Aircraft Accident Investigation: The Need for a Stronger International Regime

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A stronger international regime for aircraft accident investigations

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To Charlotte, June and Ken with all my love.

Aknowledgment

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RÉSUMÉ

Ce mémoire a pour objet d'analyser le régime juridique international gouvernant les enquêtes d'accidents d'avions et d'en établir son insuffisance voire sa faiblesse.

Affaiblis par la nature juridique de la Convention de Chicago et par des limitations volontairement infligées par ses auteurs, l'Article 26 et l'Annexe 13 de la Convention n'offrent pas une base suffisante pour assurer aux enquêtes sur les accidents d'avions, un régime juridique fiable et unifié.

Par conséquent, les questions afférentes aux enquêtes sont réglées par les diverses lois domestiques, ce qui entraîne d'inévitables conflits d'intérêts et ruine d'autant plus l'effort de coopération.

Bien qu'envisagée sous la forme bilatérale ou régionale c'est toutefois par une approche mondialiste de la sécurité de l'aviation civile que l'on peut espérer résoudre ces conflits et renforcer le régime juridique existant. Plus précisément, c'est dans le cadre de l'Organisation de l'Aviation Civile Internationale cette coopération internationale a le plus de chances d'aboutir.

ABSTRACT

The purpose of this paper is to examine the international regime governing aircraft accident investigation while focusing on its various shortcomings and weaknesses.

Weakened by the international legal nature of the Chicago Convention and by limitations voluntarily inflicted by its authors, Article 26 of the Convention and Annex 13 are unable to offer aircraft accident investigation a sufficient basis for a reliable and unified legal regime.

Consequently, the questions pertaining to accident investigation are regulated by the various domestic laws, which leads to unavoidable conflicts of interests and tends to ruine the effort of co-operation.

Although envisaged under a bilateral or regional form, a global approach to safety of civil aviation should be favoured to solve these conflicts and strenghen the current legal regime. Such international co-operation seems to stand better chances of achievement within the International Civil Aviation Organisation.

AIRCRAFT ACCIDENT INVESTIGATION:

THE NEED FOR A STRONGER INTERNATIONAL REGIME

INTRODUCTION

At the beginning of the century, aviation was more of an adventure than genuine means of transportation. The accidents occurring were merely a lesson for the pilot, if he survived the crash; accidents were numerous and safety, to a certain extent, was not a concern. However, as civil aviation began to expand, becoming a public and popular mode of transportation, a whole new set of rules were to be created[1].

The Paris Convention on Air Navigation of 1919 did not contain any provision on the investigation of aircraft accident[2]. The body established by the convention, the International Commission for Air Navigation (ICAN), merely adopted recommendatory resolutions calling for "a technical investigation to be held following an accident to an aircraft of a Contracting State in another Contracting State".

International legal regulation of aircraft accident investigation is therefore a fairly new matter and unfortunately, there are no deeply-rooted principles of general customary international law nor international law-

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[1] Dr.Milde, "Aircraft Accident Investigation in International Law", (1984) IX Air Law at 61.

[2] Although International Aviation law was founded on the principles of Maritime law in its early stages, no comparison may be made between the two systems here as no laws governing investigation of accidents were established in Maritime law. Ibid.

making treaties on the subject[3].

Up to now, the only conventional rule of international air law relating to this matter, is contained in the Chicago Convention on International Civil Aviation of 1944.

Article 26 of the Convention and Annex 13 to the Convention are the basic tools dealing with aircraft accident investigation in international law.

Beside this international regime, aircraft accident investigation regulations have further been set up on the national level in order to protect the states who owned very early, major interests in the aviation industry.

The existence of these different regulations results almost inevitably in technological, political and legal conflicts. Nonetheless, the international community shares a common understanding of the objective and purpose of an investigation which tend the safety of civil aviation and the prevention of future accidents. In order to serve this objective and purpose, an investigation should then establish the cause(s) of an accident in the most rapid and accurate way, thus preventing similar occurrences in the future.

The purpose of this paper is to describe, as far as aircraft accident investigation is concerned, the international regime set up by the Chicago Convention while

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[3] Ibid.

explaining its weaknesses. The supervision of related issues and the decision for suitable solutions is therefore left to domestic legislations, which presupposes many conflicts of interests and laws, thus rendering the international system even more vulnerable.

It appears clear that the present international system governing aircraft accident investigation needs to be improved through harmonization and consensus. However, this necessity questions the method to achieve such a goal without having to torn down the entire foundations. For the past effort of co-operation should not be disregarded as such but rather approached with a whole different attitude.

These issues will be analyzed in three Chapter.
The first Chapter, will present the international regime framed by the Chicago Convention, as well as identify its various shortcomings; it will also give a short presentation of what has been done at the European Community level.

After offering an overview of the different authorities dealing with aircraft accident investigation in North America and Europe, the second Chapter, will emphasize the main conflicting interests appearing to be common to many systems of law.

The third and final Chapter, will highlight the importance of international cooperation. International

cooperation under the auspices of ICAO of course, but not only. For cooperation may also be enforced through the exchange of information between airlines, within the different regions of the globe, or through a possible international fund, facilitating investigations in countries that cannot afford one.

CHAPTER ONE: AN INTERNATIONAL LEGAL FRAMEWORK FOR AIRCRAFT ACCIDENT INVESTIGATION ?

The purpose of this chapter is to give a presentation of the international legal framework of aircraft accident investigation. Up to now, only the Chicago Convention on Civil Aviation of 1944 has succeeded in offering an acceptable framework, however deficient it may be.

The European Community however, did attempt to propose some basic rules concerning aviation safety. These rules far from competing ICAO's, could still become the law for the European Community in the near future.

PART ONE: AIRCRAFT ACCIDENT INVESTIGATION IN INTERNATIONAL LAW

I- THE REGIME ESTABLISHED BY THE CHICAGO CONVENTION

This regime is based on Article 26 implemented by Article 37 of the Convention and Annex 13 to the Convention.

A- SCOPE OF THE CONVENTION

The Chicago Convention on International Civil Aviation of 1944 provides in its Article 26[4]:

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[4] Chicago Convention on International Civil Aviation of Dec 7,1944, ICAO Doc.7300/6;15 UNTS 295.

"Investigation of Accidents
In the event of an accident to an aircraft of a Contracting State occurring in the territory of another Contracting State, and involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities, the State in which the accident occurs will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permits, with the procedure which may be recommended by the International Civil Aviation Organisation. The State in which the aircraft is registered shall be given the opportunity to appoint observers to be present at the inquiry and the State holding the inquiry shall communicate the report and findings in the matter to that State."

It thus shows that Article 26 of the Convention is of direct relevance to the field of aircraft accident investigation. By laying down the fundamental guidelines to follow in case of an accident, it obliges the State of Occurrence "so far as its laws permit", to institute an inquiry into the accident. Article 26 further emphasizes cooperation between the States involved ("The State in which the aircraft is registered shall be given the opportunity to appoint observers(...) and the State holding the inquiry shall communicate the report and findings"). Moreover, Article 26 is implemented by Article 37[5] which provides that each Contracting State undertakes to collaborate in securing the highest degree of uniformity in regulations, standards, procedures and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation. To this end, ICAO is to adopt and amend, from time

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[5] Ibid.

to time, as may be necessary, International Standards and Recommended Practices and procedures dealing with, among other things, aircraft in distress and such other matters concerned with the safety of air navigation.

Thus in accordance with Article 37, the Council of ICAO adopted Annex 13 to the Convention.

B- ANNEX 13 ON AIRCRAFT ACCIDENT INVESTIGATION

On April 1951, the ICAO Council adopted the Standard and Recommended Practices for Aircraft Accident Investigation designated as Annex 13 to the Convention[6]. The Annex is intended to complement Article 26 and provide for the procedures, not only to be applied in an investigation constituted under Article 26, but to any aircraft accident to which the provisions of Annex 13 apply[7]. Annex 13 specifications imply that any State which has assumed responsibility for the safety of an aircraft has the right to participate in an accident investigation[8]. Thus, the key elements pertaining to Annex 13 revolve around what is referred to as the State of Occurrence, the State of the

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[6] Annex 13 to the Convention on International Civil Aviation on Aircraft Accident Investigation, 7th ed. (May 1988), ICAO Doc. 6/88 E/PI/6000. [hereinafter Annex 13].

[7] W.R.Hendrix, "International Aircraft Accident Investigation" [Spring 1992] Air and Space Lawyer at 3.

[8] Ibid.

Operator, the State of Registry and the State of Manufacture[9].

The State of Occurrence[10] is responsible for initiating and conducting an immediate investigation into the circumstances of the Accident (Chapter 5.1 of Annex 13). The only standard requirement is that the investigation will ensure the gathering, recording and analysis of all available information, if possible the determination of the cause(s), and the completion of the Final Report followed, if appropriate, by safety recommendations (Chapter 5.4). The State of Occurrence is therefore responsible for the release of information pertaining to that investigation.

The State of Operator[11], as well as the State of Registry[12] are entitled to participate in all accidents investigations conducted under Annex 13 (Chapter 5.19). However, when the location of the accident cannot be definitely established as being in the territory of any State (accidents which occur over High Sea or territory of undetermined sovereignty) the State of Registry shall institute and conduct any investigation of the accident

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[9] Ibid.

[10] The State of Occurrence is "the State in the territory of which an accident or incident occurs". Annex 13, 7th ed. (May 1988) at 2.

[11] The State of Operator is "the State in which the Operator has his principle place of business or if he has no such place of business, his permanent residence". Ibid.

[12] The State of Registry is "the State on whose register the aircraft is entered". Ibid.

(Chapter 5.3).

Finally, the State of Manufacture[13] is entitled to appoint an accredited representative to participate in the investigation of an accident whenever it is believed that its participation could be useful or result in increasing safety (Chapter 5.22).

We may notice that the rights accorded to the State of Manufacture are far from providing unconditional and immediate participation in an investigation, which according to some authors such as W.R.Hendrix, is regretful[14].

Annex 13 emphasizes in its Chapter 5.28, on the rights and duties of an accredited representative: the latter should participate in the inquiry by visiting the scene of the accident, examining the wreckage, questioning witnesses, having full access to all relevant evidence, receiving copies of all pertinent documents and making submissions in respect of the various elements of the enquiry.

Finally, Annex 13 stresses the need to co-ordinate the investigation with the judicial authorities in the receiving and custody of evidence (Chapter 5.10) and prescribes that the accident investigation authority shall have independence in the conduct of the investigation and have unrestricted

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[13] The State of Manufacture is "the State responsible for the certification as to an airworthiness of the prototype". Ibid.

[14] Hendrix, supra note 7 at 4.

authority over its conduct (Chapter 5.4).

Nevertheless, because of the constant need of adapting to changes, especially in the aviation industry, Annex 13 has been amended and improved eight times since 1951. Besides, it has been subjected to another review at the ICAO Accident Investigation Divisional Meeting in 1992[15].

Still, the latest amendment, the Seventh Edition of May 1988 remains the applicable law in this matter. Not only does it consolidate the previous amendments, but also incorporates new definitions and amendments which could be found in other Annexes to the Convention[16]. It further takes into account the submission made by the International Federation of Airline Pilots Association (IFALPA) that the privileged information obtained during the course of an accident investigation should not be attached as an appendix to the Final Report of the inspection (this problem will be discussed in greater details in Chapter Two).

In its present form, Annex 13 contains three specifications[17] which are of considerable legal interest.

First of all, Specification 3.1 states that:

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[15] Although many matters have been discussed at that meeting, no specific amendments have been adopted in Annex 13 so far.

[16] Shawcross & Beaumont, *Air Law*, 4th ed., issue 38 (1991) at 50.

[17] See attachment "D" to Annex 13 as adopted by the Council on Jan 22, 1988 (7th ed., May 88, ICAO Doc 6/88 E/PI/6000).

"the fundamental objective of the investigation of an accident or incident shall be prevention of accidents and incidents. It is not the purpose of this activity to apportion blame or liability."

Secondly, Specification 5.12 refers to the disclosure of records:

"if a state conducting an investigation considers that the disclosure of any record might have an adverse effect on the availability of information in that or any future investigation, then such records shall not be made available for purposes other than accident or incident investigation. Such information includes statements from persons responsible for the safe operation of the aircraft, communications between persons having responsibility for the safe operation of the aircraft, medical or private information regarding persons involved in the accident or incident; cockpit voice recordings and transcripts from such recordings and finally, opinions expressed in the analysis of information including flight recorder information."

Lastly, Specification 6.15 provides that:

"States shall not circulate, publish or give access to a Final Report or any part thereof, draft reports or documents obtained during an investigation of an accident or incident without the express consent of the State which conducted the investigation".

It is clear from these Specifications that the underlying motivation is one of safety and prevention, without taking into account other legitimate interests.

After having reviewed the system offered by the Chicago Convention in the field of aircraft accident investigation, attention will be drawn to the legal consequences and applications of this regime.

II- THE LEGAL IMPLICATIONS

Three major implications will be discussed in this part, one of which being ICAO's practice in the field of aircraft accident investigation.

A- THE RELATIONSHIP BETWEEN ARTICLE 26 AND ANNEX 13

As previously discussed, Article 26 of the Convention provides for the investigation of accidents. However, Article 26 does not define the term "accident" nor does it distinguish it from the term "incident". On the other hand, Annex 13 distinguishes and defines both of them.

Whereas Article 26 requires that an accident involving death or serious injury and indicating a serious technical defect in the aircraft or in navigation facilities be investigated, Annex 13 contains the procedures to be followed for accident investigation, in accordance with Article 26. However, it does not make any reference to air navigation facilities[18].

Yet, even if each provision seemed to have a defined scope and a clear role to play, discussions about the interaction of both the article and the Annex started taking place in ICAO's Council, therefore leaving a doubt about their

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[18] W.H.Park, "Use of the Terms "Accident" and "Incident" in Air Law" (1990) XV Ann.Air & Sp.L. at 195.

relationship.

For this reason, soon after the adoption of the Annex, the ICAO Council approved in April 1951, a Resolution entitled "Relationship between Annex 13 and Article 26 of the convention"[19].

The Resolution states:

> The Standards and Recommended Practices of Annex 13 are "not applicable when an accident to an aircraft not involving death or serious injury indicates serious technical defect in the aircraft or air navigation facilities, in which cases and until ICAO recommends a procedure to this effect, the inquiry shall be conducted in accordance with the national procedure of the state concerned, subject to the obligations deriving from the provisions of Article 26".

However, it is interesting to note that this necessary precision on the relationship between Article 26 and Annex 13 has lead some authors to question the need and purpose of Article 26[20]. Indeed, these authors believe that because of the independent development of Annex 13, in other words, because Annex 13, regularly amended, distinguishes and defines both terms "accident" and "incident", therefore developing outside the framework of Article 26, Article 26 no longer serves a useful purpose. The Article has become worthless. Still, this opinion remains a minority, and according to Aart A. Van Wijk[21], "It is felt that, in spite of its objectionable

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[19] Annex 13 at (vi).

[20] Aart A. Van Wijk, *Aircraft Accident Inquiry in The Netherlands- A Comparative Study*, (Amsterdam: Kluwer, 1974) at 274.

[21] Ibid.

drafting, the article (26) does provide certain minimum requirements which the Annex may not contravene and to which no difference can be filed on the basis of Article 38 of the Convention". The Annex still remains beneath the Article in terms of hierarchy and dependant of the Article as far as its existence is concerned.

Yet, the relationship between Article 26 and Annex 13 being cleared, another delicate problem of interpretation remains. Indeed, the distinction between the two terms "accident" and "incident" raises difficulties in their interpretation and application.

B- THE DISTINCTION BETWEEN THE TERMS "ACCIDENT" AND "INCIDENT":

1- DEFINITIONS

There are, of course, many definitions available according to which source is referred to. But for our purposes we will limit ourselves to the common meaning of "accident" and "incident" and compare it to the definitions given in Annex 13 to the Chicago Convention.

The common dictionary meaning of an "accident" is[22]:

a/ "an undesirable or unfortunate happening, unintentionally caused and unusually resulting in harm, injury, damage, or loss...
b/ any event that happens unexpectedly, without a deliberate plan or cause."

