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**AN EXAMINATION OF AVIATION ACCIDENTS IN THE CONTEXT OF A CONFLICT OF INTERESTS BETWEEN LAW ENFORCEMENT, INSURERS, COMMISSIONS FOR AIRCRAFT ACCIDENT INVESTIGATIONS AND OTHER ENTITIES**

**Summary.** The sole purpose of air accident investigations should be the prevention of accidents and incidents in the future without apportioning blame or liability. Any civil aviation safety system is based on feedback and lessons learned from accidents and incidents, which require the strict application of rules on confidentiality in order to ensure the availability of valuable sources of information in the future. Therefore, related data, especially sensitive safety information, should be protected in an appropriate manner. Information provided by a person in the framework of a safety investigation should not be used against that person, in full respect of constitutional principles, as well as national and international law. Each “involved person” in an accident or another serious incident should promptly notify the competent investigating authority of the state of the event. An “involved person” means the owner, a member of the crew, the operator of the aircraft involved in an accident or other serious incident, or any person involved in the maintenance, design, manufacture of the affected aircraft or in the training of its crews, as well as any person involved in air traffic control, providing flight information or providing airport services to the aircraft in question, the staff of the national civil aviation authority, or staff of the European Aviation Safety Agency. The protection level of the organization (employer):

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employees who report an event or replace applications following an event with regard to the appropriate reporting systems should not face any prejudice from their employer because of information provided by the applicant. The protection does not cover (exclusions): infringement with wilful misconduct (direct intent, recklessness infringement); infringement committed by a clear and serious disregard of the obvious risks; and serious professional negligence of an unquestionably duty of care required under the circumstances, resulting in possible or actual damage to persons or property, or damage that seriously compromises the level of aviation safety. All employees in the aviation sector, regardless of their function, have safety-related duties, which are crucial to the security of the entire civil aviation system. The safety of this system requires that as many events that have or may have an impact on security in aviation are reported voluntarily and without delay in order to conduct appropriate analyses and increase the level of safety. “Just Culture” is the basic premise of the effective functioning of event reporting required for all aviation organizations in order to maintain and enhance safety levels. As safety management is based on data, it is necessary to introduce appropriate procedures, which allow for obtaining information, not only about the events that have already occurred, but also about any other events that could potentially cause hazardous conditions. All the procedures and rules of operation relating to the policy of “Just Culture” should be constructed, so that they not only comply with the provisions of applicable law, but are also rational and understandable among all stakeholders, while ensuring a certain level of comfort and confidentiality to those reporting events that affect airline safety. Changes in the existing legal system should be established in cooperation with all concerned institutions: law enforcement, including the courts and public prosecution bodies, insurers aviation, the aircraft accident investigation commission and other entities. Is it possible to reconcile the interests of so-called “Just Culture” in the aviation industry with the requirements of the above-mentioned institutions and traders involved in the implementation of air transport and the exploration of the effects of aerial surveys? The answers to this and similar questions will be fully addressed in this article.

**Keywords:** aviation accident; conflict of interests; Just Culture; accident investigation; safety

## 1. INTRODUCTION

Although air transportation is widely recognized as the safest mode of transport, the aviation community, including air accident investigators, continues to work relentlessly to make our skies even safer. Annex 13 to the Convention on International Civil Aviation: Aircraft Accident and Incident Investigation (10th Edition July 2010) (hereafter referred to as “Annex 13”) specifies that the objective of the investigation of an accident or incident is for the prevention of recurrence and not for the purpose of apportioning blame or liability. The identification of causal factors to prevent recurrence is best accomplished through a properly conducted investigation. To meet these international obligations and to enable a proper investigation of accidents or incidents to be conducted, the government needs to put in place an appropriate investigating authority.

