

Workshop

Air Transport, Air & Space Law and Regulation

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Dr. John Saba

Adjunct Professor

McGill University Institute Of Air & Space Law



AIR TRAFFIC LIABILITY:
Is Criminalisation threatening Safety?

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

We will discuss this topic in terms of **3 objectives**.

Objective 1:

Define Key **Principles** respecting **Air Navigation Services & their Providers**

Objective 2:

Examine **some major aircraft accidents** associated with **Air Navigation Service Provider liability & broadened criminal liability**.

Objective 3

Examine the **Aviation & Safety Investigation Processes** in law & practice, comparing the **safety-oriented & criminal prosecutorial** approaches with a view of the **Just Culture** compromise.

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

Objective 1:

Define Key Principles respecting Air Navigation Services & their Providers

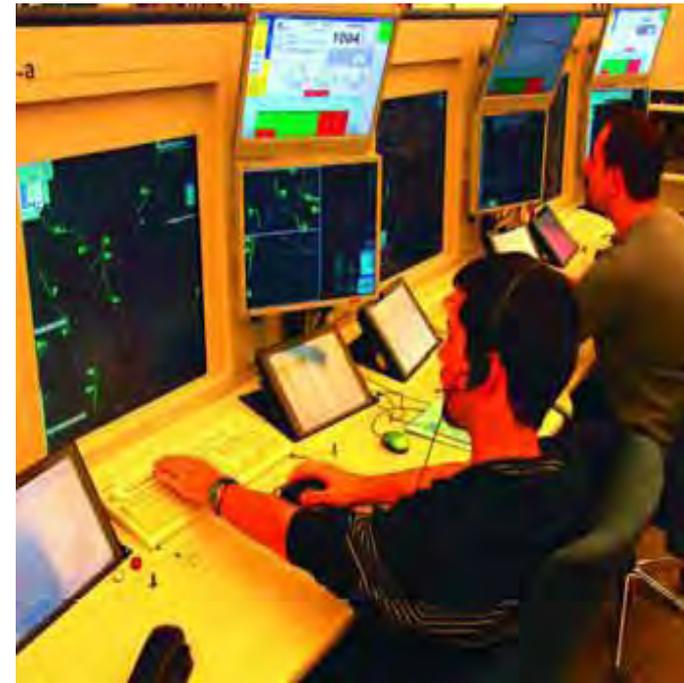


AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

Overview

- A. Defining some terms**
- B. State Obligations under International Law**
- C. Distinguishing *Responsibility, Accountability & Liability***
- D. Defining the *Criminalization Problem***



A. Defining some Terms

Air Navigation Services is a generic term that includes **air traffic control**

Air traffic control (ATC)

is a service provided by ground-based controllers who direct aircraft on the ground & in the air.

Air Navigation Service Provider (ANSP)

is the relevant authority designated by a State [or a number of States] responsible for providing *air navigation services* within a specific airspace such that it separates *aircraft* on the ground or in flight in a dedicated block of airspace



AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

Overview

A. Defining some terms

**B. State Obligations
under International Law**

**C. Distinguishing
*Responsibility,
Accountability
& Liability***

**D. Defining the
*Criminalization Problem***



NOTE:

Regulatory & service provision functions may be performed

EITHER in the **same entity** within a government
[example: *UAE General Civil Aviation Authority*]
Or allocated to **different entities**

Service Provision Function:

- 1. States ultimately are responsible for the provision of ANS under Article 28 of the *Chicago Convention*.**
- 2. Unlike the Regulatory function, whoever provides ANS services sometimes may be held *responsible/liable* for the deficient provision of such services.**

...We focus on this *service provision* function today...

B. State Obligations under International Law

Principle 2:

Basic responsibility for providing ANS facilities is assigned to individual STATES under *International Law*

Chicago Convention, Article 28, states...

Each contracting State undertakes, so far as it may find practicable, to:

(a) Provide, in its territory, airports, radio services, meteorological services & other air navigation facilities to facilitate international air navigation, in accordance with the standards & practices recommended or established from time to time, pursuant to this Convention ...



Basic Principles of Air Navigation Services

B. State Obligations under International Law

Principle 3:

States are competent & responsible to determine the type of structures to be used to provide their ANS

[Chicago Convention & its Annexes]

- **Annex 11** to the Chicago Convention, *Air Traffic Services*, [hereinafter *Annex 11*], provides in section 2.1.3:

"When it has been determined that air traffic services will be provided, the States concerned shall designate the authority responsible for providing such services"



- **3 Ways States give effect to this principle**
.. NEXT SLIDE

General Civil Aviation Authority [GCAA] of the UAE

This is a **joint effort** of all the member emirates.

It was created by Federal Cabinet decree in **1996** as an ***autonomous body*** with **BOTH regulatory & service provision** responsibilities.

The GCAA's mission statement says that:

UAE *“Air Navigation services are structured along standard organisational ICAO principles.”*

another State or Joint States entity
[e.g. EUROCONTROL]
.....Tendency to reduce number of ANSPs
as reflected in the EUROCONTROL model

Basic Principles of Air Navigation Services

B. State Obligations under International Law

HOW do different structures affect Liability?

Principle 4:

Each State remains ultimately responsible/liable for the ANS facilities & services over its territory

[Article 28, *Chicago Convention*]

....even when the responsibility for providing the service is granted to an **independent** or **foreign entity**

- **ANS responsibilities & liabilities** are mostly governed by **each State's national/domestic law**.
No international or regional regime currently exists to cover the liability of ANSPs.

This is **unlike** the *Warsaw & Montreal convention* regimes governing the **liability of air carriers**

- Where the damage is the result of a wrongful action by a service provider with delegated authority...
 - **International law** provides that the State is *ultimately liable*
 - **BUT: The State's domestic law** generally recognizes that the **State retains a right of recourse** against the **service provider**, under certain conditions, [e.g. a requirement that the ANSP was *grossly negligent*.]

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

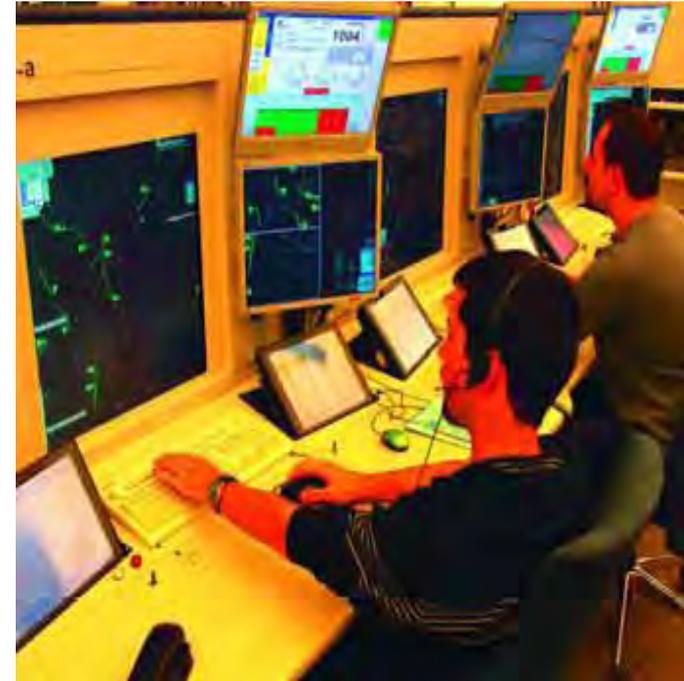
Overview

A. Defining some terms

**B. State Obligations
under International Law**

**C. Distinguishing
*Responsibility,
Accountability
& Liability***

**D. Defining the
*Criminalization Problem***



C. Distinguishing **Responsibility, Accountability & Liability**

The air transport industry distinguishes **3 concepts**:

[Source: F. Schubert & R. van Dam]

Responsibility is a *legal obligation* defined either in law or in a contract.