Whereas "incident" means[23]:

a/ an occurrence or an event
b/ something that occurs casually in connection with something else".

In this case, the sense of "incident" could imply intent[24].

On the other hand, the definitions offered in Annex 13 are somewhat different[25].

For the purposes of Annex 13, an "accident" is:

"An occurrence associated with the operation of an aircraft which takes place between the time any person boards the aircraft with the intention of flight, until such time as all such persons have disembarked, in which:

a/ a person is fatally or seriously injured as a result of:
- being in the aircraft, or
- direct contact with any part of the aircraft, including parts which have become detached from the aircraft, or
- direct exposure to jet blast,

except, when the injuries are from natural causes, self-inflicted or inflicted by other persons, or when the injuries are to stowaways hiding outside the areas normally available to the passengers and crew; or

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[22] *Webster's Encyclopedic Unabridged Dictionary of the English Language* (New York Portland House, 1989) at 9, def.1&2.

[23] Ibid. at 719, def.1 & 3.

[24] Park, *supra* note 18 at 194.

[25] Annex 13, at 1.

b/ the aircraft sustains damage or structural failure which:
- adversely affects the structural strength, performance or flight characteristics of the aircraft, and
- would normally require major repair or replacement of the affected component,

except, for engine failure or damage, when the damage is limited to the engine, its cowlings or accessories; or for damage limited to propellers, wing tips, antennas, tires, brakes, fairings, small dents or puncture holes in the aircraft skin; or

c/ the aircraft is missing or is completely inaccessible[26]."

An "incident" is defined as:

" An occurrence, other than an accident, associated with the operation of an aircraft which affects or could affect the safety of operation".

Thus it is clear from the definitions in the Annex that the distinction between an "accident" and an "incident" is a technical one[27]. Furthermore, it is now confirmed that the whole system (Article 26 and Annex 13) built by the Chicago Convention, provides for the investigations of purely technical occurrences associated with the operation of an aircraft. This is true even in the case of an occurrence which is clearly an "accident"[28].

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[26] Annex 13, note 2, at 1 states: "An aircraft is considered to be missing when the official search has been terminated and the wreckage has not been located".

[27] *Park*, *supra* note 18 at 195.

[28] *Park*, *supra* note 18, at 203.

2- CONSEQUENCES OF THE DISTINCTION:

The main consequence of the distinction is due to a misinterpretation caused by the definition of an "incident".

As previously noted, intent may be included in the common meaning of the word "incident", even though it is not clearly expressed. This word could then be interpreted, when reported to air law, as an occurrence, intentionally caused, which thereby affects the safety of operation of an aircraft[29]. The confusion may be easily foreseen here.

This hypothesis is not a purely theoretical one, as confusion on this particular topic reached the ICAO forum many times[30]. For instance, some Member States do not see the point of distinguishing an "accident" from an "incident". Whereas some Member States will qualify the occurrence as an "incident", others will qualify the same occurrence as an "accident". Some will use the ordinary sense of the terms, while others will refer to definitions found in the Annex. Unfortunately, this debate is not just one of vocabulary; it contains a very serious legal implication too. Indeed, Annex 13 imposes no mandatory duty on the State in which an incident occurs, to conduct an investigation[31]. Therefore, the

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[29] *Park, supra* note 18 at 195.

[30] *Park, supra* note 18 at 197.

[31] Annex 13. Chapter 2, note appending paragraph 2.1.

distinction is fundamental. Whereas an "accident" would have to be followed by a compulsory investigation, an "incident" could avoid being investigated. Incidently, this problem of terminology seems to have been noticed by ICAO's Secretariat, who conscientiously avoided using either terms in its investigative reports[32].

However, the question relies far too much on political, legal and technological differences to be given a straightforward answer. Until Annex 13 is enforced and applicable to everyone, the problem will remain unchanged.

After reviewing the legal framework set up by the Chicago Convention to rule aircraft accident investigations, a brief look will be given at ICAO's investigative practice in aircraft accident.

C- ICAO'S PRACTICE IN AIRCRAFT ACCIDENT INVESTIGATIONS:

So far, ICAO has investigated three aircraft accident/incidents. However, it is important to note that the ICAO "investigations" were not governed by Article 26 nor Annex 13. They were "political" situations requiring an objective fact-finding under Article 55(e) of the Chicago Convention.

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[32] *Park, supra* note 18, at 198.

These investigations followed the shooting down of a Libyan Arab Airline 727-224 in 1970 by the Israelians, the destruction of a Korean Airlines Boeing 747 over the Sea of Japan in 1983 by the USSR, and the destruction of an Iran Airbus A300 in the Vicinity of Queshm Island, Islamic Republic of Iran in 1988 by the Americans.

All three investigations orchestrated by ICAO, were based on finding facts and technical aspects only, and although the 1970 occurrence was referred to as an "accident" or "incident" regardless of the distinction discussed above[33], the second and third occurrences were basically referred to as "incidents"[34]. The significance of the reference is consequent baring in mind that incidents do not need to be investigated.

Nevertheless, emphasize will be given on the 1983 Downing of the KAL 007 case, as it has recently regained public attention.

In December 1992, due to the release by the former USSR of new information concerning the case[35], ICAO decided to re-

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[33] At meetings of both the Assembly and the Council of ICAO, the Members used interchangeably the two terms. See Minutes of the 19th ICAO Ass.Session, ICAO Doc.9061, A 19-Rec., Min., at 29-64 and Minutes of ICAO Council, 79th Session,ICAO Doc.9073-c/1011, at 31-64.

[34] Minutes of the Extraordinary Session of the ICAO Council, 13-14 July 1988, Doc.9541- C/1106 at 9.

[35] "The Gazette", (12 Sept 1992) at B7.

open the investigation[36]. Far too early to discuss any elements of this second inquiry, attention will be given to ICAO's first investigative report only.

After the occurrence of September 1st, 1983, and at the request of the Republic of Korea and of Canada, the ICAO Council met in an extraordinary session on the 15th and 16th September 1983, to consider the KAL 007 "incident"[37]. A Resolution was adopted which directed the Secretary General to institute an investigation to determine facts and technical aspects relating to the flight and destruction of the aircraft. In December 1983, the Council made the Report of the investigation public. However, no decision was reached and the Report was referred to the Air Navigation Commission for technical study. But again, no attempt was made to offer any firm conclusions: the information presented to the Commission was incomplete, limited, and some of the key findings were based on postulated then simulated scenarios[38].

This case, investigated by ICAO, may have left a bad

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[36] Council Decision of December 18th, 1992. C.DEC 137/15.

[37] P.Martin, "The Destruction of Korean Airlines Boeing 747 Over the Sea of Japan, 31 Aug 83" (1984) IX Air Law, at 140.

[38] The "black box" which was thought to have been lost at sea, was finally found in KGB files and released to the public nine years later. "The Gazette" (12 Sept 1992) at B7. Following the decision of the Council on 18 Dec 1992 that ICAO will complete the investigation, a representative of the Russian Federation handed the original tapes of the CVR and the Digital Flight Data Recorder over to the Secretary General of ICAO on 8 January 1993. ICAO News Release POI 1/93.

taste in many mouths. Indeed, among others, P. Martin[39] believes "the international legal order may have broken down in favour of political expediency. The need to avoid trouble with the Soviets". This remark is somewhat inevitable, when taking into account that such delicate cases are dealt with by a UN Specialized Agency, by essence political-oriented, primarily concerned about avoiding diplomatic trouble.

Yet, ICAO's work was not vain. The Resolution adopted by the Council deeply deplored the Soviet failure to cooperate in the search and rescue efforts of other involved States and the failure to cooperate with ICAO's investigative team by refusing to accept their visit and retain information relevant to the investigation. Furthermore, ICAO's General Assembly, adopted consequently on May 10th, 1984, an amendment to the Chicago Convention. Article 3 bis recognizes that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that in the case of interception, the lives of persons on board and the safety of aircraft must not be endangered.[40]

Presently, ICAO has the file in its hands again and one should hope the release of this new information will help to discover what really happened on September 1st, 1983 over the Sea of Japan.

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[39] Martin, supra note 37, at 141.

[40] Minutes of ICAO's Council, C-Min.111/6.

The review of the international law framed by the Chicago Convention and the study of ICAO's practice in the field of aircraft accident investigation has lead us to one conclusion: the existing regulation is aimed at technical and safety investigations and is predominantly prevention-oriented. Although significant, these principles are not sufficient. The shortcomings of the system are unfortunately too visible not to affect the Chicago Convention's regulatory framework.

PART TWO: SHORTCOMINGS OF THE SYSTEM:

The system faces two major shortcomings linked to the nature and the ratione materiae of the texts concerned.

I- SHORTCOMINGS PERTAINING TO THE VERY NATURE OF THE TEXTS:

One of the main weaknesses of the texts is that the latter are part of international law. This means that they cannot be "adequately" enforced, because no supranational entity has the power to do so and because the application of international law relies entirely on the States' "good will" to cooperate. Nonetheless, Article 26 of the Chicago Convention along with Annex 13 to the Convention do have a legal binding force.

A- BINDING FORCE OF THE TEXTS:

As far as Article 26 is concerned, the provision is part of the Chicago Convention and is therefore the law for all Member States to the Convention. As discussed earlier[41], Article 26 is implemented by Article 37 of the Convention, which stresses the collaboration of each Contracting State in complying to the highest practical degree with the Standards and Recommended Practices in the field of aviation safety.

Nonetheless, international lawyers are aware of the weaknesses of international law as a system of law. The lack of a centralized legislator and of an international administration to execute the laws as well as the need for a jurisdictional structure with a general and mandatory jurisdiction proves the system to be very incomplete[42].

In short, although Article 26 may be the law applicable to the Member States, it is a rather weak and questionable law.

As for Annex 13, the situation is somewhat different. Standards and Recommended Practices (SARPs) are not part of the Convention; they are not ratified by the Member States and

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[41] See Chapter I, Part One, I-A, above, for a discussion of this issue.

[42] D.Carreau, *Droit International*, 2nd ed (Paris: Pedone, 1988) at 34.

are not "annexes" even if given such a title[43].

The question as to their real legal nature then arises. Indeed, what is their legal binding force, if any?

The Doctrine, considers them as "soft law"[44]. This means that if States find it impractical to apply these Annexes, they are not obliged to follow them; they have the choice to opt out, in accordance with Article 38 . Nevertheless, if a State chooses to opt out, it must give immediate notification and file a difference to ICAO (Article 38)[45]. The failure to do so could engage a State's international responsibility, which is a serious sanction. Besides, if a State decides to opt out of a SARP, it is out of the entire unified regulatory system, "out of tune" and incapable of following the eventual evolutions and improvements[46].

Thus, Annex 13 may be considered soft law and may not have the same binding force as Article 26, it still is the most valuable international legal material in the field of aircraft accident investigation. Moreover, the structure

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[43] M.Milde, *"Legal Aspects of Aircraft Accident Investigation"* (Institute of Air and Space Law, McGill University, Feb 21st,1992)[unpublished].

[44] Ibid.

[45] A distinction should be made between the Notes included in the Annexes, which have no legal binding force whatsoever, Standards, which necessitate the filing of a difference and Recommended Practices, which are not a firm commitment and do not require the filing of a difference.
Ibid.

[46] Ibid.

offered by the Convention does have a legal binding force, if respected as such. In other words, the rules of the Convention may be enforced, if the States are willing to accept such enforcements[47].

Unfortunately, the system is subject to further critics.

B- CONSEQUENCES AND CRITICISM:

A few authors, such as Shawcross & Beaumont[48] believe the main shortcoming of the system is "that some Contracting States are not applying Annex 13 within its express terms, although they are Contracting States. For some this is a matter of lack of available resources, either human or economic or both".

But on the other hand, they believe many countries apply the letter of Annex 13 in such a way as to sterilize its spirit. To summarize Shawcross & Beaumont's idea, some States preclude a more efficient investigation under Annex 13 by favouring a legalistic and sterile interpretation of its terms or by conducting the investigation in such a way as to absolve the Authorities or Nationals of the country of investigation, from any possibility of blame.

These practices are made possible only because the system

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[47] Sadly, this remark is a leitmotif in international law.

[48] Shawcross and Beaumont, supra note 16.

allows it, because the nature of the texts involved is such that it is easy to get round them. Unfortunately, the weak nature of the texts is not all; there are strong "self-inflicted" limitations too, harming just as much the efficiency of the existing international law in the field of aircraft accident investigations.

II- SHORTCOMINGS PERTAINING TO THE RATIONE MATERIAE:

A- "SELF-INFLiCTED" LIMITATIONS:

Two major limitations should be pointed out, one being the supremacy of domestic laws stressed in Article 26 and the second being the right, consecrated by Article 38, to opt out of a Standard .

It appears essential to underline that Article 26 of the Convention stresses the supremacy of the domestic law over any procedures which may be set out by ICAO[49]. Indeed, Article 26 states that the inquiry should be instituted "in accordance, **so far as its laws permit**, with the procedure which may be recommended by ICAO"[50]. The principle of supremacy of international law over domestic law has voluntarily been put aside here. Domestic laws in this particular field of aircraft

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[49] Appendix to the Report by Dr.Milde - Text of ICAO Doc.LC/25-WP 1872-1, 18-1-8, at 186.

[50] Article 26 of the Chicago Convention.

accident investigation are often deeply rooted in each particular system of laws, having their own well-established procedures and techniques. It would be extremely difficult to harmonize these laws, and so would it be delicate to oblige a Member State to restrict or widen the scope of its own law. Therefore, the Convention leaves the opportunity to the Contracting States to decide for themselves, if their domestic laws allow this type of investigation or not.

However, this "self-inflicted" limitation has the tendency to weaken and mostly "discredit" the power of the Article. Once again, it is left to the Contracting States to choose if they will comply with the law or not. This lack of enforcement, besides, is completed by Article 38 of the Convention.

Indeed, as previously discussed[51], the choice is offered to Member States, in accordance with article 38, to opt out of a Standard if there is a significant contrast between their own practice and that established by ICAO. The filing of the difference is of course compulsory, keeping in mind the fact that the State's international responsibility could be engaged if the filing duty is not respected.

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[51] See Chapter one, Part two, I-A, above, for a discussion of this issue.

B- LEGAL CONSEQUENCES AND CRITICISM OF THE LIMITATIONS:

First of all, it may be deduced from the combination of Article 26 and 38 of the Convention that the latter allows a great freedom of decision and action to Member States, offering them the possibility to almost "ignore" the international law in this matter.

Furthermore, the choice offered by Article 38 may lead to a "patchworked" international law. Indeed, even if the principal elements of the Convention are implemented, one State may apply a part of the provisions, while another may apply a different one without being in a illegal position. Besides, this situation could easily lead to a conflict of laws, if an accident ever occurred in Member States not following the same pattern of law[52].

This legal situation would weaken any system of law, not only the Chicago Convention. This leads us to believe that this non-unified law, which may or may not be applicable to all States, cannot be considered as efficient nor reliable.

It appears that even the ICAO Legal Committee has given up, as according to the former Chief of the Legal Bureau[53], it is unlikely, that the matter of international legal implications of aircraft accident investigation would be

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[52] For a example of a possible conflict of laws, supra note 49 at 191.

[53] Milde, supra note 1 at 65.

studied in ICAO in the foreseeable future. At its 25th Session, the ICAO Legal Committee refused to place the problem of unification of the laws on its work programme. According to Dr.Milde: "This decision may be interpreted as indicating that the Legal Committee did not believe in the possibility of an international solution for problems which are governed by divergent imperative norms of different national legislations: furthermore, international regulation is suitable only for social relationships containing a specific and distinct "foreign element" and not for social relationships and conflicting interests governed by peremptory rules of national legislations[54]."

After pointing out the main shortcomings of the Chicago Convention, in terms of aircraft accident investigation, it may be agreed that the system does not provide a strong and reliable framework. Mainly aimed at Safety and Prevention, it therefore emphasizes the technical aspects of the investigation more than the legal ones.