With very low accident rates in recent decades, air transportation is widely recognized as the safest mode of transport. The aviation community, including airlines, aircraft manufacturers, maintenance organizations, air navigation service providers, airport operators and safety regulators have been working closely to make our skies safer. Amongst all the stakeholders involved in the aviation industry, there is a particular group of aviation professionals who are seldom mentioned, yet they contribute significantly to improving aviation safety. They are the air accident investigators: the people whose job it is to determine the causes and circumstances of air accidents and incidents, so that similar events can be prevented in the future. One accident is one too many; whenever it happens, it is bound to hit the news headlines around the globe almost instantaneously. The idealistic aspiration of zero accidents, albeit statistically unachievable, keeps everyone in the aviation profession focused on building an increasingly safe aviation system.

In the international civil aviation regime, Article 26 of the Convention on International Civil Aviation (Ninth Edition 2006) stipulates that it is incumbent upon the state in which an aircraft accident occurs to institute an inquiry into the circumstances of the accident. Annex 13 further specifies that the objective of the investigation into an accident or incident is for the prevention of recurrence, and not for the purpose of apportioning blame or liability. The identification of causal factors in order to prevent recurrence is best accomplished through a properly conducted investigation.

To meet all these international obligations and to enable a proper investigation into accidents or incidents to be conducted, an appropriate authority needs to be put in place by the contracting states. With continuous air traffic growth on a global scale, such an air accident investigation establishment is essential and instrumental in order to support the development of a safe and sustainable air transport system. It should comprise, inter alia, the following key elements:

### **(1). Independence in its authority to investigate**

Independence in its authority to investigate is of the utmost importance. The organization responsible for conducting air accident investigations must be strictly objective and totally impartial, and must also be perceived to be so. It should thus be established in such a way so as to be immune from political interference or pressure.

Some states, particularly those with a large volume of air traffic and a wide range of aviation activities, have achieved this important objective by establishing their own air accident investigation authority as a separate statutory body, independent of its regulatory civil aviation authority (CAA).

In many other states with relatively small-scale aviation activities, it may not be practical or economically viable to adopt such an arrangement. To achieve a certain level of independence in accident investigations, these states may set up an arrangement whereby, in the event of an accident or serious incident, they would mobilize a normally dormant accident investigation team comprising qualified investigators, or even appoint a separate commission, to conduct the investigation and report independently to the appropriate authorities.

Given the dormant characteristics of such a setup, few, if any, of the team or commission members would be fully employed as accident investigators. Some members may be seconded from the state regulatory agencies on a needs basis. In such circumstances, the clear delineation of responsibilities and duty specifications must be included in the appropriate legislation, emphasizing the importance of the independence, impartiality and objectivity of

an investigation. In the course of an investigation, clear policies should also be established to ensure at least the following:

- No conflict of interest exists between members of the investigation team and parties under investigation.
- Members of the investigation team shall adhere to the objective of the accident investigation in defiance of political and commercial considerations.
- The investigation team is to report directly to the head of the investigation organization, who should report directly to the government/administration, independent of the CAA.
- The findings and recommendations of an investigation team shall not be influenced or tampered with by any other party who is not involved in the investigation.

Although the above arrangement may not be ideal, there are many successful examples from around the world, which demonstrate that the independence of an investigation has been maintained. It is most important for states, administrators and all those who are involved in an air accident investigation to understand the objective of maintaining independence during the investigation, adopt the arrangements that best suit their needs and circumstances, and implement them effectively through a sound and auditable mechanism.

## **(2). Sound legal and regulatory framework**

The second key element for the establishment of a highly functional air accident investigation setup is the availability of a sound legal and regulatory framework in support of its mission, and to provide accident investigators with the required legal authority for the conduct of a safety investigation in accordance with the provisions of Annex 13.

Appropriate legislation, which defines the scope of work and responsibilities of the accident investigation establishment and those of accident investigators, must be put in place. In this connection, accident investigators should be aware that air accidents may be subjected to a technical safety investigation, as well as other judicial, statutory, administration or regulatory inquiries. Clear provisions and procedures should thus be formulated to keep the technical safety investigation separate from other proceedings.

