Aviation Safety, ICAO and Obligations *Erga Omnes*

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Abstract

The International Civil Aviation Organization (ICAO) is a United Nations (UN)-specialized agency mandated to promote the safety of international civil aviation. Because of the importance of air transport in the contemporary society, safety issues have become a matter of prime and common concern. Safety oversight function is not only the individual but also the collective responsibility of States. In view of the inherent link between aviation safety and the elementary considerations of humanity, the obligation to provide safety oversight has arguably acquired an *erga omnes* character, and all States have a legal interest in its observance. The audit activities of ICAO have provided some preliminary experience demonstrating that this obligation should ideally be enforced through centralized and neutral mechanisms within the UN system.

I. Introduction

1. The International Civil Aviation Organization (ICAO) is a United Nations (UN)-specialized agency in the field of civil aviation. Under Article 44 of the Convention on International Civil Aviation (Chicago, 1944), which is the constitution of ICAO, one of the aims and objectives of the Organization is to “insure the safe and orderly growth of international civil aviation throughout the world”. This paper discusses the role of ICAO in the promotion of aviation safety, particularly its audit activities and their legal basis.

II. Aviation safety as the *raison d’être* of ICAO

2. Aviation safety is a subject of international concern. Its importance is unanimously recognized. Opinions vary, however, when an attempt is made to define the term

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“safety”\(^1\). The Oxford Dictionary defines “safety” as “freedom from danger or risks”\(^2\), but aviation could not be completely free from danger or risks. The only way to assure risk-free flight is to never allow the aircraft to leave the gate. On the basis of this understanding, some commentators tend to consider “safety” as meaning “no (avoidable) accidents”, or more realistically, “as few accidents as possible”\(^3\). After a period of study, the ICAO Air Navigation Commission defined “aviation safety” as “[t]he state of freedom from unacceptable risk of injury to persons or damage to aircraft and property”\(^4\).

3. The remaining question is: who should determine what risk is acceptable or not? Speaking from the perspective of his country, Isaac writes:

   In my opinion, the Congress of the United States has the greatest influence on the level of safety, or acceptable risk under which we operate. Congress, of course, writes the laws that govern the operation and development of the national aviation system. Congress also controls the budget of the Department of Transportation and, in turn, the Federal Aviation Administration\(^5\).

4. Wassenbergh also observes: “Safety in civil aviation is a technical and operational matter, to begin with. It becomes a matter of public law as soon as the public is involved and private people participate under government control.”\(^6\) Accordingly, subject to its international obligations, such as those under the Chicago Convention, the legislator of a sovereign State constitutes the ultimate authority for determining how safe is considered safe for aviation within their jurisdiction. From this perspective, aviation safety may also be considered as a matter of law, namely, a matter of legislation and its implementation.

5. The foregoing discussion only addresses the issue of safety at the national level; it does not indicate who should be responsible for aviation safety at the global level. This question is of considerable significance since civil aviation is to a large extent international by its nature. Its optimal benefit could not be realized if it is confined to national boundaries. At the same time, its risks are also shared globally. Every State is sovereign in its territory, but it is not able to regulate the safety of international civil aviation alone without the cooperation of others. A State may assure the quality of aircraft registered in its country and of airports located within its territory, but it may not do so for aircraft registered in other countries and airports located therein, which may also impact aviation in the former State. An international concerted action is necessary. For this reason, ICAO should assume the worldwide leadership in aviation safety.

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4. ICAO Working Paper, above n.1, para. 2.2.


6. See above n.3, 83.
6. The endeavour to establish a safety framework for civil aviation actually preceded ICAO and may date back to the infancy of aviation. On 13 October 1919, the Convention on the Regulation of Aerial Navigation was signed in Paris, which represented the first successful multilateral endeavour to set up a global regulatory regime for aviation. In addition to the declaration that every State has complete and exclusive sovereignty over the airspace above its territory, the Convention established an international legal framework to cover various matters relating to safety, such as aircraft registration, certificates of airworthiness and international rules of the air. The Paris Convention also established an International Commission for Air Navigation (ICAN), which is the predecessor of ICAO.

