to meet costs that are not properly allocable to it. The Council therefore encourages States to maintain accounts for the air navigation services they provide in a manner which ensures that air navigation services charges levied on international civil aviation are properly cost-based.

The Council also considers that an equitable cost recovery system could proceed from an accounting of total air navigation services costs incurred on behalf of aeronautical users, to an allocation of these costs among categories of users, and finally to the development of a charging or pricing policy system. In determining the total costs to be paid for by charges on international air services, the list in Appendix 2 of ICAO document 9082/6 (ICAO, 2001) may serve as a general guide to the facilities and services to be taken into account. Guidance on accounting contained in the *Airport Economics Manual* (ICAO, 1991) and the *Manual on Air Navigation Services Economics* (ICAO, 1997) may be found useful in this general context. Moreover, the Council specifically recommends that States consider the application, where appropriate, of internationally accepted accounting standards for providers of air navigation services that maintain separate accounts.

It is recommended that, when establishing the cost basis for air navigation services charges, the cost to be shared is the full cost of providing the air navigation services, including appropriate amounts for cost of capital and depreciation of assets, as well as the costs of maintenance, operation, management and administration. The costs to be taken into account should be those assessed in relation to the facilities and

services, including satellite services, provided for and implemented under the ICAO Regional Air Navigation Plan(s), supplemented where necessary pursuant to recommendations made by the relevant ICAO Regional Air Navigation Meeting, as approved by the Council. Any other facilities and services, unless provided at the request of operators, should be excluded, as should the cost of facilities or services provided on contract or by the carriers themselves, as well as any excessive construction, operation, or maintenance expenditures. The cost of air navigation services provided during the approach and aerodrome phase of aircraft operations should be identified separately, and so should the costs of providing aeronautical meteorological service, when possible. Air navigation services may produce sufficient revenues to exceed all direct and indirect operating costs and so provide for a return on assets (before tax and cost of capital) to contribute towards necessary capital improvements.

In determining the costs to be recovered from users, government may choose to recover less than full costs in recognition of local, regional, or national benefits. It is for each State to decide for itself whether, when, and at what level any air navigation services charges should be imposed, and it is recognized that States in developing regions of the world, where financing the installation and maintenance of air navigation services is difficult, are particularly justified in asking the international air carriers to contribute through user charges towards bearing a fair share of the cost of the services. The approach towards the recovery of full costs should be a gradual progression.

The Council recommends that the allocation of the costs of air navigation services among aeronautical users be carried out in a manner equitable to all users. The proportions of cost attributable to international civil aviation and other utilization of the facilities and services (including domestic civil aviation, State or other exempted aircraft, and non-aeronautical users) should be determined in such a way as to ensure that no users are burdened with costs not properly allocable to them according to sound accounting principles. The Council also recommends that States should acquire basic utilization data in respect of air navigation services, including the number of flights by category of user (i.e., air transport, general aviation, and other) in both domestic and international operations, and other data such as the distance flown and aircraft type or weight, where such information is relevant to the allocation of costs and the cost recovery system. Guidance on cost allocation is contained in the *Manual on Air Navigation Services Economics* (ICAO, 1997), and the *Airport Economics Manual* (ICAO, 1991), although States may use any accounting approach they consider meets their particular requirements.

The Council further recommends that States should ensure that systems used for charging for air navigation services are established so that any charging system should, so far as possible, be simple, equitable and, with regard to route air navigation services charges, suitable for general application at least on a regional basis. The administrative cost of collecting charges should not exceed a reasonable proportion of the charges collected. The charges should not be imposed in such a way as to discourage the use of facilities and services necessary for safety or the introduction of new aids and techniques. The facilities or services provided for in the ICAO Regional Air Navigation Plan(s) or in any recommendations of the relevant ICAO Regional Air Navigation Meeting as are approved by the Council are, however, considered to be necessary for general safety and efficiency. Charges should be determined on the basis of sound accounting principles and may reflect, as required, other economic principles, provided that these are in conformity with Article 15 of the Convention on International Civil Aviation (ICAO, 2000a) and other principles in this document. The system of charges must be non-discriminatory both between foreign users and those having the nationality of the State or States responsible for providing the air navigation services and engaged in similar international operations, and between two or more foreign users. Where any preferential charges, special rebates, or other kinds of reduction in charges normally payable in respect of air navigation services are extended to particular categories of users, governments should ensure, so far as practical, that any resultant under-recovery of costs properly allocable to the users concerned is not shouldered onto other users. Any charging system should take into account the cost of providing air navigation services and the effectiveness of the services rendered. The charging system should be introduced in such fashion as to take account of the economic and financial situation of the users directly affected, on the one hand, and that of the provider State or States, on the other. Charges should be levied in such a way that no facility or service is charged twice with respect to the same utilization. In cases where certain facilities or services have a dual utilization (e.g., approach and aerodrome control, as well as en-route air traffic control) their cost should be equitably distributed in the charges concerned. The charges levied on international general aviation should be assessed in a reasonable manner, having regard to the cost of the facilities needed and used and the goal of promoting the sound development of international civil aviation as a whole.

**HUMANITARIAN ISSUES**

SAR operations conducted gratuitously and with the intent to save human lives and property are what legal commentators call humanitarian intervention, which is considered to be a basic moral response of one human being to another, to save the latter's life. One definition identifies

“humanitarian intervention as the proportionate transboundary help, including forcible help, provided by governments to individuals in another [S]tate who are being denied basic human rights and who themselves would be rationally willing to revolt against their oppressive government” (Teson, 1956, p. 5).

