



Preserving Safety in Aviation: “Just Culture” and the Administration of Justice

By Roderick D. van Dam

Ever since the investigation of aviation accidents was undertaken in a systematic manner with the specific aim of using the findings of each accident investigation for the prevention of other accidents, the problem of the use of these findings for other than accident prevention purposes has been manifest.

Improving aviation safety depends to a large extent on the feedback of knowledge generated by a system of accident/incident data collection and analysis. Such a system serves the industry, as well as its regulators, by allowing it to adapt and improve equipment and procedures. A high-quality output of the system very much depends on the existence of systematic records traceability and active participation and reporting from all the aviation actors involved in safety areas. In the United States and Europe, for example, well-developed accident prevention processes are in place, including mandatory incident report-

ing systems and independent accident investigation.

In such a safety-critical domain as aviation, the legal consequences of (contributory) actions or behavior that could result in serious personal harm, death, or other damages are plentiful and very significant, both in the private law and, increasingly, in the criminal law domain. Criminal sanctions have always been an essential tool for sovereign states in the exercise of their responsibility for enforcing specific domain-related norms as well as for the prevention and sanctioning of unacceptable behavior.

Recent years have shown a growing concern on the part of aviation professionals, including air navigation service providers (ANSPs), safety regulators, manufacturers and interest groups such as the International Federation of Air Traffic Controllers Associations (IFATCA) and the International Federation of Air Line Pilots Associations

(IFALPA), about the interpretation of flight safety by the general public and especially by the criminal judiciary. These concerns are associated with what is seen as the increasing emphasis on legal issues in aviation safety occurrences. This has led to growing fear of litigation and the threat of criminal sanctions against individuals and organizations that are seen as partly or fully responsible for an accident or incident they reported.

From relatively early days¹, the International Civil Aviation Organization (ICAO), in setting international rules and recommendations for improving safety, has been confronted by the need to "protect" aviation safety interests from those parties that want access to investigation results and other safety data with the goal of what ICAO calls "apportioning blame or liability." Therefore, ICAO rules, in the interest of an uncompromised safety investigation process, are often seen as advocating a protection against the interests of what is often referred to as "the administration of justice."

The administration of justice, in particular in the criminal law domain, constitutes one of the pillars of state sovereign functions; they are usually found at the constitutional level. Both the Convention on International Civil Aviation (hereafter the Chicago Convention) and the EUROCONTROL Convention² explicitly confirm the complete and exclusive sovereignty of a state over its territorial airspace. That certainly includes the administration of justice. States are of course free to choose to delegate or pool certain sovereign functions, as is the case with the European Union membership, but criminal jurisdiction, with only a few exceptions, generally remains firmly imbedded at the state national level.

This "divide" between international safety rules and national law pertaining to civil and criminal liabilities and—to a lesser extent—to public information legislation forms one of the causes of the difficulties

encountered in the safety aviation domain. It lies also at the root of the almost complete absence of communication, let alone cooperation, between those that represent the aviation safety domain and the national state prosecutors.

It is in this context that the concept of "Just Culture" was introduced for aviation safety, and in particular with respect to air traffic management (ATM)³. Its implementation aims at enhancing the reporting of incidents occurring during the operation of air navigation services to identify risks and improve safety.

Criminalization and aviation

Aviation professionals are generally very protective of their work and responsibilities. That is perfectly understandable because the potential for accident or incident investigation being compromised or even hijacked is almost built in the process. The same pieces of evidence and reports form the basis for both safety and criminal investigations. The two are therefore essentially inseparable. The understanding and acceptance of that dualism forms the key for resolving the alleged conflict of interest.

A complicating factor in that process is the discussion of or perhaps even outcry against in aviation circles the so-called criminalization of aviation incidents and accidents. The aviation community has been warning against what has been referred to as an unwarranted use of criminal laws and procedures.

