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## **Criminal liability of pilots in aviation accident cases**

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## 4.1 INTRODUCTION

This Chapter analyses the domestic law of selected jurisdictions regarding pilots' criminal liability. While ICAO lays down parameters for pilots' criminal liability by determining global air law principles, criminalisation at the national level must underlie prosecution. This chapter reviews the domestic criminal legislation of States that implement global air law parameters. At the same time, fundamental criminal law principles also come into play, including the substantive principle of legality and legal certainty as a postulate thereof.<sup>1</sup> Hence, pertinent domestic legal frameworks and the manner in which they are applied in case law will provide insights into clarity issues that may exist in the establishment of criminal liability for pilots in accident cases.

I select three jurisdictions, namely, the US, the UK, and the Republic of Korea (ROK). The selection criteria pertain to the geographical distribution, the active adherence of these jurisdictions to the Chicago/ICAO regime, and the availability of the most relevant case law.<sup>2</sup> The selection is especially meaningful for exploring the regulation of the criminal liability of pilots according to the interpretation made in Chapter 3 in the context of regimes of these jurisdictions. These States actively participate in the ICAO rulemaking process, as manifested by the fact that they have implemented 90%, if not more, of the ICAO SARPs.

Moreover, the selected States are important aviation States in terms of traffic volume, that of the selected jurisdictions covering about 29% of the world traffic volume.<sup>3</sup>

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- 1 Fletcher GP, *Basic Concepts of Criminal Law* (OUP 1998) 3 and Van Dam R, 'Preserving Safety in Aviation: "Just Culture" and the Administration of Justice' (2009) 22 *Air and Space Lawyer* 1, 6. See also Sections 1.1.2, 1.4.2, 1.6 and 2.3.
  - 2 Section 1.3.2 of this research. The previous versions of this Chapter contained information on the domestic legislation of South Africa to fulfil the requirements of the geographical distribution and active adherence to the Chicago/ICAO regime. However, due to the lack of criminal prosecution cases, this (final) version of the Chapter does not contain South African cases.
  - 3 World traffic history shows that the number of domestic and international flight departures of the US, UK, and Korea was 8.59M, 0.9M, and 0.34M out of 35.25M departures worldwide in 2023.

A preliminary consideration is that pertinent case law is generally limited. That limitation also applies to the selected jurisdictions. In the available case law, courts consider, besides the (in)actions of the pilot, other objective elements, such as technical defects in the aircraft, including avionics, or external factors such as weather conditions, the state of the airport, and instructions from Air Traffic Control, in conjunction with the subjective state of mind of the pilot when assessing accident and incident causes.

Next to legal sources defined in Chapter 1,<sup>4</sup> this chapter (4) presents analyses based on empirical sources showing the level of implementation of ICAO SARPs into the legal systems of the US, UK and Korea. Those are primarily statistics of each contracting State of the Chicago Convention (1944) and represent their responses to USOAP CMA self-assessment questions.<sup>5</sup> I retrieved these questions from ICAO's support tool for data-driven safety analysis, called 'iSTARS', provided by the Air Navigation Bureau of the ICAO, which allows States to test its implementation status,<sup>6</sup> and on ICAO's data services.<sup>7</sup>

In addition, the AIP is also a source of this Chapter (4). The AIPs are prepared by individual States and provide information on the differences between national law and ICAO SARPs, and procedures.<sup>8</sup>

The sections based on these AIP data are designed to check if and how each selected State fulfils its binding or conditional international obligations.<sup>9</sup> From all the Protocol Questions (PQs) available,<sup>10</sup> I extracted questions on the obligations under Articles 12 and 26 of the Chicago Convention (1944). The list of questions is included in the subsection on State Practice in Chapter 3.

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4 Section 1.3.1.

5 See Section 3.3.1.7 of this research. State practice – what have States done to implement this “undertaking”. ICAO supports its Member States to actively check their oversight capabilities by preparing ‘self-assessment’ questions. By answering numerous questions, Member States can determine whether they satisfactorily implement ICAO SARPs. The results are viewed on ICAO's API Data Service which is not always publicly accessible.

6 See, ICAO, ‘iSTARS 4.0’ <[istars.icao.int](https://istars.icao.int)> accessed 13 October 2024.

7 ICAO, ‘API Data Service’ <<https://www.icao.int/Aviation-API-Data-Service/Pages/default.aspx>> accessed 13 October 2024. ICAO explains its API data service: “ICAO's highly reliable Application Programming Interface (API) Data Service contains the raw data collected and processed from different aviation authorities, Member States, other international organizations and NGOs.”

8 See, ICAO, *Annex 15 Aeronautical Information Services* (16th edn, 2018). The AIPs are updated either every 28 or 56 or 28 days.

9 Sections 1.4.1 and 3.4 of this research.

10 Protocol Questions are a primary means the ICAO USOAP CMA utilises for States to self-assess their oversight capabilities. For more, see, Chapters 1 and 3 on the continuous monitoring system of the State oversight capabilities of ICAO.

This Chapter will also define whether and how specific legal instruments, either criminal law or air law, or both, regulate the criminal liability of pilots. As stated above, prosecution requires a basis in national criminal law. Hence, in many cases, criminalisation is a combination of the two branches of law, that is, criminal law norms interpreted in the light of air law provisions and principles. Discussion of these legal norms is followed by a study of the application of the selected frameworks in practice and how the respective competent bodies enforce rules. I will also look into case law in the selected jurisdictions in order to respond to my research questions.<sup>11</sup>

While this study, where necessary, makes reference to classical criminal law concepts, such as subjective elements of offences, including diverse forms thereof in the form of intent, negligence and recklessness, this study does not intend to test the compatibility of aviation criminal law with any version of these concepts in any domestic jurisdiction.

This chapter concludes with reflections on the ways and means of domestic legislation dealing with pilots' criminal liability. I also address the question of whether and how the complex interactions between safety, transparency, and legal certainty are resolved therein.

## 4.2 THE US REGIME

### 4.2.1 The position of the US in the Chicago Convention (1944) and ICAO

#### 4.2.1.1 *The Chicago Convention (1944)*

The US was a principal driving force behind the conclusion of the Chicago Convention (1944), amongst others, by having initiated the invitations for the Chicago Conference.<sup>12</sup>

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11 The case law referred to in each jurisdiction studied in this research is not exhaustive. There are still more significant cases and court decisions, yet they are irrelevant to this study. Each section of Chapter 4 with case law of jurisdictions contains those other cases omitted in this research, yet prominent. An additional point to mention here is that, in the jurisdictions referred to in this research, violations of flight and manoeuvre rules often lead to administrative sanctions, such as suspension of licenses, but not criminal liability. Such cases would be referred to in each section analysing case law.

12 *Proceedings of the International Civil Aviation Conference* (United States Government Printing Office 1948) 11. See also Osterhout H, 'Review of the Recent Chicago International Air Conference' (1944) 31(2) *Virginia Law Review* 376, 376; Klang J, 'Celebrating the Chicago Convention's 75th Anniversary' 32(4) *Air & Space Lawyer* 1, 1.

The US was one of the initial signatory States on 7 December 1944. In 1946, the US Congress ratified the Chicago Convention (1944),<sup>13</sup> which came into force in 1947 in the US.

4.2.1.2 Practice regarding the implementation of ICAO SARPs with reference to the criminal liability of pilots

The most recent USOAP carried out by ICAO in the US is dated 2007. That examination showed the following results:

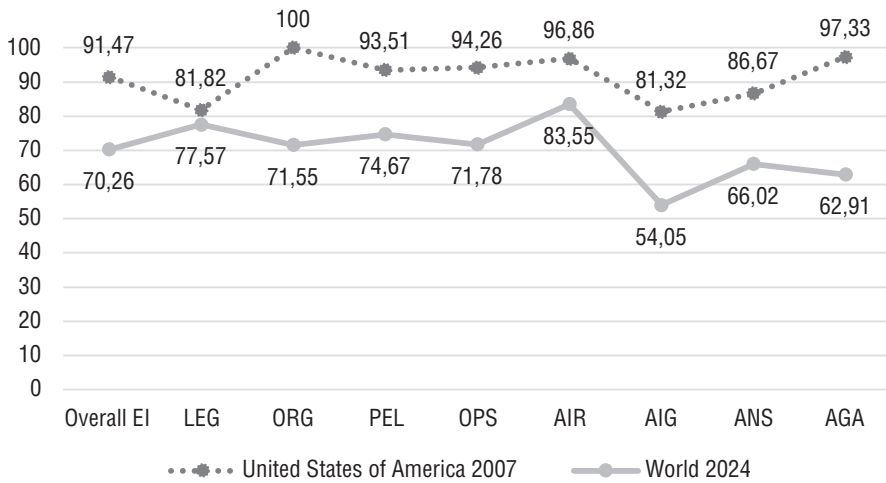


Figure 2 USOAP Result Comparison – The US v. Global Average (13 October 2024)<sup>14</sup>

As the Figure above shows, between 2007-2023, the US implemented about 90% of the then-existing SARPs. Thus, this study considers the US to be one of the leading States in implementing SARPs.<sup>15</sup>

The US has assessed that it has fulfilled almost all Article 12 of the Chicago Convention (1944) obligations, except for one aspect thereof. The US

13 Restatement (Fourth) of the Foreign Relations Law of the United States § 301 cmt. a (AM. L. INST. 2018) [hereinafter Fourth Statement], § 301 cmt. A. A comparable case is the Paris Convention (1919); the President signed the treaty, but Congress did not ratify it. See ‘ Status of the Treaties of the Conference’ in *Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XIII* (United States Government Printing Office 1947); Cooper JC, ‘United States Participation in Drafting Paris Convention 1919’ 18 *Journal of Air Law and Commerce* 266, 266.

14 ICAO USOAP utilises the following abbreviations: EI (Effective Implementation), LEG (Primary Aviation Legislation and Civil Aviation Regulations), ORG (Civil Aviation Organization), PEL (Personnel Licensing and Training), OPS (Aircraft Operations), AIR (Airworthiness of Aircraft), AIG (Aircraft Accident and Incident Investigation), ANS (Air Navigation Services), AGA (Aerodromes and Ground Aids).

