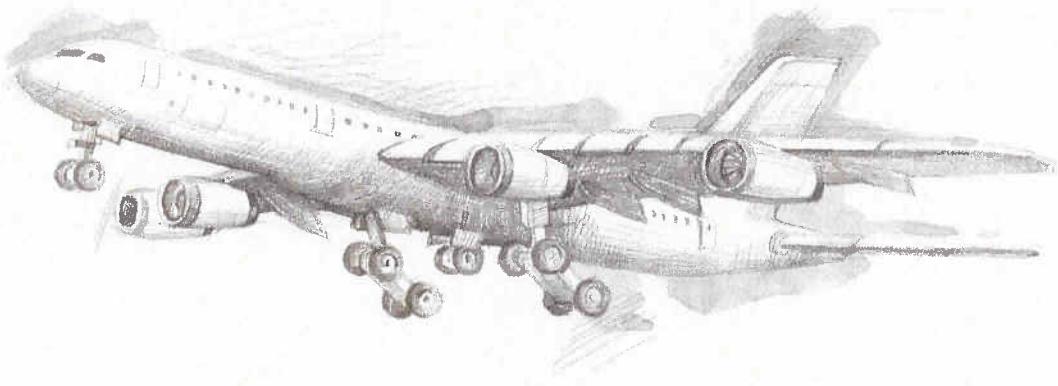


# FLIGHT INTERNATIONAL CONFERENCE

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### **PROSECUTION OF YOUR CREW FOLLOWING AN INCIDENT IN A FOREIGN COUNTRY: ARE YOU READY FOR THIS?**



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## INTRODUCTION

For the most part, it is an anomaly to suggest that an accident or incident is a crime. However, there has been an increasing trend on the part of the Authorities to prosecute aviation professionals (not just crew) following an accident or incident these days.

Surprisingly, history reveals that this is nothing new. In fact, criminalisation of aviation accidents and incidents goes back over 200 years to the first ascent of the Montgolfier Balloon on 5 June 1783. This was followed by an Order made by the Chief of Police in Paris on 23 April 1784 prohibiting the manufacture and use of balloons employing hazardous materials. Consequently, evidence of suitable precautions and prior police permission were required before all future ascents!



However, undoubtedly the criminal prosecution of crew has received significant media attention and publication in recent times. Many examples can be cited. However, the prosecution of the crew of the ExcelAire Embraer Legacy corporate jet following the mid-air collision with a GOL Boeing 737 in Brazil is a prime example. The Legacy crew survived and were able to make a successful forced landing. However, before any technical or factual investigation had commenced, they were prevented from leaving Brazil and it was only after considerable political efforts that they were ultimately able to return to the US. At the time of writing, the prosecution proceedings continue and a video-link deposition is planned to take place shortly. Not surprisingly, the Commander and First Officer have declined the invitation to return to Brazil!

More recently, on 24 August 2008 a Boeing 737-200, registration EX-009, owned and operated by ITEK Air crashed whilst attempting a turn back at night in VMC to Bishkek Airport, Kyrgyzstan, following an airstair stowage warning light in the cockpit. Of the eighty three passengers, sixty six sadly perished and the remainder sustained serious injuries. The seven crew survived with serious injuries. However, the local General Prosecutors Office imprisoned the Commander, and is currently also considering prosecuting the First Officer as well as cabin crew under the Kyrgyz Criminal Code, despite the fact that the investigation into technical cause remains ongoing.

Whilst the title of this paper refers to "incidents", the topics and concepts discussed can equally apply to "accidents". An incident involves circumstances where an accident nearly happened. It is effectively a free lesson and has been defined as:

*"an occurrence, other than an accident, associated with the operation of an aircraft which affects or could affect the safety of operation"<sup>1</sup>.*

If intent is present there cannot be an accident which, by definition and of necessity, is unintentional. By contrast, an incident can involve intentional or unintentional conduct. However, for the most part, aviation incidents are unintended.

<sup>1</sup> Annex 13 to the Convention on International Civil Aviation, Chapter 1

The concept that someone should be punished for human activities which result in death or serious injury is as old as civilisation itself. The biblical talion law of "an eye for an eye" has been effectively transformed into acceptable criminal sanctions which date back to breaches of aeronautical regulations ever since 1784.

Nevertheless, aviation is no different from any other form of transport where breaches of regulations attract criminal sanctions. Given this deep-rooted culture, any change is bound to take considerable time. Nevertheless, the chilling effect which potential prosecution has on openness and the flow of safety information following an aviation accident or incident is bound to have an adverse impact upon aviation safety and prevent lessons from being learnt.

Against this background, this paper examines some recent legislative changes and proposals which are imminent. In addition, practical initiatives taken by a number of aviation organisations including, ICAO, IFALPA and EUROCONTROL are considered. All these are focused upon developing a "Just Culture" with the aim of immunising "honest mistakes" from criminal/penal sanctions.

Inevitably, changing a culture is really hard. Doing it quickly is impossible. In the meantime, some practical suggestions are included in this paper in the event (albeit hopefully remote) that your crew are prosecuted following an incident in a foreign country.

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## **THE BLAME GAME AND THE EMERGENCE OF A JUST CULTURE**

As indicated above, the "Blame Game" is not new. There has been a tendency on the part of the Authorities to resort to criminal sanctions more readily these days. This is in part due to improved media and communications, together with the response demanded by a worldwide public with an unquenchable thirst for knowledge.

Partly to satisfy the present need to know and punish mentality, most accidents involve double enquiries from a civil and criminal perspective. It is a fact that almost any aviation accident can at the outset result in criminal allegations being made. The aviation industry and professionals who work within it are soft targets for prosecutors. However, by its very nature it is an anomaly to suggest that an accident is a crime. The essential question is therefore when can an accident become a crime, if at all? Alternatively, when can a crime become an accident? What is an honest mistake? When is conduct acceptable or unacceptable and who draws the line?

The answers are complicated and can sometimes involve punishment of individuals for the "sins of the system". As mentioned, such exposure does not only involve pilots but extends to all aviation professionals as well.



The best example is typified by the criminal proceedings which resulted from the 1996 crash of ValueJet Flight 592 in the Everglades in Florida. This, perhaps more

than any other aviation accident, brought the concept of corporate manslaughter/homicide into focus. Development of corporate crimes generally has resulted from a reaction to a perceived lack of accountability by some Companies involved in major disasters.

In England, for example, rail disasters at Ladbroke Grove and Potters Bar have resulted in a new Statute known as the Corporate Manslaughter & Corporate Homicide Act 2007. This came into force earlier this year (2008), although no decisions have yet been reported on its effect. In essence it provides that a Company can only be convicted once an individual, who was the "controlling mind", has also been convicted. It should be noted that the offence applies to organisations not to individuals.

