

Justice and safety

by A.C.(Fred) Bijlsma

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The aviation world is, by nature, international, dynamic and very sensitive to safety. The world of the prosecutor and the courts is, by nature, national, resistant to progressive change and very sensitive to the rule of law. These are two distinct worlds that seldom meet. Between these two worlds there is the world of Just Culture Task Force. Just Culture addresses the often complicated relationship between the propagation of aviation safety and the administration of Justice at national level. No wonder that their interaction, or perhaps more correctly the lack of it, generates difficult and often passionate discussions with associated allegations on the 'criminalisation' of aviation.

This contribution addresses the prosecution part of the Just Culture equation. It describes the practice of the Dutch aviation prosecutor, the underlying criminal law elements and also expresses some views on the way forward towards a workable balance between safety and the administration of justice.

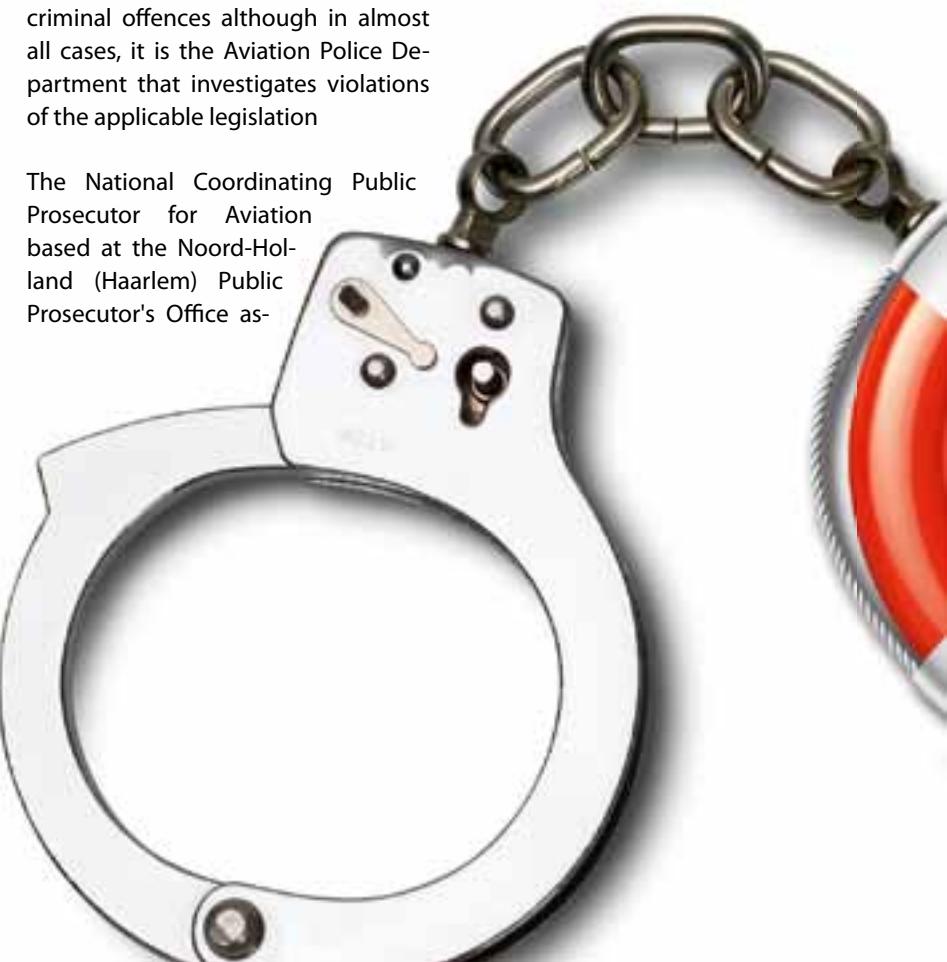
Prosecution of aviation cases in the Netherlands

In the Netherlands, the Aviation Division of the Inspectorate for the Living Environment and Transport (ILT) of the Ministry of Infrastructure and Environment and the Aviation Police Department of the National Police Services Agency are charged with the supervision of the compliance with the Aviation laws. All officials assigned by Section 141 of the [Dutch] Code of Criminal Procedure are, in principle, charged with the investigation of criminal offences although in almost all cases, it is the Aviation Police Department that investigates violations of the applicable legislation

The National Coordinating Public Prosecutor for Aviation based at the Noord-Holland (Haarlem) Public Prosecutor's Office as-

seses all the civil aviation cases occurring in the Netherlands and advises the local Public Prosecution Service. In the exercise of that function, the aviation prosecutor takes into account the so-called "Instructions with regard to criminal investigation and prosecution in the event of the reporting of occurrences in civil aviation".