15 There is no more recent reference to the USOAP result of the US.

explained that it does not implement specific Air Navigation Service (ANS)-related provisions of SARPs,<sup>16</sup> having opted to post differences under ICAO Annexes 2 and 11. Not only have standards laid down in ICAO Annexes 2 and 11 been implemented differently in the US,<sup>17</sup> but the scope of US law is also more expansive than that of the standards of these ICAO Annexes.<sup>18</sup> Thus, it may be held that the US supports the safety paradigm through the implementation and application of more extensive provisions.

The fulfilment of obligations laid down in Article 26 of the Chicago Convention (1944) may be seen in light of Standards 5.4 and 5.12 of ICAO Annex 13.

As to Standard 5.4 of Annex 13 on the separation of investigations, the technical investigation is prioritised over any other inquiries in the US. The technical investigation authorities have unhampered access to the accident scenes, evidence, and witnesses without any delay.<sup>19</sup> Furthermore, the separation of investigations is also guaranteed in the US.<sup>20</sup>

Regarding Standard 5.12 of ICAO Annex 13 on the non-disclosure of accident investigation records, the US only partially fulfils these obligations.<sup>21</sup> On the one hand, US legislation provides “some protection” for private and medical information, including non-disclosure of the cockpit voice recordings and transcripts, while courts in the US can order the “disclosure” for purposes other than accident investigation.<sup>22</sup> To that extent, US law appears to support the safety paradigm partially.

On the other hand, parts of investigation reports are subject to public reporting in the US.<sup>23</sup> FAA regulations prescribe that “facts, circumstances, and probable cause of every civil aviation accident” are not *per se* excluded

16 Question 7.009 ANS CE—2: Has the State promulgated specific operating regulations to transpose the ANS-related provisions of Annexes 2, 3, 4, 5, 10, 11, 12, and 15?

17 The details and level of abstracts of the posted differences vary. For example, the differences may be the use of different terms, as seen in the definition of ‘repetitive flight plan’. In the US, the term ‘stored flight plan’ is used for domestic operations instead of ‘repetitive flight plan’. Or, additional requirements may be introduced. See the difference posted concerning Standard 3.2.5. of ICAO Annex 2 in FAA, ‘Aeronautical Information Publication – AIP’ (Effective 20 April 2023) <[https://www.faa.gov/air\\_traffic/publications/atpubs/aip\\_html/index.html](https://www.faa.gov/air_traffic/publications/atpubs/aip_html/index.html)> Annex 2.

18 See, FAA, ‘Aeronautical Information Publication – AIP’ (Effective 21 March 2024) <[https://www.faa.gov/air\\_traffic/publications/atpubs/aip\\_html/index.html](https://www.faa.gov/air_traffic/publications/atpubs/aip_html/index.html)> Annex 2.

19 Questions 6.021, 6.023, 6.025, and 6.327.

20 Question 6.401.

21 This paragraph is based on the provided information by the US government, which can be found at FAA, ‘Aeronautical Information Publication – AIP’ (Effective 21 March 2024) <[https://www.faa.gov/air\\_traffic/publications/atpubs/aip\\_html/index.html](https://www.faa.gov/air_traffic/publications/atpubs/aip_html/index.html)> Annex 13.

22 The AIP does not specify which courts can order the disclosure and relevant types of proceedings. See also, responses to the PQ 6.031 of the US.

23 See, FAA, ‘Aeronautical Information Publication – AIP’ (Effective 21 March 2024) <[https://www.faa.gov/air\\_traffic/publications/atpubs/aip\\_html/index.html](https://www.faa.gov/air_traffic/publications/atpubs/aip_html/index.html)> Annex 13.

from publication.<sup>24</sup> Draft final reports are also not protected from publication. From that perspective, it would seem that the US tries to find a balance between safety and transparency.

Moreover, the interest of the administration of justice can prevail over safety. As discussed in the next sections, US courts can order the disclosure of information that is, in principle, protected by ICAO Annex 13. If a US court orders such disclosure, the balancing test between safety and transparency may be conducted in favour of transparency.

Hence, the unequivocal endorsement of the predominance of the safety paradigm, beyond that of transparency in the US Federal jurisdiction,<sup>25</sup> remains to be determined on a case-by-case basis.

## 4.2.2 Federal legislative framework of the US

### 4.2.2.1 Introduction

The United States Code (USC) and the Code of Federal Regulations (CFR) regulate the conduct of pilots at the Federal level.

The USC governs crimes and procedures in Title 18 and transportation in Title 49.<sup>26</sup> Both titles are codifications of positive law, meaning that courts are obliged to apply these laws as a matter of the principle of legality. These two titles of the relevant USC are visited in Section 4.2.2. of this Chapter.

The CFR lists ICAO SARPs as implemented in the US through administrative regulation.<sup>27</sup> Whereas the CFR does not deal with the criminal liability of pilots, the USC specifies such liability. The relationship between the CFR and USC is discussed in Section 4.2.2.3.

The following sections deal with US federal law as they determine the scope of pilots' criminal liability. Hence, the regulations of US states are not considered in this work.

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24 See, FAA, 'Aeronautical Information Publication – AIP' (Effective 21 March 2024) <[https://www.faa.gov/air\\_traffic/publications/atpubs/aip\\_html/index.html](https://www.faa.gov/air_traffic/publications/atpubs/aip_html/index.html)> Annex 13.

25 Chapter 2 of this research.

26 See also FAA, *Order 8020.11D – Aircraft Accident and Incident Notification, Investigation, and Reporting* (2018) 57. For an introduction to the US criminal justice system, please see Binder G, *The Oxford Introductions to US Law: Criminal Law* (Oxford University Press 2016).

27 Chapter 5 of this research.

#### 4.2.2.2 General criminal law (Federal criminal law-Crimes and Criminal Procedures (Title 18))

Chapter 2 of Title 18 of the USC, hereafter referred to as 18 USC, is dedicated to aircraft-related crimes.<sup>28</sup> According to paragraph 32, perpetrators of wilful acts of setting a fire, causing damage, destroying, disabling, and wrecking an aircraft or aircraft facilities to “endanger the safety” of the aircraft coming under the jurisdiction of the US and also of civil aircraft used in, principally, “interstate, overseas, or foreign air commerce,” are criminally liable.<sup>29</sup> Also, 18 USC paragraph 39B provides that unsafe operation of unmanned aircraft defines harming the safety of a passenger aircraft as an offence.<sup>30</sup> However, focusing on the actions of external actors, these crimes seem security-related rather than aircraft safety-related. Hence, Chapter 2 of 18 USC does not regulate the criminal liability of pilots operating aircraft according to the local flight and manoeuvre rules implemented in domestic law.

Chapter 17A of 18 USC shows a trace of international flight and manoeuvre rules. A passenger aircraft pilot for inter-state transport may be criminally liable for operating the aircraft under the influence of alcohol or psychoactive substances.<sup>31</sup> Relatively similarly worded as ICAO Annex 2 Standard 2.5 concerning problematic use of psychoactive substances,<sup>32</sup> paragraph 342 of 18 USC regulates the human performance referred to in ICAO Annex 2.<sup>33</sup> However, prohibition from operating an aircraft under the influence of alcohol or any other psychoactive substances applies to aircraft with passengers only. Therefore, this specific provision does not regulate pilots in general aviation flying without passengers.

Causing the death or injuries of passengers or persons on board may also constitute general Federal criminal law offences. For instance, 18 USC Chapter 51 regulates homicide, including murder or manslaughter.<sup>34</sup> Murder,

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28 18 USC Chapter 2. Next to aircraft, the mentioned Chapter 2 defines crimes regarding motor vehicles.

29 18 USC Chapter 2 §32 (a)(1). For the list of aircraft falling under the scope of the “special aircraft jurisdiction of the US,” see 49 U.S. Code § 46501 (2). The list includes any civil aircraft, aircraft with an armed force of the US, and aircraft with unlawful interferences that are in flight.

30 However, in the context of this research focusing pilots in the cockpit, this offence may be less relevant.

31 18 USC Chapter 17A § 342.

32 Standard 2.5 of ICAO Annex 2: “No person whose function is critical to the safety of aviation (safety-sensitive personnel) shall undertake that function while under the influence of any psychoactive substance, by reason of which human performance is impaired. No such person shall engage in any kind of problematic use of substances.”

33 Section 2.2.4.

34 18 USC Ch. 51 (1964)

as unlawful killing, involves malice,<sup>35</sup> and manslaughter does not require malice.<sup>36</sup> Therefore, the intent of the pilots at the moment of violations may be the key to determining whether pilots' conduct should be understood as murder or manslaughter. If a pilot's behaviour is identified as a lack of duty to care, it might be qualified as involuntary manslaughter.<sup>37</sup>

Moreover, even if no death occurs in an accident or no violations of *local* flight and manoeuvre rules can be determined, a pilot can still be prosecuted and punished under the abovementioned 18 USC, but only on the basis of security arguments constituting an external threat.<sup>38</sup> Such prosecution would namely be for criminal attempt, which would imply intent to cause the death of passengers on the part of the pilot.<sup>39</sup>

Beyond these potential bases for prosecution, provisions regarding crimes and procedures laid down in 18 USC barely operationalise the safety paradigm in the detailed manner in which ICAO Annex 13 envisages it.

From the perspective of legal certainty, clarity may be said to be reduced because the provisions on murder and manslaughter do not reflect aviation-specific actions for the safe navigation of aircraft. Particularly where subjective elements can be construed broadly, including as conscious risk-taking and offences can be construed as a failure to comply with duties of care, aviation violations may transpose into a criminal liability. Under what circumstances that can occur is not clear, however. An example is a deviation from the applicable flight and manoeuvre rules for safety reasons. Such deviation may cause the death of passengers or fellow crew members and make the conduct of pilots punishable under paragraph 32 of Chapter 2, 18 USC if a national judge were to determine that too great a risk was taken or the duties of care indicated alternative action.

#### 4.2.2.3 *Criminal air law (Federal aviation law)*

- *Federal Aviation Administration (FAA)*

US Federal aviation law regulates the mandate and activities of the Federal Aviation Administration (FAA) and National Transportation Safety Board (NTSB), whereas Title 19, Chapter I, Part 122 of the CFR on Air Commerce serves as an administrative legal framework for the navigation and use of aircraft and the transportation of persons and cargo by aircraft in air commerce. In certain cases, the National Aeronautics and Space Administration

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35 18 USC § 1111 – Murder.

36 18 USC § 1112 – Manslaughter.