7. During the drafting process of the Chicago Convention in 1944, the issue of safety was given great attention. As a result, the Preamble of the Convention states that the parties to the Convention have “agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner”. Article 44 further provides that the aims and objectives of ICAO are, inter alia, “to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport” so as to “insure the safe and orderly growth of international civil aviation throughout the world”, to “meet the needs of the peoples of the world for safe, regular, efficient and economical air transport” and to “promote safety of flight in international air navigation”. Six decades after the conclusion of the Chicago Convention, the safety issue became more acute due to the increasingly vital role of international civil aviation. Unlike the situation in the early days of its development, aviation is no longer reserved for the privileged class. It has become a daily means of mass transportation. It is a fundamental feature of today’s society. The statistics of ICAO indicate that in the year 2006, the total number of passengers carried in international and domestic flights reached 2105 millions, when compared with 39 millions in 1951. Corresponding to the 54-times growth of the number of passengers, Member States of ICAO have also increased from 26 when the Chicago Convention entered into force on 4 April 1947 to 190 in 2007. Consequently, aviation safety has become the focus of public attention.

8. The vital role of civil aviation also makes it a primary target for terrorists. In addition to the natural or inherent hazards of flight, such as technical failure or human error, aviation has to defend itself against horrendous man-made attacks by ruthless persons. All of these factors have further elevated aviation safety from a national community concern to a concern of the global community. It is hardly surprising, therefore, that the ICAO Assembly has time and again confirmed that “the primary objective of ICAO continues to be that of

7 Five months after the first circuit flight took place on 21 November 1783 on board a balloon invented by the Mongolfier brothers, the first aerial regulation was promulgated on 23 April 1784. In this regulation, the Paris police introduced a law forbidding balloons to fly without a special licence. See K.W. Colegrove, International Control of Aviation (Boston: World Peace Foundation, 1930), 2.

8 62 ICAO Journal (No. 1, 2007), 5.

ensuring the safety of international civil aviation.”\textsuperscript{10} As stated by the Secretary General of ICAO, Dr Taieb Chérif, its first priority, as always, must be safety.

9. How does ICAO fulfil its mandate relating to aviation safety? For 50 years, its primary activities have been the adoption of international standards and recommended practices, which, for convenience, are designated as Annexes to the Chicago Convention. The first ICAO Assembly defined a “Standard” as:

\begin{quote}
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.\textsuperscript{11} (Emphasis added.)
\end{quote}

With respect to “Recommended Practices”, it is defined as:

\begin{quote}
Any such specification, 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 endeavor to conform in accordance with the Convention.\textsuperscript{12} (Emphasis added.)
\end{quote}

10. According to these definitions and the general practice of ICAO, international standards are considered binding upon a Member State, unless the State files differences, notifying ICAO that it could not comply with a particular Standard.\textsuperscript{13} As Kotaite observes:

\begin{quote}
The structure put in place by ICAO’s founder is a watertight system: either States comply with the standards or they file differences. The Convention does not allow for a situation where States do not comply and do not file differences. It is a measure of the importance of aviation safety that the Council of ICAO is required, on the one hand, to help States and on the other hand to bring infractions of the Convention to the notice of Contracting States and the Assembly.\textsuperscript{14} (Emphasis added.)
\end{quote}


\textsuperscript{11} Assembly Resolution A1-31: “Definition of International Standards and Recommended Practices”, in ICAO Doc. 7670, Resolutions and Recommendations of the Assembly 1st to 9th Sessions (1947–1955), Montreal, 1956. The definition has been slightly modified and consolidated in ICAO Doc. 9848, above n.10, II-2.

\textsuperscript{12} ICAO Doc. 7670, ibid.

\textsuperscript{13} See Art. 38, the Chicago Convention.

\textsuperscript{14} A. Kotaite, Sovereignty under Great Pressure to Accommodate the Growing Need for Global Cooperation, 50 ICAO Journal (December 1995), 20.
11. There are currently 18 Annexes to the Chicago Convention, which are predominantly related to aviation safety. For example, Annex 1 to the Chicago Convention contains Standards and Recommended Practices (SARPs) for the licensing of flight crew members (pilots, flight engineers, flight navigators and flight radiotelephone operators), air traffic controllers, aeronautical station operators, maintenance technicians and flight dispatchers. The SARPs describe the competence, skills, fitness and other requirements for the personnel. As aviation technology continues to develop rapidly, the provisions in the Annexes are constantly reviewed and amended. When ICAO celebrated its 50-year anniversary, the number of amendments to the Annexes had reached nearly 800. These updated provisions of the Annexes constitute a basic framework for technical regulations to ensure aviation safety. Subject to their rights to file differences, Member States of ICAO are expected to incorporate Standards and, preferably, Recommended Practices as well, into their national legislation and regulations. Member States are also obliged to establish their respective safety oversight procedures to ensure effective implementation of these provisions.