The legislation and regulations should also clearly specify that the sole objective of the technical investigation is accident prevention, and not to apportion blame or liability.

The legislation must also protect certain documents and information obtained during the investigation from public disclosure in accordance with Annex 13. This is particularly important as information contained in some records may include content that was given voluntarily by interviewed persons. Inappropriate exposure of information obtained in the course of an investigation for purposes other than the prevention of accidents could inhibit disclosure of information from witnesses in the future. In turn, this would impede the work of investigators and negatively impact the thoroughness and accuracy of future investigations at the expense of promoting safety.

## **(3). Qualified investigators**

The next key element concerns the people who are actually engaged in conducting accident investigations. Even in today's highly modernized and technology-driven society, the significant involvement and contribution of human efforts in accident investigations are indispensable.

Accident investigations are highly specialized and time-critical tasks involving expertise in a wide range of aviation and non-aviation disciplines. The quality and outcome of an investigation are heavily dependent on the competence and capabilities of the investigation team. As such, accident investigations should only be undertaken by people with the right calibre, experience and training.

Accident investigators should ideally have a professional background in aviation, such as being a pilot, aeronautical engineer or aircraft maintenance engineer. The possession of expert knowledge, skills and a thorough understanding of the aviation operating environment is of paramount importance to an accident investigator. Other aviation personnel who possess experience in aviation management and operations, air traffic control, meteorology and human factors could also contribute positively to accident investigations.

In addition to technical expertise, an accident investigator should also possess certain personal attributes, including integrity, impartiality and perseverance in pursuing evidence collection, analysis, research and communication skills. An accident investigator must also be logical and methodical in his or her thinking. He or she needs to be tactful, attentive to detail and empathetic, especially in dealing with those who have survived the trauma of an air accident.

Upon recruiting the right people, the next important step should be the provision of a structured induction training programme. This is essential in order to develop investigators' ability, competence and experience for investigation tasks of varying degrees of complexity. Novice investigators should be guided by experienced mentors until they are fully competent to work independently under the most taxing conditions. The training programme should include rules and regulations, Annex 13 provisions, local legislation, interview and investigation techniques, latest investigation technologies, investigation procedures, and on-the-job, recurrent and specialized training.

#### **(4). Sound management system**

To be prepared in the event of accident or serious incident, a response plan must be put in place for the activation of investigation processes in the most expeditious manner. The availability of a sound management and support system is thus essential to ensure operational readiness for the timely activation of the accident investigation process, especially in the following areas:

- Regular review of safety regulations and investigation policies
- Quick response plan
- Safety data and information management
- Public relations management and support

With the continuous growth of the aviation industry, and rapidly changing technologies and safety requirements, there is a need for every aviation organization to constantly review and update their organizational policies and operations to keep pace with the latest developments.

Quick response actions can only be achieved through adequate planning, coordination and drills before an accident or incident actually occurs. The setting-up of quick response 'go-teams' will enable the accident investigation establishment to expeditiously respond to an accident or incident for the collection of evidence, especially volatile evidence, as well as the timely coordination of the investigation process.

It is also pertinent that a safety data and information management system be established for the preservation of accident information and evidence and, whenever necessary, sharing safety information within the organization and with external parties during and after the investigation. Safety promotion constitutes an important component of safety management and a state safety programme. It is essential that safety information and accident prevention measures be promulgated widely across all spectrums of the aviation industry in order to achieve overall safety improvements.

Accidents or incidents often generate a high degree of interest from the public and the media. Clear public relations policies and procedures for the release of accident investigation information would be most helpful in managing public sentiment and undesirable speculations on the causes of the accident. Regular meetings with the media provide timely updates on facts to the public without prejudice to the investigation process. Senior investigators should be given training on media management and opportunities for public speaking.

#### **(5). Effective coordination with other stakeholders**

The circumstances surrounding each air accident or incident are different. To prepare for the eventuality of an air accident or incident, it is important that the accident investigation establishment sets out a pre-coordinated working arrangement with other local authorities to facilitate the smooth coordination and initiation of the respective emergency response in support of the investigation team.