37 18 USC § 1112 (a) – Manslaughter. *See also* the “non-aviation evaluation” explained in Chapter 3 of this research.

38 18 USC § 1113 – Attempt to commit murder or manslaughter

39 18 USC § 1113 – Attempt to commit murder or manslaughter

(NASA) may be involved as an independent third party in dealing with confidential incident reports.

Title 49 of the USC, hereinafter referred to as the 49 USC, governs US transport in general terms. The FAA supervises aviation,<sup>40</sup> and is subject to the authority of the Department of Transport.<sup>41</sup> Part A in Subtitle VII on Aviation Programs in 49 USC is dedicated to air commerce and safety. Among other provisions in Part A, Chapter 447, to which I refer as ‘US Safety Regulation’,<sup>42</sup> remains the core of the safety paradigm in the US.<sup>43</sup>

The US Safety Regulation contains flight and manoeuvre rules, as identified in Chapter 3 of this work, but not all of them.<sup>44</sup> They refer to tasks of the FAA in relation to violations, but not leading to the criminal prosecution. Violations are rather deeply discussed in Part 122 of the CFR and guidelines.<sup>45</sup> This is related to the main missions of the FAA. As a Federal agency which is responsible for civil aviation,<sup>46</sup> the FAA’s primary mission is to support the safety paradigm.<sup>47</sup> Based on this mission, the FAA manages aviation safety by implementing SARPs, including flight and manoeuvre rules contained in ICAO Annexes, as “minimum standards.”<sup>48</sup> This task also pertains to State oversight functions.<sup>49</sup> FAA functions include issuing licenses to the pilots and inspections, investigations, and surveillance to

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- 40 49 USC § 106 – Federal Aviation Administration (g) on Duties and Powers of Administrator. This applies except for transportation, packaging, marking, or description of hazardous material. In the US term, aviation is called “air commerce.” Air Commerce is defined as “foreign air commerce, interstate air commerce, the transportation of mail by aircraft, the operation of aircraft within the limits of a Federal airway, or the operation of aircraft that directly affects, or may endanger safety in, foreign or interstate air commerce.” *See*, 49 USC § 40102(a)(3)
- 41 49 USC § 102 – Department of Transportation
- 42 The USC does not define “safety regulation,” although the title of the referred chapter in 49 USC is “Safety Regulation”.
- 43 49 USC Part A – Air Commerce and Safety. Next to this, 49 USC Ch 465 discusses aviation criminal law but against external threats. Therefore, this is a matter of aviation security connected to safety. *See* Section 1.7.
- 44 The US Safety Regulations are relevant for aircraft design, construction, and operation, on the one hand, and for the aircraft and airmen’s certification, on the other hand. *See*, 49 USC § 44702, 49 USC § 44709
- 45 FAA, Airplane Flying Handbook, Chapters 9 and 10 at: Airplane Flying Handbook | Federal Aviation Administration (faa.gov)
- 46 Federal Aviation Act, P.L. 85-726, 72 Stat. 731. Approved 1958-08-23: “...to create a Federal Aviation Agency, to provide for the regulation and promotion of civil aviation...”
- 47 49 USC § 44701 – General requirements (a): “Promoting Safety. —The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing...”
- 48 49 USC § 44701 – General requirements (a): “Promoting Safety. —The Administrator of the Federal Aviation Administration shall promote safe flight of civil aircraft in air commerce by prescribing...”
- 49 Section 3.3.1.3 of this research.

ensure compliance,<sup>50</sup> as its primary duties. The prescribed minimum standards are published not only in the US Safety Regulation but also in the form of the CFR.

The US Safety Regulation refers to criminal liability only under 18 USC, which is a Federal criminal law, and under 49 USC, which is an air law, or a combination of these two acts. Paragraph 46317 of 49 USC provides that “an individual shall be fined under Title 18 or imprisoned for not more than three years, or both,” in case of knowingly and wilfully serving as a pilot without a pilot’s license.

- *National Transportation Safety Board (NTSB)*

Next to the FAA, the NTSB, which is an independent investigation authority of the US that has been established pursuant to Standards 3.1 and 5.4 of ICAO Annex 13, is mandated to investigate the causes of accidents or incidents in accordance with the purpose of the prevention of future accidents. In this sense, the NTSB appears to be a strong supporter of the safety paradigm. Therefore, it does not address the criminal liability of pilots in its investigations.

The NTSB enjoys prior access to the accident investigation scenes.<sup>51</sup> However, when there is an indication of a criminal offence at the accident investigation scene,<sup>52</sup> the priority given to the NTSB becomes invalid.<sup>53</sup> In such circumstances, the NTSB is required to preserve the accident locations until the judicial investigation team arrives.<sup>54</sup> The CFR does not prohibit the NTSB from sharing facts or exchanging information with the judicial investigation.<sup>55</sup> However, no agency other than the NTSB is competent to determine the technical cause or contributing factors of accidents.<sup>56</sup> In this regard, the separation between the technical and judicial investigations stipulated under ICAO Annex 13 is ultimately respected in the US.

The relationship between the NTSB and the responsibility of judicial authorities also appears in provisions on the disclosure of information.<sup>57</sup> Chapter 11 of 49 USC protects cockpit recordings and transcripts from public disclosure and judicial proceedings.<sup>58</sup>

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50 Section 3.3.1.3 of this research.

51 49 CFR 831.5(a)(3).

52 49 USC § 1131(a)(2)(B) and (C).

53 49 CFR 831.5 (a)(1).

54 FAA, *Order 8020.11D – Aircraft Accident and Incident Notification, Investigation, and Reporting* (2018) 27.

55 49 CFR 831.5 (a)(5).

56 49 CFR 831.5(b).

57 Standard 5.12 of ICAO Annex 13.

58 49 USC § 1114 (a)(1). Next to these two, trade secrets are also protected.

Except for cockpit recordings and transcripts thereof and other specified documents, 49 USC allows for the publication of records, information, or investigation submitted or received by the NTSB upon request.<sup>59</sup> Also, the NTSB may formulate safety recommendations referring to communication transcripts between pilots,<sup>60</sup> which would then be publicly disseminated as final accident reports. However, this does not mean these safety recommendations are admissible in court.

Despite provisions of the US FOIA,<sup>61</sup> the NTSB may withhold records if it is reasonably foreseeable that the disclosure would harm the interest of present and future technical investigations and if the relevant law prohibits it.<sup>62</sup> Therefore, the balancing test between the safety and transparency paradigms depends on the circumstances and context of the case at hand.

- *Codes of Federal Regulation (CFR) on Air Commerce*

Meanwhile, the CFR on Air Commerce prescribes US local flight and manoeuvre rules. Standards of ICAO Annexes 2 and 6 are implemented in the CFR Title 14 (14 CFR) Part 91. Part 91 refers to the Pilot-In-Command and pilots in general, the responsibility and authority of the PIC, careless or reckless operations, and protection of technical investigation reports.

14 CFR Section 91.3 attributes direct responsibility and final authority to the PIC. Such responsibility and authority are limited to the operation of the aircraft. This section is a direct reflection of Standard 2.1 of ICAO Annex 2.<sup>63</sup> Pursuant to this provision, the PIC, when in need of immediate action, is allowed to deviate from the US rules of the air, which are the local flight and manoeuvre rules. In that event, the PIC must notify the FAA in written form about the deviation, even if the violations may involve a careless or reckless operation. In an in-flight emergency requiring immediate action, the PIC may deviate from applicable safety rules to the extent required to meet that emergency.<sup>64</sup>

While 14 CFR Section 91.3. does not provide what conduct is considered a careless or reckless operation or an element constituting the mentioned operation, a guidance material of the FAA provides such. FAA does not only provide the list of acts that are considered as 'violations' but also provides

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59 49 USC § 1114 (c)(1). Interestingly, in 1968, based on the 28 U.S. Code § 1732 on Records made in the regular course of business, photographic copies enacted in 1948, tape recordings were admissible to the court, at least for the use in civil suits. See Kennelly JH, *Litigation and Trial of Air Crash Cases*, vol II (1968) Ch8, 22 and Wood TC, 'Admissibility of Accident Reports Required by Federal Law' (1966) 18 *Hastings Law Journal* 181.

60 49 USC § 1114 (c)(3)

61 Section 2.4.3.1 of this research.

62 49 CFR 801.1(a), 49 CFR 801.2(a). Yet, many materials are openly shared on the public docket of the NTSB for safety research purposes.

63 Section 3.4.1.3 of this research.

64 14 CFR 91 § 91.3 (b)

that “careless and reckless” needs to be proven based on the condition that the related operation is “below the standard of care expected of a reasonable pilot in the same or similar circumstances (careless) or reflecting a gross disregard for or deliberate indifference to safety or a safety standard (reckless).<sup>65</sup> Yet, the burden of proof lies on the FAA.<sup>66</sup>

As soon as the report of the PIC is completed and if the information concerns “accidents or criminal offences,” the FAA may not use it or information derived from it for enforcement purposes,<sup>67</sup> including for the purpose of preparing the imposition of civil sanctions or administrative actions such as the suspension of pilots’ certificates. This rule is in line with Standard 5.12 of ICAO Annex 13. However, from this ground, it is not clear if the FAA can disclose such information to judicial authorities.

Pilots other than the PIC may also report events outside accidents, including their own violations, to NASA under the Aviation Safety Reporting Program (ASRP).<sup>68</sup> The FAA is not allowed to use reports submitted to NASA under the ASRP or information derived therefrom in any enforcement action except information concerning accidents or criminal offences, which are wholly excluded from the Program.<sup>69</sup> Nevertheless, sanctions are waived for “inadvertent and not deliberate” violations, violations unrelated to a criminal offence, actions that prove a lack of qualification for a certificate, and non-repetitive violations based on the prior five years’ records.<sup>70</sup> Concurrently, there is other evidence which may be accepted as relevant to a prosecution. Digital flight data collected under the Flight Operations Quality (FOQA) Assurance Program can become evidence if a violation concerns “deliberate violations or a criminal offense.”<sup>71</sup>

65 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4.<[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024, 4.15 and 9-23.

66 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4.<[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024, 4.16.

67 14 CFR 91 § 91.25.

68 49 CFR 830. See also, NASA, ‘NASA Aviation Safety Reporting System’ <<https://asrs.arc.nasa.gov/report/caveat.html?formType=general>> accessed 13 October 2024.