III. Audit programmes of ICAO

12. In theory, it is indisputable that under Article 38 of the Chicago Convention, a Member State has an obligation to file differences with ICAO if it is not able to comply with international Standards. In reality, before ICAO initiated the Universal Safety Oversight Programme, only a relatively small number of States had communicated with ICAO to indicate they could or could not comply with the Standards. Many States did not fulfil their obligations to file differences with ICAO. Consequently, there was no reliable information concerning the implementation of the Standards. This had created a major safety concern. In 1997, the Directors General of Civil Aviation Conference on a Global Strategy for Safety Oversight recommended, inter alia, that regular, mandatory, systematic and harmonized safety audits be introduced and that greater transparency and increased disclosure be implemented. On the basis of


16 D. Freer, ICAO at 50 Years: Riding the Flywheel of Technology, 49 ICAO J (September 1994), 19, 28.


these recommendations, the 32nd Session of the ICAO Assembly in 1998 established a Universal Safety Oversight Audit Programme (USOAP) and directed the Council to bring it into effect from 1 January 1999.¹⁹

13. The objective of the Programme is to promote global aviation safety through auditing Member States, on a regular basis, to determine States’ capability for safety oversight by assessing the effective implementation of the critical elements of a safety oversight system and the status of States’ implementation of safety-relevant ICAO Standards and Recommended Practices, associated procedures, guidance material and safety-related practices.²⁰

14. The audits are conducted by audit teams composed of ICAO officials. Before an audit, a Memorandum of Understanding is signed between the audited State and ICAO, in which the former agrees to the conduct of a safety oversight audit by an ICAO audit team. The MOU also sets out other terms and conditions relating to the audit.²¹ In addition to the review of documents and records, the audit team will perform on-site activities in the audited State. Upon completion of the audit, an interim report containing all the audit’s findings and recommendations will be transmitted to the audited State, which normally will identify the differences this State has with standards and recommended practices. On the basis of the interim report, the State will prepare a corrective action plan. Then, the Final Safety Oversight Audit Report will be issued, which will be similar to the interim report, but will include an analysis of the corrective action plan submitted by the audited State, comments made by the audited State and information on any progress made by the audited State on the implementation of the corrective action plan.²²

15. During the first cycle, the audit programme focused on Annexes 1, 6 and 8. Subsequently, it was further expanded to include the safety-related provisions contained in all safety-related Annexes.²³ One hundred and eighty-one Member States were audited, seven were not.²⁴ In early 2006, the ICAO Secretariat reported that significant progress had been achieved in the implementation of State corrective action plans. The lack of effective implementation of the critical elements of a

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²⁰ ICAO Doc. 9735, AN/960, above n.18, 3-1.

²¹ Ibid. Appendix B to this Manual contains a Generic Memorandum of Understanding.

²² Ibid., 6-3.


²⁴ ICAO Working Paper, DGCA/06-WP/3, The Status of Safety Oversight, 9 January 2006. Seven States, namely, Afghanistan, Burundi, Iraq, Liberia, Sierra Leone, Solomon Islands, and Somalia, were not audited during the first cycle, primarily for security reasons. At that time, ICAO had 188 Member States.
safety oversight system declined from an average of 32.6 per cent for all initial audits completed, to an average of 17.5 per cent at a global level, after the audit follow-up of 162 Contracting States. Moreover, ICAO was able to obtain first-hand information from its Member States regarding their compliance with its Standards. Even the most developed aviation nations discovered, during the audit process, that there were some differences between their national regulations and ICAO Standards, which had not been filed with ICAO.

16. After the terrorist attacks in the United States on 11 September 2001, ICAO established the Universal Security Audit Programme (USAP). The objective of the USAP is to promote global aviation security through the auditing of States on a regular basis to assist States in their efforts to fulfil their aviation security responsibilities. The audits identify deficiencies in each State’s aviation security system and provide recommendations for their mitigation or resolution.

17. The USAP generally follows the methodology of the safety oversight audits, but two differences should be noted. First, safety oversight audits are conducted at the governmental level, focusing on the capability of a State to ensure compliance with safety requirements in its jurisdiction. Security audits are conducted not only at the governmental level, but also at the airport level to ensure compliance with Annex 17 and aviation security-related provisions in other Annexes. Consequently, the term “oversight”, as originally suggested by Assembly Resolution A33-1, has been deleted from the name of the Programme. Second, the USAP applies the principle of limited transparency. In the aviation security system, the strength of the chain is in its weakest link. The unauthorized disclosure of any security vulnerability could itself have an adverse effect on security in the State concerned. Consequently, all USAP reports receive a security classification and are subject to rigorous physical controls. By the end of 2006, security audits had been carried out in 151 Member States, with the remaining States to be audited by the end of 2007.

18. The ICAO audit programmes, either for safety oversight or for security, are considered to be a milestone towards a new air safety regime for international civil aviation.
aviation.\textsuperscript{33} Much has been written about these programmes,\textsuperscript{34} but further legal analysis of the theoretical basis for the audit programmes is still necessary.