To achieve this, the accident investigation organization may establish formal working or cooperative arrangements with other government agencies involved in disaster response, particularly the police and fire service departments, search and rescue units, medical services and the coroner's office. Such cooperative arrangements will foster a better understanding amongst all stakeholders of investigators' needs in the preservation of evidence.

In addition, the air accident investigation body may also have to seek assistance from other organizations to provide facilities, equipment and specialized services, additional manpower, e.g., heavy salvage and lifting equipment, helicopters, metal detectors, divers and surveyors, during the investigation. It is thus important that arrangements be reviewed and expertise identified in advance to ensure that resources are readily available when needed.

#### **(6). International and regional collaboration**

The International Civil Aviation Organization (ICAO) and all of its contracting states share a common goal of achieving safety, security, efficiency and sustainability in civil aviation. Close regional and international collaboration serves to obliterate the confines of the physical boundaries of state and facilitates working towards achieving common standards and objectives regarding accident investigations amongst contracting states.

On accident investigation matters, international and regional collaboration may include the delegation of investigation responsibilities, engagement in mutual assistance and cooperation, sharing of resources, specialized facilities, equipment, and expertise in investigations. On accident investigators' training, areas of collaboration may include the provision of investigators' recurrent training, job attachment programmes and jointly organized training events in order to facilitate and promote knowledge sharing, as well as to broaden the exposure and enhance the competency of investigators.

Through strengthened and closer cooperation between states and regional investigation authorities, the capability of air accident investigation organizations can be mutually enhanced to achieve a higher quality of investigation, thereby contributing to improvements in aviation safety.

## **2. JUST CULTURE IN AVIATION**

Investigating the causes of aviation accidents and incidents is of key importance when finding solutions to improve the safety of aviation and provide assurance to passengers for an uneventful flight. Nobody should be immune from the law. The use of these findings in determining whether criminally reproachable behaviour is involved forms part of the administration of justice; a function that is an integral part of any society, which respects the rule of law. The issues related to this apparent conflict between these two worlds and approaches towards reconciling, or at least balancing, these activities form the basis of this paper. It introduces the notion of “Just Culture”, experiences involving its application in Europe, and the prospects and conditions for a more global application. The role and responsibilities of the ICAO in this context are addressed, in particular, as the possible facilitator for introducing Just Culture-based solutions in the different ICAO regions.

Accidents and incidents happen: they form part of our daily lives and we accept their occurrence, even in air traffic management and air transport, while we hope and expect that we can avoid most of them by our actions, professionalism and abiding by established rules and practices.

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

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

Since its relatively early days, the ICAO, which is responsible for setting international rules and recommendations for improving safety, has been confronted by the need to protect aviation safety interests from those parties that want access to investigation results and other safety data, with the goal of what the ICAO calls apportioning blame or liability. Therefore, ICAO rules, in the interest of an uncompromised safety investigation process, are often seen as advocating protection against the interests of what is often referred to as “the administration of justice”.

In a safety-critical domain such as aviation, the legal consequences of (contributory) actions or behaviour, which could result in serious personal harm, death or other damages, are plentiful and very significant, both in the private law and, increasingly, in the criminal law domains. Criminal law forms an essential part for a sovereign state of the exercise of its responsibility towards enforcing specific domain-related norms, as well as the prevention and sanctioning of unacceptable behaviour.

### 3. SAFETY VS. JUDICIAL ACTION

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

There has been growing concern in recent years, on the part of aviation professionals and the aviation industry, about the interpretation of flight safety and aviation accidents by the general public, as well as the criminal judiciary. These concerns are associated with what is seen as the increasing emphasis on legal issues in aviation safety occurrences. This has led to a growing fear of litigation and the threat of criminal sanctions against individuals and organizations that are seen as partly or fully responsible for an accident or incident in which they were involved.