69 14 CFR 91 § 91.25. See also, FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4.<[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024.

70 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4.<[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024.

71 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4.<[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024, 4-35.

However, there are also criminal conducts that can lead to criminal investigations. FAA refers to the “controlled substance violations” or illegal manufacturing, falsification or unauthorised reproduction of an aircraft component as criminal conduct in 49 USC.<sup>72</sup> Then, the FAA investigation intersects with criminal investigations, which means a concurrent investigation.<sup>73</sup> Sometimes, judicial authorities request the FAA to assist in criminal investigations, and criminal investigations may be prioritised over the enforcement of the FAA.<sup>74</sup>

Although it is out of the scope of this study because it relates to a military case, one study from 1988 provides an interesting perspective on the disclosure of records in the context of US military aviation.<sup>75</sup> The court in question states the following:

*“We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged.”<sup>76</sup>*

Considering horizontal transparency,<sup>77</sup> the court exempted the technical investigation reports designed to prevent accidents, implying that the record was not publicly disclosed. However, the court did use the other investigation report, which had been prepared to impose administrative sanctions against personnel.<sup>78</sup> The report was declared admissible as evidence. This leaves room for the same to happen in the criminal prosecution of a pilot.

72 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4. <[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024, 4-41.

73 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4. <[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024, 4-41 and 9-9

74 FAA, ‘FAA Compliance and Enforcement Program w/ Changes 1-11 (Order 2150. 3C w/ Changes 1-11)’ (2018) 3-4. <[https://employees.faa.gov/tools\\_resources/orders\\_notices/index.cfm/go/document.information/documentID/1034329](https://employees.faa.gov/tools_resources/orders_notices/index.cfm/go/document.information/documentID/1034329)> accessed 13 October 2024, 4-41 and 4-42.

75 See, Stevens BM, ‘Military Aviation Mishaps: The Right to Know under the Freedom of Information Act v. The Need for Safety Privilege’ (1988) 16(1) Western State University Law Review 287.

76 Cooper v. Department of Navy of United States, 558 F.2d 274 (5th Cir. 1977).

77 This report was created to prevent the accidents. See, Hayes SS, ‘The Freedom of Information Act in Air Crash Discovery: Friend or Foe’ (1986) 52 Journal of Air Law and Commerce 479, 495.

78 See, Hayes SS, ‘The Freedom of Information Act in Air Crash Discovery: Friend or Foe’ (1986) 52 Journal of Air Law and Commerce 479, 494: “The purpose of the JAGIR is the factual documentation of all matters pertaining to the accident which may serve as a basis for legal or administrative action. Id. This investigation is independent of all others and is primarily concerned with assessing property damage and unearthing possible negligence and neglect of duty.”

### 4.2.3 Enforcement

The Criminal Division of the US Department of Justice supervises “all Federal criminal laws.”<sup>79</sup> US Attorneys represent the Federal government in criminal cases in the relevant district.<sup>80</sup> Therefore, criminal prosecution of pilots falls under the duties of the US Attorneys.<sup>81</sup>

The Attorney General may also be involved in the investigation of aviation-related accidents. Under its authority to appoint Federal Bureau of Investigation’s officials to “detect and prosecute crimes” against the US,<sup>82</sup> in consultation with the Chairman of the NTSB, the Attorney General may have priority access to the accident cases for criminal investigations.<sup>83</sup>

### 4.2.4 Case Law<sup>84</sup>

#### 4.2.4.1 *United States v. Eddie E. Webber (1963)*<sup>85</sup>

On 12 April 1961, airman Webber was charged with the wrongful appropriation of an aircraft and violation of Air Force Regulations by taxiing onto the runway without clearance, taking off without clearance, and operating the aircraft with fewer crew members than required by law. Although this case was based on the Air Force Regulation,<sup>86</sup> the judges reviewed the case referencing US rules of the air.

79 The US Department of Justice, *Justice Manual* <<https://www.justice.gov/jm/justice-manual>> 9-1.000 – Department of Justice Policy and Responsibilities.

80 28 USC § 547 and *see also* 28 USC § 541 (a).

81 *See also*, The US Department of Justice, *Justice Manual*, Title 9 Criminal, 9-2.000 and 9-2.030 <<https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.030>> accessed 13 October 2024.

82 28 USC §533.

83 Section 4.2.2.3 of this research.

84 There have been more extensive discussions on the use of technical accident investigation reports in the US. *See Chiron Corp. v. National Transp. Safety Bd.*, 198 F.3d 935 (D.C. Cir. 1999), Janicki WD, ‘Aircraft Accident Reports and Other Government Documents: Evidentiary Use in International Air Crash Litigation in the United States’ (2009) 74 *Journal of Air Law and Commerce* 801, and Rosa JD, ‘Federal Accident Investigations: Civil Litigation Viewpoint’ (2018) 83 *Journal of Air Law and Commerce* 561. For cases that are dealt with administratively, *see Chirino v. NTSB*, 270 U.S. App. D.C. 396, 849 F.2d 1525 (1988), *Johnson v. NTSB*, 979 F.2d 618 (1992), and *Coghlan v. NTSB*, 470 F.3d 1300 (2006).

85 *United States, Appellant v. Eddie E. Webber, Airman Third Class, U. S. Air Force, Appellee* – 13 USCMA 538, 33 CMR 68. (No. 16,384 March 15, 1963). This case is not about international civil aviation since the aircraft was a military pilot. However, this judgment shows the applicability of US local flight and manoeuvre rules.

86 Air Force Regulation 60-16 of 1961. *See also*, McCuiston B, ‘Publicize the Violator’ (1948) 4 *Flying Safety* 8, 9: “On the cases discussed above, you will notice that the most frequent violations are of Air Force Regulations 60-16, 60-16A. Air Force Regulation 60-16 covers just about everything a pilot should know in regard to flying, and it believes all pilots to be aware of its contents.”

The judgment confirmed that there is no regulation specifically criminalising the actions of the military pilot, taxiing on an active runway, taking off without clearance under US law, and operating the aircraft with fewer crew members. The court referred to the USC on the responsibility of the FAA personnel concerning ensuring aircraft safety and applicable penalties. These sections do not criminalise the actions of the pilot in question.<sup>87</sup>

The court held the following:

*“Certainly, it is not good practice; and perhaps under some circumstances, it may constitute such gross disregard for the safety of persons or other aircraft as to be criminal. Perhaps all of accused’s acts constitute departures from common sense rules of air traffic, but in the absence of statute or regulation and injury to persons or property, it is not criminal to fail to exercise the degree of care a reasonable person in like circumstances should exercise.”<sup>88</sup>*

The court reaffirms the *legal certainty* paradigm because no one can be criminally liable without an underlying law defining a crime and punishment. Without an adequate legal framework, it was only a matter of presumption to claim that wrongful behaviour and bad practices, as opposed to “good practice,” are crimes.<sup>89</sup> It appears that the safety paradigm was not given significant weight by the court.<sup>90</sup>

#### 4.2.4.2 *Gol aircraft mid-air crash (2006)*<sup>91</sup>

Airmen Lepore and Paladino flew an Embraer executive jet on 29 September 2006. Tragically, this jet collided mid-air with a Boeing 737 with 154

87 The court refers to 49 USC §§1348(c), (d), 1471(a)(1) supplemented by 14 CFR Section 60.18 as a potentially supporting rule. 49 USC §§1348(c), (d), is revised by 49 USC §§ 40103 (b)(1) and (b)(4) Sovereignty and use of airspace. 49 USC §1155 on penalties under the FAA. The Court added that these provisions are supported by 14 CFR 60.18., which no longer exists. See also, Easton JF and Mayer W, ‘The Rights of Parties and Civil Litigants in an NTSB Investigation’ (2003) 68(2) *Journal of Air Law and Commerce* 205.

88 *United States, Appellant v. Eddie E. Webber, Airman Third Class, U. S. Air Force, Appellee – 13 USCMA 538, 33 CMR 68. (No. 16,384 March 15, 1963), 538.* While the analysis is based on the document copy of the case, the review opinion can be retrieved openly at <<https://www.courtlistener.com/opinion/8596205/united-states-v-webber/>> accessed 13 October 2024.

89 *United States, Appellant v. Eddie E. Webber, Airman Third Class, U. S. Air Force, Appellee – 13 USCMA 538, 33 CMR 68. (No. 16,384 March 15, 1963), 538.*

90 The court also reviewed a question on ‘wrongful appropriation,’ but the discussion was less relevant for the current study. As to ‘wrongful appropriation,’ there is a provision that criminalises the conduct. However, the review discussed whether there was a ground to maximise the penalty because the appropriation took place to an aircraft.

91 The competent authorities of Brazil started criminal prosecution against pilots and air traffic controllers. Only partial records of the case are available. However, this Section in the study still contains the particular analysis of the US jurisdiction because this accident raised a distinctive dispute between the US and Brazil based on Article 12 of the Chicago Convention (1944). This dispute initiated the creation of a task force group of ICAO, which is still active at the time of writing of this Chapter.

persons on board.<sup>92</sup> The accident resulted in the fatalities of everyone on board the aircraft of Boeing 737 of Gol Transportes Aereos Flight 1907.<sup>93</sup> The passengers of the Embraer Legacy 600 survived the collision.<sup>94</sup> The accident brought a technical investigation and complex proceedings, which included not only litigation concerning compensation of damages in various courts but also criminal proceedings in two jurisdictions,<sup>95</sup> the US and Brazil.

Foremost, the Brazilian investigation board took the lead in the technical investigation.<sup>96</sup> This authority analysed whether human factors, operational aspects, and/or medical factors had influenced the cause of the accident. While the report concludes that no medical factors had contributed to the accident, it found human and operational factors, which resulted in the designation of blame on the pilots of the jet.<sup>97</sup> The report states the following:

*“Relatively to the crew of the N600XL [the GOL aircraft] the following active failures were identified: lack of adequate planning of the flight, and insufficient knowledge of the flight plan prepared by the Embraer operator; non-execution of a briefing prior to departure; unintentional change of the transponder setting, failure in prioritizing attention; failure in perceiving that the transponder was not transmitting; delay in recognizing the problem of communication with the air traffic control unit; and non-compliance with the procedures prescribed for communications failure.”<sup>98</sup>*

As a corollary, the investigation board expanded its investigation to include legal analyses focussing on the behaviour of the jet’s pilots. The board scrutinised this point under US law in its technical investigation, including in relation to the conditions for licensing jet pilots.<sup>99</sup> The structure of the legal analysis consists of sections of US Federal law regarding the pilots’ position, the aircraft’s navigation, and the flight causing the accident.