Looking elsewhere, and particularly in the US, such Corporate prosecutions have generally involved circumstances where deliberate acts that involve a history of corporate non-compliance with regulations have been demonstrated. High level decisions to take action, or refrain from taking it, in circumstances where there is a wide scale level risk of harm to the public or individuals, have required accident investigators to immediately notify the appropriate authorities that they had uncovered evidence of an intentional, as distinct from unintentional, acts.

This, in turn, has led to a chilling effect on co-operation between companies and individuals with accident investigators. The corresponding adverse effect and implications for air safety are obvious.

George Santiana, a well-known American philosopher, once said "Those who do not learn from history are forced to repeat it". The ethos of this statement is at the heart of the main objective of accident or incident investigation and the emergence of a "Just Culture" which is clearly intended to prevent recurrence and to learn from mistakes made rather than punishing those involved. There is a popular misconception that a blame free reporting scheme is synonymous with lack of personal accountability. However, this is not necessarily correct as it is possible to devise a system where crew involved in incidents, and have learnt lessons thereby, can become actively involved in using their experience to best advantage in creating a better system to work in the future. Such a proposition is entirely consistent with the overall philosophy of the evolution of aviation safety based upon experience gained. Prosecuting or blaming crew can have a converse effect and outcome.

A "Just Culture" is also "*a concept associated with enhancing the reporting of incidents occurring during the operation of air navigation services and hence aimed at identifying risks and improving safety*"<sup>2</sup>. Manifestly, a just society requires a "Just Culture". This has been defined as a culture in which frontline 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<sup>3</sup>.

The line between honest mistakes and unacceptable behaviour is a fine one. It is obvious that in the event that people are blamed for honest mistakes, they may stop reporting them. It follows that lessons will not be learnt from those mistakes. Consequently, it is inherent in a "Just Culture" that openness and information sharing should feature. An honest mistake, according to Eurocontrol, is "*one that is*

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<sup>2</sup> Skymag November 2007, page 25

<sup>3</sup> EATM Just Culture Guidance Material for interfacing with the Judicial System, Edition 11/02/08, page 11

*in line with people's experience and training*<sup>4</sup>. Manifestly, gross negligence, wilful violations or destructive acts are not honest mistakes.

Almost any mistake can, with hindsight, be construed as constituting wilful disregard or negligence. However, what is crucial in building a "Just Culture" is to consider very carefully who gets to draw the line? This is undoubtedly the most difficult aspect in the evolution of a "Just Culture".

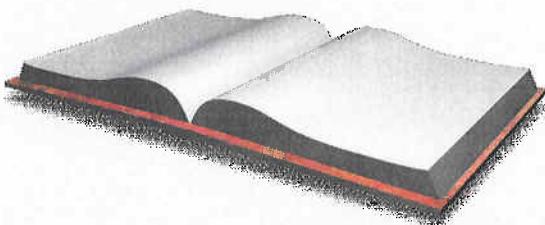
Turning to such evolution, 2006 was a significant year in that:

- ICAO released a revised Annex 13 to the Convention on International Civil Aviation including "*Attachment E: Legal guidance for the Protection of Information from Safety Data Collection and Processing Systems*" (see Appendix 1)
- Flight Safety Foundation pioneered a "*Joint Resolution regarding Criminalisation of Aviation Accidents*"; (see Appendix 2) and
- The first Eurocontrol Workshop took place (14-15 November 2006).

In the meantime, civil aviation around the world remains regulated by a framework agreement established by the Chicago Convention drawn up in 1944 (the "**Convention**") at the end of the Second World War. Most global states are party to this Convention.

In its 93 articles, the Convention deals with a wide range of topics, including in Annex 13 the "standards" and "recommended practices" relating to investigation of civil aviation accidents and incidents. Standards are regarded as "necessary" whereas recommended practices are only regarded as "desirable".

In general, a State in which an accident occurs will institute an enquiry into the circumstances of the accident in accordance with the provisions of the Annex but only "insofar as its laws permit"<sup>5</sup>. This has resulted in lack of uniformity. Indeed the Convention requires States to notify ICAO of any differences between their national laws and regulations when viewed against the international standards and recommended practices contained in Annex 13<sup>6</sup>.



However, helpfully, this Annex provides that "*the sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability*". Nevertheless, it does specifically provide for information to be given to aviation security authorities where evidence emerges of an unlawful act. More specifically, Annex 13, paragraph 5.11 provides that:

*"if in the course of an investigation it becomes known, or is suspected, that an act of unlawful interference was involved, the investigator in*

<sup>4</sup> SAFREP TF Report to PC – November 2005

<sup>5</sup> Annex 13 Foreword Page (viii)

<sup>6</sup> See page 13/14

*charge shall immediately initiate action to ensure that the aviation security authorities of the State(s) concerned are so informed*"<sup>7</sup>.

However, the fact that States are permitted to notify differences between local laws and Annex 13 Standards and Recommended Practices means that, in reality, it is no more than a code of best practice.<sup>8</sup>

The recipe for inconsistency is inherent in Annex 13, Attachment E (see Appendix 1) which deals with the protection of information derived from safety data collection and processing systems. This derived from the 35<sup>th</sup> Assembly of the International Civil Aviation Organisation ("ICAO") which noted that "*existing national laws and regulations in many states may not adequately address the manner in which safety information is protected from inappropriate use*".

As such, the guidance contained in this attachment is simply that (i.e. guidance). It requires national laws and regulations to be enacted in order to prevent the inappropriate use of information collected solely for the purpose of improving aviation safety. This is at the heart of the "Just Culture". However, as it stands, Attachment E is entirely ephemeral in that it stipulates that the guidance "*must allow states the flexibility to draft their laws and regulations in accordance with their national policies and practices*" (see Appendix 1). *Clearly, these vary markedly.*

The essential question is therefore what happens to evidence, and in particular, statements initially given to accident investigators, which can be used beyond establishing cause and preventing future accidents or incidents? The only guidance given is very vague. In Annex 13, it is provided that:

*"The State conducting the investigation of an accident or incident, wherever it occurred, shall not make the following records available for purposes other than accident or incident investigation, unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any further investigations:*

- a) *all statements taken from persons by the investigation authorities in the course of their investigation;*
- b) *all communications between persons having been involved in the operation of the aircraft;*
- c) *medical or private information regarding persons involved in the accident or incident;*
- d) *cockpit voice recordings and transcripts from such recordings; and*
- e) *opinions expressed in the analysis of information, including flight recorder information*

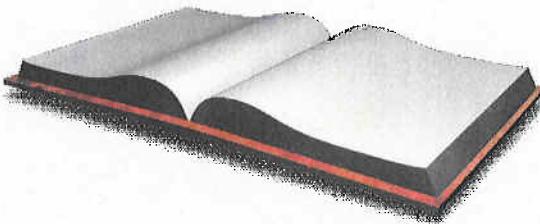
*These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the*

<sup>7</sup> Note. This is the existing paragraph 5.11 of Annex 13. However, ALPA/IFALPA have proposed an amendment to this – see page 12

<sup>8</sup> See page 4

*records not relevant to the analysis shall not be disclosed*<sup>9</sup> (emphasis added)

The election afforded to the "appropriate authority" clearly involves a subjective discretion as to when disclosure "*outweighs the adverse domestic and international impact such action may have*". This involves formulating a balance between the need for protection of such information in order to improve aviation safety and the need for proper justice. In turn, this relies upon an exercise of discretion. Plainly this is both subjective and unpredictable.