Responsibilities are the duties & competencies formally laid down in an employee's job description.

Accountability is largely a *moral obligation* of a person [with responsibilities] to answer for the consequences of a failure to perform as required under his/her job description.



C. Distinguishing *Responsibility*, *Accountability* & *Liability*

Liability

is a *legal concept* .

It involves the consequence
-- under civil or criminal law --
of not having correctly
discharged the allocated
responsibilities.

A party is identified
as a *wrong-doer*,
often in front
of a court of justice.

Liability, often involves
financial compensation for
damages caused
by some act or omission.



AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

Overview

- A. Defining some terms**
- B. State Obligations under International Law**
- C. Distinguishing Responsibility, Accountability & Liability**
- D. Defining the Criminalization Problem**



"Phew! I narrowly avoided a near miss."

D. Defining the *Criminalization* Problem

- ❑ There are many potential liability issues we may address today,
— BUT given our limited time, we will focus on an escalating trend towards the ***criminalisation*** of the **aviation accident investigations & litigation processes**
- ❑ **Criminal prosecutors** are often eager to press charges against
 - & sometimes successfully convict --
**air traffic controllers,
pilots,
civil aviation regulators,
officials of companies
& other aviation professional
involved in aircraft accidents.**



D. Defining the *Criminalization Problem*

“**Many devastations occur in a single aviation disaster**

Most importantly, lives are lost
Family members & friends
of the victims mourn
these losses;

Most seek *answers*,
Many seek *change*,
and some seek *revenge*.
Like the entire aviation industry
they want to know *what
happened, & why..*”

Kenneth P. Quinn
General Counsel & Secretary of
the Flight Safety Foundation,
Partner at the law firm of
Pillsbury Winthrop Shaw Pittman LLP



D. Defining the *Criminalization* Problem

Most accidents are the result of

human errors

& often arise in the context of a series of *acts & omissions*.

Aviation technology is *imperfect* & **individuals** are even *less perfect*.



Most of us make **mistakes** in our everyday jobs.

These mistakes normally go unnoticed & rarely result in real harm.

Aviation, however, can be most *unforgiving*.

For decades, we have progressively improved the system to today's high level of safety.

This is partly because the industry has been allowed to thoroughly investigate & collect full information about the causes of accidents.

D. Defining the *Criminalization* Problem

In recent years, Prosecutors & willing Judges around the world have turned the powerful weapons of **criminal prosecution**

against what are simply tragic **accidents**, generally the result of **mistakes**, **not willful actions**.



In some cases, the prosecutions dragged on for more than a decade, causing enormous damage to reputations, careers & finances.

Prosecutions turned into **persecutions** & chilled the free admission of mistakes

– even the direct testimony of witnesses or participants.

«***Guilty by investigation***» has caused havoc on lives.

Kenneth P. Quinn

D. Defining the *Criminalization* Problem

In terms of **air traffic liability** specifically, we will consider

whether criminalisation is jeopardising aviation safety.

We will also consider

the evolving “*Just Culture*” concept insofar as it counterbalances the criminalization trend.



AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

Objective 2

Examine some major aircraft accidents associated with Air Navigation Service Provider liability & Broadened criminal liability



AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

OVERVIEW

A. Some major aircraft accidents associated with Air Navigation Service Provider liability

B. Broadened criminal liability



A. Some major aircraft accidents associated with Air Navigation Service Provider Liability

Criminal Liability actions Instituted in Largely *Non-ANSP* cases

- ❑ An Italian court affirmed the convictions for **manslaughter** of 5 aviation officials on July 7, 2006 .
- ❑ **The** Swiss Federal Prosecutor's Office had, for many years, a criminal investigation for ***negligent manslaughter*** of the former chief executive, *Swiss International Airlines*
- ❑ **2005 Helios Crash:**
There was a lengthy Greek **quasi-judicial investigation** focused on the 2005 **Helios Boeing-737 crash** near Athens.

Greek prosecutors brought **negligent manslaughter, negligent bodily injury, & disrupting the safety of air services charges** against the captain & 1st officer



1996 ValuJet Flight 592 crash

Crater created by the crash

- The aircraft crashed shortly after takeoff from *Miami International Airport* into the *Florida Everglades*.
 - Improperly packed oxygen generators ignited, leading to a fire in the cargo hold which burned through control cables & filled the cabin with smoke
 - **U.S. federal & Florida state prosecutors** brought **criminal charges** [110 counts of murder & 110 of manslaughter] against a **maintenance contractor [*SabreTech*]**, several mechanics, & a maintenance manager.
- SabreTech* was the first American aviation company to be criminally prosecuted for its role in an American airline crash.**

DECISION: SabreTech was found criminally liable for placing the canisters aboard the aircraft.
i.e. for illegally transporting dangerous materials aboard a commercial aircraft, improperly labelling them & not providing safety equipment to ship them



Criminal Liability actions Instituted with ANSP aspects

FACTS:

January 20, 1992

An **Air Inter Airbus A320** was making a night Instrument approach landing at Strasbourg, France.
when the aircraft hit a snow-covered

Many have applauded the French court for ***avoiding criminal sanctions*** in this case

2006 – 1 air traffic controller, 5 officials of Airbus, Air Inter & Airbus were tried in criminal court on charges of involuntary manslaughter. All were acquitted.

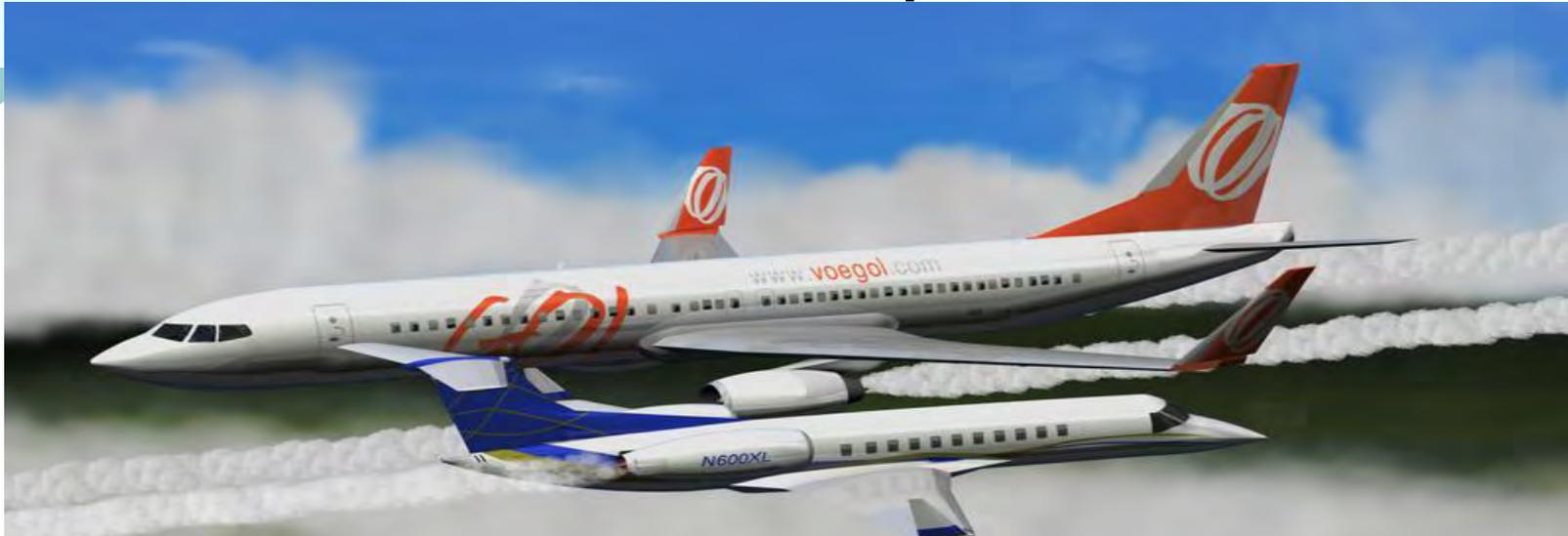
Airbus & Air France [parent company of ***Air Inter***] were found civilly liable for the pain & suffering of the victims' families