92 See Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008)

93 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 21.

94 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008)22.

95 In re Air Crash Near Peixoto De Azeveda, Brazil, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) 275 and 277.

96 Other investigation authorities and industrial bodies, such as the NTSB, FAA, the Transportation Safety Board of Canada, Embraer, ExcelAire, Honeywell, and ACSS, supported the investigation. See In re Air Crash Near Peixoto De Azeveda, Brazil, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) paras 4-5 and Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 32.

97 As to the pilots to PR-GTD, the report stated that: “Neither active failures were identified in relation to the crew, nor latent failures in relation to the organizational system of the company.” See, Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008)258.

98 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 258.

99 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 66.

Looking at the flight rules of 14 CFR Part 91,<sup>100</sup> the investigation authority had concluded that the persons in question were qualified pilots according to 14 CFR Part 61 with the flight operating under the instrument flight rules.<sup>101</sup> The report also states that the pilots were competent.<sup>102</sup> Two points were particularly relevant:

*Firstly*, because the accident occurred in the territory of Brazil, the rules of the air for the pilots of the American jet must or should have been flown in compliance with the Brazilian rules of the air.<sup>103</sup>

*Secondly*, the report does not mention whether the errors led to the finding of reckless or negligent operation of the aircraft. Interestingly, none of the human errors as found to be the contributing cause of the accident were even considered violations of relevant procedures or rules.<sup>104</sup>

One day before the final report of the investigation was released,<sup>105</sup> the Brazilian authorities prosecuted the US pilots of the Embraer jet,<sup>106</sup> charging them with “violating Article 261, § 3, in conjunction with Article 263 of the

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100 14 CFR Part 91 – “General Operating and Flight Rules”. See also, Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (2008) 66.

101 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 68. See also, Section 3.4.1.3.

102 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 76: “The pilots were experienced, certified as ATP, possessed a significant number of flight hours, were in good health and had prestige in the company, had already flown other high performance aircraft and were motivated.”

103 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 67 and 68: “The newly delivered airplane, already with the ‘N600XL’ American registration, was flying between two Brazilian airports, with a planned navigation of 2 (two) airways of the national airspace. Therefore, the flight of the aforementioned aircraft is considered as a flight of the General Aviation, under the rules set in the RBHA 91 – ‘REGRAS GERAIS DE OPERAÇÃO PARA AERONAVES CIVIS’, which is almost totally similar to the 14 CFR Part 91 – ‘GENERAL OPERATING AND FLIGHT RULES’.”

104 Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (29 September 2006) (2008) 194 and Annex: “The flight crew of N600XL, although not in violation of any regulations, was not aware of the loss of transponder and collision avoidance functionality, lack of ATC communication, and the flight’s progress reference altitude convention. The team agrees that safety lessons in these areas can be determined to better prepare flight crews for international operations.”

105 The judicial authorities were involved from the beginning of the investigation. See Command of Aeronautics General, Final Report A-00X/CENIPA/2008 (29 September 2006) (2008) 240: “The authorities responsible for the judicial processes aiming at the verification of the criminal liabilities requested all the material gathered by this commission until then, when two months had elapsed after the accident. For this reason, the attorneys representing the controllers instructed their clients not to give any declarations, even after it was exhaustively explained that the purpose was to prevent the occurrence of further accidents.”

106 In re Air Crash Near Peixoto De Azeveda, Brazil, 574 F. Supp. 2d 272 (E.D.N.Y. 2008) 283

Brazilian Penal Code.”<sup>107</sup> Article 261 of the Brazilian Penal Code applies to the endangerment of maritime, river or air transport safety. With paragraph 3, if the endangerment occurs due to a fault, the penalty of detention from six months to two years applies. Article 263 states that if the endangerment results in harm or death of a person, an additional penalty applies under Article 258 of the Brazilian Penal Code.<sup>108</sup> The pilots, who were convicted, denied “any wrongdoing,” claiming that the equipment supporting their instrumental flight was never turned on and, hence, they could not have done better.<sup>109</sup> However, in appeal, the Brazilian court upheld the convictions.<sup>110</sup> Besides the pilots, an air traffic controller was convicted with the penalty to carry out community service while a temporary ban on carrying out relevant professional duties. <sup>111</sup> In addition, a military lawsuit was filed against the controller.<sup>112</sup>

Seven years after the accident, Brazil requested ICAO to interpret Article 12 of the Chicago Convention (1944). Brazil claimed that the US did not fulfil its obligation to ensure the prosecution of the airline personnel having violated Standard 3.1.1 of ICAO Annex 2,<sup>113</sup> by not adopting enforcement action, even while the Brazilian authorities, interpreting the international rules of the air as implemented in Brazilian legislation, had found the US pilots guilty and convicted them according to Brazilian law. Subsequently, the Brazilian authorities contended that the decision of the US government not to proceed with any enforcement action should be considered a breach

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- 107 Supreme Federal Court of Brazil, HC 105301 MC / MT – Mato Grosso Precautionary Measure in Habeas Corpus (Judgment 31 August 2010).
- 108 See, Brazilian Penal Code of 1940, art 261: “*Atentado contra a segurança de transporte marítimo, fluvial ou aéreo – Expor a perigo embarcação ou aeronave, própria ou alheia, ou praticar qualquer ato tendente a impedir ou dificultar navegação marítima, fluvial ou aérea; § 3º : “Modalidade culposa – No caso de culpa, se ocorre o sinistro: Pena – detenção, de seis meses a dois anos. Modalidade culposa”; and “Forma qualificada – art 263 – Se de qualquer dos crimes previstos nos arts. 260 a 262, no caso de desastre ou sinistro, resulta lesão corporal ou morte, aplica-se o disposto no art. 258.”*
- 109 Reuter, ‘Brazil Upholds U.S. Pilots’ Conventions in 2006 Air Disaster’ (2012) <<https://www.reuters.com/article/us-brazil-crash-retrial-idUSBRE89F03C20121016>> accessed 13 October 2024.
- 110 Reuter, ‘Brazil Upholds U.S. Pilots’ Convictions in 2006 Air Disaster’ (2012) <<https://www.reuters.com/article/us-brazil-crash-retrial-idUSBRE89F03C20121016>> accessed 13 October 2024.
- 111 Aeroflap, ‘Flight 1907: 14 years after the GOL accident, what has changed since then?’ (2023) <<https://www.aeroflap.com.br/en/voo-1907-gol/>> accessed 13 October 2024.
- 112 Supreme Federal Court of Brazil, HC 105301 MC / MT – Mato Grosso Precautionary Measure in Habeas Corpus (Judgment 31 August 2010). The air traffic controller was sentenced to one year and two months in prison.
- 113 ICAO, *Council Minutes C-Min 211/9 – Summary Minutes of the Ninth Meeting* (2017) 4 and 9. See also Section 3.4.1.3 of Chapter 3 analysing Standard 3.1.1 of Annex 2: “An aircraft shall not be operated in a negligent or reckless manner so as to endanger life or property of others.”

of a treaty obligation.<sup>114</sup> The US government did not substantively counter-argue against the criminal liability of pilots as it held that it had been too long since the occurrence of the accident.<sup>115</sup>

Although the application raised significant questions as to the interpretation of Article 12, the different approaches adopted by Brazil and the US regarding the prosecution of the pilots and enforcement of the Brazilian convictions did not yield a concrete conclusion. Instead, both States agreed to form a task force group designed to create a communication mechanism and draw up guidelines for the implementation of Article 12 of the Chicago Convention (1944).<sup>116</sup> The task force group work is still ongoing.<sup>117</sup>

This case demonstrates the sheer complexity of determining whether the pilots acted in contravention of the criminal law of the State of occurrence, that is, the State where the accident happened, in this case, Brazil, and the State which issued the pilot licenses, in this case, on the side of the Embraer aircraft, the US. Both aircraft, including instruments to navigate these aircraft (avionics), were manufactured in the US. While the Brazilian and US investigation bureaus agreed on many points, they disagreed on others. The Brazilian (CENIPA) report concludes that the accident was caused by mistakes made both by air traffic control (ATC) and the Embraer pilots, whereas the NTSB report focuses on the air traffic controllers, concluding that both flight crews acted properly but were placed on a collision course by the ATC.<sup>118</sup>

#### 4.2.4.3 *United States v. Cope* (2012)<sup>119</sup>

On 8 December 2009, airman Cope, who served as the co-pilot and the first officer of United Express Flight 7686, flew from Austin, Texas, to Denver,

114 ICAO, *Council Minutes C-Min 211/9 – Summary Minutes of the Ninth Meeting* (2017) 10.

115 ICAO, *Council Minutes C-Min 211/9 – Summary Minutes of the Ninth Meeting* (2017) 4-9.

116 ICAO, *Assembly Working Paper A40-WP/101: Article 12 of the Chicago Convention: Communication Mechanism and Guidelines to Support Its Implementation* (2019), ICAO, *A39-WP/251 – Common Guidelines on Article 12 of Chicago Convention Enforcement of Violations Committed by Foreign Air Carriers (Presented by Brazil)* (2016), ICAO, *Legal Committee Working Paper LC/38-WP/3-1: Review of the General Work Programme of the Legal Committee* (2022), and ICAO, *Legal Committee Working Paper LC/38-WP/7-2: 75th Anniversary of the Legal Committee of the International Civil Aviation Organization* (2022).

117 Status of August 2024: The report of the task force group was expected to be published in the subsequent session of the ICAO, which is June 2024. In the session of June, the Legal Committee reported that the task force group continues to scope the application of Article 12 and to develop a web-based tool for better communication among States. See, ICAO, *Assembly Working Paper LC/41-WP/53: Work Programme of the Organization in the Legal Field* (2022) 4. And ICAO, *Legal Committee Working Paper LC/39-WP2-1: Consideration of Other Items on the General Work Programme of the Legal Committee* (2024) 2.