It is against this background that individual States such as the UK and USA have enacted their own national frameworks for accident investigation. These are founded upon the Annex 13 Code of Conduct. However, from 1994, European law has required Member States of the EU Community to adopt in their own domestic laws, the provisions of the European Commission Directive<sup>10</sup> which addresses the fundamental principles governing the investigation of civil aviation accidents and incidents. The most salient provisions are as follows:

- *"Whereas the sole aim of the technical investigation is to draw lessons which could prevent future accidents and incidents and the safety recommendations are not designed to apportion blame or liability"*
- *"Article 1 provides that the "sole objective" of investigations is "the prevention of future accidents and incidents"*
- *"Article 10 "A safety recommendation shall in no case create a presumption of blame or liability for an accident or incident"*
- *"Only factual information arising from the technical investigation should be available for use by the judicial authorities and any analysis or conclusions should remain limited to accident prevention use"*

Whilst similar in spirit to Annex 13, it is clearly different in form in being mandatory as opposed to necessary, desirable or recommended. The provisions go a long way to establishing a "Just Culture". So far so good. However in practice, as we have just seen, this has not prevented an increasing trend in criminalisation of aviation accidents.

With a view to ensuring that "prevention" rather than "prosecution" prevails, the Flight Safety Foundation pioneered the *"Joint Resolution regarding Criminalisation of Aviation Accidents"* (see Appendix 2). This was supported by some notable organisations, including the European Regions Airline Association, Royal Aeronautical Society and Civil Air Navigation Services Organisation, amongst others. The Resolution urges:

<sup>9</sup> Paragraph 5.12 of Annex 13

<sup>10</sup> Directive 94/56/EC of 21/11/94

*"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"<sup>11</sup>*

Whilst laudable, this simply isn't going to work in practice unless the aviation industry can convincingly demonstrate to a suspicious public that they are able to unilaterally deliver justice. Throughout the world, accidental death or serious injury automatically gives rise to formal investigations on behalf of the public. The need for investigation is fundamental, deep-rooted and entirely to be expected.

However, the criminalisation of aviation accidents is promoted in part due to the proliferation of wide ranging national aeronautical regulations which are, for the most part, broadly unnecessary. The basic standards set by ICAO in the 18 annexes to the Chicago Convention do not stipulate that compliance should be enforced by reliance upon criminal sanctions and penalties. Enforcement is entirely within the internal powers of those States who are parties to the Convention.

In the European Union ("EU"), the rule making machinery seems to be unending. In America, for instance, the culture of aviation regulation has always been not to regulate unless and until actual experience demonstrated a need. In Europe, by comparison, regulators have had free reign. A delegate to a previous IAOPA World Assembly summed up the process as "*the endless creation of regulations in search of a problem*"<sup>12</sup>

A fundamental and underpinning difficulty stems from the fact that the EU cannot be a party to the Chicago Convention (as it is not a State). Correspondingly, from the perspective of ICAO, there is no accountability on the part of the EU (as opposed to the Signatory States). This is exemplified by actions taken by the EU which ignore the existence of ICAO. For instance, the Regulation implementing rules for dissemination of information on civil aviation occurrences<sup>13</sup> makes no mention of ICAO. Nevertheless, it is assumed that such regulations are intended to mesh with Attachment E to Annex 13 (see Appendix 1). However, put simply, there are too many Regulations!

A large number of rules, regulations, directives and guidance materials relate to the practical steps to be taken to deal with the reporters of incidents and the information which they furnish. These derive from different international, national, institutional and organisational levels and, for the most part, are partially overlapping, sometimes contradictory and inconsistent in the terms used (i.e. "occurrence" versus "incident").

A typical example is a very important Directive issued by the EU relating to occurrence reporting in Civil Aviation<sup>14</sup>. This mandates that each Member State should set up a reporting system. Although the objective is expressed to be "*prevention of accidents and incidents and not to attribute blame or liability*", this is stipulated to apply "*without prejudice to national rules relating to access to information by judicial authorities*". This, in common with ICAO Annex 13 and Directive 94/56/EC<sup>10</sup>, is effectively an "*escape hatch*" (i.e. a qualification which effectively undermines and subjects the sanctity and security of mandatory confidential reporting to criminal prosecution and judicial interference). Ironically,

<sup>11</sup> Joint Resolution Regarding Criminalisation of Aviation Accidents, Flight Safety Foundation, Page 3 – Appendix 2

<sup>12</sup> Pilot Magazine April 2001, page 71

<sup>13</sup> Commission Regulation (EC) No. 1330/2007

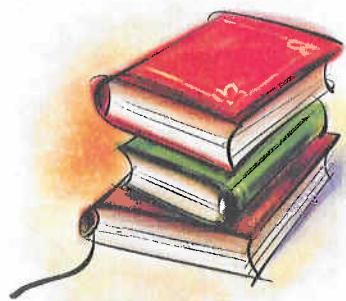
<sup>14</sup> Directive 2003/42/EC

by its very nature, this Directive makes prosecution more, rather than less, likely by virtue of its mandatory status<sup>15</sup>!

However, a few States have gone further than the Directives suggest in categorically denying access to information for criminal prosecutions. An example is Norway where the current Air Law legislation provides:

*"Prohibition on use as evidence in criminal proceedings: Information received by the Investigating Authority may not be used as evidence in any subsequent criminal proceedings brought against the persons who provided the information."*<sup>16</sup>

Whilst not ruling out criminal proceedings altogether, it protects an individual pilot, or other aviation professional from self-incrimination (see also page 10) and ensures that it is safe to report safety critical information arising from an incident.



Likewise, in 2001, a new law was passed by the Danish Parliament<sup>17</sup> mandating the establishment of a compulsory, strictly non-punitive and confidential system for the reporting of aviation incidents. Consequently, aviation professionals, including air traffic controllers and pilots, are ensured strict immunity against penalties and disclosure. However, failure to comply with disclosure is effectively made a punishable offence!

