

Just culture in aviation: dynamics and deliverables

by Tony Licu and Roderick van Dam

What is this?

This article is not another song of praise for the Just Culture concept. Mind you, it is a good one – don't let anybody fool you! But this contribution aims to provide you with the latest insights, deliverables and expectations. It contains a reality check on do's and don'ts in Just Culture, deliverables and – most important – a wakeup call for a comprehensive understanding of the interaction with Air Transport and ATC, both at front line operator, corporate and national criminal law level. Work in progress, certainly, but with plenty of indications where we are going and what to expect and certainly also what not to expect.

ciary, operators and service providers; on pilots and controllers as well as managers.

The myth of total protection

The administration of justice, in particular in the criminal law domain, constitutes one of the pillars of State sovereign functions; they are usually firmly imbedded at constitutional level. The ICAO Convention and the EUROCONTROL Convention and many other international legal instruments, confirm the complete and exclusive sovereignty of a State over its territorial airspace. That cer-

to "protect" the aviation safety domain intervention by the national criminal authorities.

The problem is that invoking real or alleged criminalisation of aviation incidents or accidents as a justification for fully protective legislative action does not really work.

Let's do a quick reality check:

- At this moment in time, most (but not all) States have formally established in their applicable legislation a priority for the Judiciary (Police and Prosecutorial Officials) in the investigation of accidents and incidents;
- Most (but not all) States have legislation that prevents use by the Judiciary of the evidence the investigator has collected and collated; and
- All the regional and global rules and standards (in force or under discussion) related to the protection of safety data and investigative processes in aviation make an exception for the intervention of the criminal judiciary of a sovereign State.

"War is too serious a matter to entrust to military men"

Georges Clemenceau

First off, 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 enhancing aviation safety through independent investigation and reporting and the other with the aim of preserving justice by investigating and prosecuting possible perpetrators.

Recognising and accepting the dynamics of Just Culture in Aviation will help us to progress towards realistic deliverables that are based on a sound assessment of the different roles of the legislator, the regulator, the judi-

tainly includes the administration of justice. States are of course free to choose to delegate or pool certain sovereign functions, as is the case with the European Union membership, but criminal jurisdiction, with only a few exceptions, generally remains firmly imbedded at State national level, also in the EU.

The discussion on the administration of justice related to protection of safety reports and reporters of aviation incidents and accidents shows concerns about the perceived intrusion by the judiciary in the all important effort of enhancing safety in aviation. It also shows a tendency

That does of course not mean that there is no role for legislating protection of safety issues. Both at ICAO level as well as in Europe, effective and focused rules and regulations on protection of safety data already exist or are under discussion. But there are limits to what can be addressed by safety legislation. Nobody can be above the law and interpreting acceptable or unacceptable behaviour or actions remains a responsibility for the national judiciary.

Criminalisation crusade

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

This is an important and sensitive issue. Many, perhaps too many, discussions and opinions on Just Culture and the cases discussed evoke examples of highly visible and often tragic aviation accidents, the aftermath of which results in criminal prosecution and convictions of first line operators, managers and sometimes even regulators. In some of these cases, blatant misuse obviously occurred. In others, application of national norms of criminal law differs from those applied in other states or regions. That may not change soon – international harmonisation of criminal law remains a delicate and different issue.

As mentioned above, invoking criminalisation of aviation incidents or accidents as a justification for full legal protection 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 needed now is the establishment of equilibrium between two equally relevant goals: aviation safety and the administration of justice.

Just Culture requires understanding and appreciation of the different processes and commitments by both safety people and the judiciary. And let there be no mistake: Just Culture also implies that misuse of criminal processes or ignorance from the part of the judiciary is equally unacceptable! These are mostly highly visible but limited cases almost always only related to serious accidents. Misuse of powers and processes in aviation accidents, by national authorities must be flagged and condemned.