A. Some major aircraft accidents associated with Air Navigation Service Provider Liability

Criminal Liability actions Instituted with ANSP aspects

September 29, 2006 mid-air collision between an Embraer Legacy 600 executive jet & a Gol Linhas Aéreas Inteligentes Boeing 737

- ❑ Law enforcement authorities opened a **criminal investigation**



- ❑ **GOL B-737: ALL 154 people on board died** & the wreckage was found in the Amazon.
- ❑ **Legacy business jet** made an emergency landing. with **no fatalities.**

- The **Air Traffic Controllers** were never charged.
- BUT: in late 2006, Brazilian police charged the 2 **American business jet pilots** --- who were detained in Brazil for more than 2 months after the crash – with ***endangering aircraft safety***.
- The pilots were not summoned to a criminal trial after leaving the country in December, 2006 [They had agreed to show up for trial, if one was ever held].

B. There were **serious failings by air traffic control** since the **Brazilian flight controllers** --- did not notice that the Legacy's transponder was on standby for 58 minutes

We now turn to the
ANATOMY of a Mid-Air Collision Disaster [#28-45]

Criminal Liability actions Instituted with ANSP aspects

A KEY CASE: 2002 Überlingen Mid-Air Collision

- ❑ Swiss prosecutors in **August 2006** charged 8 Swiss *Skyguide* air traffic controllers with **negligent homicide** because of a **mid-air collision**

FACTS

Flights involved

- ❑ **DHL Flight 611**, a **Boeing 757-23APF** cargo jet was flying from **Bahrain** north to **Brussels, Belgium**.
- ❑ At the same time, **Munich air traffic control** handed a Russian jet -- **Bashkirian Airlines Flight 2937** -- to **Zurich air traffic control [i.e. SKYGUIDE]**
This was a **Tupolev Tu-154M** chartered passenger jet *en route* flying west from *Moscow* to *Barcelona, Spain*

Überlingen Mid-Air Collision

FACTS

- ❑ Both aircraft was flying at a *cruising altitude* of **36 000 feet** (11, 500 metres)
- ❑ Both aircraft were now under **Skyguide's control**
- ❑ The **2 aircraft collided in mid-air** on July 1, 2002, at 21:35 over the towns of *Owingen & Überlingen* in Germany, (near Lake Constance), killing all 71 aboard both aircraft.

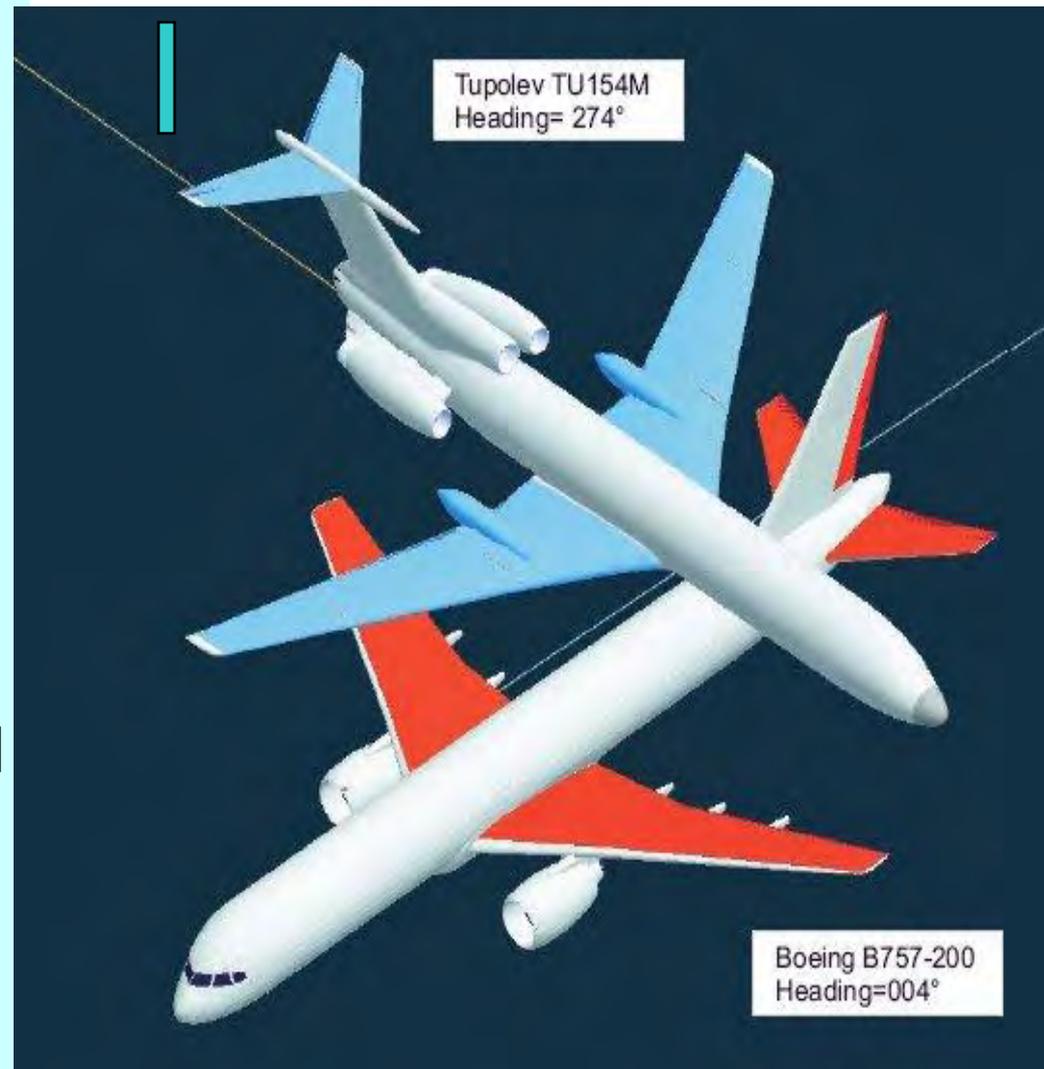


**Site of the crash
(Germany)**

DECISION/Report of the Official Accident Investigators

DECISION/Report of the Official Accident Investigators

The **German Federal Bureau of Aircraft Accidents Investigation (BFU)** determined on May 19, 2004, that the accident had been caused by problems within the **air traffic control system** & problems with the use of the **collision warning system**.