The legislation goes further to grant freedom from prosecution even though the reporter had committed an erroneous act or omission that would normally be punishable. Any written material or reports derived from this scheme are also granted exemption from the provisions of the local Freedom of Information Act (legislation which is normally regarded as sacrosanct in certain States!).

As such, investigators in Denmark are obliged to keep information from reports on incidents undisclosed. The only qualification ("escape hatch") would be that such immunity would be lost *"if gross negligence or substance abuse was present in the reported situation and it would also be punishable by fine not to report an incident in aviation"*<sup>17</sup>.

Nevertheless, it was acknowledged by Danish politicians and aviation specialists that the public have a right to know the facts about the level of safety in Danish aviation. Accordingly, it is law in Denmark that statistics should be published twice a year based on de-identified data derived from mandatory occurrence reports. To

<sup>15</sup> EATM "Just Culture Guidance Material for interfacing with the Judicial System", Edition 11, February 2008

<sup>16</sup> Article 12-24 Norwegian Air Law

<sup>17</sup> Civil Aviation Administration – Denmark BL 8-10 Regulations on Mandatory Reporting of Flight Safety occurrences

date, this scheme has worked well and prosecutions in this jurisdiction have been minimal.

Against this background, it is appropriate to consider, briefly, the civil liability of flight crew following incidents or accidents, particularly from a common law perspective.

3

### **LIABILITY OF AVIATION PROFESSIONALS**

Flight crew, in common with engineers, air traffic controllers and other aviation professionals, all owe a duty of care to those making use of/or relying upon their services. A breach of this duty of care will be actionable in negligence.

For those unfamiliar with the legal meaning of negligence, the question of duty of care was considered by a most significant and far reaching UK negligence case in 1932. A Miss Donoghue purchased a bottle of ginger beer in a café. The bottle was dark brown and opaque. After drinking about two thirds of the bottle, a friend of Miss Donoghue poured the remainder into the glass. At this stage the black decomposed remains of a snail fell out. Not surprisingly, Miss Donoghue suffered shock as well as a gastric illness!

Miss Donoghue subsequently sued the manufacturer of the ginger beer, with whom she had no direct contractual relationship. Eventually, the case was considered by the UK House of Lords which held that she was entitled to succeed on the basis of a breach of duty of care owed by the manufacturer to her in the civil wrong of negligence. In essence, the Court held that in law the rule that you should 'love your neighbour' means in practice 'you must not injure your neighbour'.

In practice, the law therefore requires that you must take reasonable care to avoid acts or omissions which can reasonably be foreseen and would be likely to injure your neighbours. Neighbours of flight crew, engineers and air traffic controllers are plainly their customers, together with ultimate users of their services and products.

Nevertheless, the question to be considered is what does reasonable care mean in the context of aviation activities? In a situation where a "reasonable" man could not be expected to have the knowledge or expertise to perform a certain special service, the standard of care and state of knowledge is judged against that normally adhered to by others engaged in the same business. In the case of a qualified pilot, the test is whether his actions or inactions were those of a reasonably competent pilot?

When is a breach criminal? When is a crime an accident and an accident a crime? These are essentially matters of evidence of the degree to which, if at all, the conduct was intended. Sabotage, wilful use of drugs, alcohol abuse and what is termed in legal parlance as 'egregious conduct' (i.e. falsification of log books and records etc.) would all qualify to justify criminal prosecution.



The central requirement at law is 'mens rea" or "guilty mind". You could be forgiven for considering that this is not a concept which you would normally

associate with an "accident". Indeed, you would be right in disassociating an accident with such intentional conduct.

As a general rule, making an "*honest mistake*" does not make a person a criminal. With this in mind, immunity from self-incrimination is available as a form of protection. The right to silence takes many forms worldwide. For instance, by virtue of the Fifth Amendment of the US Constitution a person cannot be compelled to testify against himself. However, juries may (and usually do) draw an adverse inference from invoking such protection. Tactical care is therefore needed in taking such a step<sup>18</sup>.

A mirrored position exists in Japan where under the Japanese Constitution, it is provided that:

*"No person shall be compelled to testify against himself. A confession made under compulsion, torture or threat or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession."*<sup>19</sup>

However, aside from any adverse inferences which a Tribunal may draw if this is exercised, the right to silence is clearly counter productive to air safety at the investigation stage. It can delay the issue of urgent safety recommendations or emergency directives in a situation where the people involved are the only ones who have knowledge of what transpired in a particular situation. Without their testimony, clearly accident investigation authorities will be working at a significant disadvantage. The real losers in such a situation are the public.

Nevertheless, the underlying rationale stems from the severity and seriousness of criminal proceedings which require the prosecution to shoulder the major burden of proof. It is not a case of guilty until proven innocent, although that is how it appears in most parallel criminal and civil investigations<sup>20</sup>.

In the case of pilots or other aviation professionals, the intention is not to immunise persons who are guilty of crimes from prosecution. It is in essence to exclude testimony given to accident investigators from being used inappropriately in subsequent criminal proceedings.

In the absence of obvious criminal conduct, there are many alternative incentives for safe operation. These include disciplinary proceedings, administrative penalties and, of course, exposure to civil remedies and litigation. Compensation is clearly more appropriate and effective in an accident situation than retribution. Pilots are the first to arrive at the scene of an accident. If the crew arrive safely then the chances are that the aircraft and passengers will also do so.

Last, but not least, the ultimate incentive for pilots is clearly personal safety and/survival. The difference in the personal consequences arising from negligence of a pilot, as distinct from that of a surgeon, is obvious!

4

## THE WAY FORWARD – A GLOBAL SOLUTION?

Given that there are too many inconsistent individual national rules and regulations worldwide, the way forward must turn upon the collective ability of States to

<sup>18</sup> See page 14/15

<sup>19</sup> Article 38, Japanese Constitution

<sup>20</sup> See Section 2 above

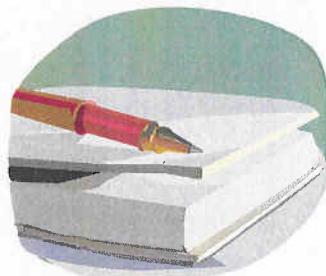
globally implement the basic standards set out by ICAO in the 18 annexes to the Chicago Convention. However, given their longevity, it is hardly unsurprising that these standards have, to an extent, now exceeded their overhaul life! The time between overhauls (TBO) needs to be reduced!

It is therefore essential to the establishment of a "Just Culture" that existing ICAO Standards should, insofar as possible, be installed as a component in global national legislative machinery at the earliest opportunity.