One of the huge added values of Just Culture is its potential to safeguard the ongoing, perhaps inglorious but essential processes of incident reporting. It will be hard to overestimate the importance of that reporting mechanism and the deliverables of Just Culture to help ensure its continuation.

Corporate just culture

The vast majority of EU Member States have now corporatised and, in a number of cases, fully privatised their Air Navigation Service functions. The provision of ATC has now been mandated to dedicated organisations established under national corporate or private law. In particular the financial and operational responsibilities for running an ANSP have become the responsibility of a CEO or senior management as set out in the corporate constitution. A similar process has also taken place in the air transport sector that was regulated and liberalized under the EU legislative system well before ATM in a gradual process that started in the mid-seventies.

For the application of Just Culture principles, the corporate activities related to incident reporting will include the handling of incident reports and mistakes by controllers



Just culture in aviation: dynamics and deliverables (cont'd)

and other ATM front line employees. In a corporate environment with of course up-front goals on safety, but also regarding efficiency and performance-based financial goals, the “corporate culture” will interact with the JC elements as adopted in the company.

That creates an important issue that is not necessarily a problem but certainly a challenge. Applying JC at corporate level means that we have to find the corporate “equivalent” of the criminal law principles of gross negligence or wilful misconduct. In other words: “Honest mistakes” should not result in sanctions by management, but manifestly irresponsible behaviour will result in reprisals under applicable corporate law.

So far, so good. But the challenge lies in assuring that no conflicts arise between the applications of corporate rules that would be based on, e.g., national labour or corporate law with those governing in criminal judiciary processes. Corporate sanctions cannot be compared with criminal law sanctions. We must therefore reconcile the appreciation and description of unacceptable behaviour at corporate level with the applicable criminal rules that govern the responsibilities of the criminal judicial authorities. The administration of criminal law is an exclusive prerogative of a sovereign state that should be respected.

Quite a few well-established corporate Just Culture programs and procedures already exist in Europe. These are good examples and precedents for further initiatives, also in smaller service providers and airlines. A Just Culture policy is not a document but a continuing effort. As in the safety and safety management domain, economic and financial priorities sometimes may challenge the full implementation of Just Culture at corporate level.

The ongoing discussions in the European Parliament and the Transport Council clearly show the need for clear guidance

for operators and service providers, in particular smaller ones that could be invoked in the event of misuse of powers. At the same time, norms for unacceptable behaviour at corporate level and in a non-criminal sense must be reconciled with the qualification of unacceptable criminal behaviour by the national judicial authorities and in particular the state prosecutors and ultimately a court of law in the exercise of their sovereign functions.

Progress report

We have said it before: Just Culture is not the “magic wand” against injustice and misuse of judiciary processes. It has been introduced to protect as much as possible the mundane but ever so important ongoing processes of incident or occurrence reporting: literally thousands of daily events that feed into the well-established system of using the reports for the improvement of safety and the prevention of incidents and accidents. It represents an ongoing daily routine, certainly 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.

Every now and then someone emphatically declares that Just Culture has failed or that at least its success is limited. That may be based on impatience, pessimism or simply wrong expectations. Just Culture indeed represents a culture shift, moving away from “my work is more important than yours” to agreeing to a balance of activities based on building mutual support and confidence. That will take time. It would be time well spent.

The more so as it will be spent on a number of realistic and promising Just Culture deliverables: continuation of regional conferences to discuss the Just

Culture components and seek the support of those involved; the proliferation, again at regional level of the model for an aviation prosecution policy and the formation of a team of experts to support prosecutors and judges in aviation cases. Please note that none of these require any changes in national or European law.

Work is ongoing and looks outright promising. Here is why. Last year, EUROCONTROL and the EU have unanimously endorsed two important initiatives:

- The model for a national aviation prosecution policy centres on limiting prosecuting incidents only in cases of “gross negligence”. It is important to note that “Gross negligence” is used as a generic term for behaviour that may be enacted differently in national criminal law, in particular in Europe. Discussions with many different national prosecutors have shown that most of them would only prosecute only at that level of behaviour. That is quite encouraging for the prospects for implementing the model policy.
- The establishment of a group of dedicated experts to support prosecutors is now in full swing. Pilots and controller organisations as well as the judiciary have indicated their support and appreciation for such a group that would be exclusively available on demand to provide focused information on technical and operational facts surrounding an incident without indoctrination or subjective opinions.