In the aftermath of an accident, in particular with fatalities, criminal investigations will most likely take place. A number of high-profile accidents and serious incidents, such as the mid-air collision over Überlingen in Germany; the runway incursion at Linate Airport in Milan, Italy; the mid-air collision in São Paulo, Brazil; the Air France Concorde crash in Paris, France; and the Japan Airlines near miss between two of its aircraft have resulted in criminal investiga-

tions and proceedings.⁴ Those have triggered some strong reactions from the aviation safety domain which need to be put into context.⁵

It is evident that accidents will almost always trigger a police investigation as a potential first step to further criminal law actions. In Europe, as in most other ICAO regions, the rules in many states explicitly foresee joint police/accident prevention investigations, often with an established priority for the police. A first investigation

by law enforcement authorities after an accident should be accepted as a given, in the expectation that it will not interfere (too much) with accident / serious incident investigations foreseen under Annex 13 to the Chicago Convention, which purpose is not apportion blame or liability but rather prevention

of accidents and incidents. The key is what happens next: A qualified criminal investigator or prosecutor must assess whether under the applicable criminal law the actions leading to the accident/incident warrant further activities (investigations, indictment).

This is not an easy assessment considering the complicated and specialized operational and technical issues that inevitably come into play.

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Furthermore, events have shown that further complications could arise as a result of public and media pressures that generally accompany any crash or serious incident with the associated "search" for a guilty party.

The discussion on criminalization of aviation incidents and accidents shows the concerns of those who worry about the intrusion by law enforcement processes in the all-important processes for enhancing safety in aviation. It also reflects a

tendency to use "criminalization" as the epitome of misdirected and unwarranted activities by the judiciary in the criminal law domain.

Let there be no misunderstanding: The consequences of criminal proceedings in certain cases have proven to be detrimental to safety reporting (an

often quoted example is the Delta case in the Netherlands, where an incident report became the basis for criminal proceedings against controllers).⁶ At another level, there are also cases of accidents where the actions by the authorities seemed to be mainly driven by efforts to shift the blame for their own shortcomings to other innocent or only remotely involved parties such as pilots or controllers.

The latter are unfortunate, but isolated, occurrences. Misuse of law enforcement processes in case of aviation accidents should be strongly condemned, but cannot in itself be used as an argument for exempting aviation professionals from the administration of justice. Nobody will deny the overriding need to ensure the continuation and, where possible, the further enhancement of today's impressive aviation safety records. But invoking real or alleged

criminalization of aviation incidents or accidents as a justification for immunity for controllers, pilots, or other aviation professionals does not seem an appropriate argument. Rather, what should be achieved is equilibrium between two equally relevant functions.

What is a Just Culture?

Just Culture has been for the last few years closely related to ATM safety reporting. This is because incident reporting and data sharing are not optimal, and progress in this field has been difficult. One of the key reasons for controllers/pilots not systematically reporting is fear--fear of ending up on the radar of judicial authorities, even in cases where tasks were perceived to be exercised in a responsible and professional manner. Although such apprehensions cannot justify noncompliance with mandatory reporting systems, they do have an effect on the flow of information with all the associated safety consequences. The same problem rises a fortiori for voluntary reporting.

Some argue that the solution lies in offering forms of judicial immunity for those accepting to report. Apart from the fact that this would require a very fundamental change of national law in many states, such a solution would essentially remove any responsibility or liability of persons that could potentially be involved in incidents. Another related issue affecting reporting is the confidentiality of the information and the potential negative impact, in terms of image and performance, the disclosure of such information could have for the organization and individuals concerned.

Just Culture is not limited to aviation. It has been associated with other incident-prone professional activities where consequences of mistakes are potentially grave, such as the medical and health domain. In aviation, concepts such as "non-punitive reporting" and "blame-free reporting" were the precursors to the notion of Just Culture. The last five years have seen the emergence

of the more realistic concept of Just Culture. Most aviation professionals have now accepted that a blanket immunity, which is related to concepts such as non punitive reporting, was not the right way forward. The definition and principles associated with Just Culture are still subject to discussions and further refinement.

Description

Attempting to describe, let alone define, Just Culture is not simple. The results may vary from one person, culture, or legal system to another. The following description of Just Culture in the aviation domain has been developed in Europe:

A culture in which front line operators or others are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, wilful violations and destructive acts are not tolerated.⁷

This description introduces the notion of gross negligence and willful violations for qualifying criminally relevant behaviors that are not subject to internationally agreed definitions. And although the criteria to establish gross negligence or related legal concepts ("faute lourde," "faute intentionnelle") may be similar in most countries, their interpretation and application with respect to each individual case will ultimately lie in the hands of prosecutors and judges. What can be considered by someone as an action, omission, or decision by an individual commensurate with his/her experience and training may be considered by someone else as gross negligence. Therefore, descriptions or definitions can certainly help in promoting and understanding the concept of Just Culture but, because of the very nature of Just Culture, they cannot be prescriptive.