Transparency and sharing of information are recognised as cornerstones of aviation safety. "Just Culture" should therefore create an environment in which the reporting and sharing of information are both encouraged and facilitated. In this respect, timely and adequate information on issues of public interest, which include aviation safety, are made available in a number of States on the basis of vigorously upheld Freedom of Information legislation. Nevertheless, it is essential that a balanced approach should be adopted in the use of such information.

Given that all persons and entities, including the aviation industry, are subject to the normal principles of justice, whether it be at national or international level, judicial action must embrace a delicate balance between the fundamental and sometimes competing interests of maximising justice and maximising safety. They are both deep-rooted and fundamental constitutional rights which serve the public interests.

The excessive publicity that inevitably surrounds an aviation incident can lead to a situation where people are discouraged from reporting safety information. This, in turn, will clearly adversely affect the mandatory reporting schemes and could serve to totally undermine and ruin any voluntary reporting schemes. It is therefore no wonder that aviation professionals are generally concerned and sceptical about the ability of existing legislation to protect confidentiality and thereby avoid blame and liability. The provisions in existence at present are seen as being far too limited and vague in their scope.



Taking this onboard, the ICAO Assembly have produced a Resolution entitled "*Protecting information from safety data collection and processing systems in order to improve aviation safety*"<sup>21</sup>. The aim of this Resolution is to generate an environment in which the reporting and sharing of information is encouraged and facilitated.

However, in order to succeed, a "Just Culture" will only evolve when accidents and incidents are investigated by reference to failures of systems rather than individuals. Blaming individuals has the effect of ignoring the importance of contributions made by systemic failures. Furthermore, the blame game has all kinds of negative side effects which lead to defensive posturing, protectionism and ineffective reporting systems.

<sup>21</sup> ICAO Assembly Resolution A35-17

The three essential questions which need to be addressed, and which go to the heart of a "Just Culture", are:

1. Who gets to draw the line between acceptable and unacceptable behaviour?
2. What type of expertise should be used in judging whether behaviour is acceptable or unacceptable? and
3. To what extent is safety data protected from judicial interference?

Clear, predictable and comprehensible answers to these questions will minimise anxiety and uncertainty in those involved in an incident. Furthermore, greater and closer involvement of specialised aviation industry expertise in drawing the line jointly with the judicial system will avoid and minimise exposure of aviation professionals to unfair or inappropriate judicial proceedings and prosecutions. Transparent protection of safety data from judicial interference will plainly encourage voluntary reporting of safety critical information and lessons learnt from incidents.

Insofar as publicity is concerned, the media clearly have an important role to play. For the most part, they operate under the same time pressures and deadlines as airlines. It is therefore vital that media should be in a position to understand the nature and purpose of a "Just Culture" in the aviation industry in order to generate more accurate and balanced reporting. In turn, this will have the benefit of keeping the general public, the Government and the Judiciary better informed about aviation safety generally and the spirit of "Just Culture" principles in particular. Guidance material for interfacing with both the judicial system and the media has recently been formulated by Eurocontrol<sup>22&23</sup>.

These guidelines basically provide instructions for aviation professionals in the steps to be taken and how to deal with the media in order to give accurate factual information where required but at the same time preserving confidentiality when due.

In the meantime, consistent with the ethos of a "Just Culture" and the aim to achieve balance between justice and safety, the existing concerns prompted ALPA, through IFALPA, to propose an amendment to the provisions of Annex 13. The new section is as follows:-

#### *"Proceedings to impose sanctions*

*5.11 Recommendation - States should not impose criminal sanctions arising out of an aircraft accident against individuals unless there has been an independent judicial determination that the accident or incident was caused in whole or part by such default on the individual's part as, in accordance with the law of the Court to which the case is submitted, is considered to be the equivalent to wilful misconduct."<sup>24</sup>*

All these issues have been very recently considered by ICAO<sup>25</sup> including a proposed 'overhaul' of Annex 13 to the extent that this should support and adopt the description of "Just Culture" (i.e. "a culture in which frontline operators or others

<sup>22</sup> EATM Just Culture Guidance Material for interfacing with the Judicial System, 11 February 2008, reference 08/02/06-07

<sup>23</sup> EATM Just Culture Guidance Material for interfacing with the Media, 10 June 2008

<sup>24</sup> See footnote 6 and discussion of existing paragraph 5.11 on page 5

<sup>25</sup> ICAO Accident Investigation and Prevention (AIP) Divisional Meeting 13-18 October 2008

*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")<sup>4</sup>.* More particularly, the vague and uncertain drafting of Attachment E to Annex 13 (see Appendix 1) has come under review in order to provide more precise legal guidelines, particularly with regard to the role of the Judicial Authorities in implementing a "Just Culture", with the ultimate aim of achieving a proper balance between the objectives of the implementation of effective safety reporting systems and those of the administration of justice.

Guidelines for interaction with the media are also proposed as an additional attachment to Annex 13. This is expressed to have the objective of achieving "*the right balance between providing relevant and accurate information to the public whilst preserving the needed confidentiality of individuals in the interest of aviation safety*"<sup>23</sup>.

Interestingly, statistics released by ICAO have indicated that in replies received from States, 77% have indicated that Attachment E had assisted them in the implementation of protection of certain records and safety data. On the other hand, the remaining 23% of States had indicated that the Attachment had been of no assistance in protecting safety data mainly due to impediments in the National Laws and Regulations<sup>26</sup>. It is nevertheless, an encouraging move in the right direction which will be reinforced by the "overhaul" proposed.

Whilst it appears that the concept of a "Just Culture" was fully supported at the latest ICAO Divisional Meeting, doubt was expressed as to the need to formalise a definition or even use the term at this stage bearing in mind that this is an evolving concept. Nevertheless, this meeting unanimously agreed that a study should be undertaken with the aim of "*reviewing and facilitating the implementation of paragraph 5.12<sup>9</sup> and Attachment E (see Appendix 1) with the assistance of an appropriate group of experts*". Incidentally, the deliberations of the group will apparently include the video image recording of the cockpit environment and protection from disclosure<sup>25</sup>. Perhaps this provides an insight into the focus of future accident investigation?!

Consequently, a global solution in which States who are parties to the Chicago Convention would agree to collectively enact appropriate, complimentary and consistent State legislation in support of the above steps, and to abandon individual, inconsistent and divergent national aeronautical standards, is undoubtedly a way forward. However, given the need for deliberations on the part of the working group established by ICAO, coupled with the timetable for the next assembly in 2010, such change as can be agreed will inevitably take a while to implement.