Computer reconstruction of the accident derived from the Flight Data Recorder & collision evidence

DECISION/Report of the Official Accident Investigators

FACTORS Affecting Decision

Air Traffic Control Details

- The two aircraft were flying at about 36,000 feet (11,000 m) above Sea Level on a collision course.
- Despite being **over Germany**, **the airspace was controlled from Zürich**, by the private Swiss ANSP **Skyguide**.
- The **air traffic controller** handling the airspace, **Peter Nielsen**, was working 2 workstations at the same time. He did not realise the danger facing the 2 aircraft until *less than a minute before the accident*.



Computer reconstruction of the accident

DECISION/Report of the Official Accident Investigators

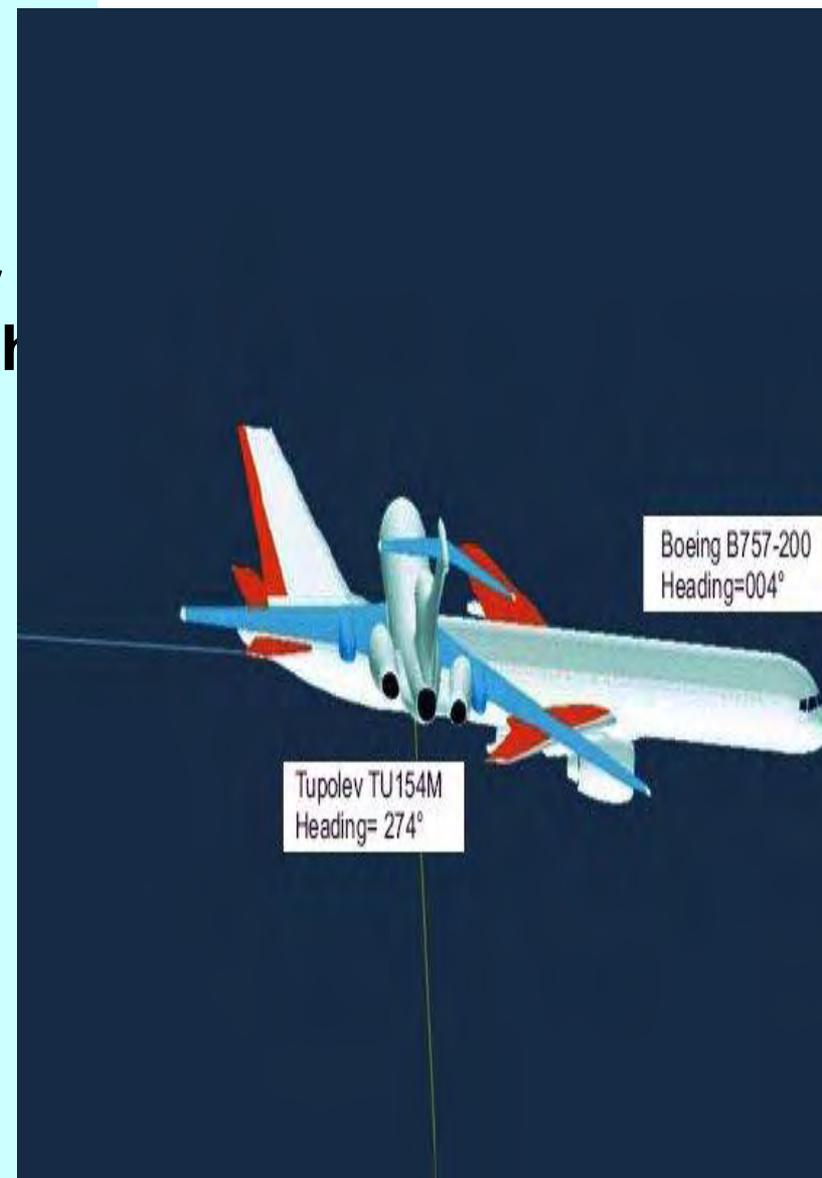
FACTORS Affecting Decision

Air Traffic Control Details

- **Air traffic controller Nielsen**, finally realized the danger, & contacted **Flight 2937**, instructing the pilot *to descend* by 1000 feet to avoid collision with the crossing traffic (**Flight 611**).

Traffic Collision Avoidance System (TCAS) gives opposite order

- Seconds after the **Flight 2937** started its *descent*, its TCAS instructed its crew *to climb* BUT it ignored the TCAS & kept descending
- At about the same time, **Flight 611** obeyed the TCAS instructions *to descend*.
- If both aircraft had followed the automated instructions, the collision would have been avoided ... Thus, **both planes were now descending !!!**



DECISION/Report of the Official Accident Investigators

FACTORS Affecting Decision

Air Traffic Control Details

- Unaware of the TCAS-issued alerts, **Air Traffic Controller, Nielsen**, repeated his instruction to **Russian Flight 2937** to descend, giving it incorrect information as to the position of the **DHL** plane
- Maintenance work was being carried out on the main radar system, that meant that the **Skyguide controllers** were forced to use a slower system
- The aircraft collided at a right angle at an altitude of 34,890 feet (10,630 m), with the **Boeing's** vertical stabilizer slicing completely through **Flight 2937's** fuselage just ahead of its wings.



Computer reconstruction of the accident

FACTORS Affecting Decision

The Results of the Collision

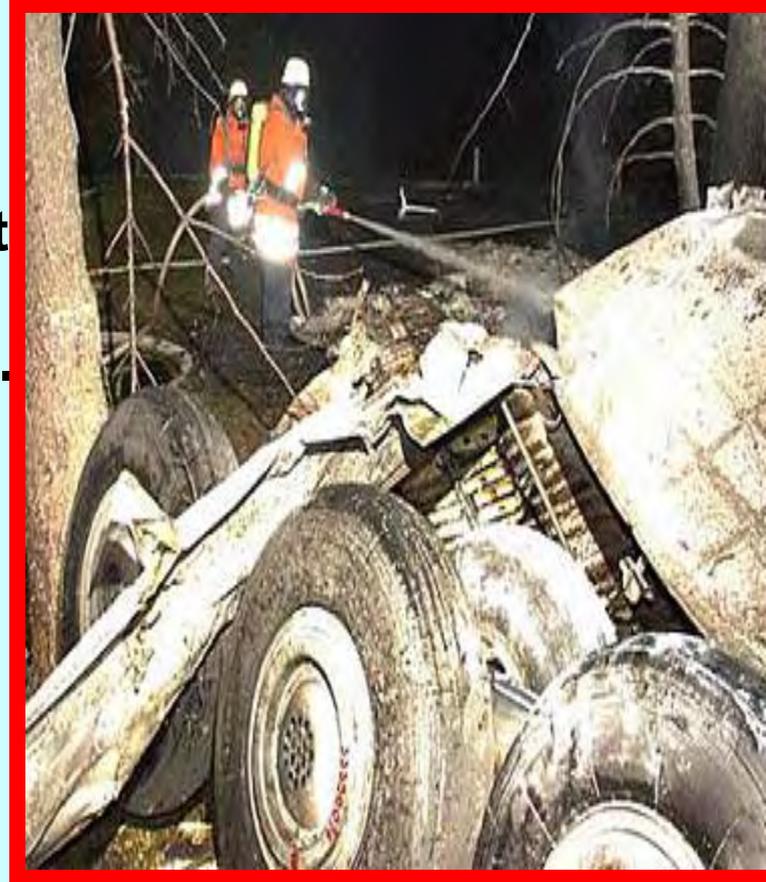
- The **Tupolev** exploded & broke into several pieces, scattering wreckage over a wide area.
- The crippled **Boeing**, struggled for a further 7 kilometres (4 miles) before crashing into a wooded area.
- **Fatalities:** No survivors
All 69 people on **Russian plane**
The 2 crew on the **Boeing** aircraft



FACTORS Affecting Decision

The AIR TRAFFIC CONTROLLER

- **One air traffic controller, SKYGUIDE's Nielsen**, controlled the airspace through which both aircraft were transitioning.
- Another controller on duty was **resting** in another room for the night.
- This was **against the regulations, BUT a common practice for years**. This was known & was tolerated by SKYGUIDE management.
- Due to **maintenance work**, Nielsen had a *stand-by controller & system manager on call*.
- **Nielsen** was *either* unaware of this *or* he chose not to use the 2 additional air traffic controllers available to him.
- When Nielsen realised that the situation had subtly increased beyond his span of control, it was **too late to summon assistance**.