We need to understand the complicated relationship between the administration of justice and the safety investigation. As in a classical drama, two antagonists are involved: one with the aim of preserving justice by investigating and prosecuting possible perpetrators, and the other with the aim of enhancing aviation safety through independent investigation and reporting.

The issue concerning the criminalization of aviation accidents or incidents illustrates the delicate relationship between the propagation of aviation safety and the administration of justice in the aviation domain. These are two distinct worlds that seldom meet: one is, by nature, international, dynamic and very sensitive to safety; the other is, by nature, national, resistant to progressive change and very sensitive to the rule of law. It is no wonder that their interaction, or perhaps the lack thereof, generates difficult and often passionate discussions.

Accidents and serious incidents very often occur as the result of a series of events, which, in an eerie and inevitable way, lead to disastrous results. When mistakes are involved, they can often be labelled as "honest" mistakes, which would not qualify as criminal behaviour. Controllers and pilots are professionals who are ready to realize that nobody can claim criminal immunity in any civilized country. But, it is equally true that a small, but highly visible, number of cases raise questions about the relevance and motives of some criminal prosecution and court cases.

Here lies the root of the problem: who will determine whether a mistake was made by a qualified professional, acting in a responsible manner, or whether this was a clear case of gross negligence, wilful misconduct or criminal intent (to use just a few of the many legal terms for criminally reproachable behaviour)? That person cannot be a chief pilot or a control room supervisor; such a call can only be made by a professional in the judiciary, a prosecutor and ultimately a court of law.

The key is what happens next. A qualified criminal investigator or prosecutor must assess whether, under the applicable criminal law, the actions leading to the accident/incident warrant further steps, such as an investigation and indictments. A number of high-profile accidents and serious incidents has not resulted in criminal investigations and proceedings, which has raised strong concerns from the air traffic control and air transport community about the criminalization of aviation. That is not all, as events have shown that further



complications may arise as a result of public and media pressure, which that generally accompanies any crash or serious incident, with the associated “search” for a guilty party.

The discussion on the criminalization of aviation incidents and accidents highlight concerns regarding the perceived intrusion by the judiciary in the all-important effort to enhance safety in aviation. It also shows a tendency to use “criminalization” as the epitome of misdirected and unwarranted activities by the authorities, as well as to argue that the safety domain should be protected from any action by the prosecuting authorities.

The problem is that invoking the real or alleged criminalization of aviation incidents or accidents as a justification for fully protective legislative action does not really work. All the regional and global rules and standards related to the protection of safety data and investigative processes in aviation create an exception for the actions of a sovereign state in the exercise of the administration of justice. What is now needed is a balance between two equally relevant goals: aviation safety and the administration of justice.

#### **4. DIALOGUE BETWEEN THE NATIONAL AUTHORITIES**

Rather than trying to silence the judiciary, focus has now shifted towards initiating a dialogue between the national authorities concerned. A better understanding of the consequences of a judicial inquiry must be the starting point. In most states, national criminal legislation provides prosecutors with a level of discretion as to how to apply the relevant laws, while a clearer appreciation of the associated safety consequences may actually influence the application of those laws.

This is where the Just Culture initiative, as developed for aviation by Eurocontrol, enters the equation. Attempting to describe, let alone define, Just Culture is not simple, to put it mildly. The results may vary from one person, culture or legal system to another. The following description of Just Culture in the aviation domain has been accepted in Europe:

“A Culture where front line operators 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.”

This description introduces the notion of gross negligence and wilful violations for qualifying criminally relevant behaviours, which are not in accordance with internationally agreed definitions. Although the criteria to establish gross negligence or related legal concepts in common or civil law may be similar in most countries, their interpretation and application with respect to individual cases will ultimately lie in the hands of prosecutors and a criminal court.

When the legal consequences of Just Culture were first discussed, the initial reaction was that most European states would need to significantly amend their laws in order to implement Just Culture in a non-punitive environment. Calls were made for changes to criminal laws, as well as regulating and fully protecting access to information. The general feeling was that Just Culture could not be implemented without these.