As from 1 January 2007, the legislative changes introduced by EC Directive 2003/42 on occurrence reporting have become effective. The objective of the





Directive was to contribute towards the improvement of aviation safety by a better process for the reporting, collecting, storing and disseminating critical information. This is presently the responsibility of the Occurrences Analysis Bureau of the Inspectorate for the Environment and Transport. The European Commission has since launched a proposal for a new Occurrence Reporting Regulation that is presently subject of discussion in the European Parliament and the Transport Council.

Another obvious player in the Netherlands related to this subject is the Dutch Safety Board. This Board is the independent investigator for a wide array of safety related events and was created in 2005, replacing different domain-specific investigation bodies. It should be noted that a basic assumption of the Dutch legislation is that a judicial investigation and an

investigation by the Dutch Safety Board into the same event are on an equal footing. The Public Prosecution Service and Dutch Safety Board have therefore concluded a cooperation protocol.

Legal framework

The original Penal Code dates back to 1881. The original Code of Penal Procedure dates back to 1921. Through the years both Codes have been amended and modernised. In addition, there is the Aviation Act and various regulations based thereon, both of which are subject to continuous change as necessary. International developments (ICAO, ECAC, EU, EASA etc.) often happen in quick succession so that the Dutch legislator can hardly keep up.

A Dutch Public Prosecutor is not only a public prosecutor, but has also a lot of competences which in other European countries may be vested in investigating magistrates or judges. When a Dutch Public Prosecutor applies those competences, they will

only be subject of judicial – and therefore independent – review afterwards.

In respect of aviation incidents, in the Netherlands – in principle – only accidents, serious incidents (outcomes which were almost-accidents), serious danger and systematic minor offences due to design or gross negligence are prosecuted. In any case, a criminal investigation is instituted in these situations.

'Gross negligence' means, according to Dutch law, a considerable degree of culpable imprudence (insufficient precautions, consciously taking an irresponsible risk, physical and/or psychological unsuitability). Accidents and serious incidents very often occur as the result of events that have – or might have – led to disastrous results. When mistakes are involved, they can often be labeled as 'honest' mistakes that would not qualify as criminal behaviour.

However a small, but highly visible, number of cases raise questions on the relevance and motives of some criminal prosecutions and court cases. The most important question in this



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respect is in my opinion "who will determine whether a mistake was made by a qualified professional acting in a responsible manner" and whether this behaviour clearly constituted gross negligence, willful conduct or criminal intent. Such a determination can only be made by a professional in the judiciary – a prosecutor and ultimately a court of law. It cannot be made by a chief pilot or a control room supervisor and these professionals have to realise that nobody can claim criminal immunity in any civilised country.

When it concerns civil aviation, these basic responsibilities, particularly those assigned to the Public Prosecution Service, may not just be set aside at the discretion of the Public Prosecutor. The "Instructions with regard to criminal investigation and prosecution in the event of the reporting of occurrences in civil aviation" is revised and re-published every 4 years by the Board of Procurators General. Such a directive can be seen as a demarcation of the "manoeuvring space" of the Prosecutor. Ultimately a judge or court may review whether a prosecutor has acted within the powers allocated to him or her.

Mutual Confidence and Understanding

After the implementation of the EU occurrence reporting requirements in the Netherlands Civil Aviation Act, the Ministry of Infrastructure and Environment started a what was termed a case study discussion group in which the aviation service providers (airline companies and air traffic control), the Aviation Police Department and the Public Prosecution Service participated. One of its goals was to promote mutual confidence as a basis for learning from and understanding each other

since confidence in each other's professionalism and independent role is not something natural. In other words, not only does the Public Prosecution Service accept an aviation sector that looks and judges critically, but the other way round, does the aviation sector accept the role of the Public Prosecution Service?

Initially, this discussion addressed – using artificial examples – collaboration and the trust. Since then, the group's participants have begun to discuss real incidents and debate whether they should be forwarded to the Public Prosecution Service. Up till the end of 2012, this had happened in three cases. In each case, a criminal investigation was initiated, but the investigations did not lead to a prosecution.