DECISION/Report of the Official Accident Investigators

FACTORS Affecting Decision

The AIR TRAFFIC CONTROLLER

- In the minutes before the accident, **Nielsen** was occupied with another aircraft [Airbus-Flight 1137] in his flight control zone
- **Handling 2 workstations at once**, Nielsen struggled with the malfunctioning phone system that he was trying to use to call the *Friedrichshafen Airport* to announce the approaching other aircraft [Flight 1137].
- The main phone lines at **Skyguide** were not working due to maintenance work & the backup line was defective
- This caused **Nielsen** to spend more time than he anticipated coordinating the Airbus late arrival into *Friedrichshafen*, **& to miss several calls from other aircraft.**



DECISION/Report of the Official Accident Investigators

FACTORS Affecting Decision

The AIR TRAFFIC CONTROLLER

- The faulty phone lines also prevented adjacent air traffic controllers at *Karlsruhe* from phoning in a warning.
- Due to these distractions, **Nielsen** did not spot the danger until about *a minute before impact*.
- **If** Nielsen had ordered the **Russian plane** to descend earlier the aircraft would have been separated & their collision avoidance systems would not have issued instructions.
- **ALSO:** after Nielsen instructed the **Russian crew** to descend, he returned to the situation with the Airbus bound for *Friedrichshafen*, & did not hear the **DHL** aircraft TCAS report of its descent.



DECISION/Report of the Official Accident Investigators

FACTORS Affecting Decision

The AIR TRAFFIC CONTROLLER

Who is responsible & liable?

- The **Russian Crew?**
- The **DHL crew?**
- Deficient Swiss Air Traffic control system**
 - Swiss equipment?
 - Swiss management?
 - The **Air Traffic Controller – Nielsen?**

.... It all depends on what *perspective* you take...

warning addressed to a nearby work station at 21:35 (32 seconds before the collision).

This warning was not heard by anyone present at that time.

Deviating Statements to the

Official German Report of the Accident Investigators

- All countries involved were allowed to add ***"deviating"*** statements to the official German report.
- **Bahrain**, as the home country of the DHL plane, mostly agreed with the findings of the report.
- BUT: Bahrain said that the report should have
 - Put less emphasis on the actions of individuals & stressed the problems with the organisation & management more
 - Emphasized the lack of crew resource management in the **Tupolev's cockpit** as a factor in the crash.



Deviating Statements to the

Official German Report of the Accident Investigators

- The **Russian Federation** stated that the Russian pilots were unable to obey the Traffic Controller advisory to climb
- The advisory was given when they were already at **35,500 ft** while the **controller wrongfully stated** there was conflicting traffic above them at **36,000 feet**.
- Also, the controller gave the wrong position of the DHL plane.
- Russia asserted that the **DHL crew** had a **"real possibility"** to avoid a collision since they were able to hear the conversation between the Russian crew & the controller



Deviating Statements to the

Official German Report of the Accident Investigators

- **Switzerland** noted that a cause of the accident was that the **Tupolev** was about 33 metres below the flight level ordered by the Swiss controller.
- The Swiss position also states that in spite of the false information given by the Swiss controller the TCAS advisories would have been useful if obeyed immediately



What were the Effects of this crash?

EFFECTS of the Crash

1. **SKYGUIDE Air Traffic Controller Nielsen** retired from his job as controller, since he had been struck by grief and guilt over the incident.
2. **Skyguide**, after initially having blamed the **Russian pilot** for the accident, accepted its part of the responsibility & **paid compensation** to some Russian families.
3. On May 19, 2004, the **Swiss official investigators** found that **managerial incompetence & systems failures** were the main cause for the accident i.e. **Nielsen** was not the only one to be blamed for the disaster. As we just explained, **a series of coincidences of which Nielsen was unaware precipitated the accident.**



Computer reconstruction of the accident

EFFECTS of the Crash

4. On 27 July 2006, the court of *Konstanz*, Germany [it borders Switzerland] determined that fault lay exclusively with the **German government**, since it was against German law to allow Skyguide to offer air traffic control services in German airspace.



Computer reconstruction of the accident

EFFECTS of the Crash

5. A **criminal investigation** of the Skyguide begun as of May 2004. On 7 August 2006, a Swiss prosecutor **filed manslaughter charges** against **8 employees of Skyguide**.

The prosecutor called for jail terms of 6 to 15 months, alleging **"homicide by negligence"**.

The **verdict** was announced in September 2007.

- **3** of the **4** managers convicted were given *suspended prison terms*
- the **4th** was ordered to pay a fine.
- The other **4 Skyguide** employees were cleared of wrongdoing

Our Concern



Tupolev TU154M
Heading= 274°

Boeing B757-200
Heading=004°

Computer reconstruction of the accident

Überlingen Mid-Air Collision

EFFECTS of the Crash

6. Murder of Air Traffic Controller, Peter Nielsen

- Grieved by the loss of his family, Russian **Vitaly Kaloyev** held Air Traffic Controller, **Peter Nielsen** responsible for their deaths.
- Kaloyev** killed **Nielsen** at his Kloten home, near Zürich, on February 24, 2004, over 2 ½ years after the crash.



Skyguide memorial to the aviation accident & murder of Peter Nielsen.

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

Objective 3

Examine the
**Aviation Safety &
Investigation
Processes**

in law & practice,
comparing the
***safety-oriented
& criminal
prosecutorial***
approaches
with a view of the
Just Culture
compromise.



AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

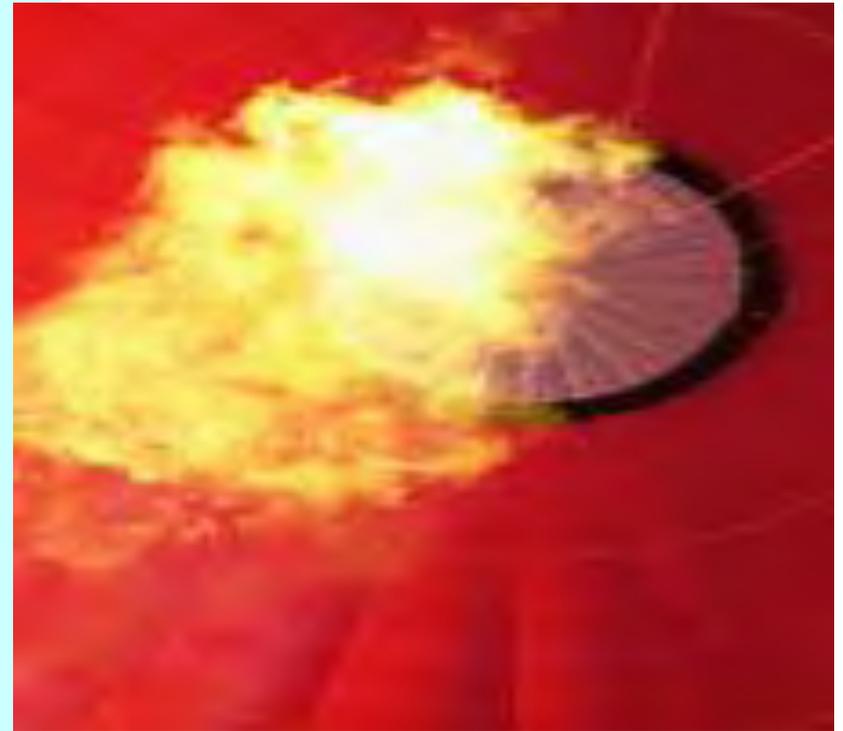
OVERVIEW

**A. The Aviation
Safety
& Investigation
Processes**

**B. 3 Basic Principles
of *Aviation Safety
Investigation*
Established by ICAO
& the European Union**

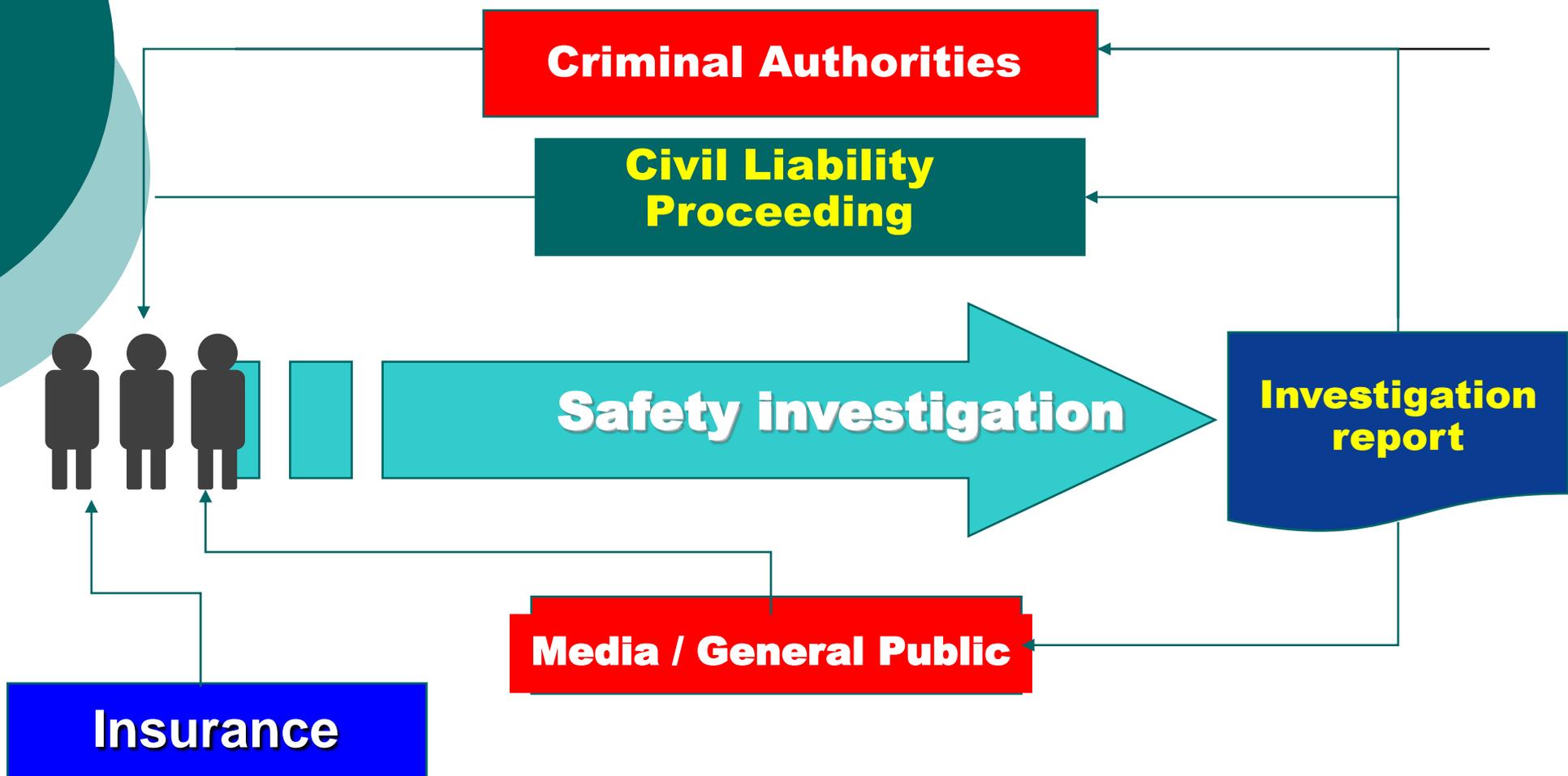
**C. Criminalization
Challenges these
Principles**

**D. The *JUST CULTURE*
Option**



The Safety Investigation Process

Involves Interaction of many Parties & Interests



Priority Issues

of an Aviation Safety Investigation

1. *Who made what errors ?*

**2. *How & Why*
were the errors made ?**

**3. *How do we prevent
the same or similar errors
from happening again ?***

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

OVERVIEW

A. The Aviation Safety & Investigation Processes

B. 3 Basic Principles of *Aviation Safety Investigation* Established by ICAO & the European Union

C. Criminalization Challenges these Principles

D. The *JUST CULTURE* Option



Next slides

Let us look at

2 Basic Principles of Aviation Safety Investigation Established by ICAO &

How the European Union enhances these principles

It sets standards & regulations necessary for
aviation safety,

security,

efficiency & regularity,

& aviation environmental protection.

ICAO Member States are under the obligation to implement ICAO standards.

ANNEX 13 to the *ICAO Convention on International Civil Aviation* states that:

*'States should establish **formal incident reporting systems to facilitate collection of information on actual or potential safety deficiencies**'*

(Chapter 7, par. 7.3)

2 Basic Principles of Aviation Safety Investigation Established by ICAO

□ Principle 1:

**The only Objective of safety investigation
“.... of an accident or incident shall be the
prevention of accidents & incidents.
It is not the purpose of this activity
to apportion blame or liability.”**

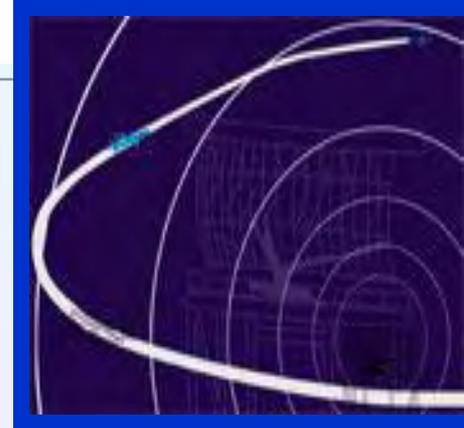
ICAO Annex 13, Art. 3.1.

Compare..

**LAW: The main objective of
legal proceedings is to
apportion *blame or liability.***

2 Basic Principles of *Aviation Safety Investigation* Established by ICAO

□ Principle 2:



"Non-punitive" environment

- "..... is fundamental to **voluntary reporting**".
- "a voluntary incident reporting system shall be **non-punitive** & afford protection to the sources of the information"

Next slides

We now turn to

How the European Union enhances these safety investigation principles

The European Union

builds on the ICAO foundation

First Step to implementing these principles is protecting the **Sources of Safety-related Information.**

technical investigation of civil aviation accidents & incidents is to draw lessons that could prevent future accidents.