19. One of the most important principles enshrined by the Chicago Convention is that every State has complete and exclusive sovereignty over the airspace above its territory.\textsuperscript{35} When the concept of ICAO’s audit was introduced and debated in the Council, which was then composed of 33 States, ten members of the Council, representing different regions and different legal systems, expressed the following view:

\begin{quote}
The primary role of ICAO, as established in the Chicago Convention, is the adoption and amendment of SARPs. The Convention does not, in any way, give the Organization an executive function in ensuring compliance by States with the SARPs; the filing of differences is the explicit responsibility of the States. The development of a more robust safety oversight programme must respect these basic competencies.\textsuperscript{36}
\end{quote}

20. In line with this view, Senegal queried whether the mandatory nature of the audit would be contradictory to the principle of sovereignty in the Chicago Convention.\textsuperscript{37} China added that ICAO should not leave the impression that in the field of flight safety and security it was acting as police. France considered the new proposal as being tantamount to changing the relationship between the Organization and its Member States, which would necessitate the modification of the Organization’s charter.\textsuperscript{38} Indeed, according to the classical theory of international law, restriction on the independence of States cannot be presumed.\textsuperscript{39} One of the key features of sovereignty is that a State is not subject to any external authority. An audit by an international team, as Milde pointed out, may be potentially perceived as “intrusive” and offending the sensitivities of sovereign States.\textsuperscript{40}

21. The Secretariat of ICAO expressed the view at that time that the audits could be carried out upon the initiative of ICAO, but always with the audited State’s consent, as

\begin{itemize}
\item Weber, above n.19, 304.
\item See, for example, Milde, above n.19; Weber, above n.19; R.I.R. Abeyratne, Aviation in Crisis (Burlington: Ashgate, 2004), 34–42.
\item Art. 1, Chicago Convention.
\item ICAO Council Working Paper C-WP/10832, Safety Oversight Programme – Implementation in 1999–2001 Triennium (Presented by Angola, Australia, Bolivia, Canada, Egypt, India, Indonesia, Mexico, Pakistan, and Saudi Arabia), 18 February 1998. It should be noted that while Members in the Council are fully entitled to present working papers, it is not their frequent practice to do so. Most of the Council working papers are prepared and presented by the Secretary General of ICAO.
\item ICAO Doc. 9704-C/1122, C-MIN. 151/1-15, Council—151st Session, Summary Minutes with Subject Index (1997), 94–95.
\item Ibid., 97 and 101.
\item Lotus Case, PCIJ, Reports, Series A, No. 10, 18.
\end{itemize}
the principle of sovereignty should be fully respected. It was suggested that an Assembly resolution approving the audit programme, supplemented by bilateral expressions of consent, would provide a proper legal basis for such a programme.\footnote{ICAO Doc. 9704-C/1122, C-MIN. 151/1-15 (1997), above n.37, 94–95; see also ICAO Council Working Paper C-WP/10612, Possible Enhancement of the Implementation of ICAO Annexes on Aviation Safety and Security, 4 June 1997, at para. 2.3.} On the basis of this view, the Assembly Resolution establishing the Universal Safety Oversight Audit Programme urges “all Contracting States to agree to audits to be carried out upon ICAO’s initiative, but always with the consent of the State to be audited, by signing a bilateral Memorandum of Understanding with the Organization, as the principle of sovereignty should be fully respected.”\footnote{Assembly Resolution A32-11, above n.10.} Consequently, more than 180 bilateral Memoranda of Understanding were concluded, all based on the single model approved by the Council. Most States acceded to the standard text of ICAO, whereas some requested certain amendments. It has been an unwritten but firm policy of ICAO not to deviate substantially from the model, in order to safeguard uniformity.

22. The conclusion of the Memorandum of Understanding has fulfilled the requirement of consent, alleviated the concern of the more sceptical minds and provided the legal justification for the audits carried out by ICAO. From a doctrinal point of view, it may be asked whether a Member State actually had the choice to refuse the ICAO audits. The audits under both programmes of ICAO are designed to be “regular, mandatory, systematic and harmonized”. If the audits are based on the consent of the audited States, how could they be branded as “mandatory”? Aside from the Memoranda of Understanding, is there any other legal basis to justify the mandatory nature of the audits? Milde observed that although the Conference of the Directors General “had no law-making power, its unanimous recommendations carried important weight as opinion iuris ac necessitates”. In fact, it “formulated, by implication, a principle that matters of aviation safety are a subject of international concern and that the international community should be empowered to verify the national implementation of safety standards and procedures”.\footnote{Milde, above n.19 at 174.} On the basis of this, can an argument be made that a State’s responsibility for safety oversight is emerging as an obligation \textit{erga omnes}? These issues seem to deserve further consideration.