118 See, Lacagnina M, 'Midair over the Amazon' in *AeroSafety World* (February 2009) 11

119 *United States v. Cope*, 676 F.3d 1219 (2012) [*United States v. Cope*]

Colorado, under the influence of alcohol. The captain of the flight, Mr Obodzinski, testified that the night before the flight, he saw that Mr Cope did not seem well. On the day of the flight, Mr Obodzinski noticed the smell of alcohol in the cockpit and concluded that Mr Cope was the source of the scent. After completing the flight, Mr Obodzinski delayed the next leg and communicated with the chief pilot and human resources officer of the airline. He took Mr Cope to the breath analyser testing facility, where Mr Cope was found to be under the influence of alcohol. Mr. Cope was prosecuted and convicted based on 18 USC §342, which criminalises the operation of aircraft under the influence of alcohol.<sup>120</sup>

However, Mr. Cope argued that under the relevant FAA regulation, Title 14 CFR Section 91.17, prohibiting acting or attempting to act as a crew member of a civil aircraft under the influence of alcohol,<sup>121</sup> he should not be convicted. This is because the FAA is not an enforcement body of criminal law.<sup>122</sup> Also, the violation of this FAA regulation could not lead to prosecution because violation of the FAA rules does not constitute a crime since the FAA regulation is administrative legislation.<sup>123</sup>

The relevant court confirmed that his action was not a crime under CFR Title 14 Section 91.17. In this respect, the court argued that non-criminal forms of liability do not automatically lead to criminal liability, citing another case that provides “although the evidence concerning a civil violation may be used to prove knowledge or intent.”<sup>124</sup> Instead of the administrative violation, the court held Mr Cope criminally liable based on the testimony of other crew members and breath analyser test results as evidence to find him guilty of being under the influence of alcohol under 18 USC 342.<sup>125</sup> This case shows that the violation of the US’ local flight and manoeuvre rules may not be considered a criminal offence.<sup>126</sup>

#### 4.2.4.4 *United States v. Fitzgerald* (2018)<sup>127</sup>

On August 25, 2016, Captain Fitzgerald of Talon Air, Traverse City, Michigan, was in the process of preparing a flight while intoxicated. Mr. Fitzgerald’s co-pilot recognised his inebriation and alerted Talon Air executives, who contacted law enforcement. Subsequently, Mr. Fitzgerald was arrested

120 “Whoever operates or directs the operation of a common carrier while under the influence of alcohol or any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), shall be imprisoned not more than fifteen years or fined under this title, or both.”

121 Title 14 CFR Section 91.17 (a), §(2).

122 Sections 4.2.2.3 and 4.2.3 of this research.

123 *United States v. Cope*, §1229.

124 *See Prouse* (945 F.2d), 1024 and *United States v. Hilliard* (31 F.3d 1509, 10th Cir. 1994), 1516.

125 Pursuant to the above quoted provisions of 18 USC §342.

126 14 CFR Chapter I Subchapter F – Air Traffic and General Operating Rules (Parts 91 – 108-109)

127 *United States v. Fitzgerald*, 906 F.3d 437 (6th Cir. 2018) [*United States v. Fitzgerald*]

and charged under 18 USC §342 for operating a common carrier while intoxicated.<sup>128</sup> He was convicted by a jury and received a sentence of one year and one day in prison, with three years of supervised release.<sup>129</sup> While this case seems similar to the one of Cope above, the question of whether the violation of the administrative rule of 14 CFR 91.17 qualified as a criminal offence was not a concern. Fitzgerald appealed, contesting the definition of “operate” under 18 USC §342, the correctness of jury instructions, and alleged errors during sentencing.

The central issue concerned the interpretation of the term “operation” of an aircraft in 18 USC §342,<sup>130</sup> instead of the violation of the relevant CFR being an administrative rule. Fitzgerald argued for a limited interpretation of 18 USC §342, restricting it to actions in which passengers were aboard, or the engines were turned on rather than the preflight actions in which he was engaged.<sup>131</sup> In contrast, the government advocated for a broader interpretation encompassing pre-flight activities.<sup>132</sup> According to Fitzgerald, the charge was not foreseeable under the legal certainty paradigm. The district court instructed the jury that “operate” contained actions directly linked to the operational requirements of the flight, regardless of passenger presence or whether or not the aircraft was in motion.<sup>133</sup>

The US Court of Appeals for the Sixth Circuit upheld Fitzgerald’s conviction, emphasising that this interpretation aligned with practicality and the statute’s primary goals. The first goal of the law is to protect passengers by deterring intoxicated pilots from operating the aircraft,<sup>134</sup> that is aviation safety.<sup>135</sup> Practically, Mr Fitzgerald had control over the aircraft for an hour,<sup>136</sup> meaning he had operated the aircraft.<sup>137</sup> Clearly, as a reasonable person, Mr. Fitzgerald had “fair notice that he was acting illegally” as a consequence of his state of health.<sup>138</sup>

According to the court, in aviation cases, the interpretation of a technical term like “operation” in the 18 USC should reflect the technical practical-

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128 *United States v. Fitzgerald*, §441.

129 *United States v. Fitzgerald*, §§441-442.

130 *United States v. Fitzgerald*, §442.

131 *United States v. Fitzgerald*, §442.

132 *United States v. Fitzgerald*, §442.

133 *United States v. Fitzgerald*, §445.

134 *United States v. Fitzgerald*, §447.

135 *United States v. Fitzgerald*, §448.

136 *United States v. Fitzgerald*, §449: “...Fitzgerald manipulated several of the airplane’s controls for nearly an hour, turning on the auxiliary power unit, calibrating the altitude-measuring device, programming the flight-management system, and communicating with air-traffic control. Any one of these actions alone might have provided sufficient evidence of operation.”

137 Such interpretation also fits the definition of aviation safety contained in ICAO Annex 19. See Section 1.7.1 of this research.

138 *United States v. Fitzgerald*, §448.

ity of aviation and the purpose of the law, that is, the protection of safety. Although the interpretation may be broader than the pilot in question understood, the safety paradigm, which aims to prohibit unsafe pilot behaviour, seems to have prevailed, albeit causing some tension with the legal certainty paradigm.

#### 4.2.5 Concluding remarks of Section 4.2

Pursuant to the legal framework of the US, pilots may be prosecuted in the US based on Federal common criminal law and specific aviation law provisions. However, due to the nature of US technical regulations in aviation, namely, the CFR being administrative legislation, the prosecution of pilots based on (only) violations of the relevant CFR, that is, the local flight and manoeuvre rules, may be hindered if those rules are not also covered by criminal law.

In the US, the safety paradigm appears to occupy a prominent position in legislation, especially in aviation legislation, and receives principal attention in case law. Other paradigms, that is, legality and transparency, are also relevant and are referred to. How these paradigms unpack in concrete cases lies significantly, besides in the facts and circumstances, within the discretion of courts, while outcomes can vary significantly. The absence of substantial case law also impedes the gradual clarification of the delineation of criminal liability in this respect.

### 4.3 THE UK REGIME

#### 4.3.1 The participation of the UK at the Conference preparing the Chicago Convention (1944) and in the ICAO

##### 4.3.1.1 *The Chicago Convention (1944)*

The UK was one of the initial signatories of the Chicago Convention (1944).<sup>139</sup> In 1947, the UK also ratified the Chicago Convention (1944) on behalf of its Crown Dependencies and Overseas Territories.<sup>140</sup> The Chicago Convention (1944) came into force for the UK in 1947.<sup>141</sup>

139 See *Proceedings of the International Civil Aviation Conference* (United States Government Printing Office 1948) 118. See also, US Department of State, 'Depository – Treaty Affairs – 01 Convention on International Civil Aviation, done at Chicago December 7, 1944.' (2019) <<https://www.state.gov/convention-on-international-civil-aviation-chicago>> accessed 13 October 2024.

140 Foreign, Commonwealth & Development Office of the UK, 'UK Treaties Online – Convention on International Civil Aviation' <[https://treaties.fcdo.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=qs%3D%5Bconvention%20on%20international%20civil%20aviation%20%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2\\_lib](https://treaties.fcdo.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=qs%3D%5Bconvention%20on%20international%20civil%20aviation%20%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2_lib)> accessed 13 October 2024.

141 Foreign, Commonwealth & Development Office of the UK, 'UK Treaties Online – Convention on International Civil Aviation' <[https://treaties.fcdo.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=qs%3D%5Bconvention%20on%20international%20civil%20aviation%20%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2\\_lib](https://treaties.fcdo.gov.uk/responsive/app/consolidatedSearch/#search/v=list,c=1,q=qs%3D%5Bconvention%20on%20international%20civil%20aviation%20%5D%2CqueryType%3D%5B64%5D,sm=s,l=library2_lib)> accessed 13 October 2024.

Section 4.3 contains the analysis of the relevant legislation in the metropolitan area of the UK, that is, England and Wales.<sup>142</sup> The Crown Dependencies and Overseas Territories do not enjoy sovereignty but have autonomy regarding aviation,<sup>143</sup> meaning that only England and Wales are represented in the ICAO Council. As these two parts of the UK have separate jurisdictions, including those related to the criminal liability of pilots, this section focuses only on the metropolitan UK.

4.3.1.2 *The implementation of ICAO SARPs with reference to the criminal liability of pilots*

The most recent Universal Safety Oversight Audit Programme (USOAP) results of the UK are dated 2018. These results are as follows:

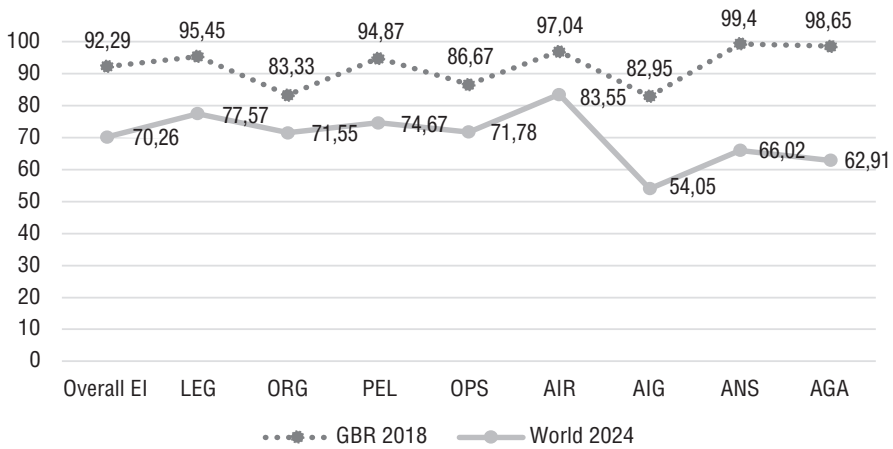


Figure 3 USOAP Result Comparison – The UK v. Global Average (13 October 2024)

The Figure above shows that in 2018, the UK’s implementation level was 92.29%, significantly above the global average, making it one of the leading States in the implementation of SARPs.