However, practice has shown that, despite the perceived shortcomings, the degree of compliance by States with the Standards is remarkable[55]. Moreover, Annex 13 is widely regarded within ICAO itself, as probably, according to Kane

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[54] Ibid.

[55] Ibid. at 62.

"the most used in facilitating inter-state relationships"[56]. As previously noted, it is the most important legal material in the field of aircraft accident investigation and it should be respected as such, since there is no other choice.

The international regime framed by the Chicago Convention being somewhat random, an overview of what has been accomplished by the European Community should be mentioned.

Gathering some of the biggest airlines in the world, the European Community and its law concerning our issue should not be neglected, albeit its scope and importance cannot be compared with the Chicago Convention's.

PART THREE: EUROPEAN COMMUNITY LAW:

The European Community's action in the field of aircraft accident investigation can be reduced to one major text (the 1980'Directive), one Resolution and one Commission's Communication to the Council.

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[56] R.F.Kane, " Accident Investigation and the Public Interest: A Pilot's View" [1989] ZLW 38.Jg., at 4.

I- THE 1980 COUNCIL DIRECTIVE:

The Council Directive on Future Cooperation and Mutual Assistance between the Member States in the Field of Aircraft Accident Investigation was issued on December 16th, 1980[57]. It follows a West-German proposal in the Group of Experts on Air Transport of the Transport Group of the Council[58], and was essentially motivated by the disparities among Member States.

This short Directive also emphasizes the importance of co-operation, though going beyond Article 26 of the Chicago Convention. Indeed, the Directive provides:

Article I:

"In the event of an accident involving a civil aircraft, each Member States shall, by way of mutual assistance, endeavour to make available, on request by the Member State conducting the investigation, within the limits of its possibilities and as appropriate:

a/ installations, facilities and equipment owned by its authorities(...)

b/ accident investigation experts to undertake specific tasks, but only where an investigation is opened following a major accident".

Furthermore, article 1 in its paragraph 2 provides:

"Such mutual assistance should be given, as far as possible, free of charge".

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[57] Council Directive of 16 Dec 1980 on Future Cooperation and Mutual Assistance Between the Member States in the Field of Aircraft Accident Investigation (80/1266/EEC), O.J. 1980,L 375, at 32 (of 31 Dec 1980).

[58] L.Weber, "The European Communities. (Their Involvement in Air Transport Matters)" (1981) VI Ann.Air & Sp.L., at 559.

Article 2 complements Article 1 by stating that Member States shall directly exchange information on near misses and other similar incidents as well as the results of investigations involving small size aircraft.

Finally, **Article 3** provides that Member States should adopt necessary implementing measures with effect of July 1, 1981.

As far as the co-operation is concerned, these provisions go far beyond Article 26 of the Chicago Convention[59], being more explicit ("by mutual assistance") and more detailed ("as far as possible, free of charge"). However, this may be understandable as the text solely addresses itself to a regional entity, which has accepted the principle of supremacy of Community law. The scope is narrower therefore the implementation is easier. Still, the efficiency of the Directive remains linked to the willingness of Member States to apply the text. The European Community system of law may well be established and closer to a pattern of "a domestic system of law", the problem is identical to the one of enforcement of international law. In the Community's hierarchy of norms, the Directive is mandatory as far as the contents and results are concerned, but optional as for the means and procedures to achieve the goal[60]. This optional

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[59] Ibid.

[60] *Lexique de Termes Juridiques*, 6eme ed. (Paris: Dalloz, 1985) Def.3 at 166.

aspect causes the norm to be vulnerable as it relies on the States'good will to be implemented. Unfortunately, this lack of enforcement led the European Parliament to approve a new Resolution seven years after the adoption of the Directive.

II- THE 1987 RESOLUTION OF THE EUROPEAN PARLIAMENT:

The Resolution on Community Measures in the Field of Air Transport Safety of 19 October, 1987[61], after agreeing that it is "indispensable to learn from aircraft accident investigation and that it is even more important to learn from dangerous incidents (para.i), stresses that air safety must be an integral part of Community's aviation policy (para.1). The most interesting initiative, however, is the request to set up a European Accident Investigation Board in "which the best qualified experts from all European countries would co-operate to investigate accidents involving all public transport aircraft and helicopters occurring in European Airspace in order to reach undisputed conclusions about the causes of these accidents and to learn from their findings[62]."

The Resolution further requested the Commission "to set up an air safety task force within the Directorate General for Transport and to instruct it to monitor accidents and safety trends (...)".

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[61] European Parliament Resolution on Community Measures in the Field of Air Transport Safety, of Oct 19th, 1987, (OJ No C 51, 19.10.87).

[62] Ibid.

Evidently, the European Community is concerned with air safety in general and accident investigation in particular. Nevertheless, these requests are part of a Resolution which has no binding force among Member States; the latter are free to follow it or not. The Parliament uses "requests" to express its concerns, meaning that these requests would have to count on a serious motivation among Member States to become the law governing aircraft accident investigation in the EEC. It is a pity as far as the European Board of Investigations is concerned.

It should be noted that consultations with national experts have already started on a draft Directive setting up the fundamental principles governing aircraft accident investigation[63]. The five following principles are contained in the project: mandatory investigation of aircraft accidents and serious incidents; status of the technical investigation sufficient to allow its unhampered realisation; permanent and independent investigation body; publication of a report containing recommendations for corrective measures; and finally, a follow-up of the implementation of those recommendations[64].

If this draft ever comes through, harmonization may

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[63] DG VII Special Report, "The Future Development of the Common Transport Policy - A Global Approach to the Constitution of a Community Framework for Sustainable Mobility ", at 74.

[64] Ibid. at 76.

become possible, thus allowing the EEC a more efficient Air Safety policy. This of course depends widely on the willingness of the Member States to cooperate in this field.

The review of international and regional law governing aircraft accident investigation has led us to one conclusion: the weakness of the existing system and its inability when facing numerous conflicts of interests, to ensure a efficient and unified regime. These shortcomings, due either to the nature of the texts or to their contents, have major consequences. Indeed, the issues must be regulated. If international law appears presently unsuitable, domestic laws on the other hand, seem to regulate aircraft accident investigation in a very methodical and complete way. Unfortunately, this situation does not serve the Chicago Convention at all. International law governing aircraft accident investigation appears "vain", when they are as many laws governing the issue as there are countries concerned. Harmonization is then difficult to conceive. However, it is imperative for the common good of aviation safety.

The purpose of the second Chapter is to highlight some of the most important legal aspects of aircraft accident investigation. These aspects may be found in almost all the systems of laws, consequently, this Chapter will offer a comparative study.

CHAPTER TWO: SOME LEGAL ASPECTS OF AIRCRAFT ACCIDENT INVESTIGATION: A COMPARATIVE STUDY:

After briefly introducing the main types of boards of investigations, this Chapter will focus comparatively, on some of the most important issues that may lead to conflicts of interests in terms of aircraft accident investigations.

PART ONE: THE AUTHORITIES INVOLVED IN THE INVESTIGATIONS:

As far as these authorities are concerned, one may say that there are almost as many as there are countries dealing with the issue. Every Board of investigation meets the needs of their respective State and are built in accordance with these needs.

One interesting point, is to show how some States have adapted their laws and investigatory structures to the new needs, while some still do not feel the necessity to do so.

I- A EUROPEAN POINT OF VIEW:

The British and French systems will be analyzed in this section.

A- THE BRITISH CHIEF INSPECTOR:

Under the Civil Aviation (Investigation of Air Accidents) Regulations of 1989, for the purpose of carrying out an investigation into the circumstances and causes of accidents, "the Secretary of State shall appoint persons as Inspectors of Air Accidents, one of whom shall be appointed by the Secretary as Chief Inspector of Air Accident[65]."

The role of the Chief Inspector is to determine wether or not an investigation should be carried out into any accident to which these Regulations apply as well as determine the form of the investigation. He may himself carry out, or may cause an Inspector to carry out, an investigation of any such accident[66]. In making his investigation an Inspector may seek such advice or assistance as he deems necessary; the Chief Inspector may also require the Secretary of State to appoint

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[65] Civil Aviation (Investigation of Air Accidents) Regulations 1989, SI 1989/2062, Reg 8(1) and the Air Navigation (Investigation of Air Accident Involving Civil and Military Aircraft or Installations) Regulations 1986, SI 1986/1953, Reg 2(1).

[66] Ibid. Reg 8(2) and 8(1).

persons to assist an Inspector in his investigation[67].

An Inspector has the power to issue summons in order to question any person, to get any information or to examine any book, paper document and article which he may think relevant[68]. As far as the aircraft is concerned, the Inspector has a right of access to the aircraft and to the place where the accident occurred; he may require the aircraft or any of its parts or equipment to be preserved and he may examine, remove, test or otherwise deal with the aircraft, any of its parts or anything contained therein[69].

The Chief Inspector may also decide to discontinue an investigation undertaken by an Inspector: no report will be made to the Secretary of State but a public notice must be given to the effect that the investigation is discontinued[70].

Finally, upon completion of a formal investigation[71], the report of the Inspector who carried out the Investigation should be submitted by the Chief Inspector to the Secretary of State[72]. Whereas upon completion of a field investigation,

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[67] Ibid. Reg 8(3).

[68] Ibid. Reg 9(a) and 9(b).

[69] Ibid. Reg 9(c) and 9(d).

[70] Ibid. Reg 10(6).

[71] An investigation into a civil aircraft accident may be either a formal investigation or a field investigation. The difference lies within the intention of the Chief Inspector to report or not to the Secretary of State for Transport. Ibid. reg 10(1) and 2(1),(definitions).

[72] Ibid. Reg 11(11).

the Chief Inspector shall submit to the CAA[73] such information as he considers desirable in the interest of the avoidance of accidents in the future[74].

After reviewing the basic elements of the British aircraft accident investigation authority, a presentation of the French system will be given.

B- THE FRENCH BUREAU ENQUETES-ACCIDENTS:

In 1962, the French Minister of Transports signed an "Arrêté" instituting an aircraft accident investigation board, namely the Bureau Enquêtes-Accidents (the BEA)[75]. The BEA, dependant from the Civil Aviation Authority (Inspection Générale de l'Aviation Civile) is in charge of aircraft accident and incident investigations[76]. The Bureau is composed of a group of experts investigating the equipment, a second group of experts investigating the operation of the aircraft, and an administrative section[77]. The first group of

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[73] The Civil Aviation Authority which is mandated to administer civil aviation within the U.K.

[74] Supra note 65, Reg 11(2).

[75]"Arrêté relatif à l'organisation et aux attributions du bureau "Enquêtes-Accidents" à l'Inspection Générale de l'Aviation Civile" of 1962. Journal Officiel No.162, 11th July 1962, at 6784.

[76] Ibid. art (1).

[77] Ibid. art(2).

experts is in charge of the investigation when it appears that the origin of the accident lies in a technical defect pertaining to the aircraft, or when the regulations concerning the construction and maintenance of the aircraft were not adequately applied[78]. The second group of experts is in charge of the investigation when it appears that the origin of the accident lies in the procedure used, or in a failure of the crew members, or of the maintenance on the ground[79]. Finally, the administrative section is in charge of administrative questions pertaining to all investigations. It participates in the elaboration of accident and incident investigations regulations, and ensures the liaison with all services involved in the investigation.

All the reports are sent to the Civil Aviation Secretariat[80]. The Minister in charge of Civil Aviation has competence with respect to (french and foreign) civil aircraft accidents or incidents[81]. When an accident or incident occurs the captain of the aircraft must deliver in the next 48 hours a full written report to three authorities: the Operator, the professional flying staff council and the Bureau Enquêtes-Accidents. This duty to report has been extended to all

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[78] Ibid. art(4).

[79] Ibid. art(5).

[80] Ibid. art(6).

[81] Code de l'Aviation Civile, art.R 425-1.

professional and private crew members[82].

The Minister may institute a technical and administrative "ad hoc" commission of inquiry. This commission must include a flight inspector and a doctor in aeronautical medicine. The chairman of the Commission may, if necessary, appoint as many experts as he needs. The commission must hear the crew, or its representatives, as well as the Operator of the aircraft[83].

All parties involved have access to the draft report. Furthermore, they have the opportunity to present observations which will be considered by the commission before submitting the final report. The final report is always sent to the Ministry of Justice before being published in the "Journal Officiel" under ministerial decision[84].

Although framed differently, it is clear that the British and French systems share common traits: their head of investigation have to report to the Department of Transport or Department of Justice. They have to work in collaboration with these departments, and are therefore dependent from them.

On the other hand, Canada and the United Sates, which once had similar organisations, completely renewed their perspective, granting their investigatory bodies independent

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[82] Ibid. art.425-2.

[83] Ibid. art.425-3.

[84] M.Vigier, "Aircraft Accident Investigation Procedures. The French System" (1984) IX Air Law, at 6.

powers and means to adapt to the reality of the aviation industry.

II- A NORTH AMERICAN POINT OF VIEW:

A- THE UNITED-STATES' NATIONAL TRANSPORTATION SAFETY BOARD:

In the United States, aircraft accidents are investigated by the National Transportation Safety Board (NTSB).

The NTSB is an independent government agency located within the DOT, which role is to promote transportation safety by conducting independent accident investigations and formulating safety improvements and recommendations[85].

Members of the Board shall be appointed by the President, following the advice and consent of the Senate. No more than three members of the Board shall be of the same political party[86]. The Board shall investigate, or cause to be investigated, any aircraft accident. It should determine the facts, conditions, circumstances and the cause or probable cause(s), of any aircraft accident[87]. Finally, the Board may for the purpose of carrying this title, hold such hearings,

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[85] Independent Safety Board Act of 1974, Sec 302(1). Pub.Law 93-633- (JAN.3,1975) at 2166.

[86] Ibid. Sec 303 (b(1)) at 2167.

[87] Ibid. Sec 304 (a(1-A)) at 2168.

sit and act at such times and places, administer such oaths, and require by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such evidence as the Board or such officer or employee deems advisable[88].

In reality, the NTSB conducts two kinds of investigations[89]. It investigates major air carrier accidents in a very thorough methodical way, and general aviation accidents, with much less thoroughness[90].

The NTSB has field offices located throughout the U.S. that usually handle the general aviation accidents. If an accident should occur, an investigator will be in charge of the accident; he may be assisted by a specialised agent of any kind if he so wishes. However, the NTSB Bureau of Accident Investigation headquarters, maintains a team of accident investigators and specialists which will be dispatched in case of an air carrier accident, or a general aviation accident of some special significance (a Board member will often join the team). This team is headed by a designated Investigator-in-

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[88] Ibid. Sec 304 (b(1)) at 2169.

[89] J.S.Dillman, "Aircraft Accident Investigation Procedures in the U.S.A." (1984) IX Air Law, at 39.

[90] Some authors, such as Dillman, believe the quality of the general aviation accident investigation and the reports of these investigations is poor. They are "of inconsistent quality - often erroneous both in what they do say as well as misleading in what they fail to say". Ibid. at 40.

Charge (IIC)[91].

Still, it should be noted that the NTSB does not work alone. The Federal Aviation Agency (FAA) is obligated by law to assist the NTSB in the investigation of aircraft accidents. Its purpose is to find compliance or non compliance with the Federal Aviation Regulations, and determine whether the existing Regulations are adequate to assure a good level of safety in aviation. Its purpose is not to determine the so-called "probable cause". FAA investigators commonly assist investigators in general accident investigations. Furthermore, when the accident is non-fatal, or involves aerial applications, an amateur built or restricted category aircraft, the NTSB renounces to investigate and delegates the complete responsibility to the FAA.

Lastly, FAA specialists/investigators participate further in the team investigating air carrier accidents for the NTSB Bureau of Accident Investigations[92].

Evidently, the system framed by the U.S. is rather complex, mainly because of the several independent bodies (NTSB and FAA) it gathers. It also has the duty to determine the facts, the "probable cause" of the accident, and distinguish general aviation and air carrier accidents in such a way as to generally emphasize the latter. Such characteristics fashion a rather complicated although

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[91] Ibid.

[92] Ibid.

according to many[93], efficient structure. For this reason, Canadians have inspired themselves considerably from that system, in order to create their own.