IV. Aviation safety and obligations \textit{erga omnes}

23. The celebrated pronouncement of the concept of obligations “\textit{erga omnes}” (towards all) is contained in the judgement of the International Court of Justice (ICJ) in the \textit{Barcelona Traction} case in the following \textit{obiter dictum}:

\begin{quote}
... an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising \textit{vis-à-vis} \end{quote}
another State in the field of diplomatic protection. By their very nature, the former are the concern 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*.

Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law... others are conferred by international instruments of a universal or quasi-universal character.44

One of the characteristics of obligations *erga omnes* is their universality and non-reciprocity, i.e. they are obligations of a State “towards the international community as a whole”, and all States have a legal interest in their observance.45 These obligations “are grounded not in an exchange of rights and duties but in an adherence to a normative system”.46 Although the Chicago Convention was adopted in 1944, when the concept of *erga omnes* was not yet proclaimed, there is evidence, however, that certain safety obligations are grounded “in an adherence to a normative system”.47 To illustrate, according to Article 33 of the Chicago Convention, certificates of airworthiness and certificates of competency and licenses must at least meet the minimum standards established under the Convention. If a Member State does not impose the minimum standards in the issuance of the certificates or licenses, other Member States may refuse to recognize the validity of certificates and licenses issued by the non-complying State, but could not take retaliatory action by, for example, reducing their own requirements for the certificates of airworthiness for aircraft flying to that State. The non-complying State, on the other hand, could not legally refuse to recognize the validity of certificates and licences issued by other States, solely on the ground that the latter States have refused to recognize the validity of the certificates and licenses issued by the former. The safety standards laid down within the framework of the Chicago Convention are designed to protect the common interests of the international civil aviation community, and to enhance the global normative system for the safety of civil aviation. They are not pronounced on the basis of *quid pro quo*, under which States could derogate from obligations inter se.

44 Barcelona Traction (Belgium v. Spain) (Second Phase) ICJ Reports 1970, 32.
47 Ibid.
24. The Chicago Convention is a multilateral treaty with 190 States Parties, including all major aviation powers. It may therefore be considered as meeting the criteria of the “international instruments of a universal or quasi-universal character” mentioned in the above quoted statement of the ICJ. Moreover, as indicated in the North Sea Continental Shelf case, a rule of conventional origin may under certain conditions pass into the general corpus of international law. In this connection, it is worth noting that the Soviet Union had meticulously observed most ICAO standards long before it became a member State in 1970s. The same was also true for China before it restored it membership in ICAO in 1974. This may illustrate that the effect of the Chicago Convention has in fact gone beyond its States Parties, indicating that safety is the concern of all States. Long before the pronouncement of the dictum in the Barcelona Traction case, Fitzmaurice, who later became a judge of the ICJ, mentioned that certain obligations are in the nature of jus cogens, the compliance of which is “not dependent on corresponding compliance by others, but is requisite in all circumstances, unless under stress of literal vis major”. He specifically mentioned, for example, the obligation to maintain certain standards of safety of life at sea and emphasized that “no amount of non-compliance” on the part of other States “could justify a failure to observe” the obligation. This remark applies, a fortiori, to the obligation to maintain certain standards of safety of life in the air, since civil aviation is not only essentially international by its nature, but is also more vulnerable than maritime transport. Numerous aviation activities cross borders and involve crews, passengers and supporting staff of different nationalities. It follows from this that the safety oversight function of one State will have impact upon another State. “When safety standards and procedures are involved on international flights, one cannot even take the position that non-compliance by a sovereign State affects only the citizens of that State. Any other State that receives flights of aircraft registered in the non-complying State has every reason to be concerned about whether international standards and procedures are in fact being followed with respect to such aircraft and crews.” In a nut shell, certain safety obligations, such as those under Article 33 of the Chicago Convention, are not designed for reciprocal purposes, but for “high purposes which are the raison d’être of the convention”, namely, the safe and orderly development of international civil aviation.

25. From the foregoing analysis, it may be perceived that some safety obligations are inherently linked to the right to life, and in a broader sense, to elementary considerations of humanity. In its Advisory Opinion in the Wall case, the ICJ mentions that a great many rules of humanitarian law applicable in armed conflict are fundamental to the respect of the human person and “elementary considerations of humanity”.