Subsequently, when the discussions began to mature, it dawned upon the participants that amending laws and principles, which constitute the basis of sovereign judicial systems, was, in most cases, not a realistic option. Of equal importance, it was not deemed essential. The issue was not necessarily the need for more legislative actions, but rather the way in which those existing laws and regulations were implemented and enforced by national judicial authorities.

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

## 5. GLOBAL AND REGIONAL PROGRESS

Since Just Culture has been on the agenda for many years, it has become apparent that a key part of its successful implementation relies on a number of realistic deliverables, which could stimulate further understanding among, and active and open coordination between, the safety and judicial authorities.

In the ICAO, the discussions and findings of its 36th Assembly, the Accident Investigation and Prevention Divisional meeting in 2008, and the recommendations of the ICAO High-level Safety Conference in March 2010 resulted in resolutions A37-2 and A37-3 at the 37th General Assembly on the sharing of safety information and the protection of safety data. Both resolutions, using the description of the Just Culture initiative, instructed the ICAO Council to strike a balance between the need for the protection of safety information and the need for the proper administration of justice. The Assembly further noted the need to take into account the necessary interaction between safety and judicial authorities in the context of an open reporting culture. The ICAO Safety Information Protection Task Force (SIPTF) was, among other reasons, created as a result of these conclusions, which, to a great extent, have inspired its findings and recommendations.

In Europe, the EU has not only formally enacted Just Culture as part of EU law, with the introduction of Performance Regulation (EU) No 691/2010, but it has also recently introduced elements of it in Regulation (EU) No 996/2010, governing air accident and incident investigations, which also addresses the need to achieve a balance between the objectives of the judiciary to determine whether criminality was involved, and the need for the aviation industry to be able to run a real-time self-diagnostic system without unnecessary interference from the justice system.

EU Regulation 996/2010 stipulates that its purpose is dual: to regulate both “the investigation and prevention of accidents and incidents”. It says: “An accident raises a number of different public interests such as the prevention of future accidents and the proper administration of justice. Those interests go beyond the individual interests of the parties involved and beyond the specific event. The right balance among all interests is necessary to guarantee the overall public interest.”

Although it may sound a little negative, the strength of the Just Culture concept (or by any other name, as long as it addresses the same processes) is the understanding that there is realistically no other way forward. Formal legislation, fully protecting pilots or controllers or sidelining criminal prosecution is a dead-end street, as demonstrated by all the existing national, regional and international pieces of legislation. Providing a reasonable expectation, for example, with regard to a controller or a pilot, that the chances that he or she would ever be invited to be part of a preliminary criminal investigation, let alone prosecution, are highly minimal, should provide the sound basis for continued incident reporting, and even measured and balanced accident investigations.

Just Culture represents the fundamental recognition that both the aviation safety drive and the administration of justice should benefit from a carefully established equilibrium, moving

away from criminalization fears. It is based on the understanding that controllers and pilots can blunder, and that the line between an “honest mistake” and intentional or reckless behaviour can only be drawn by a judiciary professional.

That is easier said than done, of course. But the time has come to seriously question the added value of endless and generally unsuccessful efforts at the international level to “protect” controllers and pilots against judiciary actions by creating standards, regulations and laws, which are supposed to shield them against interference by justice bodies. This is perhaps a good time to point out that this paper primarily focuses on the introduction and benefits of Just Culture at the state and international level, as well as the interaction between safety experts and the judiciary. At the (national) corporate level, in the interaction between management and staff of airlines and air traffic service providers, for example, Just Culture inevitably plays an equally important role in the acts of pilots and controllers and the application of company rules, contract and labour law.

A lot of progress has already been made in this domain through safety management and related practices, while the new ICAO Annex 19 will certainly play an important role in this area. It is important to note that these developments will also require the recognition and perhaps the harmonization of corporate Just Culture with criminal law requirements and policies at state level.