B- THE CANADIAN AVIATION SAFETY BOARD:

Until late 1983, aircraft accidents in Canada were investigated by the Aviation Safety Bureau, located within the structure of the DOT. Because of many conflicting interests - which will be given greater attention in the 2nd part of this Chapter - the Canadian Aviation Safety Board Act was adopted in 1983, establishing an independent aviation investigation board (i.e., the Canadian Aviation Safety Board)[94]. However, in 1987, an Act establishing the Transportation Safety Board of Canada (TSBC) was adopted, thus replacing the CASB[95]. The principal difference between them is that the latter was unimodal, dealing solely with aviation occurrences, whereas the TSBC is multimodal, dealing with occurrences in maritime,

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[93] such as P.A.Goldman, "NTSB Procedures" (1984) IX Air Law, at 46. Contra Dillman, Supra note 89 at 41.

[94] (29-30-31-32) Elizabeth II, Chapter 165, "Act to establish the Canadian Aviation Safety Board, and to amend certain Acts in consequence thereof", assented to 17th November, 1983.

[95] "Act to establish the Canadian Transportation Accident Investigation and Safety Board and to amend certain Acts in consequence thereof", assented to 29th June, 1989.

rail, commodity pipeline and aviation occurrences[96].

The object of the Board is to advance transportation safety by making recommendations to the Minister of Transport, conducting independent investigations, and, if necessary, public inquiries into (aviation) occurrences in order to make findings as to their causes and contributing factors, by reporting publicly on its investigations and public inquiries and on the findings in relation thereto[97]. No findings of the Board shall be construed as assigning fault or determining civil or criminal liability[98].

The CASB Act of 1983 brought about some major changes in Canada with respect to air accidents investigations. One of the most interesting changes was to give exclusive jurisdiction to the CASB while investigating, thus taking it away from the DOT[99]. This above provision was confirmed in the 1987 Act, in section 14(3) which states that:

"No Department other than the Department of Defense may

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[96] D.Fiorita, *Overview of Aircraft Accident Investigation in Canada* (Institute of Air and Space Law, McGill University, Feb.14, 1992) [unpublished]. It should be noted that there is no significant difference between the jurisdiction and the powers of the two bodies in so far as aviation occurrences are concerned.

[97] Goldman, supra note 93, Sec 7(1).

[98] Ibid. 12 Sec 7(3).

[99] The DOT is excluded from investigating only on respect of those accidents/incidents that the CASB is investigating. Moreover, the DOT may continue to investigate for regulatory purposes. Discussion with D.Fiorita, April 1993.

commence an investigation into a transportation occurrence for the purpose of making findings as to its causes and contributing factors if,
(i) that transportation occurrence is being or has been investigated by the Board (...) or
(ii) the Department has been informed that, that transportation occurrence is proposed to be investigated by the Board".

In order for the Board to be in a truly impartial position when issuing a report, a clear separation was created between Board Members and investigators. A Director of (air) investigations, with the aid of other investigators whose role is to assist the Director, are appointed by the Board. The Director of (Air) investigations has exclusive authority to direct the conduct of an investigation on behalf of the Board.

The services of persons having technical or specialized knowledge may be engaged to assist the Board in carrying out its duties (section 9(2)).

On completion of an investigation the Board shall prepare, and make available to the public, a report on its findings (24(1)). Nonetheless, before making it public, the Board shall, on a confidential basis, submit a draft report to each Minister and any other person, who in the opinion of the Board, has a direct interest in the findings of the Board, giving that Minister or other person a reasonable opportunity to make representations to the Board, before the final report is prepared (24(2)). This ensures the objectivity and impartiality of the system.

Finally, the Act provides that certain persons may

participate as observers at an investigation subject to such conditions as the Board may impose (22(2)).

It is clear that the Canadian system stresses objectivity and impartiality in order to avoid possible conflicts of interests. The Regulations are somewhat modeled on the American NTSB practice, taking the structure into account though adding modifications in such a way as to give Canada a very specific and convenient system.

This overview of the main authorities throughout North America and Europe goes to show how complex the issue of aircraft accident investigations really is. Indeed, the same subject is dealt with by very different structures, all of them "very efficiently" according to their representatives. However, one major difference can be pointed out, dividing the bodies into two categories: investigatory boards which directly report to the DOT (the Chief Inspector and the Bureau Enquêtes-Accidents) and investigatory boards independent from the DOT (the NTSB and CASB).

This distinction between dependant and independent bodies raises the question as to which system is more efficient and should one be favoured over the other?

III- CONCLUSIONS:

In order to answer these questions, one should first determine whether a board of investigation ought to be independent from the DOT or not.

When analysing the U.S. and Canadian examples, the main reason for independence seems to be the desire to avoid any conflicts of interests among governmental entities. Prior to the 1974 Act in the U.S. and 1983 Act in Canada, the respective DOT's were investigating the accidents. But by the late 1960's, allegations of conflicts of interests were raised, pointing out the fact the government had too many roles in the process.

In the case of Canada for instance, the DOT was at the same time the regulator, the enforcer, the investigator, the operator of the air navigation system, the provider of numerous services, the operator of a large aircraft fleet and last but not least, an interested litigator![100]

A conflict of interest was bound to arise when, according to D.Fiorita, "there was a reasonable possibility that an accident was caused or contributed to, by the action or inaction of the DOT's officials in their role as providers of civil aviation facilities and operators of the air navigation

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[100] B.M.Deschênes, "The Canadian Aviation Safety Board: Experiences in International Cooperation and Adaptation" (1987) XI Ann.Air & Sp.L., at 3.

system"[101].

This situation did not apply to Canada alone. The American system underwent the same kind of pressure, obliging the government to make necessary improvements.

Furthermore, this evolution has led some authors, to believe that there is a real need for independent investigations. According to Miller, "little argument exists today for the NTSB concept of investigative authority separate from the regulatory agency"[102] [103].

So why do countries such as Great Britain or France, still favour a "close cooperation" between the board of investigation and the DOT?

In Great Britain, under the Civil Aviation Act 1989, the Secretary of State for Transport has power to make regulations for the investigation of accidents, appoint a Chief Inspector of Air Accident who will report directly to him. Again, the government acts as the regulator, the enforcer and the investigator. Then why has the institution not followed the same evolution North America has?

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[101] Fiorita, supra note 96.

[102] C.O.Miller, "Aviation Accident Investigation: Functional and Legal Perspectives" (1981) 46 Journal of Air Law and Commerce, at 288.

[103] This point of view is shared by other authors like Sakamoto, who believes, in the particular case of his country, Japan, that the only way to improve air safety is by giving the Board more power, i.e., making it an independent entity, totally free of the DOT's influence.

The answer may lie within the institutional structure itself. These European institutions are old and deeply rooted in the society. These characteristics are further enhanced by a "European mentality" not always willing to change or to adapt very fast. This may lead the society to accept the possible conflict, without acknowledging the need for a change. It is, without going into too many details, more of an opposition between fairly old institutions v. fairly new institutions, "European mentality v. North American mentality".

Thus, the answer to the question "which system is more efficient?" is very subjective. Members representing the various boards will argue their system is the greatest. However, such independent entities, such as the NTSB and mainly the CASB, will provide for a much more objective and impartial investigation, as they will avoid, as much as possible, the conflict of interests involved.

Nonetheless, the conflict pointed out in this section is merely one of many originated by the legal framing of aircraft accident investigations. In this case, Canada and the U.S. decided to get rid of the problem by adapting their respective laws. But the following conflicts of interests are, unless a certain unification is developed, almost unavoidable.

PART TWO: UNAVOIDABLE CONFLICTS OF INTERESTS:

The conflicts of interests stemming from aircraft accident investigation, mainly refer the inevitable interaction of investigations (technical, judiciary, etc...), the confidentiality of the information gathered during an investigation and, the impact of media coverage on the technical investigation.

I- CONFLICTING INVESTIGATIONS:

A- THE OBJECTIVE(S) OF AN INVESTIGATION:

1- CONSENSUS AMONG THE INTERNATIONAL COMMUNITY:

Despite the many diversities in domestic laws, the international community forms a consensus as far as the objectives of a (technical) investigation are concerned. Indeed, the international community seems to agree that the main purpose of an investigation is to establish the causes of the accident in order to prevent similar occurrences in the future. This objective is stated in Annex 13 to the Chicago Convention, specification 3.1 as follows:

> "The fundamental objective of the investigation of accident or incident shall be the prevention of accidents or incidents. It is not the purpose of this activity to apportion blame or liability."

In certain States, such as Great Britain or Canada, the

legislation states expressly what Annex 13 stipulates[104]. They insist on the fact that the investigation, in connection with aviation occurrences, does not have for purpose to apportion blame or liability. Thus, these countries create a legal obligation based on the fundamental objective of Annex 13.

The French and U.S. laws also refer to specification 3.1 of the Annex. However, they do not refer to the apportionment of blame or liability, for the simple reason that their system does not make such a distinction[105] [106]. The point remains

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[104] Under the British 1989 Regulations, Reg (4), the fundamental purpose of investigating "shall be to determine the circumstances and causes of the accident with a view to the preservation of life and the avoidance of accidents in the future; it is not the purpose to apportion blame or liability".
Under the Canadian Regulations, Sec 7(1): "The object of the Board is to advance transportation safety (...). In making its findings as to the causes and contributory factors of a transportation occurrence, it is not the function of the Board to assign fault or determine civil or criminal liability(...)".

[105] Art R 425-2 of the French Civil Aviation Code states: "Le Ministre chargé de l'Aviation Civile (..) fait procéder à toutes investigations et enquêtes en vue de rechercher et de constater les causes des accidents ou incidents". The text does not separate the two types of investigations, headed by the Minister. For convenient reasons, two other texts refer to it: the "Instruction Interministérielle" du 3 Jan 1953,(art.6) for the judiciary investigation and the "Instruction du Secrétaire d'Etat aux Travaux Publics, aux Transports et au Tourisme" du 3 Juin 1957, (art 5) for the technical investigation.

[106] Sec 304 (a) of the U.S. Transportation Safety Board Act of 1974 says: "the Board shall investigate or cause to be investigated (...) and determine the facts, conditions and circumstances and the cause or probable cause or causes of any aircraft accident".

that while every State agrees on the principle according to which an investigation of air accident must serve the purpose of prevention of future accidents, the means to achieve this goal are very different depending on the State in charge of the investigation. Therefore, countries (especially civil law countries), without a clear distinction in their laws, between the notions of "cause" and "fault", often face problems of conflicting investigations.

2- THE COMPLEX NOTIONS OF "CAUSE" AND "FAULT":

In all the legislations examined, investigations of accidents were always the basic tool to help determine the causes of air accidents. Although the notion of cause was always mentioned too, the exact definition and scope were seldom referred to.

According to Annex 13 to the Chicago Convention, dealing with purely technical occurrences as mentioned earlier, the cause is an :

> "Action(s), omission(s), event(s), condition(s) or a combination thereof, which led to the accident or incident"[107].

Yet, this notion of "cause" is not perceived similarly in every legislations. Very often the notion contains elements of

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[107] Annex 13 at 1 (definitions).

fault. Moreover, accidents are not the result of just one simple cause but of a complex network of interrelated causes. An accident investigation should then cover this whole network of causes[108]. Furthermore, these causes should be the fruit of a safety-oriented investigation (i.e.,a technical investigation) and should not be mistaken with fault and liability, notions which have nothing to do in that process. Very often investigations conducted for purposes of litigation go beyond those conducted for safety and preventive reasons. The latter usually consider causation in so far as the development of recommendations for the prevention of similar accidents are concerned[109]. On the other hand, judiciary investigations deal with causation, in order to determine who is responsible, liable for the accident. These are obviously opposite objectives!

Some legislations, such as those found in Canada and Great Britain, clearly express the objectives of an investigation, by d stinguishing between cause and fault. However, this is sometimes not enough and the principle of non-apportionment of blame and liability can be quite difficult to apply. According to Deschênes, "(...) in practice (...) human involvement is found to be a contributory factor in the majority of investigations and(...) the identification

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[108] W.Guldiman, "Some legal Aspects of Aircraft Accident Investigations" 1990 XV Ann.Air & Sp.L., at 102.

[109] Miller, supra note 102 at 267.

of this involvement is the conclusions of a report, [which] may imply, at least indirectly, some element of blame or even liability"[110]. Deschênes then goes on explaining how the CASB still "is in the process of indoctrinating its investigators in the use of phraseology which will reflect only factual objectivity"[111].

Canada appears to have made a serious effort towards objectiveness as far as the investigation process is concerned, insisting by means of legislation and practice on a clear distinction between cause and fault. This policy is followed by the doctrine of various countries. In Great Britain for instance, Wilkinson believes "the investigation of aircraft accident should be entirely objective and solely related to the task of finding out what happened, why it happened, and what action is necessary to prevent similar accidents re-occurring. The evidence accrued during the course of the investigation should be used only for the purpose for which it was gathered - safety. It should not be used as a launching pad for a legal suit (...)"[112].

In the U.S., authors such as Miller, explain that despite their protestations, the NTSB do in fact determine blame. By

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[110] Supra note 100, at 4.

[111] Ibid.

[112] G.C.Wilkinson, "U.K. Aircraft Accident Investigation Procedures" (1984) IX Air Law, at 38.

using wordings such as "failure to adhere to..." and by phrasing statements of causes in accusatory language, the NTSB oversimplifies "the multiple causation factor present in every accident. Thus, the NTSB induces the lay public and itself, to concentrate on the obvious "failure to ..." factor of causation and to miss in a practical manner to prevent future accidents[113]."

This kind of statement has led some American authors namely Dillman to propose the idea upon which the Board would "merely report the facts and circumstances of the accident and allow the aviation community to draw its own conclusions".[114]

This problem of interaction of investigations can be very harmful to the goal of safety which is aimed at. Indeed, mistaking cause and fault could lead some important witnesses to refrain from giving all necessary information, fearing this information will later rebound against them[115].

On this account, how is the problem dealt with in countries like France, where the technical and judiciary bodies are obliged by law to cooperate and count on each others information?

How does a country like Great Britain, who clearly

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[113] Miller, supra note 102, at 274.

[114] Supra note 89, at 42.

[115] Supra note 56 at 12.

How does a country like Great Britain, who clearly distinguishes both notions of cause and fault handle the topic?

These questions will be examined in the following subdivision.

C- **EXAMPLES**:

In France, under the Napoleonic Code, judicial information prevails. French Authorities, aware of the possibility of conflict of interest between the judicial inquiry and the technical investigation, try to solve the problem by a formal acknowledgment of the conflict, and by creating conditions for close cooperation[116].

The judicial authorities as well as the technical investigators are expected by their respective Ministers to establish full cooperation based on a joint Ministerial Instruction of 1953 dealing with the coordination between judicial information and technical investigation.

The Ministers of Justice and Civil Aviation tried to avoid the conflict by giving a common definition of aircraft accident (slightly broader than ICAO's definition) and by obliging the representatives of both Ministers to simultaneously give aircraft accident notifications. Moreover, both Departments should determine the causes of the accident,

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[116] Supra note 84, at 7.

the Minister of Justice dealing with liability, the Minister of Civil Aviation aiming at improvements of air safety.

The Instruction insists on a close cooperation between both Ministers, which should be "trusting and loyal"[117]. This means that the judicial personnel are expected to rely on the technical investigation for the facts, while in return, facilitate the technical investigator's work as much as possible. For instance, when a technical investigator wants to take hold of a piece of the wreckage, he must ask permission to the "Juge d'instruction". When the Judge wants to study a piece of the wreckage, he must ask the advice of the technical investigator[118].

This system, emphasizing close cooperation, seems to be efficient, despite the distinctive duties. It also presents a balance between all interested parties.

However, this close cooperation and so-called balance may not work as well in reality as it does on paper.

First of all, the principle by which the judicial inquiry must prevail, tends to make the search for liability more important, thereby neglecting the necessary improvements of safety (this criticism agrees with Miller when he refers to the NTSB's practice).

Furthermore, in order to decide whether or not a criminal

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[117] Ibid.