The general principle of intervention for the provision of relief on moral grounds has been subject to a great degree of intellectual polarization. One view is that if humans are dying, one has got to help at all costs (Lillich, 1973). The other is that the mere act of treating humanitarian intervention as an extant legal doctrine would be to erode the applicable provision of the United Nations Charter on recourse to force.

The principle of non-intervention has been strongly espoused in order that sovereignty of a State is retained as sacrosanct. This view is substantiated by the following argument (Hall, 1924; Lawrence, 1923; Scott, 1916):

1. The good Samaritan must fight for the right to perform his act of humanitarian intervention and may end up causing more injury than he averts;
2. The authorization for forceful and unilateral humanitarian assistance may be abused; and,
3. Unilateral recourse to force even for genuinely humanitarian purposes may heighten expectations of violence within the international system and concomitantly erode the psychological constraints on the use of force for other purposes.

The essence of intervention is compulsion. Compulsion could either take place through the use of force, armed or otherwise. The legal question, with regard to the inviolability of the sovereignty of a State is not whether the intervention concerned was an armed or unarmed one, but whether it was effected unilaterally under compulsion or threat by the intervening State (deLima, 1971). Starke (1977) is inclined to stretch the principle of sovereignty to accommodate external involvement by a State in the affairs of another in special circumstances:

...“Sovereignty” has a much more restricted meaning today than in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised States, few limits on State autonomy were acknowledged.

At the present time there is hardly a State which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus most States are members of the United Nations and the International Labour Organization (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a State means the *residuum* of power which it possesses within the confines laid down by international law. It is of interest to note that this conception resembles the doctrine of early writers on international law, who treated the State as subordinate to the law of nations, then identified as part of the wider "law of nature." (p. 106)

Oppenheim (1955) holds a similar view that the traditional law of humanity is incorporated into contemporary international law. He views this attitude as, "Recognition of the supremacy of the law of humanity over the law of the sovereign State when enacted or applied in violation of human rights in a manner that may justly be held to shock the conscience of mankind" (p. 312). Some authorities in international law also believe that intervention should, if absolutely necessary, be effected when there is cogent evidence of a breakdown in the minimum guarantees of humanity (Hall, 1924, Hyde, 1945; Lawrence, 1923; Stowell, 1921; Wehberg, 1938).

Accordingly, it may be argued that any act of intervention aimed at saving the lives of human beings which are in danger, would be legally and morally justifiable. Fernando Teson (1956) argues that since the ultimate justification for the existence of States is the protection and enforcement of the natural rights of the citizens, a government that engages in substantial violations of human rights betrays the very purpose for which it exists and so forfeits not only its domestic legitimacy, but also its international legitimacy as well. He goes on to say:

I suggest that from an ethical standpoint, the rights of States under international law are properly derived from individual rights. I therefore reject the notion that States have any autonomous moral standing—that they hold international rights that are independent from the rights of individuals who populate the State. (p. 15)

Schwarzenberger (1971) analyses the concept somewhat clinically and concludes that in the absence of an international *jus cogens* which corresponds to municipal *jus cogens* of advanced communities, where the latter prevents the worst excesses of inequality of power, the supremacy of the rule of force would prevail.

There is also a contrasting view that humanitarian intervention is generally resorted to by States only in instances of serious abuses of human rights by one State upon its people or others. Dr. Michael Akehurst (1977) argues that if a State intervenes forcibly on the territory of another in order to protect the local population from serious human violations, such an

armed intervention could inevitably constitute a temporary violation de facto of the territorial integrity of the latter State, and to an extent of its political independence, if carried out against its wishes. Akehurst (1984) goes on to assert, "Any humanitarian intervention, however limited, constitutes a temporary violation of the target State's political independence and territorial integrity if it is carried out against the State's wishes" (p. 105).

The doctrine of humanitarian intervention is thought of by some commentators as an invention of strategy to circumvent the strong *jus cogens* nature of the principle of sovereignty and inviolability of States to which Dr. Akehurst refers. Professor Brownlie (1963) is of the view that States have generally invoked the doctrine to give support to their commercial and strategic considerations. The United Kingdom legislature recently considered the view of the British Minister of State who was of the view, "When members of the United Nations act in a forcible manner either they should do so within and under the authority of the United Nations or that which they do should be authorised by the principles of international law" (Hansard, 1993, col. 784).

Clearly, this statement establishes the view that international law in the context of intervention is *jus cogens*. The British Foreign Office has supported this position in the following language:

The best case that can be made in support of humanitarian intervention is that it cannot be said to be unambiguously illegal...but the overwhelming majority of contemporary legal opinion comes down against the existence of a right of humanitarian intervention. (UKMIL, 1986, p. 619)

Despite this strong alignment towards anti-humanitarian intervention, it is believed that there is a school of thought within the British legislature that is prepared to accept unilateral intervention as justifiable under customary international law in cases of extreme humanitarian need (Lowe & Warbrick, 1993).

The author supports the view that despite these divergent views, the non-intervention principle remains sacrosanct as a contemporary postulate of international law and deviations from the principle, although recognized as ethical and moral in certain instances by scholars, would be justified only in extreme cases (Vincent, 1974).

## CONCLUSION

The essence of SAR operations in aviation is cooperation, which is embodied as a fundamental principle in the Preamble to the Chicago Convention which states, *inter alia*, that it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the

peace of the world depends. At the root of international cooperation is the element of assistance, and in this sense the maritime regulations which admit of gratuitous help are both significant and laudable. Although it is not the intention of this paper to recommend that all SAR operations be gratuitous, it certainly behoves the community of States to encourage all States who are in a position to give assistance without charge, to do so. Humanitarian assistance is an integral element of diplomatic unity and co-existence.

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