

Investigation of Aircraft Accidents

Fears grow that the crash site of flight MH17 in Eastern Ukraine may have been compromised. This is a gross infringement of the internationally endorsed rules how a state where a crash site is situated should protect the evidence and maintain the safe custody of the crashed aircraft

Pro-Russian fighters or at least: armed men, have been controlling the site since the downing of the Boeing 777 flying from Amsterdam to Kuala Lumpur. Without official investigators having access to the site to conduct a proper air crash investigation in accordance with the International Standards described below the downing of MH17 may become the World's First Open-Source Air Crash Investigation. This means using vital information from reliable, publically accessible sources.

Already on 7 December 1944 certain principles and arrangements to promote development of safe international air transport services was signed in Chicago, USA (the Convention on International Civil Aviation, or: "Chicago Convention").

General Principles

According to Article 1 of this Convention the Contracting States recognised that every State has complete and exclusive sovereignty over the air space above its territory. The territory of a State shall include the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State (Article 2). Under the Convention each Contracting State may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other states from flying over certain areas of its territory, provided that no distinction in this respect is made between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other Contracting States likewise engaged.

Descriptions of prohibited areas, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other Contracting States and to the International Civil Aviation Organisation ("ICAO").

Furthermore, each Contracting State has also reserved the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, to temporarily restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other states (Article 9a and 9b Chicago Convention).

The Contracting States have explicitly recognised that every State must refrain from resorting to the use of weapons against civil aircrafts in flight and that, in case of interception, the lives of persons on board and the safety of aircrafts must not be endangered (Article 3 *bis* (a) Chicago Convention). It has been stated explicitly that the provision of Article 3 *bis* (a) shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

Investigation of Accidents

The State in which an accident to an aircraft occurs to an aircraft of a Contracting State involving death or serious injury will institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the ICAO. 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 reported findings in the matter to that State.

The Chicago Convention provides (Article 37) for the Council of ICAO to make standards and recommended practices dealing with a wide range of matters concerned with the safety, regularity and efficiency of air navigation. The current standards and recommended practices are published by ICAO as Annexes to the Chicago Convention. At present there are 19 of such Annexes, including Annex 13 on Aircraft Accident Investigation. ICAO was created in December 1944 and is part of the UN-system. At present 187 States are Members of ICAO. The objectives of

the canal are to promote co-operation between nations and peoples and to agree on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air services may be established on the basis of equality of opportunity and operated soundly and economically.

Annex 13 provides the International Safety And Recommended Practices (“SARPs”) as the basis for aviation accident, serious incident and incident investigations, as well as accident prevention and accident and serious incident reporting. The sole objective of these investigations is accident prevention. It is not the objective to apportion blame or provide a means of determining a liability. ICAO manages a database known as the Accident/Incident Reporting (“ADREP”) system, where safety information discovered during an aviation investigation, and considered vital to accident prevention, is shared among the Contracting States worldwide. The ADREP- system operates using a software platform developed by the European Union – the European Co-ordination Centre for Aviation Incident Reporting System (“ECCAIRS”).

This platform was adopted for ADREP use in 2004. The same software is also made available to the States by the EU through ICAO to support the development of their own reporting systems, and to facilitate the electronic transfer of occurrence report information through software compatibility. As of January 2009, some 45 states and 7 international organisations have installed the ECCAIRS- software and have reported occurrences in the ECCAIRS-format to ICAO.

In accordance with International Safety And Recommended Practices (Annex 13) the findings of a technical investigation report shall not be used and are not admissible in criminal proceedings. A judicial investigation should be conducted independently by the competent police and prosecution and this could lead to a

situation whereby the technical investigators from an investigation board may be called as an expert witness at a court hearing once the trial has begun.¹