[118] Ibid.

most of the time, on the technical conclusions.

Finally, this following point may question the very efficiency of the system.

The Ministerial Instruction states that the technical investigator must ask the "juge d'instruction" for permission to study a piece of the wreckage for instance, whereas the Judge simply has to seek the advice of the technical investigator. Predominance of the judicial investigation is preserved, but is the balance? It appears easier, in terms of procedures, to seek advices than ask for permissions! Not to mention that this hierarchical structure, leading to tedious paper work, slows the technical investigation, precluding a quick and accurate inquiry of the accident.

This so-called "close cooperation" does not appear very fair and seems more like a mean for the judiciary authority, to control the entire investigative process.

The British system, on the other hand, is very different. First of all, the Chief Inspector may have to work in coordination with Her Majesty's Coroner. The principal function of HM Coroner is to enquire into the cause of the violent or unnatural death of a person[119]. The enquiry takes the form of an inquest by the Coroner, with a jury, the purpose of which is to ascertain the identity of the deceased person and the cause and circumstances of death. The purpose

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[119] Shawcross and Beaumont, supra note 16 at 68.

purpose of which is to ascertain the identity of the deceased person and the cause and circumstances of death. The purpose is not to allocate responsibility for the death nor determine any question of civil or criminal liability. The verdict is not conclusive of question of civil or criminal liability, even though it is likely to be persuasive[120].

Thus, the function of the Chief Inspector and HM Coroner are separate and distinct, but nevertheless closely related. Frictions are therefore inevitable although the practical convention in the U.K. is that the Coroner first opens the inquest for identification only, and then adjourns it until such time any public inquiry or inspector's investigation shall have been concluded[121].

Secondly, whether or not an inspector's investigation is conducted, the Secretary of State for Transport may direct that a public inquiry be held by a commissioner (known as the "court") appointed by the Lord Chancellor, and thereupon, any inspector's investigation into the accident is discontinued[122]. The court has all the powers of a magistrate's court and can summon any witness and order the production of any documents it thinks appropriate[123]. Once the Secretary of State has directed a public inquiry to be

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[120] Ibid.

[121] Ibid. at 68.

[122] Ibid.

[123] Ibid. Sec 18(8).

held, the case is remitted to the Attorney General. The Chief Inspector shall render such assistance to the Court and to the Attorney General as is in his power[124].

Upon completion of the inquiry, the Court shall report to the Secretary of State stating the facts relating to the accident and the opinion of the Court, touching on the cause or causes of the accident or on the particular matter referred to the Court after adding any recommendations which the Court thinks fit to make, with a view to the preservation of life and the avoidance of accident in the future[125].

It seems clear that cooperation between the different investigatory bodies is essential. Nevertheless, investigations are not carried out together. Where one starts, the others finish, which is a convenient way to avoid conflict of interests. Besides, this procedure seldom used. Public inquiries, when all evidence is presented in open court with full legal involvement, are fairly rare in the U.K[126].

These two examples prove that various methods exist to approach the investigatory process of an aircraft accident. The aim appears to be the same, but the means employed to reach the goal can be extremely different. Prevention of

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[124] Ibid. Sec 18(3).

[125] Ibid. Sec 19(5).

[126] Supra note 112 at 36.

future accidents has been the priority in all cases examined; the difference lies in the way the priority was expressed and in the very concept of priority, which is not the same for every country.

Another matter subject to conflict is the problem of confidentiality surrounding information gathered during a technical investigation.

II- CONFLICTS ARISING FROM THE NOTION OF CONFIDENTIALITY OF INFORMATION:

Before discussing the very real conflict underlying this notion, let us give a short list of the main sources of information relevant to an investigation.

A- SOURCES OF INFORMATION:

The information pertinent to an investigation can stem from various sources because any little detail is deemed relevant. However, the sources discussed below will be those subject to controversy. They comprise the medical reports, air traffic control (ATC) tapes and mostly, cockpit voice recorders(CVRs).

Medical reports, which can be of tremendous help in an investigation, are usually divided into two categories, medical information and autopsies.

In Canada, the investigator who believes, on reasonable grounds, that a physician or other health practitioner has information concerning a patient that is relevant to that investigation, can require the physician or practitioner to provide that information[127].

In France, on the other hand, information gathered during a medical examination is strictly confidential. This obligation is a duty linked to the medical profession and only a judge could overrule the obligation[128].

When autopsies are involved, the issue is a little more delicate as it involves a moral and emotional element.

In Canada, the investigator may require the performance of an autopsy on the body of a deceased person, if he believes it is relevant to the conduct of the investigation[129]. Under Canadian law, these medical examinations are privileged and subject to the power of the Board to make such use of it[130].

This privilege however, is not granted in every legislations. While some believe autopsies of all the people killed in an air crash, when practised by experts

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[127] Supra note 95, Sec 9(a) and 9(c).

[128] French "Code Penal", Art. 378.

[129] Supra note 95, Sec 9(d).

[130] Ibid. Sec 11.

pathologists, are necessary[131], others are more careful, allowing the autopsies to be performed only when their relevance to the conduct of the investigation is made and mostly, when the deceased family has agreed upon such operation[132]. These emotional and ethical elements should be taken into account even if the information drawn from that particular source is of important relevance to the findings and conclusions of the investigation.

ATC tapes are not usually granted any kind of privilege. In Canada however, their use and access are restricted to the persons named in the law. They would, nonetheless, still be released to parties in a civil action under a subpoena since they must be made available "as required by law"[133].

In the U.S., ATC tapes raise some difficulty as the FAA personnel are required to retain the pertinent documentation. The practical problem is that, left unchecked, the FAA cuts and recycles the original tape at a point five minutes before the first contact with the aircraft and at a point five minutes following the accident. Relevant conversations may have taken place before or after the cut and unless the steps are taken by the parties, the tapes will be recycled. This

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[131] "Necessity of Autopsies", AIG/92-WP/98, 18/12/91, note presented by the U.K.

[132] "Autopsies", AIG/92-DP/1, 11/02/92, note presented by IFALPA.

[133] Supra note 95, Sec 29(3).

situation leads to many controversies in the U.S[134].

Yet, the most important source of information is probably the recording of the conversation between the flight crew in the cockpit, i.e., the Cockpit Voice Recorder (CVR).

The conversation between the pilots and the flight engineer, or the orders issued by the pilot in command to his other crew members, may contain valuable information relating to the cause of a given accident. The CVR will thus provide valuable insight for investigators and will supplement the information available through Flight Data Recordings (FDR).

Under Canadian regulations, the CVR is privileged whether or not it concerns an aircraft that has been involved in an accident investigated by the Board. The privilege, attached to the CVR itself, may not be waived by anyone.[135]

However, the privilege may be set aside by a Court of Law or a Coroner after the "prevailing interest test" is applied; this test evaluates the balance between the administration of Justice and the necessity of confidentiality.[136]

A similar privilege exists under the Australian Air Navigation Act, in its amended section 27 A.

In France and in the U.S., there is no such privilege. In

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[134] W.J.Lack, "Defendant's Discovery Plan in Mid-Air Crash Litigation" (1982) 47 Journal of Air Law and Commerce, at 780-781.

[135] Fiorita, supra note 96.

[136] See page 78, for a detailed analysis of this "test"

France, CVR and FDR read-outs must be made available to the judicial authorities by the technical investigator if requested to do so, by virtue of the supremacy of the judiciary inquiry[137].

This question of privilege is nevertheless completed by a problem which is linked to the very nature of CVRs.

Indeed, most pilots consider their jobs as being very special because their working environment and intimacy is constantly supervised by the recording of their conversations - conversations related to their work or not. Knowing their conversation is being taped and could be used against them in later proceedings, the pilots fear their behaviour could become "unnatural" in case of an abnormal situation. A pilot may have a defensive attitude instead of taking the action needed to face a dangerous situation. Moreover, a voice recording is extremely open to misunderstanding and should only be handled with care by trained and skilled accident investigators[138].

However, the pilots have accepted the use of CVRs because of their useful, undeniable role in case of an accident investigation; they have accepted it for the sole purpose of aviation safety, and as a concession to the pilots' objections, some measures have been taken. The CVR will erase

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[137] Vigier, supra note 84, at 7.

[138] Kane, supra note 56, at 12.

all but the last thirty minutes of the tape continuously, but the erasure feature will cease to operate in the event of a power interruption or crash impact[139].

This pilot's attitude (mainly expressed through IFALPA) is merely a reaction to the abuses that have been perpetuated, leading to a sometimes inappropriate invasion of privacy. Captain Kane, Vice-Chairman of Legal Committee of IFALPA, insists on the fact "that what is sought is not immunity for an offender. No one would be granted immunity for what was done, but those seeking to take action against him would have to resort to information other than by the CVR"[140].

Clearly, the sources of information are subject to conflict of interests. These conflicts arise from the use and abuse of the information gathered for the purpose of an investigation but also from the will to protect this information. Because such information is so valuable and necessary to the conduct of an investigation, some believe it should be granted a special privilege. However, it has been observed that, despite the existence of protective legislations in some countries, such as Canada, one can always find a legal way to by-pass the obligation. Thus, the

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[139] S.M.Speiser, "Airplane Flight recorders: A New Source of Evidence", The Forum at 101.

[140] Kane, supra note 56, at 11.

information bares a similar condition than in States with "freedom of information" legislations.

B- "FREEDOM OF INFORMATION" LEGISLATIONS:

"Freedom of information" legislations are laws enforcing a right to access information gathered during an investigation, except in special cases. The problem lies in the fact that parties to a litigation call upon these laws in order to use in court the information gathered during a technical investigation.

This situation will be exemplified by the American and Australian "Freedom of Information" legislations.

In the U.S., the "Freedom of Information Act" of 1974 prevents government agencies from withholding documents from the public, except if the disclosure of such information goes against the public's interest[141].

However, the fact that such documents and reports of investigations are available to the public does not imply that this type of information can be used in all civil, criminal or disciplinary procedures. The Independent Safety Board of 1974 states in Section 304c that "no part of any report of the Board, relating to any accident or the investigation thereof,

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[141] 5 USC para.552 (1976), as amended by Pub.L.No.93-502 (1974).

shall be admitted as evidence or used in any suit or action for damage growing out of any matter mentioned in such report or reports."

Still, the courts have focused on a way to by-pass the law. In fact, all information is admissible in court if it does not give any indication on "the probable cause" of the accident.

American authors such as Miller[142], are concerned, just like IFALPA, about the threat to safety communications brought by complete absence of privilege for accident inquiry interrogation. He gives the NTSB rules regarding confidentiality of information as an example. A request to guarantee the confidentiality of information gathered in an investigation must be written and approved by the Board. The Board may also order, on its own initiative, that such information be withheld to protect the public's interest.

Therefore, confidentiality in American procedure remains a problem, as some information is not protected well enough. Nevertheless, Miller provides recommendations as to what the Board should do to improve this situation. One of his recommendations refers to the setting up of a committee that would develop a policy statement regarding privilege, acquisition and dissemination of information for the purpose

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[142] Miller, supra note 102, at 282.

of accident prevention, as opposed to litigation[143].

As a conclusion, it is important to note that the U.S. filed a difference to specification 5.12 of Annex 13[144]. Indeed, due to the existence of their "Freedom of Information" legislation, they might not be able to comply with this specification.

Similarly, Australia has a "Freedom of Information" legislation. Adopted in 1982, the Act extends the right of the Australian community to access information in the possession of the Australian Government. Access to all documents is not possible because confidentiality must be preserved where it is necessary for the protection of essential public interests, the private and business affairs of persons and organisations in respect of whom information is collected.

Under the Australian legal system, an investigator may be called upon to give evidence to three different official inquiries[145]:

a) Boards of Accident Inquiry, as investigators appear as

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[143] Ibid.

[144] The U.S. were joined by Canada and Australia, to mention only a few, in filing a difference to specification 5.12 of Annex 13. The main reason for such filings is that the final decision to reveal any information always rests with a Court of law, not the Government or the Accident Investigation Bodies. Discussion with D.Fiorita, April 1993.

[145] BASI Journal (10 Dec 1991) at 19.

official witnesses;

b) Coroner's Inquest, where a copy of the approved findings is made available as a matter of policy for his information, and

c) Civil proceedings, where the official files will only be presented if a subpoena or summons for their production has been served.

It is interesting to note the real effort of Australia to comply with Annex 13 specification 5.12. Indeed, the Australian Bureau of Air Safety Investigation has argued that the information covered by Annex 13 should not be released under the Freedom of Information law. This argument has withstood several legal challenges and is now broadly accepted by the Australian legal community. Moreover, because the release of records is made possible when a subpoena or summons have been served by a court of law, no absolute guarantee can be given that the records listed in specification 5.12 will not be disclosed. However, it is stated by BASI officials that practical steps will be taken to minimize the extent and occurrences of such disclosures[146].

Australia provides a perfect example of good will to comply with international Regulations, despite opposite provisions in their domestic laws. Such effort should be encouraged and followed.

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[146] Ibid.

In response to a questionnaire prepared by the ICAO Secretariat at the AIG/Divisional Meeting of 1979, only a few States indicated that they had, at that time, specific legislations permitting unrestricted access to information[147].

However, the scope of this question was much wider. Indeed, even in the absence of such legislation, in most States, a person, authority or court of law may obtain access to information related to an accident investigation under the general legal provisions, in particular the general procedural rules of evidence, if a satisfactory legal interest in such information is proved[148]. Besides, in most States, such information has to be made available in the judicial process, and the court may order the release of any particular information for a specific purpose under conditions determined by the court (see the Australian example).

Once again, it seems like national legislations and national procedures are stronger than the international regime aimed at governing the issue. Still, if States such as Australia are followed in their effort to comply, as much as possible, with the international law, the notion of confidentiality for certain type of information will prevail. Knight believes that "it is to be regretted that such Freedom

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[147] Milde, supra note 1 at 64.

[148] Ibid.

Knight believes that "it is to be regretted that such Freedom of information laws, while potentially giving greater protection to the individual can have an adverse effect when considering the wider public's interest (...). I am not advocating that information obtained during an investigation should be withheld as confidential for its own sake, but when it is necessary to release information in the course of the investigation, it should be used responsibly.[149]"

C- THE NOTION OF DISCLOSURE OF RECORDS:

Aware of the recent developments of "Freedom of information" legislations and of IFALPA growing concern about the release of certain information, ICAO added in 1980 the following text (known as Specification 5.12) to Annex 13:

"Disclosure of records

When the State conducting the investigation of an accident or incident, wherever it occurs, considers that disclosure of any records, described below, might have an adverse effect on the availability of information in that or any future investigation then such records shall not be made available for purposes other than accident or incident investigations:

a) statements from persons responsible for the safe operation of the aircraft;
b) communications between persons having responsibility for the safe operation of the aircraft;
c) medical or private information regarding persons involved in the accident or incident;

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[149] J.R.Knight, "Accident Investigation Procedures as Viewed by a Technician" (1984) IX Air Law, at 32.

e) opinions expressed in the analysis of information, including flight recording information."

Unfortunately, this was not enough to please IFALPA. One important point made[150] was that specification 5.12 could be rendered ineffective if the final report of the accident investigation body was published containing the records referred to in this provision. Moreover, IFALPA is mostly worried about the use of the records referred to in 5.12 for disciplinary, civil, administrative or criminal proceedings. Basically, IFALPA believes the information given voluntarily by flight crew members is presently inadequately protected. If this situation is permitted to continue, flight crew members will no longer openly disclose accident or incident related information to investigators, thus jeopardizing the investigative process and air safety[151]. Kane, expressing himself as a pilot, explains this is not an attempt "to impose restrictions on the freedom of action of the State criminal authorities. What is sought is rather the withholding of proof which has been freely given for the improvement of aviation safety but which, if used for other purposes, may put the person involved in a weaker position than other subjects of criminal prosecution[152]".

Others believe the absence of confidentiality of reports,

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[150] Kane, supra note 56 at 7.

[151] Ibid.

[152] Ibid. at 8.

criminal prosecution[152]".