<sup>26</sup> Report on Agenda Item 1.7 AIG/08/WP/72 and see page 4

## **FOREWARNED IS FOREARMED "THE VITAL ACTIONS CHECKLIST"**

*"One owes respect to the living: but to the dead one owes nothing but the truth." (Voltaire)<sup>27</sup>*

Hopefully aviation incidents and accidents will become increasingly rare. In the meantime, to ensure that you are ready for the unexpected, crew need to be briefed and reassured that open, truthful and factual communications with the Accident Investigation Authorities and the media are vital. Speculation should be avoided at all costs and the legal exposures associated with offering opinions or theories as to the cause of an incident or accident need to be understood. In doing so, crew should appreciate that lawyers engaged to prosecute or defend other interests involved have a duty to do everything legally possible to assist their clients. They do not have a brief to act in favour of some altruistic notion of air safety!

In keeping with "Just Culture" principles, an incident should not be perceived as a failure or further stigmatised by imposition of financial or professional penalties in the wake of an occurrence. The notion that such incidents are "shameful" and should be concealed is clearly likely to lead to loss of important safety information and generate a climate involving lack of trust.

Expect the unexpected. Ideally, a risk management programme embracing a list of published "vital actions" (akin to an aircraft checklist) could involve:

1. Formulating a debriefing/incident management programme which clearly identifies the organisation and related personnel in place to assist employees following incidents;
2. Establishing a separate and distinct Staff Safety Department which is independent of "the frontline" in order to distance or avoid the appearance of links to a retrospective performance/skill review and any associated retraining which may be needed;
3. Encouraging the application of scientific, as opposed to legal, tests in order to determine whether the substance of safety information which it is contemplated will be released is accurate, can be proved and/or could be entrusted to others for the purposes of promoting a "Just Culture";
4. Generating an understanding that truthful, forensic, justifiable and incontrovertible safety information should not be withheld or concealed from investigators or the press.
5. Taking steps to convince crew that the difference between a safe and an unsafe operation lies not in how many incidents it has but more in how it deals with incidents that are reported;
6. Ensuring that whilst in a foreign country, crew know in advance their rights and duties by reference or access to a portable, short, concise and clear checklist including a brief/mandate as to whom they are obliged to speak, and to whom not, together with the restricted factual statements which should be made, if any<sup>28</sup> (see also action 10.);

<sup>27</sup> "On doit des regards aux vivants: on ne doit aux morts que la verite" [Lettres sur Oedipe (i)]

<sup>28</sup> See Page 10

7. Minimising the possibility of outside investigation or probing by a Prosecutor in relation to any safety data retained (by preserving confidentiality/legal privilege where possible);
8. Adopting a concise, yet comprehensive, written Emergency Preparedness Program or Crisis Communication Manual, including all relevant checklists and contacts to ensure that all relevant documentation and manuals are collated/accessible and pre-established communication lines identified;
9. Appointing an experienced press spokesperson;
10. Ensuring a speedy and effective incident response by providing/disseminating checklists to crew which cover:
  - (i) The communication/notification chain and procedure to be adopted;
  - (ii) A chart depicting the incident management procedure;
  - (iii) A short but clear statement of responsibilities attributed to individuals, departments and units involved;
  - (iv) Media monitoring procedures;
  - (v) Tips for dealing with press interviews;
  - (vi) Tasks delegated to personnel designated to man company websites in order to provide factual incident updates when/where required.

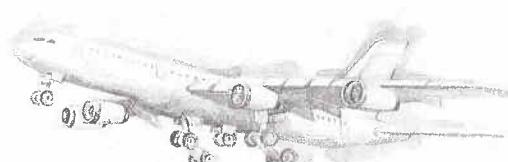


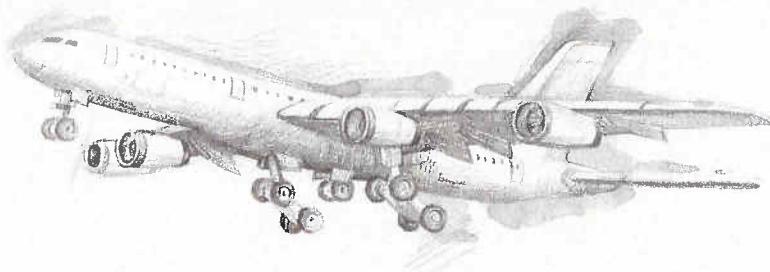
Conscientious risk management and pre-incident preparation in order to "expect the unexpected" is the key to avoiding unnecessary and unwarranted criminal prosecutions.

The emerging global solution involving collective legislative reform, which is on the radar screen, should be supported in every way. However, the landing approach is likely to be both long and turbulent!

In the meantime, forewarned is forearmed!

**TIM BRYMER**  
 Aviation Aerospace Partner  
**Clyde & Co LLP**  
 28 October 2008

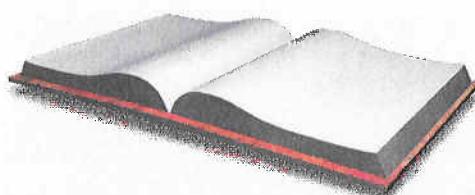




## APPENDIX 1

### **ATTACHMENT E, ANNEX 13 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION**

### **LEGAL GUIDANCE FOR THE PROTECTION OF INFORMATION FROM SAFETY DATA COLLECTION AND PROCESSING SYSTEMS**



## INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES

### AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION

### ANNEX 13 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION

#### ATTACHMENT E. LEGAL GUIDANCE FOR THE PROTECTION OF INFORMATION FROM SAFETY DATA COLLECTION AND PROCESSING SYSTEMS

##### 1. Introduction

1.1 The protection of safety information from inappropriate use is essential to ensure its continued availability, since the use of safety information for other than safety-related purposes may inhibit the future availability of such information, with an adverse effect on safety. This fact was recognised by the 35th Assembly of ICAO, which noted that existing national laws and regulations in many States may not adequately address the manner in which safety information is protected from inappropriate use.

1.2 The guidance contained in this Attachment is therefore aimed at assisting States enact national laws and regulations to protect information gathered from safety data collection and processing systems (SDCPS), while allowing for the proper administration of justice. The objective is to prevent the inappropriate use of information collected solely for the purpose of improving aviation safety.

1.3 Because of the different legal systems in States, the legal guidance must allow States the flexibility to draft their laws and regulations in accordance with their national policies and practices.

1.4 The guidance contained in this Attachment, therefore, takes the form of a series of principles that have been distilled from examples of national laws and regulations provided by States. The concepts described in these principles could be adapted or modified to meet the particular needs of the State enacting laws and regulations to protect safety information.