Recognizing the possibility of conflicting interests that may arise when an accident investigation board is a governmental body, the EU Directive 94/56 (European Council 1994) requires all Member States to establish an independent accident investigation board to safeguard the impartiality of the board and not to compromise its findings. In the Netherlands the Safety Investigation Board was officially invested on 7 February 2005 on the basis of the Safety Investigation Board Act which came into force on 1 February 2005. By virtue of Article 57 of the Kingdom Act the Investigation Board shall not include certain information collected during its investigations in so far as this information and disclosure thereof might endanger the security of the Netherlands or the relations of the Netherlands with other states might be jeopardised. In criminal, disciplinary or civil proceedings, statement of persons made within the context of the investigation, any communication recorded by means of a technical device among persons who were involved in the operation of a means of transport, medical or private information recorded within the context of the investigation concerning persons who were involved in an incident, data from a flight recorder, a cockpit-voice recorder or a travelling-data recorder used in shipping, opinions expressed within the scope of analysing the investigation material and documents drawn up by the Investigation Board cannot be used as evidence, nor can a disciplinary measure, an administrative sanction or an administrative measure be based thereon (Article 69). In derogation of this data carriers such as flight recorders and cockpit-voice recorders may be used as evidence and be demanded for inspection or be seized if it concerns a criminal investigation into a hostage-taking, murder, manslaughter or an offence with the intention of frightening the population or part of the population of a country, or forcing a government or an international organisation to do, omit or tolerate something, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. An investigator of

¹ This happened with the members of the National Transportation Safety Committee of Indonesia in the criminal proceedings after the death of 20 passengers and a crew member of a Garuda B737 flight at Yogyakarta Airport in 2007.

the Investigation Board shall not be called as a witness or an expert in connection with an investigation in which he is or was involved.

Surprisingly the EU Directive does not directly address the problems that may arise from the parallel investigations of the investigation board and judicial authorities. This may cause tensions as was seen in 2009 during investigations into the Turkish airline accident in Amsterdam.

In that case the investigators of the investigation board refused to hand over the CVR and FDR to the Dutch police as there is no legislation in force allowing the judicial authorities to gain control over the CVR and FDR data.

If we have a look at Annex 13 we see that the State of occurrence² has a duty to take all reasonable measures to protect the evidence and to maintain safe custody of the aircraft and its contents for such a period as may be necessary for the purposes of an investigation (Article 3.2).

The protection of evidence shall include the preservation, by photographic or other means of any evidence which might be removed, effaced, lost or destroyed. It also includes protection against further damage, access by unauthorised persons, pilfering and deterioration. The investigator-in-charge shall have unhampered access to the wreckage of the aircraft and all relevant material, including flight recorders and ATS-records, and shall have unrestricted control over it to ensure that a detailed examination can be made without delay by authorised personnel participating in the investigation (Article 5.6).

The State conducting the investigation into a fatal accident shall arrange for complete autopsy examination of fatally injured flight crew and, subject to the particulate circumstances, of fatally injured passengers and cabin attendants, by a pathologist, preferably experienced in accident investigation. The examinations shall be expeditious and complete (Article 5.9).

Guidance material related to autopsies is provided in the Manual of Civil Aviation Medicine (Doc 8984) and the Manual of Aircraft Accident Investigation (Doc 6920). The State conducting the investigation shall recognize the need for co-ordination

² The State in the territory of which an accident or incident occurs.

between the investigator-in-charge and the juridical authorities. Particular attention shall be given to evidence which requires prompt recording and analysis for the investigation to be successful, such as the examination and identification of victims and read-outs of flight recorder recordings.

A State which has a special interest in an accident by virtue of fatalities or serious injuries to its citizens shall, upon making a request to do so, be permitted by the State conducting the investigation to appoint an expert who shall be entitled to:

- a. visit the scene of the accident;
- b. have access to the relevant factual information;
- c. participate in the identification of the victims;
- d. assist in questioning surviving passengers who are citizens of the expert's State; and
- e. receive a copy of the Final Report.

The Dutch Safety Board was formally informed on the air disaster of flight MH17 by its Ukrainian counterpart (NBAAI) on 18 July 2014. The NBAAI requested the Dutch Safety Board to participate in the international investigation. According to international (ICAO) regulations, the State of Occurrence, i.e. the State in which the crash took place is responsible for taking the lead in investigating the circumstances of the incident. In response to Ukraine's request, the Dutch Safety Board has sent a team of investigators to take part in the international investigation. Contact will also be sought with the relevant authorities for retrieving the data stored on the "black boxes". The Dutch Safety Board has stressed the importance of carrying out a full and thorough investigation into the disaster. Given the large number of Dutch fatalities (194), the Board will contribute in any way it can to the investigation into the cause of the crash.

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