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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.

## 2 **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".

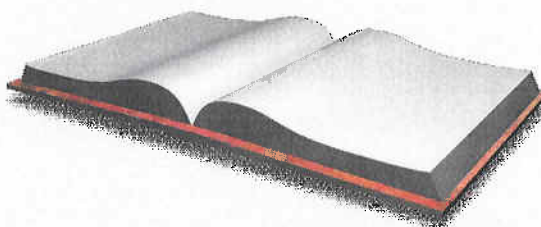
Turning to such evolution, 2006 was a significant year in that:

- 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*

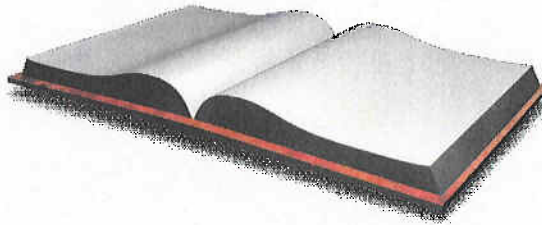
*These records shall be included in the final report or its appendices only when pertinent to the analysis of the accident or incident. Parts of the*

<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:

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

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