Legislative aspects

When the legal consequences of Just Culture were first discussed, the initial reaction was that most European states would need to significantly amend their laws to imple-

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ment Just Culture. A number of calls were made for changes to criminal laws, accession to information, and aviation legislation. The general feeling was that Just Culture could not be implemented without these. Later, when the discussions involved legal experts, it dawned upon the participants that amending laws and principles that constitute the basis of sovereign judicial systems was, in most cases, neither a realistic option, nor essential. The issue was not necessarily the need for more legislative action, but rather the way in which those existing laws and regulations were implemented and enforced by the national judicial authorities.⁸

Provisions that could result in a legal environment supporting a Just Culture, while taking a realistic view of the need to respect some fundamentals with respect to the administration of criminal justice, already exist. A number of relevant instruments dealing with accident investigation and incident reporting, supported in some cases by guidance material, are in place.

At the international level, ICAO has introduced the need for states to ensure a balance between safety and the administration of justice through Annex 13 to the Chicago Convention, dealing with accident and incident investigation.⁹ In 2006, Attachment E was added to ICAO Annex 13. This Attachment provides legal guidance for the protection of information from safety data collection and processing systems.

At the European level, the European Community, as well as EUROCONTROL, have respectively enacted two Directives¹⁰ and a Safety Regulatory Requirement (ESARR 2),¹¹ transposed by their member states, which are also tools addressing safety reporting that can be used toward the implementation of Just Culture. Directive 2003/42, dealing with occurrence reporting, provides in particular that:

Without prejudice to the applicable rules of penal law, Member States shall refrain from instituting proceedings in respect of unpremeditated or inadvertent infringement

of the law which come to their attention only because they have been reported under the national mandatory occurrence-reporting scheme, except in cases of gross negligence.

The above-mentioned instruments had to be transposed by states into their national legal order. Because of their legal nature and as they are objectives-based acts, their transposition resulted in certain discrepancies regarding the national legal frameworks in place with respect to safety reporting and Just Culture. Some states have taken the opportunity of the need to transpose those texts to establish a legal environment that would be supportive of a Just Culture (and some have even gone further), while others have done the strict minimum to comply with their obligations.

The following conclusion, drawn in 2005 in a EUROCONTROL Report, is still of relevance:

The concept of "just culture" has become better understood and accepted by aviation personnel. However, the need for a "just culture" is generally not understood and reconciled with the judicial system and legislators, and the situation is likely to get worse if adequate measures are not taken. The removal of identified obstacles against the establishment of a "just culture" in ANS (air navigation services) does not necessarily require the creation of additional regulations at international/regional level, but should concentrate firstly on appropriate implementation actions at domestic level.¹²

The different legal instruments enacted by ICAO, the European Community, and EUROCONTROL are under review this year. However, at this stage, it is expected that the resulting modifications to those instruments will be limited, in particular regarding the "criminal law" component of Just Culture. This leaves states with a responsibility to domestically address two key issues: Have they established a legal framework that can support Just Culture; and have they taken the means to ensure that the notions related to Just Culture are understood not only

by their safety experts and aviation personnel in general, but by those involved in the administration of criminal justice? This latter aspect will be discussed in further detail in the next section.

Reconciling the needs of judicial authorities and aviation safety

A number of cases have demonstrated how the involvement of judicial authorities may impact the collection of information that is vital to aviation safety. The fear of legal proceedings and the involvement of judicial authorities can have an impact on the level of reporting of safety incidents. With respect to aviation, failure to gather all available safety data may have serious consequences, as one of the most valuable tools for the promotion of safety is the ability to learn from previous mistakes.