Others believe the absence of confidentiality of reports, transcripts or all evidence gathered during an investigation, precludes the airlines or aircraft manufacturers, among others, of revealing the truth[153]. For instance, documents relating to aircraft are generally confidential. Airlines and aircraft manufacturers have great difficulties acquiring such documents, when they wish to evaluate the real importance of technical modifications done to an aircraft. If an accident occurs before the modification is made, the manufacturer's bulletin becomes an obvious proof of the defect, thereby, exposing the manufacturer to liability.

Nevertheless, some will argue that granting a privilege to the pilots or airlines, because of the peculiar environment in which they work, is of total irrelevance[154]. This counter-argument lies in a comparison with the circumstances of the Watergate scandal during the 1970's. The President of the United States, head of the Executive Power, was refused by a court of law, the presidential notion of an absolute privilege and was ordered to turn over all relevant data for an ***in camera***

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[152] Ibid. at 8.

[153] J.L.Magdalenat, "La Nouvelle Loi Canadienne sur les Enquêtes d'Accident d'Avions" (1984) IX Air Law, at 110.

[154] Discussion with Pr.M.Milde, Director of the Air and Space Law Institute, McGill University, March 5th, 1993.

inspection by a federal judge[155]. The court rejected the "absolute privilege" because it would upset the constitutional balance of a workable government. The disclosure of presidential records was mandatory because of the perceived need of the prosecutor for the information that was needed for a pending criminal trial.

Following this argument, the perceived need for information should equally apply to aircraft accident investigation. Therefore, if the President of the United States himself is denied such a privilege of confidentiality, why should pilots be entitled to it?

According to this trend of thought, as long as the information is discussed ***in camera*** all records should be disclosed.

In search for an equilibrium, ICAO agreed to incorporate the contents of some of the proposed amendments in an Attachment "D" to Annex 13. The material in Attachment "D" supplementary to Annex 13 by taking into account the issues discussed above, is intended as guidance.

It should be worth noting that specification 5.12 has

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[155] In his decision, Judge Burger states: "No where in the [U.S.] Constitution is there any explicit reference to a privilege of confidentiality", in H.Ball, *"We have a duty": The Supreme Court and the Watergate Tapes Litigation,* (Greenwood Press: N.Y., 1990) at 134.

been upgraded from a Recommendation to a Standard[156]. The importance lies that a State unable to comply with its provisions must file a difference to ICAO. Moreover, this specification has been widely supported by ICAO Member States, even by those having conflicting provisions in their domestic laws, such as "freedom of information" legislations.

At the domestic level, the Canadian legislation proposes an interesting solution to the conflict arising from disclosure of records. In an attempt to balance the interests of confidentiality and disclosure, the Canadian law offers a "prevailing interest test" anytime a request for the production and discovery of a CVR is made in any proceedings before a Court or Coroner[157]. In such case, the Court must weigh, in the circumstances of the case, the public interest in the administration of justice against the public interest in preserving the privilege attached to the CVR[158]. If the Court or Coroner concludes that production and discovery should be allowed, the Court or Coroner may nevertheless subject such production and discovery to such restrictions and conditions as the Court or Coroner deems appropriate[159].

Moreover, the legislation requires that when a request for production and discovery of a CVR is made, the Court or

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[156] Kane, supra note 56, at 7.

[157] Supra note 95 Article 28 (6).

[158] Supra note 95 Article 28 (6)(c).

[159] Ibid.

Coroner notify the TSBC (if the Board is not a party to the proceedings) and then examine ***in camera*** the CVR as well as giving the TSBC a reasonable opportunity to make representations with the respect thereto[160].

Disclosure of records when related to aircraft accident investigation is very complex because of the many opposing views. The right of access to information and the right to a certain privacy being diametrically opposed, the conflict can only be solved through certain compromises and mutual understanding. Nevertheless, the conflict of interest raising from confidentiality of information possesses another facet which is not thought of immediately: the impact of media coverage on an air crash investigation.

III- MEDIA COVERAGE AND INVESTIGATIONS OF ACCIDENTS: CONFLICT?

Because serious airline accidents are relatively rare occurrences, when they do happen, journalists have a tendency to jump on "the scoop".

Questions then arise whether the headlines always tell the whole truth, whether they mislead the public perception about an accident or whether they have an impact on a

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[160] Supra note 95 Article 28(6)(b).

technical investigation?

These issues are most likely to be argued, as they point out a legitime conflict: the right to be informed v. the duty to investigate.

A- THE IMPACT OF MEDIA COVERAGE ON AN INVESTIGATION:

When a transport aircraft crashes, involving many casualties, the accident immediately becomes a top news priority. The problem lies in the fact that media coverage of the air disaster and the accident investigation are two interests diametrically opposed to one another.

Media coverage relies on immediate answers, speculations and oversimplification of a complex series of events. In fact, journalists are more often concerned with "what if" than "what is" situations.

On the other hand, accident investigations are long, time consuming and involve detailed analysis. This type of investigation generally leads to mostly contributory factors and hypothesis of what caused the accident[161].

Thus, the main reproach is that the media distorts the news in such a way as to provide the reader with premature judgments concerning the causes of the accident.

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[161] Huff and Lederer, "The Media and Accident Investigation" [Dec 1991] Interpilot, IFALPA Quaterly Review at 3.

The doctrine is very critical of the journalists'role in the case of an air disaster. Wilkinson believes "there is a very real danger in ending up with a major investigation being conducted in the full glare of media publicity (...) which does nothing to advance the cause of aviation safety as in my experiences, this treatment tends to inhibit the acquisition of evidence"[162].

A section of the doctrine opposes the release of information to the press. Such broadcasting and publishing by the mass media, of CVRs conversations serves no purpose other than to sensationalize the accident[163], because the press seems to highlight the more salacious aspects of the accident[164]. Consequently, the people involved often become uncooperative because of the fear of public scrutiny.

The doctrine is even more virulent in its accusation towards the media, when considering its influence on the course of an investigation.

Indeed, the press succeeds in influencing the general

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[162] Supra note 112, at 36.

[163] In the U.S., because of the strong critics formulated by the NTSB about the Media's role in an investigation, an extinction of the delay for the release of CVR's transcripts is possible. Currently, the NTSB has 60 days after a crash to make portions of the transcript public, and needless to say these tapes usually receive considerable publicity. Huff and Lederer, supra note 161 at 6.

[164] Ibid.

public on key issues and events because of the means of communications it uses. Television, for instance, has a very powerful effect. By combining emotion, images and dramatic statements, it can mould public opinion and convey a wrong perception of the reality. The quest to satisfy the public's expectation for instant information, leads journalists to make premature and irrelevant conclusions. Furthermore the pressure for immediate answers and the duty to inform as rapidly as possible, forces journalists to draw their own conclusions[165].

These criticisms are complemented by complaints from accident investigators about press intrusions at the crash sites. Investigators believe journalists have no role to play at the site and are thought to interfere with the investigation. Huff and Lederer give a good example of this conflict. They explain that "at a recent accident site, over 40 members of the newspaper and television media appeared within hours of the crash. Some tried to get into survivor's hospital rooms and temporary morgues. Others resorted to ingenious tactics such as hiring a helicopter and hovering over the site, thereby interfering with communication, rescue and recovery operations"[166].

This interference is largely evident when considering the fact that journalists, not the investigators, are often the

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[165] Ibid. at 4.

[166] Ibid. at 6.

first to interview eyewitnesses. Such procedures may influence valuable witnesses because of the numerous interviews or because of the information they obtain on the news.

Critics are abundant and intolerant of the press and the media in general. They often blame the media for interfering with the technical investigation, influencing the witnesses as well as the general public and last but not least, sensationalizing and dramatizing the occurrence, often drawing inaccurate and wrong conclusion, let alone their power to damage airlines' and pilots' reputation.

Still, because investigators are professionals and experts in their field, the media does not have bearing on the ultimate findings of the investigation. This feeling is shared by many. For instance, the first Director of the Safety Bureau of the CAB (from which the NTSB stems), involved in several "mediatic" air crashes, says: "I cannot recall any impact by the media on the findings of an investigation (...). Basically, we as investigators went on about our business as though there was no media"[167].

It should be noted that the Doctrine does not criticize the media for displaying the actual event as it happened. The public has a right to be informed because an aircraft accident with 250 or more people on board is a serious matter. However, what is commented are the ways and means the media utilizes to

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[167] Ibid. at 7.

obtain and then display this news.

These accusations would not be fair to the journalists if they were not able to answer back. Therefore, the following section will present the counter-argument put forward by the media in order to defend their duty to inform.

B- THE RIGHT OF ACCESS TO AIR CRASH SITES:

Journalists strongly argue the right for media to access air crash sites[168]. This right is a matter for the evolution of U.S. case law. Consequently, focus will be given on the American jurisprudence which is very complete and revealing of the peculiar conflict of interest between investigators and journalists[169].

Under the First Amendment to the U.S. Constitution "Congress shall make no law (..) abridging the freedom (...) of the press". Consequently, there is a right to gather news. The issue is whether that special right extends to a right of access to aviation disaster sites.

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[168] K.S.Precella, "Freedom of the Press: Does the Media Have a Special Right of Access to Air Crash Sites" (1990) 56 Journal of Air Law and Commerce, at 641.

[169] For a complete review of the U.S. case law, Ibid. 641 at 679.

The evolution of case law in the U.S. supports the proposition that the press has a right of access to air crash sites. But due to a conflict of interest between the Government and the press, this access right can, when decided on reasonable ground, be limited.

The protection of lives by ensuring prompt rescue and medical attention, security as to the protection of passenger's and crew's personal property or cargo, preservation of the scene of the crash for investigatory purposes and protection of privacy and dignity of the victims and their families, are "reasonable" reasons to exclude the press from a crash site. These restrictions are either total or partial, thus being only limitations[170].

According to Precella, "a normal crash site" should be subject to limitations, not total exclusion. A "normal crash site" would then be when national security interests are not involved, when there is no extreme danger resulting from the crash or when the location of the crash is not such that the admission of the media would cause unavoidable interference with emergency personnel. Moreover, total exclusion or arrest should not occur unless the press member has demonstrated that they will not operate within this presumption[171].

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[170] Ibid. at 680.

[171] Ibid. at 683.

In short,according to K.S.Precella, although the Supreme Court has not expressly acknowledge a special right of access to aviation crash sites for the press, the U.S. case law seems to support a presumption of the right of admission under the First Amendment, unless compelling governmental interests require closing or limiting access to the accident scene.

Nonetheless, these restrictions apply to almost all crash sites, thus excluding the press from almost all the cases involving such occurrences. Any counter-argument allowing the press an automatic and immediate access to the crash site would not appear very convincing, except maybe, for the right to inform the public. This right, is without any doubt, essential but may be satisfied otherwise and does not mean the press is entitled to interfere with the investigative process. The ***a contrario*** argument formulated by U.S. courts may give, according to a part of the Doctrine, a presumptive right to the press to access the accident site. Nevertheless, it appears, in our opinion, much more in favour of denying such a right. Depending on what side you stand, is a question of interpretation.

Although, these comments only apply to the U.S., the problem is the same in every country dealing with major crashes. The doctrine analyzed, far from being composed of only American authors, shared the same feelings and concerns,

pointing out similar problems and similar conflicts of interest between the right to inform and the duty to perform the investigation of an aircraft accident. Consequently, the issue and solutions could be extended to all cases.

How can this question be solved, when both interests are legitimate and important? A equilibrium should be met whereby the restrictions imposed on journalists on the site of the crash would not interfere with the investigative team in their quest to find the answers.

C- **SOLUTIONS FOR A BETTER UNDERSTANDING:**

In the U.S. for instance, the NTSB advocates co-operation with the media to avoid the problems addressed earlier. Generally, a spokesman for the Board of investigation is named to give minimum necessary information, thus feeding the journalists' curiosity while providing information on where the investigation is heading, etc...[172]

Unfamiliarity with the accident investigation process, airline terminology and aviation safety often lead to misunderstandings and misinterpretations. For this reason, some authors reckon that one way to promote fair and accurate reporting of aviation accidents is to educate reporters on the

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[172] Huff and Lederer, supra note 161, at 3.

process of accident investigation[173]. Some publications already exist providing for reference for reporters, writers, editors and photographers who may cover the event[174]. Moreover, the event should not be covered by laymen, only by reporters specialized in aviation and who possess basic technical knowledge.

Thus, through a better education and a balanced co-operation, this harmful and unnecessary conflict of interest could be eliminated.

This Chapter has focused on the numerous conflicts of interests encountered. It has examined only the most important ones which represent merely a facet of the myriad of problems raised by aircraft accident investigation. The point was to expose, not only how many conflicts there were, but mainly how many different and opposite ways there are to consider the issue. It should be clear that one system or procedure is not superior to another. The investigatory structure meets the various requirements of each State and therefore applies in the most convenient way to each State.

A follow up would then be to investigate aircraft accident needing the co-operation of several State. Whose

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[173] Huff and Lederer, supra at 7.

[174] "Air Accidents and the News Media" issued by the "Aviation/Space Writers Association", Ibid.

system is going to be applied, since every country wants to apply its own? Chapter One has explained how the international regime framed by the Chicago Convention does not adequately respond to the need for unified regulations, albeit their necessity for aircraft accident investigation with an international scope.

Therefore, the unique solution for the improvement of aviation safety and prevention of future accidents lies in a full co-operation among States. Whether international co-operation takes place within ICAO's forum or not, it appears to be the only remedy.

Consequently, the Third Chapter will try to give a broad outlook on the different ways to achieve this co-operation, whether this achievement is through ICAO, through local co-operation or through the creation of an international fund, emphasizing a beneficial system of joint financing of international aircraft accident investigation.

CHAPTER THREE: PROPOSALS AND RECOMMENDATIONS FOR A NECESSARY CO-OPERATION:

Co-operation in terms of aircraft accident investigation can be organised in many different ways. There is no doubt about the need for international co-operation in that particular field; what is uncertain are the means used to express it when it can be illustrated at so many levels (legal, preventive, bilateral, regional, etc.).

After presenting a rapid overview of some of the various levels of co-operation, the third part of this chapter will focus on the question of large and costly accidents with a special emphasize on the setting up of an international fund, thus placing co-operation at a "solidarity" level.

PART ONE: LEGAL PROPOSALS:

After discussing the importance and need of international co-operation, its value will be assessed through the work achieved in ICAO forum.

A- INTERNATIONAL CO-OPERATION IS INDISPENSABLE:

As soon as the first aircraft took off from a State to land in another, the nature of aviation became international.

The aviation community formally recognized this international nature very soon, in the 1919 Paris Convention and more significantly in the 1944 Chicago Convention. These were the first steps towards international co-operation.

Co-operation is not simply about gathering States in a forum and discussing related matters. It is more about identifying the various problems (the conflicting interests) then searching for a solution to these problems. According to K.Hammarskjöld, "in search of a solution, the commitment must be made to use an established mechanism for international agreement in order to develop guidelines for problem-solving which are responsive to, but not overcome by, the wide range of national economic and legislative policies involved"[175].

Since the Chicago Convention, co-operation has been constantly present on the scene of international civil aviation, especially in the ICAO forum. Article 26 and Annex 13 to the Chicago Convention are of considerable importance as instruments of international co-operation. Both the work of AIG Meetings and amended editions of Annex 13 are very valuable efforts to achieve a suitable regime and wider co-operation. Besides, these are the only international legal tools available. Consequently, ICAO seems to be a most suitable forum to achieve such co-operation.

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[175] K.Hammarskjöld, "About The Need To Bridge A Jurisdictional Chasm" (1983) VIII Ann.Air & Sp.L., at 113.

However, the first Chapter of this paper demonstrated how the present international regime does not adequately respond to the conflicts of interests in the present time. The criticisms formulated in the first Chapter do not imply the system has to be disregarded. On the contrary, authors such as J.R.Schaetzel strongly believe, that "renovation of the system is theoretically possible. The basic ingredients are there: institutions, machinery, even the habit of communication. The missing element is the failure to understand that a viable system, one capable of coping with a disorderly and dangerous world, must be vested with an element central to any working democratic society: compromise. Compromise involves acceptance of the fact that solutions to problems will be imperfect, generally messy, with no contending group fully satisfied"[176].