To begin with, the UK declares that there is no “significant” difference between the UK legislation and ICAO Annex 1 but that there are such differences between the UK legislation and ICAO Annexes 2, 6, and 11. In implementing its obligations in Article 26 of the Chicago Convention (1944), UK legislation does not provide protection against public disclosure of a draft

142 UKCAA, ‘State Safety Program – the UK Aviation System’ <<https://www.caa.co.uk/safety-initiatives-and-resources/how-we-regulate/state-safety-programme/safety-policy-objectives-and-resources/the-uk-aviation-system/>> accessed 13 October 2024.

143 When the Crown of the UK authorises, the Crown Dependencies and Overseas Territories can become parties to international treaties. See, for example, Hendry I and Dickson S, *British Overseas Territories Law* (2nd edn, Hart Publishing 2018) 23. See also, Section 1.4.2 of this research.

final report, meaning that Standard 5.12 of ICAO Annex 13 is not implemented.<sup>144</sup> However, it is unclear if the draft final report can be used to establish a criminal offence; this is not clear from the UK's self-assessment or the AIP.

Other than this, there appears to be some discrepancy between the self-assessment results and the AIP of the UK regarding the implementation status. Therefore, this study looks further into the legislative framework in more detail.

### 4.3.2 Legislative framework of the UK

#### 4.3.2.1 Introduction

In the UK, both general criminal and criminal air laws regulate pilots' criminal liability. The Air Navigation Order of 2016, amended in April 2022, hereinafter the ANO 2022, governs the criminal liability of pilots.<sup>145</sup> Civil aviation requires various other regulations. For instance, the responsibility and mandate of the UK Civil Aviation Authority (UKCAA) are referred to in the Civil Aviation Act 1982 of the UK.<sup>146</sup> Next to this, the UK Reg (EU) No 996/2010, hereinafter the 'UK Accident Investigation Regulation', is also relevant for this research.

#### 4.3.2.2 General criminal law

In the UK, statutory law, common law, and legal principles regulate criminal offences. The Offences Against the Person Act of 1861 functions as the primary source applicable to pilots in that this Act regulates homicide or harm caused to persons.<sup>147</sup>

This study does not delve into offences described under the general criminal law, however, because UK air law does specifically govern the acts of pilots, also in terms of criminal liability. The following sections explain this approach, pursuant to which aviation cases are dealt with under the *lex specialis* of UK aviation law.

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144 Self-assessment of the UK, See PQ 6.417 and 'Aeronautical Information Publication of the UK' (Effective 5 Sept 2024) <<https://www.aurora.nats.co.uk/htmlAIP/Publications/2024-09-05-AIRAC/html/index-en-GB.html>> accessed 13 October 2024.

145 The UK, Air Navigation Order 2016 SI 2016 No 765, Air Navigation Order 2016/765 last amended 13 April 2022 (hereinafter the 'ANO 2022'). There are also other acts in the UK that enforce prosecution, such as the Airport Acts 1986 or the Aviation Security Act 1982.

146 Civil Aviation Act 1982 of the UK (UK Public General Acts 1982 c. 16) Section 3.

147 There has been an attempt to prosecute a pilot based on Section 1(1) of the Criminal Attempts Act 1981 that provides: "[i]f, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence." See, UKCAA, 'CAA Announces Charges Relating to the Accident Involving N264DB' (2020) <<https://www.caa.co.uk/news/caa-announces-charges-relating-to-the-accident-involving-n264db/>> accessed 13 October 2024.

#### 4.3.2.3 Criminal air law

- *The Air Navigation Order 2022 (ANO 2022)*

In the UK, Article 265 of the ANO 2022 forms the legal basis for the criminal liability of pilots.<sup>148</sup> Its provisions prescribe offences and penalties. Breaches of the ANO 2022, including rules on approvals, licenses, and certificates, are considered offences.<sup>149</sup> Besides prosecution, the ANO also provides for civil sanctions.

The criminal offences under ANO 2022 are drawn up in separate lists.<sup>150</sup> These include negligent or reckless operation of the aircraft, which is likely to endanger safety,<sup>151</sup> or problematic use of psychoactive substances as punishable conduct.<sup>152</sup> The rules on approvals, licenses, and certificates are referred to in the Aviation Safety (Amendment, etc.) (EU Exit) Regulations 2019. The concerned offences apply to aircraft, operators, and the PIC.<sup>153</sup>

- *UK Accident Investigation Regulations and MoU*

Even after the UK exit from the EU, the EU Regulation on the investigation and prevention of accidents and incidents in civil aviation remained applicable in the form of the UK Regulation (EU) No 996/2010, hereinafter the “UK Accident Investigation Regulation,”<sup>154</sup> supplemented by the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018.<sup>155</sup> This Regulation provides the basis for the implementation of the safety paradigm and the relevant SARPs of ICAO Annex 13.<sup>156</sup>

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148 ANO 2022 Article 265 Offences and penalties.

149 ANO 2022 Article 265 (1).

150 ANO 2022 Article 265 (5), (6), and (7). *See also* Parts 1, 2, and 3 of Schedule 13 of the ANO 2022.

151 The Crown Prosecution Service, ‘Transport Offences’ (2019): ‘Likely’ means “a real risk, a risk that should not be ignored” rather than more likely than not: *R v Whitehouse* [2000] Crim LR 172, CA’ <<https://www.cps.gov.uk/legal-guidance/transport-offences>> accessed 13 October 2024.

152 Air Navigation Order 2016, Article 240. However, Section 240 may apply more to external threats against the aircraft and persons on board. Air Navigation Order 2016, Section 265, paragraphs 7 and 8. *See also* UK Reg (EU) No 923/2012 (as amended), SERA 2020 and 3101. The wording of the SERA specifications is equivalent to the rules of the air contained in Annex 2 to the Chicago Convention (1944). *See* Section 2 of Air Navigation Order 2016. This includes when the pilot does not do the pre-flight inspections. *See* the Commission Regulation (EU) No 593/2012 amending Regulation (EC) No 2042/2003 on the continuing airworthiness of aircraft and aeronautical products, parts and appliances, and on the approval of organisations and personnel involved in these tasks, Annex I (Part-M), M.A.201(d): “The pilot-in-command or, in the case of commercial air transport, the operator shall be responsible for the satisfactory accomplishment of the pre-flight inspection. This inspection must be carried out by the pilot or another qualified person but need not be carried out by an approved maintenance organisation or by Part-66 certifying staff.”

153 ANO 2022 Article 265 (1).

154 The UK Reg (EU) No 996/2010 (the UK Accident Investigation Regulation) based on the Regulation (EU) No 996/2010 of the European Parliament and of the Council of 20 October 2010 on the investigation and prevention of accidents and incidents in civil aviation and repealing Directive 94/56/EC (Text with EEA relevance) (Retained EU Legislation).

155 Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 2018 of the UK (Statutory Instruments 2018 No. 321 coming into force on 9 April 2018).

156 Section 4.3.1.2 of this research.

Next to the legal framework, there is also a practical arrangement. The Aviation Accident Investigation Authority of the UK (AAIB) signed a Memorandum of Understanding (MoU) with the Crown Prosecution Service (CPS) and other accident investigation boards.<sup>157</sup> Albeit only partially, this MoU reflects Standard 5.10 of ICAO Annex 13, which requires coordination between the investigator in charge and the judicial authorities, that is, in the UK, between the AAIB and CPS.<sup>158</sup> Without any binding effect,<sup>159</sup> the mentioned MoU aims to create “practical working arrangements.”<sup>160</sup>

In the following paragraphs, I attempt to analyse the interaction between the UK legal framework and policy on the one hand and the safety and transparency paradigms on the other. Also, I discuss how these paradigms interact and relate to UK regime responses to legal certainty.

Under Article 11 of the UK Accident Investigation Regulation, the chief investigator is granted “unhampered access” to accident evidence and scenes of the accident or incident.<sup>161</sup> The MoU also grants such prioritised access to the AIB, potentially considering the “public interest” for “safety considerations” while recognising the possibility of concurrent investigations of the technical investigation body and judicial body.<sup>162</sup> In other words, in practice,<sup>163</sup> technical and judicial investigations can be, and are, conducted in parallel.<sup>164</sup> Therefore, the immediate unrestricted and unhampered access under Article 11 does not imply the provision of prioritised and exclusive access to the UKAAIB. As the goal of the MoU is to promote the effectiveness of and separation between technical and judicial investigation “where permitted,”<sup>165</sup> the judicial investigation may obtain prioritised

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157 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020.

158 Section 3.4.2.2 of this research.

159 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 2.

160 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020.

161 UK Accident Investigation Regulation, art 11.

162 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 1.

163 As said, the MoU is not binding.

164 See UK Accident Investigation Regulation Art 12 (1): “When a judicial investigation is also instituted...” See also Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 1

165 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 1.

status. However, the MoU recognises the possible precedence of a technical investigation over a criminal investigation.<sup>166</sup>

The CPS also dictates that, despite the preference of the AAIB that prosecution be initiated after the publication of an accident report, the CPS still may commence prosecution based on “valid reasons.”<sup>167</sup> On the one hand, this practical working arrangement was articulated to support the safety paradigm by implementing ICAO Annex 13 Standard 5.10. On the other hand, the transparency paradigm, supporting prosecution, may also prevail when dealing with the criminal liability of pilots.

Furthermore, the disclosure of information to the public and the use of information to establish criminal liability is somewhat controversially regulated. Article 14 of the UK Accident Investigation Regulation protects sensitive evidence, including statements of pilots or cockpit voice recordings and transcripts.<sup>168</sup> However, following an Order of the High Court, the transparency paradigm prevails, the Order determining whether and which evidence is admissible in relevant proceedings.<sup>169</sup> Said admissibility is identified in one judgment, which will be discussed in Section 4.3.4 on the UK case law. Section 4.3.4. contains an explanation of whether and how the transparency and legal certainty paradigms may be applied to the detriment of the safety paradigm in the UK.