48 ICJ Reports 1969, 41.
49 Milde, above n.40, 6.
51 Kotaite, above n.14 at 20.
52 Words used by the ICJ in its Advisory Opinion in Genocide case, ICJ Reports 1951, 15, 23.
These rules “incorporate obligations which are essentially of an erga omnes character.”53 From this, it could be deduced that “elementary considerations of humanity” is one of the overriding universal values underlying the concept of obligations erga omnes.54 The right to life is one of the core elements of such considerations. As Ramcharan observes, “[t]here can be no issue of more pressing concern to international law than to protect the life of every human being from unwarranted deprivation.”55 In the context of civil aviation, a threat to aviation safety is a threat to life. According to a psychological study, safety is one of the few “basic human needs like food, shelter and health”.56 The need for safety is even more obvious in the air. “Aviation takes place in a hostile environment, unfriendly to human beings, in which a passenger has no control and is enclosed in a vulnerable cocoon, outside of which human life cannot be supported.”57 Unwarranted deprivation of life could result from terrorist attacks, mistaken use of military forces, as well as preventable failure to comply with safety standards. Accordingly, it is of paramount importance to maintain aviation safety in order to protect the right to life.

26. The link between aviation safety and elementary considerations of humanity is convincingly demonstrated in cases relating to the shooting down of civil aircraft as well as terrorist attacks on civil aviation. When the ICAO Assembly adopted, on 10 May 1984, Article 3bis to the Chicago Convention, prohibiting the use of weapons against civil aircraft in flight, the Assembly declared that the safety and the lives of persons on board civil aircraft must be assured in “keeping with elementary considerations of humanity”.58 Moreover, reacting to the abhorrent terrorist acts on 11 September 2001, the ICAO Assembly strongly condemned “such terrorist acts” as “contrary to elementary considerations of humanity”.59 In one word, aviation safety, in the final analysis, is rooted in the elementary considerations of humanity.

57 Ibid.
58 Protocol Relating to an Amendment to the Convention on International Civil Aviation (Art. 3bis), ICAO Doc. 9436.
59 ICAO Assembly Resolution A33-1: “Declaration on misuse of civil aircraft as weapons of destruction and other terrorist acts involving civil aviation”, para. 3 of the preamble, in ICAO Doc. 9848, above n.10, VII-1
27. The obligations of States in relation to aviation safety not only consist of negative obligations of abstaining or refraining from conducting activities which may endanger the safety of flight, such as the use of weapons against a civil aircraft in flight, they also arguably require certain positive action to promote safety. Some writers believe that obligations *erga omnes* in international law are considered analogous to public law obligations or public policy in domestic law.\(^{60}\) Accordingly, the rules of public policy “are merely disabling”, in the sense that they can do no more than prohibit “anything contrary to the supreme interests of international society.”\(^{61}\) Moreover, “the implementation of positive prescriptions depends on the particular circumstances, which may or may not allow a positive prescription to achieve its stated aim.”\(^{62}\)

28. If this reasoning is followed, the responsibility of States for safety oversight may not be considered as having an *erga omnes* character, because this responsibility requires certain positive action from States. It should be pointed out, however, that the ICJ does not appear to foreclose the possible existence of obligations *erga omnes* in positive prescriptions.\(^{63}\) In the *Wall* case, the Court, in affirming that the right of peoples to self-determination has an *erga omnes* character, refers to the provision of the UN General Assembly resolution 2625 (XXV) that “[e]very State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle . . .” (Emphasis added).\(^{64}\) From this, it may be perceived that the right of self-determination, which has an *erga omnes* character, also carries with it certain positive obligations.

29. International law in general has long evolved from “an essentially negative code of rules of abstention to positive rules of cooperation.”\(^{65}\) Ramcharan observes:

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\(^{60}\) UN Doc. A/CN.4/L.682, above n.54, 200, para. 395.


\(^{62}\) Ragazzi, ibid., 152.

\(^{63}\) There are some instances in which the Court refers to positive rules in the context of obligations *erga omnes*, particularly in cases where negative obligations will also give rise to the corresponding positive action. In the Corfu Channel case, the prohibition of unnotified mining will give rise to the positive obligation to give notice. ICJ Reports 1949, 4. In the Genocide case, Preliminary Objections, the obligations relating to genocide include the obligation to prevent and punish the acts of genocide. ICJ Reports 1996, para. 31.

\(^{64}\) The *Wall* case, above n. 53, para. 156.