Coupled with other elements of the model policy such as advance contacts or arrangements between safety investigators and the judiciary and respecting formally protected safety information, the first conclusion must be that

we are on our way after a promising start.

What next

Just Culture has been introduced find an acceptable balance for pilots, controllers and management in the exercise of their functions and responsibilities. At corporate level, Just Culture furthermore plays an important role in incident reporting by pilots and controllers and the application of company rules and national contract- and labour law. Just Culture does not replace any safety or criminal rules. It aims to create a balanced interaction at state or corporate level of rules and regulations, policies and commitments and communication and support.

In Europe initiatives are under discussion to establish a Just Culture Charter as a comprehensive repository for all relevant legislation, corporate and judiciary commitments or policies and guidance material relevant to an open safety culture in aviation. It is yet too early to tell whether this will fly, but a workable just culture charter could have the form of a living document with clear political ownership, professionally and independently managed through e-media and with fully updated listings of applicable law and regulations as well as established policies and commitments that are signed off by their respective national or corporate owners for their duration. It should also cater for amendment, extension and, where appropriate, implementation of JC related initiatives and commitments.

Closing remarks

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

from criminalisation 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 may be easier said than done, of course. But the time has come to seriously query the added value of those ongoing and generally unsuccessful efforts at International level to fully protect controllers and pilots against judiciary actions by creating standards, regulations and laws that are supposed to shield them against judicial interference.

A balanced corporate and judiciary environment will provide a sound and sustainable basis for a continuation of controller or pilot incident reporting as well as accident/incident investigation. Both sides have in the past shown trends to caricaturize each other as the devil incarnate: The "safety czars", pilots and controllers interests groups by evoking visions of scores of pilots, controllers and managers behind bars and demanding full protection against criminal interference and the judiciary in their ivory towers as the crime hunters with complete disregard for the intricacies and realities of civil aviation.

It is very encouraging to note the consistently high professional standards and dedication of pilots, controllers and other ATC and Air Transport professionals. Almost without exception they represent realistic and hard working men and women that take great pride in their job and quite ready to continue to work in an environment that will provide them with the reasonable expectation that the chances that they would find themselves subject of a criminal process would be very small.

It is equally encouraging that our ongoing contacts and discussions with the judiciary in Europe and beyond

again yield a picture of realistic, reasonable and responsible hard working professionals with a keen interest in the specifics of aviation safety, in learning more about the safety environment while at the same time ready to draw the line when necessary.

The EUROCONTROL Just Culture Task Force JCTF deliverables have now started a dialogue between these parties that should be nurtured and further developed. Both the safety people and the judiciary have to leave their trenches and start working together on their joint interest: keeping aviation safe. Notions or one-liners such as the criminalisation of safety or dismissing prosecution as a threat to aviation safety are not very useful in that discussion. The same applies to prosecutors and judges that claim absolute autonomy.

There is another issue: We have to keep things simple and realistic. It may be very tempting to descend into the realms of the human mind and the motives and conditions governing human behaviour and have visions of eliminating culpabilities and understanding human error. But we still have a long way to go.

This article quotes a famous French Prime Minister: Georges Clemenceau – nickname Le Tigre, who played a crucial role towards the end of WW I and the ensuing peace negotiations. Famous quotes are often used and misused to fit the ambitions of those who use them. Paraphrasing Prime Minister Clemenceau, we would humbly suggest that this case, his wisdom fits all:

Be it the Safety Crowd (including Pilots and Controllers), or the Judiciary, both Aviation Safety and the Administration of Justice are too important to be left to one party alone.

Enter Just Culture. 