1.5 Throughout this Attachment:

- a) *safety information* refers to information contained in SDCPS established for the sole purpose of improving aviation safety, and qualified for protection under specified conditions in accordance with 3.1, below;
- b) *operational personnel* refers to personnel involved in aviation operations who are in a position to report safety information to SDCPS. Such personnel include, but are not limited to, flight crews, air traffic controllers, aeronautical station operators, maintenance technicians, cabin crews, flight dispatchers and apron personnel;
- c) *inappropriate use* refers to the use of safety information for purposes different from the purposes for which it was collected, namely, use of the information for

disciplinary, civil, administrative and criminal proceedings against operational personnel, and/or disclosure of the information to the public;

- d) SDCPS refers to processing and reporting systems, databases, schemes for exchange of information, and recorded information and include:
  - 1) records pertaining to accident and incident investigations, as described in Annex 13, Chapter 5;
  - 2) mandatory incident reporting systems, as described in Annex 13, Chapter 8;
  - 3) voluntary incident reporting systems, as described in Annex 13, Chapter 8; and
  - 4) self-disclosure reporting systems, including automatic data capture systems, as described in Annex 6, Part I, Chapter 3, as well as manual data capture systems.

*Note.—Information on safety data collection and processing systems can be found in the ICAO Safety Management Manual (Doc 9859).*

## 2. General principles

2.1 The sole purpose of protecting safety information from inappropriate use is to ensure its continued availability so that proper and timely preventive actions can be taken and aviation safety improved.

2.2 It is not the purpose of protecting safety information to interfere with the proper administration of justice in States.

2.3 National laws and regulations protecting safety information should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety, and the need for the proper administration of justice.

2.4 National laws and regulations protecting safety information should prevent its inappropriate use.

2.5 Providing protection to qualified safety information under specified conditions is part of a State's safety responsibilities.

## 3. Principles of protection

3.1 Safety information should qualify for protection from inappropriate use according to specified conditions that should include, but not necessarily be limited to: the collection of information was for explicit safety purposes and the disclosure of the information would inhibit its continued availability.

3.2 The protection should be specific for each SDCPS, based upon the nature of the safety information it contains.

3.3 A formal procedure should be established to provide protection to qualified safety information, in accordance with specified conditions.

3.4 Safety information should not be used in a way different from the purposes for which it was collected.

3.5 The use of safety information in disciplinary, civil, administrative and criminal proceedings should be carried out only under suitable safeguards provided by national law.

#### 4. Principles of exception

4.1 Exceptions to the protection of safety information should only be granted by national laws and regulations when:

- a) there is evidence that the occurrence was caused by an act considered, in accordance with the law, to be conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct;
- b) an appropriate authority considers that circumstances reasonably indicate that the occurrence may have been caused by conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct; or
- c) a review by an appropriate authority determines that the release of the safety information is necessary for the proper administration of justice, and that its release outweighs the adverse domestic and international impact such release may have on the future availability of safety information.

#### 5. Public disclosure

5.1 Subject to the principles of protection and exception outlined above, any person seeking disclosure of safety information should justify its release.

5.2 Formal criteria for disclosure of safety information should be established and should include, but not necessarily be limited to, the following:

- a) disclosure of the safety information is necessary to correct conditions that compromise safety and/or to change policies and regulations;
- b) disclosure of the safety information does not inhibit its future availability in order to improve safety;
- c) disclosure of relevant personal information included in the safety information complies with applicable privacy laws; and
- d) disclosure of the safety information is made in a de-identified, summarized or aggregate form.

**6. Responsibility of the custodian of safety information**

6.1 Each SDCPS should have a designated custodian. It is the responsibility of the custodian of safety information to apply all possible protection regarding the disclosure of the information, unless:

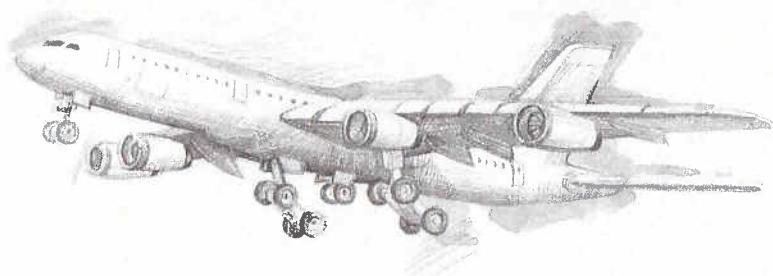
- a) the custodian of the safety information has the consent of the originator of the information for disclosure; or
- b) the custodian of the safety information is satisfied that the release of the safety information is in accordance with the principles of exception.

**7. Protection of recorded information**

7.1 Considering that ambient workplace recordings required by legislation, such as cockpit voice recorders (CVRs), may be perceived as constituting an invasion of privacy for operational personnel that other professions are not exposed to:

- a) subject to the principles of protection and exception above, national laws and regulations should consider ambient workplace recordings required by legislation as privileged protected information, i.e. information deserving enhanced protection; and
- b) national laws and regulations should provide specific measures of protection to such recordings as to their confidentiality and access by the public. Such specific measures of protection of workplace recordings required by legislation may include the issuance of orders of non-public disclosure.

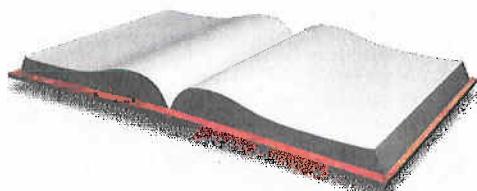
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## APPENDIX 2

# **JOINT RESOLUTION REGARDING** **CRIMINALISATION OF AVIATION** **ACCIDENT**

**FLIGHT SAFETY FOUNDATION**



**JOINT RESOLUTION**  
**REGARDING CRIMINALIZATION OF AVIATION ACCIDENTS**

*Recognizing* the importance in civil aviation accident investigations in securing the free flow of information to determine the cause of accidents and incidents and to prevent future accidents and incidents;

*Recognizing* the actions taken recently by the International Civil Aviation Organization in promoting amendments to Annex 13 – *Aircraft Accident and Incident Investigations* to the Convention on International Civil Aviation, encouraging Contracting States to adopt by November 2006 certain actions to protect the sources of safety information;

*Recognizing* the importance of preventing the inappropriate use of safety information, including the increasing use of such information in criminal proceedings against operational personnel, managerial officers, and safety regulatory officials;

*Recognizing* that information given voluntarily by persons interviewed during the course of safety investigations is valuable, and that such information, if used by criminal investigators or prosecutors for the purpose of assessing guilt and punishment, could discourage persons from providing accident information, thereby adversely affecting flight safety;

*Recognizing* that under certain circumstances, including acts of sabotage and willful or particularly egregious reckless conduct, criminal investigations and prosecutions may be appropriate;

*Concerned* with the growing trend to criminalize acts and omissions of parties involved in aviation accidents and incidents;