\(^{65}\) W. Friedmann, The Changing Structure of International Law (New York: Columbia University Press, 1964), 62. In the context of civil aviation, numerous legal obligations involve both negative and positive prescriptions. For instance, the obligation to refrain from resorting to the use of weapons against civil aircraft in flight may be regarded as a negative prescription, but the corresponding and incidental obligation to have due regard for the safety of navigation of civil aircraft when issuing regulations for aircraft used in military and police services is of a positive nature. In the context of the obligations to prevent unlawful interference against civil aviation, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal...
In its modern sense, the right to life encompasses not merely protection against intentional or arbitrary deprivation of life, but also places a duty on the part of each government to pursue policies which are designed to ensure access to the means of survival for every individual within its country. If, after its best efforts, in good faith, a government is unable to meet the survival requirements of its own people, then a residual duty vests upon the international community to assist through appropriate forms of international cooperation.66

30. There has been consensus in ICAO that Member States collectively bear a common responsibility for aviation safety.67 By virtue of this conviction, States are required to do something to promote aviation safety. They certainly do not have the right to do nothing. Of course, “the implementation of positive prescriptions depends on the particular circumstances, which may or may not allow a positive prescription to achieve its stated aim.”68 In terms of safety obligations, not every State is equipped with adequate financial and technical means. Their capability to carry out safety oversight functions in civil aviation is subject to their respective constraints. However, this does not mean that positive prescriptions regarding safety oversight could not find their place in obligations erga omnes. As mentioned above,69 the obligation to promote the realization of the right of self-determination does not prevent the principle of self-determination from obtaining the erga omnes status. Similarly, the existence of positive prescriptions concerning the obligation of safety oversight should not present obstacles to its being categorized as an obligation erga omnes. This obligation does not require a State to guarantee that there is no aerial accident in its jurisdiction, but it does require the State to take all necessary measures to implement the safety standards, or at least to demonstrate that it is impossible to take such measures. A practical question may arise concerning how to evaluate the extent and specificity of the obligation. “In this area, the notion of ‘due diligence’, which calls for an assessment in concreto, is of critical importance.”70 The ICAO audit process may provide means to verify whether a particular State has fulfilled the obligation of safety oversight under particular circumstances. In this connection, it should be noted that Ragazzi, although generally favouring the argument that

on 23 September 1971 (Montreal Convention) (ICAO Doc. 8966), when outlawing certain acts of sabotage against the safety of civil aviation, also lays down certain correspondent obligations, such as the famous obligation to extradite the alleged offenders or to submit the cases to the competent authorities for the purpose of prosecution, as well as the obligation to provide assistance in criminal proceedings. The Convention goes even further by providing that Contracting States shall, in accordance with international and national laws, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in the Convention.

66 Ramcharan, above n.55, 6.
67 ICAO Assembly Resolution A35-7; the first and second paras, above n. 10, I-60.
68 Ragazzi, above n.61, 152
69 Above n.64, the Wall case.
obligations *erga omnes* must have a prohibitive content, does indicate that “the identification and enforcement of positive obligations *erga omnes* would require, in practice, a high degree of cohesion within the international community.”\(^71\) The initiatives of ICAO in establishing audit programmes, and their follow-up, will hopefully be one stepping stone towards the promotion of such cohesion within the international civil aviation community.

V. ICAO and enforcement of safety obligations

31. If a conclusion could be drawn from the foregoing analysis that the responsibility for aviation safety oversight is emerging as an obligation *erga omnes*, the next issue is how to enforce this obligation. Traditionally, ICAO has focused on the development and adoption of treaties, Standards and Recommended Practices, guidance material and other provisions relating to aviation safety, leaving their implementation basically in the hands of its Member States. The embarkation on audit programmes has altered this pattern, but further implementation action by ICAO could also be considered.

32. The enforcement of obligations *erga omnes* has been an interesting topic for intensive debates among the commentators. Some writers have generally recognized and supported “decentralized enforcement” of obligations *erga omnes*,\(^72\) namely, the counter-measures taken against the breaching State by parties which are not directly injured or affected by the breach. Others would have preferred centralized or institutional enforcement, such as the enforcement through the UN system, in order to