In the light of ICAO's work, the following section will examine what kind of measures have been taken in order to improve the existing regime.

B- <u>ICAO FORUM</u>:

In order to improve and adapt the existing regime governing aircraft accident investigation, ICAO convenes

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[176] Former U.S.Ambassador to the European Community in "International Herald Tribune", (April 16-17 1983) in Hammarskjöld, <u>Ibid</u>. at 115.

meetings gathering experts from all around the world. These meetings, named AIG Meetings, attempt to fulfil the requirements needed for co-operation. They identify the problems and propose suitable solutions.

The existence of proposals made by the participating States does not systematically lead to amendments of Annex 13. For instance, in the 1979 AIG Meeting, the essential point made by IFALPA, was the proposal to draft an international instrument (presumably a multilateral convention) which would stipulate the basic characteristics of aircraft accident and incident safety investigation. This instrument would safeguard complete privacy of such investigation and prevent disclosure of any records presently mentioned in Specification 5.12 of Annex 13.

ICAO Legal Secretariat did not believe such an attempt to "circumvent" the present imperative provisions of domestic law in certain countries, was legally realistic. Moreover, the chances of a wide acceptance of any such multilateral instrument would appear to be minimal[177].

After almost 15 years of silence, another AIG Meeting was held in February 1992 in Montreal. Gathering again some of the finest experts in the field of aircraft accident investigation, the Meeting pointed out the major conflicts of

[177] Supra note 49 at 192.

interests still precluding a harmonized framework. It is now too soon to see any of the proposals become amendments. Still, the effort for acknowledging these problems and the attempt to solve them should be recognized.

Some of the issues discussed in Chapter two were raised in this forum, consequently, some of the proposals and recommendations made by the represented countries will be analyzed.

France presented a note submitting an amendment of Specification 3.1 of Annex 13. Acknowledging the problem of interaction between technical and judicial investigatiors, the amendment would emphasize the necessity of a clear distinction between the objectives of both investigations[178]. This proposed amendment would not aim at precluding the communication of information to the judicial authority but rather draw the attention to the risks of such a communication[179].

This concern was followed by IFALPA, who proposed several changes to Specification 3.1.

In short, IFALPA suggested the withdrawal in

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[178] AIG/92 - WP/128, agenda item 1.5 "Objectives of an Investigation", note presented by France.

[179] Comment made by M.Arslanian, Director of the french BEA, President of the 1992 AIG Meeting, Montreal Feb.1992.

Specification 3.1, of the word "fundamental". The text would thus read:

"The objectives of the investigation of an accident or incident shall be the prevention of accidents and incidents"[...].

The Pilot's Association then suggested the addition of two new recommended practices following Specification 5.4, emphasizing the necessity of the independence of an investigation (5.4.1) and the independence between domestic investigations and those conducted under Annex 13 (5.4.2)[180].

Determination of the various causes of an accident have also been the issue of some debate.

France and Great Britain submitted two notes containing similar proposals for the amendment of Annex 13 and the Manual of Aircraft Accident Investigation. These notes encouraged the proper identification of both immediate and deeper systematic causes of accidents. In both cases, a proposal was also made for an expert study group to examine the Appendix "Format of the Final Report" and to suggest amendments aimed at encouraging States to examine the deeper systematic causes of an accident[181].

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[180] AIG/92 - WP/46, 7/11/92, agenda item 1.5 "Objectives of an Investigation", note presented by IFALPA.

[181] AIG/92 - WP/, agenda item 1.9, "Cause(s)in the Final Report", note presented by France and AIG/92 - WP/94, 18/12/91, agenda item 1.9 "Cause(s) in the Final Report", note presented by the U.K.

The reason for such proposals lies in the fact the concluding section of the Annex 13 report format has contained two sub-sections for many years, namely, "Findings" and "Causes". The Annex and Manual of Aircraft Accident Investigation suggest that the expression of causes should be a concise causal statement of why the accident happened. The constraint of having to construct such a statement has often led to reports containing explanations of what happened not why it happened, and to specifying degrees of contribution by the use of words such as "primary cause", "main cause", "root cause", "underlying cause" and " contributing cause". These "concise" statements have tended to concentrate on immediate causes, such as technical failures or crew errors, while paying little or no attention to the deeper systematic failings[182].

Finally, the issue of disclosure of records was also raised and IFALPA naturally presented a note expressing its concerns. The note reiterated its dissatisfaction about the continuous abuses in the use of information gathered from CVR's and other sources. IFALPA feels there is an urgent need to reinforce Specification 5.12 of Annex 13. This information would then only be used for the purpose of prevention of

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[182] Ibid.

accidents, according to Specification 3.1[183].

The AIG Meeting held in Montreal in 1992, was warmly welcomed by the aviation community since the problems were still very present and had not been resolved since 1979. The proposals reflected the acknowledgment of some of the issues as being obstacles, but also revealed the desire to find a suitable and balanced solution.

As mentioned earlier, it is too early to make any report on what, precisely, is going to be amended or remain as such. However, encouraging such efforts of co-operation and common understanding, may help to achieve a stronger regime for aircraft accident investigation. ICAO, as a forum open to international co-operation, should not be ignored. In other words, one should not wait 12 years before calling the next AIG Meeting, as co-operation should be consistent and administered on a regular basis in order to function effectively.

Nevertheless, there are other entities aside from ICAO that may help develop co-operation in the field of air safety and prevention.

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[183] AIG/92 - WP/54, agenda item 1.14 "Disclosure of Records", note presented by IFALPA.

PART TWO: INTERNATIONAL CO-OPERATION OUTSIDE ICAO:

Exchange of information between airlines, signature of bilateral agreements, and regional harmonization of laws and bodies governing aircraft accident investigation, are three possible means to increase co-operation in the field of air safety and prevention.

Let us give a brief view at how such co-operation is operated.

A- CO-OPERATION BETWEEN AIRLINES:

The first idea of co-operation between airlines for the purpose of aviation safety was put forward in 1959 during a seminar in Europe[184].

Attention was drawn to some exchange of information existing between KLM, BEA and BOAC. The idea was then expressed to give greater attention to this form of co-operation and this on a wider basis.

In 1960, several European airlines[185] agreed to form a group for the exchange of information on accidents and incidents. Subsequently, the scheme was taken under the umbrella of IATA and is presently called "the Safety

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[184] G.C.Wansbeck, "Some Remarks on Incident Investigation", in the "Proceedings" of the Flight Safety Foundation Seminar in A.A.Van Wijk, supra note 20 at 280.

[185] Aer Lingus, BEA, BOAC, KLM and SAS.

Information Exchange"[186]. Participating airlines are assumed to be in agreement with the principle of mutual co-operation and to accept the obligation of reporting accidents, incidents, or other occurrences of an operational or unusual mechanical nature. IATA reproduces the reports and a copy is mailed as a confidential bulletin to each airline taking part in the Information Safety Exchange. This bulletin can only be used by aircraft operators for accident prevention[187].

An interesting addition to this written exchange has been the development of a verbal exchange of safety experiences between airlines. This form of co-operation has the advantage of being informal (i.e., unwritten) giving more confidence to the airlines when they release information, which could be otherwise withheld, in fear of legal consequences[188].

Since the first Meeting in 1960, many views had been formulated against the restriction to IATA members only, of both the written and verbal method. Consequently, an Incident/Accident Review Meeting is now open to all. Among other things, this yearly meeting allows the airlines to obtain an update on the major accidents. It should be noted

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[186] A.A.Van Wijk, Supra note 20 at 281.

[187] Ibid.

[188] Ibid.

that no records of the notes are kept[189].

B-CO-OPERATION THROUGH BILATERAL AIR AGREEMENTS:

Although it appears clear that co-operation in the field of aircraft accident investigation should not be framed by bilateral agreements, for reasons pertaining to the scope of these agreements, such accords do exist.

Provisions on the investigation of aircraft accident were inserted in some bilateral air agreements which have been concluded by States such as The Netherlands, France, Bulgaria China, Liberia or the former Yugoslavia and countries which at that time, were not part to the Chicago Convention[190]. However, there are some States, member to the Convention, which have signed such agreements[191]. As far as the Netherlands is concerned, the provisions have generally been aligned with Article 26 of the Chicago Convention[192].

This type of co-operation is not common because of its restricted scope (only two States are concerned). However, this practice reveals a desire for co-operation in the field

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[189] Interview with M.Woodhouse, IATA Technical Department, March 1993.

[190] A.A.Van Wijk, supra note 20 at 282.

[191] See art.11 of the "Civil Air Transport Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republic's" in McGill Yearbook of Air and Space Law (1966) 162 at 163.

[192] Ibid.

of aircraft accident investigation.

Finally, a final form of co-operation will be discussed in this part, namely regional co-operation.

C- **REGIONAL CO-OPERATION**:

By deduction of what has been explained in Chapters one and two, it is understood that the more efficient way to improve the existing regime governing aircraft accident investigation would be to unify and harmonize the different domestic laws.

Far from being a simple task, it remains conceivable. Some States have attempted to fulfil the requirements through regional co-operation. The advantage of a regional approach lies in the ability to attain a consensus, due to mutual interests among members. Large worldwide data bases for instance pose problems of management and correct interpretation of data. In particular, they tend to give inadequate information about regional situations[193]. The regional approach being narrower, the means to achieve a preferable safety are more efficient, and simpler to apply. Besides, the scope remains wide enough to gain credit on the international scene.

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[193] See 1992 Directorate General VII Special Report at 75.

Up to now, three regions of the world have shown some interest in this type of unification, namely, South America, the Middle East and Europe.

South American countries met in 1971 to organize a draft code for civil aviation law: "Proyecto de Codigo Aeronautico Americano", otherwise called the 1971 Bogota Draft[194].

In this draft, aircraft accident investigation is found in Title X. Even if the draft code is supposed to be applicable to "international" accidents only, the contents of Title X are a little more than just a codification of a portion of the existing practices between States on the basis of Annex 13 (2nd edition, March 1966). Nevertheless, this effort of codification remained a draft as no consensus could be reached.

Arab States also attempted to set up a regional unity in civil aviation. The initiative came from a recommendation adopted at a conference of the Permanent Committee for Communication held in 1967 in Cairo. This work provided for the establishment of a committee composed of experts on aviation legislation from the League of Arab States. The purpose was to prepare a draft for a unified law of civil

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[194] A.A.Van Wijk, *Supra* note 20 at 277.

aviation to be adopted by the Arab States.[195]

The final draft of the "Unified Law of Civil Aviation for Arab States" was approved in 1971 and was submitted to the Member States for adoption. Contrary to the South American draft, application of the law was not restricted to the "international" accidents and the provisions pertaining aircraft accident investigation did not have an obvious link with Annex 13 to the Chicago Convention[196].

Still, the draft has known the same fate as the South American Draft, namely, it remained dead letter.

Still, there is a region of the world where the attempt to co-operate has not fallen into disuse.

The European Economic Community (EEC) is tending towards stronger co-operation in terms of civil aviation. In this case, the advantage lies in the fact the infrastructure already exists and in the functioning of the EEC as a regional entity.

According to the Directorate General VII (dealing with transport matters) Special Report of 1992, future Community action in the field of air safety will be based on the work already achieved and on the perceived needs created by the political and technical evolution of this sector.

In its Communication to the Council of September 1991,

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[195] Ibid. at 279.

[196] Ibid. at 280.

the Commission expressed its opinion that a sensible air safety policy should be based on the early detection of the weaknesses, needs and trends concerning the aviation system. The Communication contains a work programme addressing three items: mandatory incident reporting systems, confidential reporting systems and accident investigations[197].

The aim of the first item is to improve air safety by bringing together the knowledge derived from the collection of incompatible occurrences, reporting systems existing in a number of member States by the setting up of a central data base. Each Member State would therefore have access to a large source of valuable safety data. Common analysis would permit deeper study of incident causes[198].

Secondly, the setting up of a confidential reporting system is considered, by many safety experts, as one of the most important steps to improve the knowledge of human factors in aviation. As most of the accidents are human factors related, this initiative is potentially very promising. The realisation of a prototype system launched in September 1992 should last between 24 and 30 months before final evaluation.

Finally, as far as accident investigation are concerned a series of measures should be approved to guarantee the availability of adequate investigation organisations in each

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[197] Supra note 193 at 76.

[198] The joint Research Centre of the Community has started to work on a pilot project which should be finished in 1994.

member state, and ensure that they work effectively together. Mainly, these objectives would allow an adaptation to the existing national regulations, taking into account the proposed modifications to Annex 13 to the Chicago Convention, a reinforcement of the national investigation bodies, the establishment of closer contacts between members of these bodies and finally, a provision to allow improved co-operation.

The Communication further stresses the importance to act, when realizing its safety objectives, within the general international context of civil aviation and the work of the relevant international organisations such as ICAO, ECAC (European Civil Aviation Conference), the JAA (the Joint Aviation Authorities) and Eurocontrol.

Up to now, this form of regional co-operation has not been very efficient and has mostly remained at the level of "good will". However, the EEC is the example proving regional unity is feasible and is able to function when given the means.

The constant growing interest in aviation safety leaves States no other choice but to gather together and co-operate, thus developing more accurate investigations as well as reducing overall costs. This regional co-operation may be a faster and more feasible way to achieve such goals.

This spirit of co-operation has nevertheless given rise to many ideas and comments among the different members of the aviation industry. One of these ideas, is the necessity of joint financing of large and costly accident investigations.

Whether the proposal is submitted within ICAO or by the doctrine, joint financing appears like a favourable option to reduce the costs of such operations.

After reviewing ICAO's effort for the past 20 years, to facilitate large and costly aircraft accidents investigations, importance will be given to the creation of a international fund providing financial aid to costly aircraft accident investigations.

PART THREE: PROPOSALS FOR A STRONGER CO-OPERATION:

This third part will essentially focus on the issue of large and costly aircraft investigations, while evaluating ICAO's effort in the consolidation of co-operation in that particular field. Lastly, this section will examine the proposal to create an international fund the purpose of which being to assist States in financial difficulties, in the conduct of a thorough investigation.

I- THE ISSUE OF LARGE AND COSTLY AIRCRAFT INVESTIGATIONS:

The idea of international co-operation in the field of aircraft accident investigation is not new nor is the approach of international joint financing in civil aviation. Many scholars or professionals have submitted such proposals. However, the funding of large and costly accident investigation is still a current issue and a difficult assess for the States who are unable to support them. Indeed, many States are incapable of making adequate provisions for the security of the accident site and/or the continuing investigation because of the large cost of providing these facilities. The cost pertaining to the safeguard of the wreckage, or the cost of the investigation itself, can impose a heavy financial burden on the State where the accident occurred.

Furthermore, the technical experts along with the specialized equipment needed for investigations, are not always available in the State where a major accident has occurred. Most of the time, the results of an investigation strongly depend on the resources available from the country conducting it. Then, when several major accidents happen within the same year, on the territory of a same needy State, not only will the results of the investigations be compromised but so will the entire prevention and safety process!

The case in point may be illustrated by two major

accidents that occurred in Nepal in 1992[199]. Both accidents, occurring during landing approach to Katmandu, involved high fatalities and led to the destruction of a Pakistani and Thai Airbus. Needless to say, the resources of Nepal are hardly adequate to carry out a comprehensive and thorough investigation of both accidents.

Besides, the State of Occurrence may not have an immediate or direct interest in the investigation. This remark may result in three possible outcomes. The State of Occurrence can either:

1) support the entire financial burden of the investigation, in conformity with article 26 of the Chicago Convention,

2) limit its financial burden by restricting the investigation, thus jeopardizing the efficiency of Prevention, or

3) try to delegate part or whole of the investigation to another State involved[200].

Because the financial aspect of an aircraft accident can be of such significance on the global process of prevention and safety, the international aviation community reacted accordingly.

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[199] The Pakistani Airbus crashed on September 28th, 1992 and the Thai Airbus crashed on July 31st, 1992.

[200] AIG/92-WP/19, 14/10/91 agenda item 1.11: "Financement des enquêtes d'accidents onéreuses et de grande ampleur", note presented by the ICAO Secretariat.