*Noting that:*

- a. law enforcement authorities in the September 29, 2006 mid-air collision between an Embraer Legacy 600 executive jet and a Gol Linhas Aéreas Intelligentes B-737-800 have opened a criminal investigation and threatened involuntary manslaughter charges and interrogated pilots, while a magistrate revoked the pilots' passports;
- b. the French Supreme Court on September 20, 2006 rejected a request to dismiss charges in the July 2000 Air France Concorde crash where three people, a former French civil aviation authority official, and two former aircraft manufacturing officials, are currently under investigation for criminal charges;
- c. a French court is expected to issue its verdict soon in the 1992 Air-Inter crash in Strasbourg, France, wherein the designer of the Airbus A320, two retired Air-Inter executives, the former Director General of Civil Aviation, the retired civil servant who was national head of certification, and an air traffic controller were investigated and prosecuted 14 years after the crash and face negligent homicide charges;
- d. Swiss prosecutors in August 2006 charged eight Swiss Skyguide air traffic controllers with negligent homicide arising out of the DHL B-757 mid-air collision with a Bashkirian TU-154 on July 1, 2002 over Überlingen in Southern Germany;

- e. the Swiss Federal Prosecutor's Office has an ongoing criminal investigation for negligent manslaughter of the former chief executive of Swiss International Airlines, along with the head of Switzerland's Federal Office of Civil Aviation, and the operations chief and chief trainer at Crossair in connection with the November 2001 Crossair plane crash near Zurich, which the Swiss Aircraft Investigation Bureau concluded was the result of pilot error;
- f. an Italian court on July 7, 2006 affirmed the convictions for manslaughter of five aviation officials, including an air traffic controller, the former director of Milano Linate airport, and the chief executive and a former director-general of ENAV, the Italian air traffic control agency, arising out of the October 2001 runway accident between an SAS aircraft and Cessna jet in Milan, where authorities found an inoperative ground radar system contributed to the accident;
- g. an ongoing Greek quasi-judicial investigation exists of the 2005 Helios B-737-300 crash near Athens, Greece, wherein a draft accident report has been leaked and authorities have indicated it will be used directly in a quasi-judicial investigation to determine criminal liability;
- h. U.S. federal and Florida state prosecutors brought criminal charges, including 220 counts of murder and manslaughter, against a maintenance company, several mechanics, and a maintenance manager arising out of the 1996 ValuJet flight 592 crash in the Florida Everglades, with nearly all charges later dismissed, withdrawn, or dismissed on appeal, and all tried individuals acquitted; and
- f. Greek prosecutors brought negligent manslaughter, negligent bodily injury, and disrupting the safety of air services charges against the captain and first officer in connection with the 1979 Swissair crash in Athens, with the pilots receiving sentences of four years imprisonment, which was later converted into a fine.

*Recognizing* that the sole purpose of protecting safety information from inappropriate use is to ensure its continued availability to take proper and timely preventative actions and to improve aviation safety;

*Considering* that numerous incentives, including disciplinary, civil, and administrative penalties, already exist to prevent and deter accidents without the threat of criminal sanctions;

*Being mindful* that a predominant risk of criminalization of aviation accidents is the refusal of witnesses to cooperate with investigations, as individuals invoke rights to protect themselves from criminal prosecution, and choose not to freely admit mistakes in the spirit of ICAO Annex 13 for the purpose of preventing recurrence;

*Considering* that the vast majority of aviation accidents result from inadvertent, and often multiple, human errors;

*Being convinced* that criminal investigations and prosecutions in the wake of aviation accidents can interfere with the efficient and effective investigation of accidents and prevent the timely and accurate determination of probable cause and issuance of recommendations to prevent recurrence;

*BE IT THEREFORE RESOLVED*, that the below organizations:

1. Declare that the paramount consideration in an aviation accident investigation should be to determine the probable cause of and contributing factors in the accident, not to punish criminally flight crews, maintenance employees, airline or manufacturer management executives, regulatory officials, or air traffic controllers. By identifying the “what” and the “why” of an accident, aviation safety professionals will be better equipped to address accident prevention for the future. Criminal investigations can and do hinder the critical information gathering portions of an accident investigations, and subsequently interfere with successful prevention of future aviation industry accidents.
2. Declare that, absent acts of sabotage and willful or particularly egregious reckless misconduct (including misuse of alcohol or substance abuse), criminalization of aviation accidents is not an effective deterrent or in the public interest. Professionals in the aviation industry face abundant incentives for the safe operation of flight. The aviation industry every day puts its safety reputation and human lives on the line, and has a remarkable safety record which is due in large measure to the current willingness of operators and manufacturers to cooperate fully and frankly with the investigating authorities. The benefit of gaining accurate information to increase safety standards and reduce recurring accidents greatly outweighs the retributive satisfaction of a criminal prosecution, conviction, and punishment. 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.
3. Urge 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. Without any indicia of proper justification for a criminal investigation or charges, the aviation system and air disaster victims and their loved ones are better served by resort to strong regulatory oversight and rigorous enforcement by national and international aviation authorities, and by pursuit of claims through civil justice systems to obtain compensation.
4. Urge States to safeguard the safety investigation report and probable cause/contributing factor conclusions from premature disclosure, and use directly in civil or criminal proceedings. Although use of official accident reports may save criminal investigators the considerable expense of conducting an entire separate investigation, a considerable and serious risk exists of diverting these reports from their original purpose, as technical causes often cannot be equated to legal causes necessary when establishing either civil or criminal liability. In addition, use of relatively untrained and inexperienced technical “experts” by prosecutorial or judicial authorities, as compared to official accident investigating authorities, can result in flawed technical analyses and a miscarriage of justice, while interfering with the official accident investigation.
5. Urge National aviation and accident investigating authorities to: (i) assert strong control over accident investigations, free from undue interference from law enforcement authorities; (ii) invite international cooperation in the accident investigation under Annex 13; (iii) conduct professional investigations to identify probable cause and contributing factors and develop recommendations in a deliberative manner, avoiding any “rush to judgment;” (iv) ensure the free and voluntary flow of essential safety information; (v) provide victims’ loved ones and their families with full, accurate, and precise information at the earliest possible time; and (vi) address swiftly any acts or omissions in violation of aviation standards.

DATED: October 17, 2006



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William Voss, President and CEO  
Flight Safety Foundation



**Flight Safety Foundation**



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Keith Mans, Chief Executive  
Royal Aeronautical Society



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Jean-Claude Bück, President  
Académie Nationale de l' Air et de l'  
Espace



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Alexander ter Kuile, Secretary General  
Civil Air Navigation Services Organisation



DATED: November 16, 2006



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Mike A Ambrose, Director General  
European Regions Airline Association



DATED: November 28, 2006



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Brian Finnegan, President  
Professional Aviation Maintenance Association



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Marc Baumgartner, President  
International Federation of Air Traffic  
Controllers' Associations