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71 Ragazzi, above n.61 at 153.
72 See, mainly J.A. Frowein, Reaction by Not Directly Affected States to Breaches of Public International Law, 248 Collected Courses of the Hague Academy of International Law (1994: V), 345, 417–420. Tams, above n.45, 207 et seq; Simma, above n.45, 313 et seq. In the context of civil aviation, two instances have been cited by commentators as examples of counter-measures against the breach of obligations *erga omnes*. In 1981, when Afghanistan provided refuge to the hijackers of a Pakistani aircraft, several States proposed to suspend all flights to and from Afghanistan and called upon all States which shared their concern for air safety to take appropriate action to compel Afghanistan to honour its obligations under the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970 (The Hague Convention). The non-punishment of hijackers is therefore regarded as “a violation of an obligation for the safety of international air traffic.” (Frowein, cited above, 418). The action taken by these States implicitly recognized that States are under an obligation *erga omnes* to refrain from providing a safe haven for hijackers. When such an obligation is breached, even the States which are not directly injured may take counter-measures against the violating State. The second example of counter-measures relates to the aerial incident of Korean Airlines Flight 007, which was shot down on 1 September 1983 by the Soviet Union. In this case, despite the fact that they were not directly injured by the act of the Soviet Union, certain States still took action to suspend the landing rights of Soviet civil aircraft in their territory. Moreover, the ICAO Council adopted a resolution on 6 March 1984, pointing out that “such use of armed force is a grave threat to the safety of international civil aviation” and is incompatible with elementary considerations of humanity. ICAO Doc. 9441-C/1081, C-Min, 111/1-18, Council—111th Session (1984) at 106.
prevent the possible abuse of counter-measures by individual States. Frowein, after reviewing State practice regarding third-party reactions, arrived at the following conclusion:

The recognition of fundamental rules of the system would be meaningless without any special procedures for implementing these rules. Only bilateral reactions would always create the danger that the more powerful State in the bilateral relations will prevail. Of course, it must be admitted that the danger in giving powerful States the justification for disguised political action to further their interests is also great where one accepts that third party reactions are lawful. With the decentralized structure of present-day international law this danger cannot be fully avoided. What one has to balance is on the one hand the need to protect the fundamental rules of the system by all those belonging to the community of States and on the other hand the danger that powerful States overstep the limits of the law. It is clearly preferable, therefore, that collective institutions should be involved in the procedure.

33. The experience of ICAO in the implementation of its audit programmes has confirmed that it is preferable to enforce safety obligations through the institution of ICAO, particularly those obligations which may essentially be of erga omnes character. As the UN-specialized agency responsible for civil aviation, and as the universal, neutral and legitimate body in this field, ICAO is well-positioned to take the proactive role in the global action of enforcing safety obligations. This may ensure that a balance is maintained between “the need to protect the fundamental rules of the system by all those belonging to the community of States and on the other hand the danger that powerful States overstep the limits of the law”.

34. UN organizations, with few exceptions, have been characterized as having “intensive co-operation and monitoring, but little direct enforcement of legal obligations”. The ICAO audit programmes represent some progress from “monitoring” to “enforcement”. Although it is by no means comparable to the enforcement procedure of a court, the Chicago Convention does contain certain rules for sanctions against non-compliance of its provisions. Under Article 54 j), one of the mandatory functions of the Council is to report “to contracting States any infraction of this Convention, as well as any failure to carry out recommendations or determinations of the Council”. Although this power has rarely been used in the past, it may have compelling force in the future. In the contemporary world, the reports of a UN-specialized agency in the

74 Frowein, above n.72, 423.
75 Ibid.
76 Simma, above n.45, 283.
sphere of its competence may carry with it powerful political, economic and other effects against a State that commits an infraction, which could affect its vital interests.

35. Article 54 j) covers the infractions of the Chicago Convention but may not necessarily cover infractions of other treaties adopted under the auspices of ICAO. Nevertheless, several ICAO treaties beyond the Chicago Convention also, to various degrees, contain reporting requirements to the ICAO Council. For instance, Article VIII, paragraph 2 of the Convention on the Marking of Plastic Explosives for the Purpose of Detection provides that States Parties shall keep the Council informed of the measures they have taken to implement the provisions of this Convention.77 Article IX further provides that the Council shall, in co-operation with States Parties and international organizations concerned, take appropriate measures to facilitate the implementation of this Convention. These provisions, together with the general provision in Article 55 c) of the Chicago Convention, which authorizes the Council to conduct research into all aspects of air transport and air navigation which are of international importance, leave the Council with a broad latitude to compel or enable States to fulfil their obligations under the relevant treaties, if it so wishes. The ICAO Assembly, under Article 49 k) of the Chicago Convention, may also deal with any matter within the sphere of the Organization not specifically assigned to the Council.

VI. Conclusions

36. Civil aviation is to a large extent international by its nature. It transcends territorial boundaries and various nationalities. Given its vital role in the contemporary world, its safety has gradually become the concern of the international community as a whole. There is strong evidence to demonstrate that aviation safety is closely linked to the elementary considerations of humanity, which is one of the core values underlining the concept of obligations erga omnes. In this sense, there is growing consensus that aviation safety is not a matter of an individual State but has become the concern of all States. As the UN-specialized agency in the field of civil aviation, ICAO should embrace its responsibility to oversee the global safety of civil aviation, including the undertaking of certain enforcement and implementation action, if necessary.