- It states that **safety recommendations are not designed to apportion blame or liability.**

□ **European Union adds**
Principle 3:

Confidential reporting is fundamental

- "The **sensitive nature of safety information** is such that the **way to ensure its collection** is by **guaranteeing its CONFIDENTIALITY**, the protection of its source & the confidence of the personnel working in civil aviation."

Why are these 3 Basic Principles of Aviation Safety Investigation So Important: Protecting Safety-Related Information

➤ Existing **international & national laws** do not properly protect many sources of safety-related information arising from accident/incident investigations

➤ The **public interest** requires a balancing of two sometimes conflicting values:

The **protection of safety-related information** [that will be used possibly to prevent future accidents] & **the availability of evidence in judicial actions**

➤ **Goal** should be to **protect safety information** [so that it cannot be used in criminal prosecutions] , **BUT not to deny the right to prosecute where appropriate....**

No person or entity is above the Law

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

OVERVIEW

A. The Aviation Safety & Investigation Processes

B. 3 Basic Principles of *Aviation Safety Investigation* Established by ICAO & the European Union

C. Criminalization Challenges these Principles

D. The *JUST CULTURE* Option



Why are these 3 Basic Principles of Aviation Safety Investigation So Important: **Challenges**

- **Safety Investigations** must be **independent**
 - **Unhindered** by **judiciary authorities** [civil or criminal]
 - Safety Information related to the accident must be freely available to accident investigators
- Difficult to have Independent Safety investigations in some countries because of....
 - **Legal systems** that support criminal prosecutions of alleged wrong-doers
 - **Cultures** that seek to attribute blame or liability to someone

Why are these 3 Basic Principles of Aviation Safety Investigation So Important:

Challenges - Increased Criminalization

- ❑ **Numbers increasing** of Criminal prosecutions of safety-related aviation occurrences
- ❑ **Scope** of the Proceedings is broadened to include:
 - Not only aviation **accidents** but also **incidents**
 - **all categories of aviation professionals** are now prosecuted from the *front line operators* to *those climbing the corporate ladder*
- ❑ Increasingly liability is being attached to **individual fault** [negligent or intentional] rather than attributing blame to **organisational/systemic failures**

Challenges - Increased Criminalization

Criminal prosecution would only be reasonable

if the system did NOT provide accountability through administrative & civil penalties and remedies.

i.e. license suspensions or revocations

.... or tort remedies

[usually by tort compensation].



❑ BUT administrative & civil penalties and remedies nearly always exist

❑ In most cases, it appears inequitable to punish individuals, companies & organizations further by subjecting them to the *risk of imprisonment* or the equivalent of a *corporate death sentence*, particularly in an industry where **safety reputations mean everything.**

Challenges - Increased Criminalization

Criminal prosecution is only justifiable in extreme cases of **willful misconduct** or **egregious reckless conduct**, or **intentional acts** [such as terrorism or sabotage].



We do not have to reinvent the wheel today.

The Joint Resolution Regarding Criminalization of Aviation Accidents [October 1, 2006] [61-67]

is excellent at

Defining the Problem
Proposing a Solution

Prosecutors often pursue actions against members of the aviation community based on nothing more than their involvement in ***unfortunate accidents***.

Kenneth P. Quinn

Responding to the Criminalization of Aviation Safety

The Joint Resolution Regarding Criminalization of Aviation Accidents [October 1, 2006]

- This was an agreement of:
 - Flight Safety Foundation (FSF)
 - Royal Aeronautical Society (RAeS) [London]
 - *Académie Nationale e l'Air et de l'Espace* (ANAE) [Paris]
 - Civil Air Navigation Services Organization (CANSO) [the Netherlands]
- This resolution addressed a growing tendency of prosecutors & judges to seek **criminal sanctions** respecting certain aviation accidents, even when the facts do not appear to support findings of *sabotage, criminal negligence* or *willful misconduct*

Joint Resolution Regarding Criminalization of Aviation Accidents: Key Provisions

- ❑ *Recognizing* the importance in civil aviation accident investigations in securing the **free flow of information**
[to determine the cause of accidents & incidents & to prevent future accidents and incidents]
- ❑ *Recognizing* the actions taken recently by ICAO in promoting **amendments to Annex 13**
[i.e. encouraging Contracting States to adopt 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;

Joint Resolution Regarding Criminalization of Aviation Accidents: Key Provisions

- ❑ *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 & punishment**, could **discourage persons** from **providing accident information**, thereby **adversely affecting flight safety**;
[*BUT ALSO: Recognizing* that under certain circumstances, including **acts of sabotage & willful or particularly egregious reckless conduct**, criminal investigations & prosecutions may be appropriate]
- ❑ *Concerned* with the **growing trend to criminalize acts & omissions** of parties involved in aviation accidents & incidents

Joint Resolution Regarding Criminalization of Aviation Accidents: Key Provisions

- ❑ *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 & improve aviation safety;**
- ❑ *Considering* that numerous incentives, including **disciplinary, civil, & administrative penalties, already exist to prevent & 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, & choose not to freely admit mistakes in the spirit of ICAO Annex 13 for the purpose of preventing recurrence;

Joint Resolution Regarding Criminalization of Aviation Accidents: Key Provisions

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

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

Joint Resolution Regarding Criminalization of Aviation Accidents: Key Provisions

BE IT THEREFORE RESOLVED, that the [signing] organizations

1. Declare that **the paramount consideration in an aviation accident investigation should be to determine the probable cause of & contributing factors in the accident, NOT to punish Criminally** flight crews, maintenance employees, airline or manufacturer management executives, regulatory officials, or **air traffic controllers**
2. Declare that, absent acts of **sabotage & 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**

Joint Resolution Regarding Criminalization of Aviation Accidents: Key Provisions

- 3. Urge States to exercise far greater restraint & adopt stricter guidelines** before officials initiate criminal investigations or bring criminal prosecutions in the wake of aviation disasters

We now turn to an arguably fair & equitable approach that, when an aviation accident/incident occurs, tries to reconcile the tension between a **purely safety-oriented investigation & criminal prosecution** of alleged wrong-doers.

Is a Just Culture the appropriate balance?