## **6. CONCLUSION.**

The time has come to focus on the pursuance of the practical goals identified by Just Culture activities. The first steps toward the proliferation of the model aviation prosecution policy concept have been taken and the first prosecutor expert courses have been held. The relevance of offering assistance and education to prosecutors and judges, together with the introduction and implementation of the model for an aviation prosecution policy in Europe and beyond, is obvious. After the historic support from the 39 full state members of the Eurocontrol and the EU for these deliverables, the next step will be to submit them for global consideration at the ICAO.

At the 37th General Assembly, Resolutions A37-2 and A37-3 on the sharing of safety information and the protection of safety data added the instruction to the ICAO Council to strike a balance between the need for the protection of safety information and the need for the proper administration of justice. The Assembly further noted the need to take into account the necessary level of interaction between safety and judicial authorities in the context of an open reporting culture.

As mentioned earlier, the ICAO SIPTF was tasked with analysing present ICAO rules, standards and recommended practices (SARPs), and national legislation, as well as considering enhanced communication and interaction mechanisms to improve the efficiency and credibility of data protection and incident reporting, and the relations between safety activities and the national judiciary.

It may be expected that the SIPTF, which held its last meeting in January 2013, will come forward with realistic proposals for the enhancement of safety data protection, which recognize and reconcile the existing national and international legislation and regulatory processes, and their limitations. In addition to SIPTF recommendations regarding changes in positive law or ICAO SARPs, considerable progress could be made in advancing safety information protection, with deliverables in the domains of training, support, education and

communication, through innovative implementation tools and tactics in order to balance the adequate protection of safety data with the proper administration of justice.

There is general recognition of the need to establish communication and training initiatives, as well as advance arrangements between the aviation safety sector, regulators, law enforcement and the judiciary to avoid unnecessary interference and build mutual trust and understanding. Furthermore, making high-level aviation expertise available to law enforcement and the judiciary could facilitate the exercise of their respective investigative and judicial processes.

Several states and groups of states in different ICAO regions are already organizing training and communication between safety and judicial authorities, which address implementation tools and deliverables that should lead to a stable and successful basis for enhanced safety data protection and a balanced interaction between safety and the administration of justice. It is important to note that these recommendations address processes and activities, which are expected to continue well beyond the active life of the SIPTF. Training, support, cooperation, communication and advanced arrangements form decisive conditions for an efficient and realistic safety data protection.

The time has come for the ICAO to further build on Just Culture principles, while becoming the facilitator at the regional level to educate and encourage states in order to establish (joint) permanent frameworks, ensure a constructive and ongoing dialogue with the judiciary, inform them on the possibilities for establishing a national aviation prosecution policy and provide them on request, with dedicated and impartial aviation expertise in the exercise of their functions.

Furthermore, the ICAO should establish and regularly update a repository of training and education activities related to the protection of safety data, interaction with the judiciary, and existing or new best practices and policies. It should also provide coordination and support, as well as organize progress reporting and information on a regular basis to all contracting states.

Just Culture is not a “magic wand” against injustice and the misuse of judiciary processes. It has been introduced to protect, as much as possible, the mundane, but highly important, ongoing processes of incident reporting: the literally thousands of daily events that feed into the well-established system, which uses such reports for the improvement of safety and the prevention of incidents and accidents. This represents an ongoing daily routine, which is not as spectacular and awesome as the aftermath of an accident, but absolutely vital for the continued effort to improve safety by learning from mistakes and other relevant occurrences.

Just Culture requires understanding and appreciating the different processes and commitments involving both safety people and the judiciary. Let there be no mistake: Just Culture also implies that the misuse of criminal processes or ignorance on the part of the judiciary is equally unacceptable! There is still a long way to go, both in Europe as well as at the ICAO; but most signs are outright encouraging, as evidenced by the deliverables of the Just Culture Task Force and those expected from the SIPTF, as well as reactions from third parties.

Finally, as good concepts are often, in essence, simple ones, I am minded that Just Culture, in terms of reconciling safety and justice interests, can be summarized by the aphorism, “it takes two to tango”!

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