II- ICAO'S EFFORT FOR A STRONGER CO-OPERATION:

After several proposals were submitted to ICAO, its Secretariat felt the need to present a note at the 1992 AIG Meeting in Montreal[201]. Before examining the current situation, the note summarized all tne different information, projects and recommendations advanced since the 1974 AIG Meeting. Some States, present at the Meeting, also expressed their point of view[202].

The funding of large and costly investigations was first examined at the 1974 AIG Meeting, then at the 1974 21st Assembly Session, and finally at the 1977 22nd Assembly Session. The issue was again briefly raised at the ICAO Colloquium on Aircraft Accident Investigation in Vancouver in 1988. There is no doubt the question is of major concern for the international civil aviation community. What creates the hesitation is the question of how to solve the problem.

During the 1974 AIG Meeting, ICAO agreed that international measures needed to be agreed upon to govern the issue, but this type of co-operation required the States' experience as ICAO could not handle nor solve the problem

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[201] Ibid.

[202] AIG/92-WP/95 28/12/91 agenda item 1.11:"Funding of large and costly accident investigations", note presented by the U.K.

alone.

The Report from the 1974 Meeting was further integrated at the 21st Assembly Session in 1974, on an agenda item called "Co-operation between Member States in Major Aircraft Accident Investigations". The Assembly consequently formulated the Resolution A21-20[203], emphasizing co-operation among Member States. According to the Resolution, the Member States should provide, when required, the assistance of experts as well as installations and services. Moreover, the Council was to study the means by which the States could be informed on such assistance, costs and financial incidence of aircraft accident investigations, including the recovery of wreckage.

In order to facilitate the Council's study, a letter[204] was sent to all Member States asking them to hand over all information concerning the experts and installations they were willing to offer along with as the costs incurred by major accidents investigations on a five years basis.

The results of the survey were quite interesting. 48 States replied, of which 27 indicated their willingness to offer assistance of their experts and installations when required to[205]. But what is of greater significance is that 15% of the Member States having released the information, considered the financial incidence of investigations of

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[203] Supra note 200.

[204] Ibid.

[205] Ibid.

aircraft accidents "considerable"[206].

At the 22nd Assembly Session in 1977, the ICAO Council submitted the idea that Member States should sign bilateral agreements, in accordance with Annex 13 to the Chicago Convention, to share the costs of major accidents investigations[207]. Instead of a global approach, ICAO's Council was therefore favouring a more realistic method.

The Council retained the following options which would help reduce the costs of major accidents investigations:

1) Firstly, the aircraft operators providing international transport services should make sure they are covered for accidents investigation costs.

2) Secondly, the Organisation could try and collect the necessary financing in order to create and administer a fund dealing with the costs pertaining to aircraft accident investigations, and

3) Finally, the States directly involved in an investigation should share out the costs among themselves according to a pre-established formula.

At the Vancouver Colloquium in 1988, the participants were still concerned about the financing question which had

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[206] The three categories proposed were graded "insignificant", "medium" and "considerable".

[207] Supra note 202.

yet to be settled. The majority of the participants believed ICAO had a crucial role to play, transmitting the demands for assistance from a State to another. Some proposed to enlarge the scope of Annex 13 in order to include the question of large and costly aircraft accident investigation, and the negotiations pertaining to the distribution of costs.

Nevertheless, the problem is still very present and the concerns are growing.

The 1992 AIG Meeting did not propose any new ideas on this specific matter, but recommends, after acknowledging the significance of the topic, an exchange of views and a further study of the question.

Similarly, some States like the United Kingdom, presented a paper exposing their views about the subject[208].

The U.K. paper discussed how third-party insurance cover can be best utilized in the interest of the investigation and the Insurance Companies, to help fund costly aspects of the investigation. According to the note, accident investigations authorities should be aware that third-party liabilities in most aviation insurance policies include sums for clearing the accident site, and restoring it to its pre-accident condition.

Furthermore, according to the U.K. paper, "it should be recognized that the Underwriters have obligations under the

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[208] Ibid.

insurance policy and States should be able to make provisions for site security and arrange for wreckage recovery for investigation purposes in the knowledge that at least part of the cost involve can be recovered"[209].

When reviewing ICAO's work in this particular domain one may observe the growing interest and attention the topic is receiving.

Yet, the actual decision as to what method should be chosen to treat the problem has not be agreed upon. According to ICAO, the Organisation cannot cope with the situation alone and requires the enrolment of the Member States through bilateral negotiations.

On the other hand, many States strongly disagree with this point of view and believe ICAO should play the key role in the organisation of the co-operation. This approach may be illustrated through the creation and administration of a fund for international major aircraft accident investigations.

III- THE CREATION OF AN INTERNATIONAL FUND:

In order to help the States facing financial difficulties when carrying out a laborious and time-consuming investigation, an international fund could be conceived. The advantages of such a fund appear to be numerous, thus

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[209] Ibid.

deserving further study.

Clearly enough, co-operation and union are closely connected. When applied to the fund, this notion of union would enable a significant cost reduction and imply a valuable distribution of risk.

Relieved from a heavy financial burden, countries assisted by the fund would be able to conduct better quality investigations. Better investigations would yield precious technical information which could lead to greater prevention of future accidents or incidents, if equitably shared among the civil aviation community.

This chain of logic helps to understand the purpose of such a fund, thus meeting the purpose for which the Chicago Convention was created, namely, to ensure a safe, orderly and economical aviation.

The idea of an international fund has a precedent in international maritime law[210]. Although created for a very different purpose, the idea of co-operating through joint financing remains. The international Compensation Fund founded by the 1971 Bruxelles Convention on Civil Liability for Oil Pollution Damage, is a fund based on solidarity, representing the contribution of a group of professionals. The financial

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[210] M.Remond-Gouilloud, *Droit Maritime*, 2nd ed. (Paris: Pedone, 1988) at 237.

contributions come from Member States, and are calculated according to the quantity of fossil fuels imported by each of the States during the past year. Its administration stems from a U.N. type administration, encompassing an Assembly of Member States deciding the main lines of conduct and the total of the contributions, an executory Committee deciding on the granting of the compensation, and a permanent Secretariat ensuring the continuity of the action.

The maritime fund is based on ceilings and works either as a complementary or as a subsidiary tool.

Its role is complementary when the damage exceeds the compensation limit offered by the ship-owner. Its role becomes subsidiary when the ship-owner is financially incapable of facing his obligations; the fund will then ensure the entire compensation.

The existence of the maritime fund is due to the peculiar nature of maritime law in general and damage related to oil pollution in particular. Made by sailors for sailors, maritime law could not adequately respond to the needs of the common man. For this reason, a particular fund was created.

It should be noted that the idea of a similar compensation fund was raised in space law fora too.

Although no major accidents due to space debris, involving massive losses of lives or property, have occurred yet, the possibility of creating a compensation fund has

already been put forward. The constitution of an international compensation fund is considered a solution to remedy this foreseeable problem. Indeed, it would be unreasonable to expect a State to pay colossal reparations for unintentional injuries or damage inflicted by a lawful and universally beneficial activity.

As far as the contributions are concerned, several proposals have been submitted by the doctrine. Hurwitz[211] proposes that the contributions to the fund be based upon the number of space objects each country has launched and the number of operational satellites the States has in any orbit.

On the other hand, Hobe[212] suggests that each State launching an object into outer space would be obliged to pay a certain fee, calculated according to the risk incurred by its space object.

However, it should be clear that this space fund would be a post-accidental compensation fund for victims of space debris. Besides, it is merely a proposal raised by the doctrine.

Both the maritime and space funds are closely related but are clearly very different from the proposed aviation fund.

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[211] B.A.Hurwitz, "An International Compensation Fund for Damage Caused by Space Objects" (address to the 42nd IAF Congress, Dec 1991) IISL-91-068 [unpublished].

[212] S.Hobe, "Space Debris: a Proposal for its Legal Regulation", (address to the 42nd IAF Congress, Dec 1991). IISL-91-068 [unpublished].

The novelty of the so-called aviation fund would be its capacity to conduct more accurate aircraft accident investigations while benefiting prevention and safety in general, not the victims of a crash. It would not be based on a compensation system functioning once the person liable has been determined (presumption of fault is set on the ship-owner in accordance with the Bruxelles Convention). It would create a system by which co-operation would serve co-operation.

Besides, the maritime fund has a scope of application somewhat restricted. Not all maritime accidents are considered, and no investigations are conducted.

However, while totally opposed in their purposes and objects, the two funds may still be compared. One fund may deal with pre-accidental matters and the other with post-accidental matters, they are still both aimed at improving a specific aspect of transportation through international co-operation.

The comparison with the international maritime fund has allowed us to evaluate the feasibility of an international aviation fund. However, the aviation fund envisaged would have its own characteristics, framework and advantages, with a distinct object and a very different purpose.

The immediate purpose of this international fund would be to support the countries involved, when they cannot afford

large and costly investigations. Indirectly, this fund would strengthen aviation safety and prevention of future accidents. Indeed, rapid and accurate information together with thoroughness in the conduct of the investigation are crucial to the safeguard of the aviation industry.

The object of the fund would not be one of determining blame or compensating victims of air crashes, but one of "solidarity", based on common interest preventing the repetition of similar accidents.

This non-apportionment of blame would meet the requirements of Annex 13 to the Chicago Convention, thus allowing ICAO to be the desired organiser of such a fund. Under the auspices of ICAO, the fund would formulate a collective payment mechanism. Rather than attaching itself to a behaviour (implying blame or judgement), it would base itself on risk.

In short, this fund would be the expression of a collective distribution of a given risk and cost supported by the international aviation community.

A systematic allocation of the aid should not be the goal aimed at. In fact, the fund should offer its assistance whenever the financial burden of a large and costly aircraft accident investigation cannot be supported by the State in

charge, and only in that case.

This element poses the problem of the eligibility of such States to the aid. Indeed, how would be determined the States incapable of supporting the financial charge?

One could employ the 1974 survey discussed earlier, as a model. Based on the study of the different categories in which the States classified their costs incurred by aircraft accidents, the survey could offer the means to determine the eligibility to assistance. States who consider their costs "medium" or "considerable" could be entitled to an ***a priori*** financial assistance, whereas States who evaluate their costs as "insignificant", could be granted an *a posteriori* assistance depending on the magnitude of the accident. In other words, a clear distinction could be made between an automatic financial aid and a post-accidental aid; the criterium being the level of need for subsidy in order to pursue a healthy investigation. By taking over the financial burden, the fund would then substitute itself money-wise to the country.

Nonetheless, in order to exist and function adequately, the fund would need financial contributions.

Keeping in mind that ICAO is a non-profit organisation, these contributions could be raised by Member States themselves, acquiring the finances through the indirect beneficiaries of such a fund, namely manufacturers, airline operators, etc...

One could make a parallel with ICAO's joint financing department, which supports Air Navigation Services (Article 68 to 76 inclusive, Chapter XV of the Chicago Convention)[213].

In the particular case of ICAO's joint financing department, the users' fees are received from the airlines as users of the facilities, and are calculated on a pro-rata basis according to the number of flights.

Although not directly relevant to the fund envisaged, this technicality is interesting as it indicates the possibility of establishing an international joint financing when needed, as it was the case for Air Navigation Services. This example allows us to believe that a mechanism of international joint financing, such as an international fund, is conceivable, if considered "indispensable" to the safety of civil aviation.

The motivation for financing such a fund, could stem from the latter's positive impact on the aviation industry. Indeed, the relevance of the fund for the immediate beneficiaries has previously been discussed: the financing of a large and costly investigation would no longer be an impossible task or a

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[213] "The Danish and Icelandic Joint Financing Agreements" of September 25th, 1956.

unbearable burden for a State in financial difficulties. What has yet to be discussed is the interest of the indirect beneficiaries, namely, the suppliers of the fund.

Indeed, there must be a counter-part for this necessary joint financing and mandatory contribution. The interest and attention of the principal actors of the industry must be attracted. In order to do so, there must be a "reward" to the financial sacrifice.

This "reward" could encompass the release and distribution of the technical information provided by the investigation. This valuable information could then be shared among all Member States in accordance with Annex 13 provisions, leading to a more "transparent" and efficient notion of co-operation. Consequently, the aviation industry (airlines, manufacturers) could indirectly profit from such co-operation and the money allocated into the fund could then be considered as an investment. Such a long term investment would further serve the interests of the industry by creating a safer and less competitive environment. Clearly, investing in prevention, results in a reduction of accidents and uncontrollable occurrences, thus avoiding major financial losses in every sector of the aviation industry.

It seems evident that ICAO should be at the centre of such co-operation. ICAO should be the instigator of the fund,

for a privately organized fund would probably be inefficient and unfair to the participants. Unable to attract the wide number of direct and indirect users ICAO would, the fund would favour the countries with the biggest airlines or manufacturers. This situation might discourage the countries with fewer users, which are the very countries for which the fund should be created. A privately owned fund would then not be able to function as efficiently as a fund organized by ICAO, let alone the enforcement of the obligation to pay the contributions.

Furthermore, ICAO already possesses the structure and the "spirit of co-operation". As a non-profit organisation, the only income would be assigned to safety. As discussed earlier, the existence of a joint financing within ICAO establishes the feasibility of the idea; the solidarity-minded fund following the "non apportionment of blame" rule would also comply with the technical-oriented view expressed in Annex 13 to the Chicago Convention.

The proposal for an international maritime fund finally came through because of the urgency of the situation due to the tragic oil spills in the 70's and the inadequacy of maritime law when applied to the common man.

Because air law is not just aimed at air professionals and governs the international aviation industry as well as

passengers all around the world, the need for this international fund is even stronger. The post-accidental approach, although necessary, does not appear to be the best way to handle aircraft accident investigation. Prevention seems like a much more reasonable and realistic way to deal with air safety. The combination of co-operation through financial assistance and thorough investigations is a plausible way of envisaging the answer to the question: "How can we improve the existing international regime governing aircraft accident investigation?"

Therefore, international co-operation should be considered by the international aviation community as the key solution to approach civil aviation in general and air safety in particular.

CONCLUSION

The purpose of this paper was to describe the weakness of the existing international legal regime governing aircraft accident investigation.

This international regime, composed of Article 26 of the Chicago Convention accompanied by Annex 13, along with regional law such as the European Community's law, is not a bad one *per se*. However it does have strong limitations restricting its scope and refraining its enforcement. Due to a rather weak legal nature, common to all international laws and conventions, and strong "self-inflicted" limitations, Article 26 and Annex 13 do not allow a solid, nor reliable legal basis for a unified international regime applicable to aircraft accident investigation(Chapter one).

Consequently, the questions pertaining to aircraft accident investigation have as many answers and approaches as they are domestic laws and jurisdictions. The interaction of the Chicago Convention with the different systems of laws lead to inevitable conflicts of interests. Conflicts of jurisdiction, disclosure of records or media coverage of air disaster are some of the main issues subject to polemic. These various polemics receive a great deal of attention from the national and international aviation community, still, the

negotiations are too often slowed down by the lack of unity in terms of the laws applicable (Chapter Two).

Nevertheless, while outlining the drawbacks of the present day system, this paper supported this international regime as being the only international legal tool available. Its guidelines have already proven to be tremendously rewarding, and thus have been accepted by the aviation community, with a high degree of compliance.

The answer to the need for a stronger international regime can be found through greater co-operation. International co-operation appears to be the most reasonable choice to improve aviation safety in general, and aircraft accident investigation in particular. Aviation safety being of common interest to all, a global approach seems like the most appropriate way to govern the issue.

Furthermore this co-operation would best be handled by ICAO as opposed to any other existirg entity. Thanks to its experience and infrastructure, it alone has the power to improve a system already in place and create a more unified regime.

The proposal concerning the creation of a fund aimed at facilitating large and costly aircraft accident investigation is merely one of the many tools ICAO may exploit to improve international aviation safety. Nonetheless, this proposal has the advantage of offering a prevention-oriented approach, which, according to Specification 3.1 of Annex 13 to the Chicago Convention, is the fundamental objective of an investigation(Chapter Three).

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