Successful working together and the reconciliation of the interests of safety and justice can be achieved by developing mutual trust. In a recent case the prosecution service decided not to act. In December 2012 two Boeing 747 were approaching Amsterdam Airport Schiphol. They approached each other one from the north, the other from the south at landing speed, at the same height. The newspapers headed 'almost disaster'. The prosecution service did not act because we decided first to

look at the report from the Dutch Safety Board and secondly, because of our good relationship with Amsterdam Air Traffic Control and main carrier at Schiphol Airport who was the operator of one of the aircraft involved and could demonstrate their application of an effective Safety Management System.

In case of an aviation accident various bodies begin an examination of the facts:

- Those directly involved who wish to learn from their findings how to improve safety.
- The Dutch Safety Board which looks after public responsibility and may issue recommendations in order to improve safety.
- (only where appropriate) The Public Prosecution Service acting thereby repressively and also making public responsibility possible.

At this point, I would like to emphasise that the assistance of the expertise from the aviation police is indispensable for a prosecutor. This assistance of an expert group from the nationwide police department is of great value not only because of their knowledge of aviation technology, but also because of their knowledge of aviation regulations.



To that effect, a Cooperation Protocol has been agreed upon with the Dutch Safety Board. The cooperation agreements have also been laid down for the Public Prosecution Service in an instruction. The agreements in the cooperation protocol have been adopted by the Chairman of the Dutch Safety Board and the President of the Board of Procurators General. This protocol contains far reaching agreements about – for instance – the mutual sharing of data. Both the Instruction and the Protocol are public and may be consulted on various websites.

To Prosecute or Not to Prosecute

The Dutch Public Prosecution Service is not obliged to prosecute. This is the principle of expediency/opportunity. The basic assumption of the principle of expediency/opportunity is that a Public Prosecutor decides himself (independently) whether a punishable offence is being prosecuted (or not). The principle of expediency is an important feature of the Dutch law of criminal procedure.

It means that the Public Prosecution Service holds the discretionary power to decide not to prosecute a punishable offence if such is desirable. Ap-

plicable legislation stipulates that the Public Prosecution Service may decide not to prosecute "on grounds derived from the general interest". The Public Prosecution Service may for instance drop a case when the case is too insignificant, if reliance on a statutory defense probably will succeed, if there is insufficient evidence, if the interests of the suspect and/or (his) family would be harmed excessively by the prosecution. Dropping a case is called "dismissing a case" or "abandonment of prosecution" by the Public Prosecution Service.

The basic assumption of the principle of expediency/opportunity is that a Public Prosecutor decides himself (independently) whether a punishable offence is being prosecuted (or not).

Also in the Netherlands the public demand to blame someone is growing stronger. The Public Prosecution Service has to take that into consideration. In the aviation the Public Prosecution Service is more often confronted with a report. The Public Prosecution Service has to ensure that a decision is made, thereby taking into account the right of complaint of the person reporting. For, the decision of the Public Prosecution Service to drop charges may be submitted to the Court of Appeals, which may instruct the Public Prosecution Service to prosecute.

As opposed to the demand to blame someone there is the confidence in the professional and his organization. Safety incidents are not something airline companies and air traffic control are in need of. And no one will deny that a pilot, in any case the ones employed by the civil aviation and the air traffic controllers are professionals.

Concluding remarks

The keyword in my opinion is not the rules (legislation). A good basis for co-operation, or perhaps better – a basic attitude, if you want – is mutual confidence and communication. Central in this concept is 'transparency and honesty', even if you are in disagreement with each other. Because that does not necessarily mean you can not work together. I am convinced that in this way, the Dutch Public Prosecution Service in the Netherlands has contributed as a prosecuting body to the safety of civil aviation.

I hope that this contribution will be followed elsewhere in Europe, not just geographically, but in the end in the specific areas where the application of Just Culture may lead to an open communication and a balanced weighing of interests. Aviation with its international profile is the domain where both the safety and the 'administration of justice' may profit from the role of pioneer of particularly the Royal Kingdom and the Netherlands. Within the aforementioned boundaries I therefore expect that the Dutch Public Prosecution Service will continue to support the activities of EUROCONTROL Just Culture Taskforce within Europe and – maybe – also outside of Europe. 