Discussions and initiatives to address the perceived negative consequences of the potentially conflicting interests of the administration of justice representatives and aviation safety experts are presently almost exclusively limited to the aviation safety community. The representatives invariably support proposals to protect the interest of safety investigation, including the concept of a Just Culture. But the result is often a warm, but rather one-sided and even somewhat incestuous meeting with no or limited input from anyone representing the judiciary. Proposals are therefore not as effective as they could be since they fail to directly commit one of the key concerned parties. That results in mostly affirmative resolutions and proposals for action that do not really move the issue forward. Clearly, support

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and commitment by the different national authorities concerned, and not solely aviation safety experts and regulators, are necessary.

Focus in EUROCONTROL has now shifted toward initiating a dialogue between the national authorities concerned. A better understanding of the consequences that a judicial inquiry, and potential resulting legal proceedings, may have on reporting systems must be the starting point. Certain provisions of national aviation or criminal legislation provide prosecutors with a level of discretion as to how to apply

those laws; it is proposed that a clearer view of the safety consequences may actually influence the application of those laws.

With this objective in sight, EUROCONTROL has been promoting the creation of a pan-European Just Culture network open to all concerned professionals, and aimed at facilitating exchanges, experiences, and best practices.

A number of states have taken initiatives involving their prosecutors. Guidelines, decrees, and "expert" prosecutors have been introduced in order to implement the legal "arm" of the concept of Just Culture. A particular, encouraging initiative has been taken by the Dutch aviation prosecution office. Formal instructions by the Ministry of Justice have been published that aim to qualify the type of behavior in the context of incident reporting that would warrant further investigative actions by the prosecution office.

EUROCONTROL has also issued guidance on how to interface with judicial authorities.¹³ The work has only begun for the development

of Just Culture to spread across Europe and for the right balance to be achieved. A common European approach is needed, involving the joint forces of EUROCONTROL and the European Community. An ongoing review of the two relevant EC directives regarding accident investigation and occurrence reporting is expected to result in a legislative framework that can take the notion of Just Culture further, using all the mechanisms available for harmonization, even in the criminal domain.

A culture in itself cannot be changed overnight—it will take a number of years to reach what can be considered as a Just Culture with respect to ATM reporting, even with the support of stronger legislative instruments. This challenge must, however, be undertaken as it will become an important factor in the effective achievement of a European Single European Sky, in a context where operations in the aviation domain are not limited to national borders.

Conclusion

There is a copy of a well-known picture in my office of a WWI type of airplane that seems to have "landed" in a tree. It looks a bit crumpled, but still more or less in one piece. It is also about 15 feet above terra firma. A text above the image reads:

Aviation in itself is not inherently dangerous. But to an even greater degree than the sea, it is terribly unforgiving of any carelessness, incapacity or neglect.¹⁴

I am certain that this picture decorates many a safety investigator's office and serves as a source of inspiration. I am equally certain that it would also be a source of inspiration for a criminal prosecutor as the message seems to fit the roles and duties of both categories of specialists.

Passengers expect to be provided with air transport and air traffic management services that are well regulated and provided in accordance with the highest safety norms. They have similar expectations as citizens of a

state that aims to protect them against wrongs, personal harm and injustice through criminal legislation and an impartial and efficient judicial infrastructure. Both activities in essence aim to protect innocent citizens.

There is an identified need for those involved in the administration of justice and aviation safety to exchange views and to establish balanced processes, which must ultimately support and improve aviation safety. The concept of Just Culture is based on the support and understanding of both groups of professionals.

It is important to realize that all efforts, be they at the global (ICAO), European (European Community / EUROCONTROL) or national level, to establish boundaries between the incident or accident investigation and the administration of justice, recognize the principle that nobody should be immune from investigation and possible sanction if he or she was suspected of actions that could be qualified as criminal acts. Article 4 of the recent Attachment E to ICAO Annex 13 provides a good example as it contains the justifications for state authorities to access safety information and proceed with their inquiries when deemed necessary. That does not mean that Annex E or any other legislation that seeks to protect safety investigation or data reporting is flawed. But it reflects the limits of protecting one activity without harming the other.

The Just Culture approach respects those limits and explores the promising solutions of educating both parties and building trust and understanding toward exercising their tasks in recognition of their mutual responsibilities.