DATED: October 17, 2006

AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

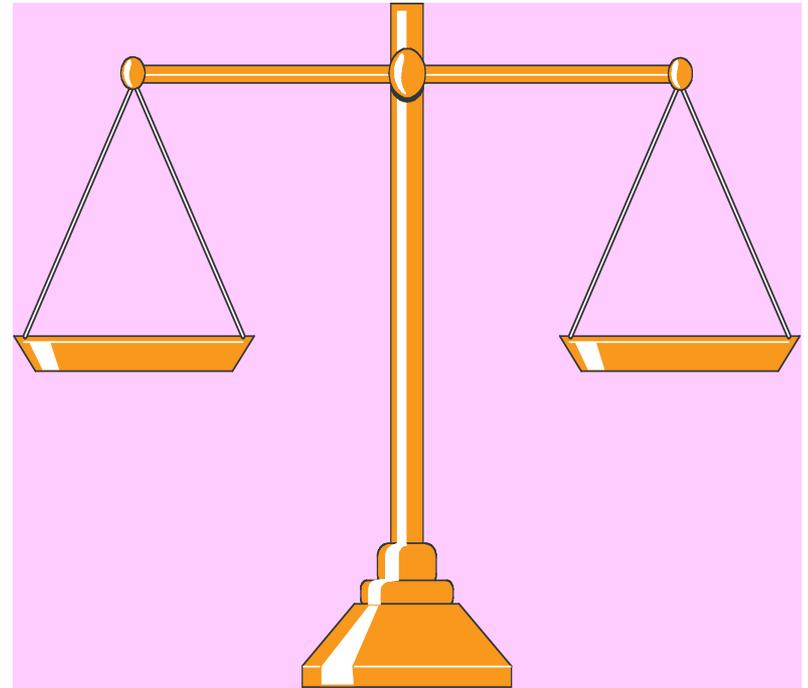
OVERVIEW

A. The Aviation Safety & Investigation Processes

B. 3 Basic Principles of *Aviation Safety Investigation* Established by ICAO & the European Union

C. Criminalization Challenges these Principles

D. The *JUST CULTURE* Option



A **"Just Culture"** is defined as one in which

“..... **front line operators or others** are:

“ **Not punished** for **actions, omissions or decisions** taken by them that are not commensurate with their experience & training,

BUT

“Not tolerated are **gross negligence, willful violations & destructive acts...”**

Source of this definition

“*Just Culture and safety occurrences reporting*”, working paper
Presented by the *Civil Air Navigation Services Organisation*, I
CAO 36th General Assembly, A36-WP/112, TE/22, 29/8/07

Concept of *Just Culture*

Key elements



- ❑ A ***Just Culture*** promotes an **atmosphere of trust** in which people are *encouraged -- even rewarded --* for providing essential safety-related information.
- ❑ A ***Just Culture*** is one in which the boundaries **between justifiable error & criminal activity** leading to possible prosecution is understood by all parties.
- ❑ A ***Just Culture*** provides information so that **proactive safety management** can occur

Concept of *Just Culture*

Domain of the *Just Culture*

COURT System

is responsible for
dealing with

- Criminal acts**
- Gross negligence**
- Willful Misconduct**

Safety Management System

addresses

Honest mistakes

for the single
purpose of improving safety

Management

to monitor &
take disciplinary actions
as required for:

- Inadequate attitude**
- Repetitive errors**
- Deliberate acts**

Concept of *Just Culture*

Advantages of the **Just Culture** approach

- 1. Provides for an increase in reporting & exchange of information** because reporting is:
 - **Compulsory**
 - **Strictly non-punitive & blame free**
 - **Strictly confidential**
- 2. Avoids any extremes** that might otherwise result in:
 - Grants of immunity from Prosecution
 - The misuse of Prosecution/Judicial Powers
- 3. Protects the civil investigation process**
- 4. Requires establishing a clear-cut criminal prosecution policy**



AIR TRAFFIC LIABILITY

Is Criminalisation threatening Safety?

CONCLUSION



AIR TRAFFIC LIABILITY

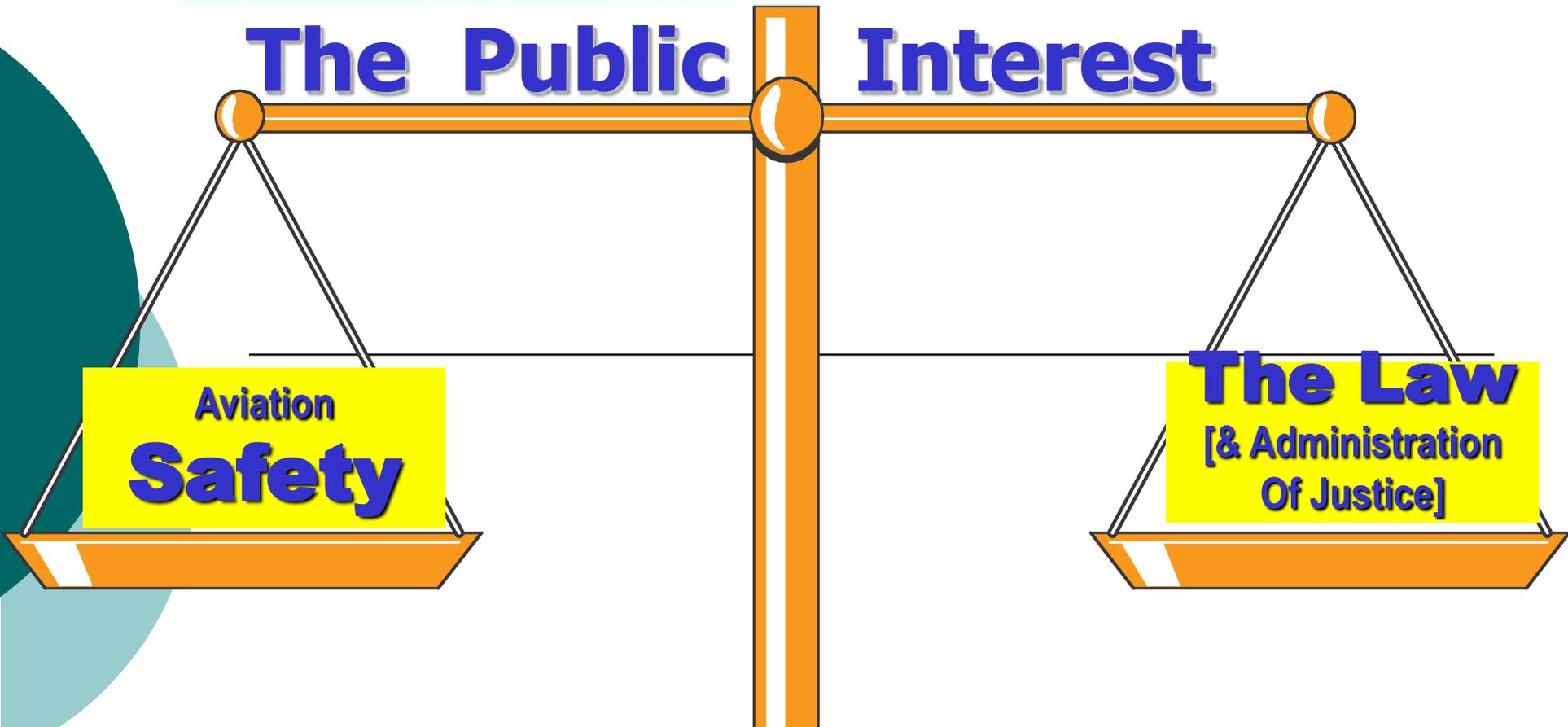
Is Criminalisation threatening Safety?

- ❑ **Criminal liability & society's tendency to criminalise** the actions of those involved in **Air Traffic Management [ATM]** may affect safety levels in ATM.
- ❑ **Criminalisation** is **NOT** the correct approach to a serious problem.
- ❑ The European **Just Culture** initiative has been debated in ICAO & elsewhere. It seeks to find realistic solutions for the challenges posed by **criminalisation**



Concept of *Just Culture*

The Public Interest



In the **Public Interest**,
the *Just Culture* approach tries to balance
& maintain in equilibrium 2 factors:

- the **interests of aviation Safety**
[& the protection of safety information]
- the **Law` & proper administration of justice**

Workshop

Air Transport, Air & Space Law and Regulation

Abu Dhabi, UAE

April 13, 2009



Dr. John Saba
Adjunct Professor

McGill University Institute Of Air & Space Law



AIR TRAFFIC LIABILITY:
Is Criminalisation threatening Safety?