A number of promising initiatives by EUROCONTROL and the European Commission are presently ongoing in Europe. Partly inspired by the initiatives of the Dutch Aviation Prosecution Office, guidance material and a model for a possible "incident reporting prosecution policy" at the national level are presently being developed and discussed. These ini-

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tiatives and first results will also be brought forward to ICAO for further discussion and inspiration.

Finally, and perhaps not surprisingly, the concept of Just Culture, of reconciling aviation safety and the administration of justice, can be summarized by that universally recognized expression: "It takes two to tango."

Endnotes

1. ICAO Annex 13 was adopted in 1951. A number of additions relating to the status to be granted to investigation records and coordination between the investigator-in-charge and judicial authorities, were introduced in the mid-70s.

2. The International Convention relating to Co-Operation for the Safety of Air Navigation of 13 December 1960, as variously amended.

3. The article will focus mainly on air traffic management. The issues raised are, however, of relevance for aviation safety as a whole.

4. On July 1, 2002, a DHL B-757 collided mid-air with a Bashkirian TU-154 over Überlingen in Germany. Employees from Skyguide, the air navigation service provider involved, were found guilty of negligent homicide. On October 8, 2001, a runway accident between an SAS aircraft and a Cessna Citation II jet occurred at Linate Airport in Milan, Italy. Airport officials and managers of ENAV, the air

navigation service provider, were convicted of manslaughter. On September 29, 2006, a midair collision between an Embraer business jet and a B-737-800 from Brazilian carrier GOL took place in São Paulo, Brazil. The two pilots from the business jet and the air traffic controllers are facing criminal charges. On July 25, 2000, an Air France Concorde crashed further to a runway incursion (a metal strip allegedly coming from a Continental Airlines aircraft busted the Concorde tires) at Paris Charles de Gaulle Airport, France. Prosecutors have recommended manslaughter charges against Continental Airlines and two of its employees, and two French officials. On January 31, 2001, a near miss occurred between two Japan Airlines aircraft over Yaizu, Japan. The court found two air traffic controllers guilty of professional negligence resulting in injury following the near miss.

5. On October 17, 2006, a number of safety organizations and aviation professional associations issued a joint resolution regarding criminalization of aviation accidents. They in particular underlined that "increasing safety in the aviation industry is a greater benefit to society than seeking criminal punishment for those 'guilty' of human error or tragic mistakes." They urged "States to exercise far greater restraint and adopt stricter guidelines before officials initiate criminal investigations or bring criminal prosecutions in the wake of aviation disasters."

6. For details on the Delta case, please see Appendix 2 of the Just Culture Guidance Material for Interfacing with the Judicial

System, EUROCONTROL, February 11, 2008, http://www.eurocontrol.int/esp/gallery/content/public/library/Just%20Culture/JustCulture_final.pdf.

7. SAFETY DATA REPORTING & DATA FLOW (SAFREP) TASK FORCE, ESTABLISHED BY THE DIRECTOR GENERAL OF EUROCONTROL, REPORT ON ATM INCIDENT REPORTING CULTURE: IMPEDIMENTS AND PRACTICES, Oct. 2005 [hereafter SAFREP REPORT]. This report and its recommendations were approved by the EUROCONTROL deliberating bodies.

8. *Id.*

9. States can notify their non compliance with ICAO Standards through the filing of differences.

10. Council Directive 94/56/EC of 21 November 1994 establishing the fundamental principles governing the investigation of civil aviation accidents and incidents and Directive 2003/42/EC of the European Parliament and of the Council of 13 June 2003 on occurrence reporting in civil aviation.

11. EUROCONTROL Safety Regulatory Requirement (ESARR) 2, Reporting and Assessment of Safety Occurrences in ATM, adopted by Decision 80 of the EUROCONTROL Permanent Commission, Nov. 12, 1999.

12. SAFREP REPORT, *supra* note 7.

13. EUROCONTROL, JUST CULTURE GUIDANCE MATERIAL FOR INTERFACING WITH THE JUDICIAL SYSTEM, Feb. 11, 2008, http://www.eurocontrol.int/esp/gallery/content/public/library/Just%20Culture/JustCulture_final.pdf.

14. Captain A.G. Lamplugh, British Aviation Insurance Group, London, early 1930s.