- *Civil sanctions as an alternative to criminal sanctions*

In the UK, there has been discussion on whether or not criminal sanctions can be substituted by civil sanctions in the form of monetary fines in the context of civil aviation. The discussion was caused by the fact that the UK

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166 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, para 6.

167 Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, para 22: “The AIBs and criminal court proceedings 22. Although it is the AIBs’ preference that any prosecution take place after their investigation report has been published, there may be valid reasons why a prosecution should commence before publication.”

168 Records revealing the identity of persons who have given evidence in the context of the safety investigation, including third-party experts, Cockpit video and image recordings and transcripts, air traffic control recordings, flight data recorders, All communications between persons having been involved in the operation of the aircraft; and Information collected by the AAIB which is of a particularly sensitive or personal nature. *See also*, Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, Annex B. Also, any other evidence may avoid public disclosure if the disclosure hampers the fact-finding. *See* UK Accident Investigation Regulation art 15(4).

169 In case of maritime accidents, reports are generally inadmissible in civil and criminal proceedings without an order of the High Court. *See*, Government of the UK, *Policy Paper – Memorandum of Understanding between The Crown Prosecution Service and the Air, Marine and Rail Accident Investigation Branches* (2008), updated in September 2020, 4.

government did not consider that the UKCAA had a proportionate and flexible approach to “all breaches of aviation safety and airspace regulations.”<sup>170</sup> This view initiated an impact assessment to find the best resolution to promote safety.<sup>171</sup> While it holds that criminal prosecution is “intrusive,” “time-consuming,” “costly, and disproportionate,”<sup>172</sup> the assessment considers that more extensive use of prosecution can benefit UK civil aviation as an effective deterrent mechanism against non-compliance.<sup>173</sup>

The UK CAA is a prosecutorial authority when it comes to breaches of aviation safety rules and aviation-related consumer protection and health and safety requirements, as tasked by the UK Department for Transport to investigate and prosecute. The UK CAA ensures that the aviation rules for which it is responsible are properly observed and appropriately enforced by prosecuting persons who may be guilty of breaching such rules.<sup>174</sup>

The UK Department of Transportation acknowledges that “[c]ourt action can sometimes be slow, cumbersome and expensive, and a criminal sanction may be a disproportionate way of enforcing aviation related offences. Civil sanctions are intended as a more flexible and proportionate alternative.”<sup>175</sup> At the same time, safety concerns require immediate attention and enforcement.<sup>176</sup>

Thus, the consultation conducted by the UK Department of Transportation concluded that civil sanctions better fit the offences identified in ANO 2022 Section 265.<sup>177</sup> Nevertheless, the UK CAA still utilises both methods, that is, the instigation of criminal proceedings and the imposition of civil sanctions as enforcement tools depending on the seriousness of the conduct.<sup>178</sup>

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170 Department of Transport, *Impact Assessment (IA) – CAA Civil Sanctions* (2011) 1

171 UK Department of Transport, *Impact Assessment (IA) – CAA Civil Sanctions* (2011) 1

172 UK Department of Transport, *Impact Assessment (IA) – CAA Civil Sanctions* (2011) 1 and 5

173 UK Department of Transport, *Impact Assessment (IA) – CAA Civil Sanctions* (2011) 2. Currently, criminal prosecution is relevant to Level 1 Findings. Level 1 finding is for “the level of compliance and/or safety performance of an organisation or individual has fallen to the extent that there is a potential or significant risk to safety.” See CAA UK, *CAP 1074 – Safety and Airspace Regulation Enforcement Guidance* (2015) 6.

174 See, Enforcement and prosecutions | Civil Aviation Authority (caa.co.uk), accessed 13 October 2024.

175 UK Department of Transport, *Consultation on Civil Sanctions for the Civil Aviation Authority* (2015) 5.

176 UK Department of Transport, *Consultation on Civil Sanctions for the Civil Aviation Authority* (2015) 27.

177 See Section above on the ANO 2022 in this Chapter (4).

178 UKCAA, *CAP 1422 – Code of Practice for the Investigations and Enforcement Team* (3rd edn, 2020) 8. Currently, criminal prosecution is relevant to Level 1 Findings. Level 1 finding is for “the level of compliance and/or safety performance of an organisation or individual has fallen to the extent that there is a potential or significant risk to safety.” See CAA UK, *CAP 1074 – Safety and Airspace Regulation Enforcement Guidance* (2015) 6.

### 4.3.3 Enforcement

The CPS is generally responsible for prosecution in the UK.<sup>179</sup> Since December 2012,<sup>180</sup> prosecution related to transport-related accidents has been mainly enforced by the UKCAA.<sup>181</sup> However, the UKCAA, as an “independent regulator” dealing with civil aviation matters,<sup>182</sup> has the power to prosecute criminal offences under Section 20(1A) of the Civil Aviation Act 1982.<sup>183</sup> Therefore, regarding aviation matters in the UK, the CPS is not an enforcement body. It is not clear if the CPS can decide that it wants to prosecute, but not under *lex specialis* air law crimes, but general ones, such as negligence causing death. However, the *lex specialis* rules generally will mean that prosecution thereunder is preferred.

The UKCAA states precisely what Article 12 of the Chicago Convention (1944) dictates: “[p]rosecution is one means by which the UKCAA ensures that the aviation rules for which it is responsible are properly observed and appropriately enforced.”<sup>184</sup> Thus, prosecution should be considered one of the enforcement tools under Article 12 of the Chicago Convention (1944) to promote safety.<sup>185</sup>

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179 Section 3(2)(a) Prosecution of Offences Act 1985

180 See Civil Aviation Act 2012, 2019 Chapter 19, Introductory Text.

181 Usual prosecution cases must fall under the scope of the CPS. However, under Under Section 3(2)(a) and Section 1(7) of the Prosecution of Offences Act 1985, upon the consent of the CPS, the CAA has the legal ground to take over any prosecution of offences. In this case, the CPS cannot institute any proceedings for such cases based on Section 92(2) of the Civil Aviation Act 1982. Because it is not the duty of the director to take over the proceedings, the Director may never institute the proceedings. See Section 6 Prosecution of Offences Act 1985.

182 UKCAA, *CAP 1422 – Code of Practice for the Investigations and Enforcement Team* (3rd edn, 2020) Foreword.

183 See Section 101 of the Civil Aviation Act 2012. The UKCAA states that it is tasked by the Department for Transport with the responsibility to enforce in the form of prosecution. See, Civil Aviation Act 1982, Section 20(1A). The scope of prosecution includes consumer protection and health and safety requirements, too. Please See UKCAA, ‘Enforcement and prosecutions – CAA’s regulatory enforcement role, and recent court actions’ (U/A) <<https://www.caa.co.uk/our-work/about-us/enforcement-and-prosecutions>> accessed 13 October 2024.

184 UKCAA, ‘Enforcement and prosecutions – CAA’s regulatory enforcement role, and recent court actions’ (U/A) <<https://www.caa.co.uk/our-work/about-us/enforcement-and-prosecutions>> accessed 13 October 2024 and UKCAA, *CAP 1326 – CAA Regulatory Enforcement Policy* (2012). See also, UKCAA, *CAP 1074 – Safety and Airspace Regulation Enforcement Guidance* (2015) 8: “We will consider investigation with a view to prosecution whenever there is an alleged breach of the law (including of the applicable EU regulations), particularly when there has been a serious breach of the regulation or deliberate criminal action is suspected. A decision as to whether or not to prosecute will be taken when we are satisfied that a decision to prosecute would comply with the Code for Crown Prosecutors.”

185 See Chapter 3

In addition, the UKCAA encourages reports of suspected breaches.<sup>186</sup> It specifies that “low flying” and “unsafe flying” can be reported by anyone.<sup>187</sup> The views of the UKCAA can effectively observe violations and initiate enforcement actions, including criminal prosecution, in its reports.<sup>188</sup>

#### 4.3.4 Case law<sup>189</sup>

##### 4.3.4.1 *November Oscar Case*<sup>190</sup>

On 21 November 1989, Airman Stewart, who served as the PIC of a British Airways Boeing 747 aircraft, flew from Bahrain to London, UK. The PIC and his co-pilot had been experiencing stomach flu a few days before. Nevertheless, they received permission from a medical doctor to fly the aircraft to London. Combined with the bad weather and the bad health condition of the co-pilot, the PIC flew the aircraft with very little rest. Because of

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186 UKCAA, ‘Report a potential breach of aviation law’ <<https://www.caa.co.uk/our-work/make-a-report-or-complaint/report-a-potential-breach-of-aviation-law/>> accessed 13 October 2024.

187 UKCAA, ‘Report a potential breach of aviation law’ <<https://www.caa.co.uk/our-work/make-a-report-or-complaint/report-a-potential-breach-of-aviation-law/>> accessed 13 October 2024

188 UKCAA, *CAP 1422 – Code of Practice for the Investigations and Enforcement Team* (3rd edn, 2020) 11.

189 In the UK, other important cases and writings of scholars discuss the balancing test in the UK. This research does not analyse those cases as the High Court’s assessment is intended to cover civil or administrative proceedings but not criminal proceedings. For more information, see *Rogers & Anor v. Hoyle* [2013] EWHC 1409 (QB), *Re (On the Application of the Secretary of State) v. Her Majesty’s Senior Coroner for Norfolk & Anor* [2016] EWHC 2279 (Admin), *Chief Constable of Sussex Police v. Secretary of State for Transport & Anor* [2016] EWHC 2280 (QB). See also, Challinor CAS, ‘The Decision of the English High Court in *Rogers & Anor v. Hoyle*: Clipping the Wings of the Principles of Air Accident Investigation’ (2014) 39(1) *Air and Space Law* 83, Challinor CAS, ‘Accident Investigators Are the Guardians of Public Safety: The Importance of Safeguarding the Independence of Air Accident Investigations as Illustrated by Recent Accidents’ (2017) 42(1) *Air and Space Law* 43, and Challinor CAS, ‘Defending Just Culture in Air Accident Investigations: The Decision of the English High Court in *British Broadcasting Corporation & Anor v. Secretary of State for Transport & Anor*’ (2019) 44 *Air and Space Law* 583.

190 The technical and judicial inquiries are not publicly available. Therefore, as Bennun insisted, this research is based on academic journal articles and magazine articles that concern the case. See Bennun ME, ‘Prosecuting Professional Pilots in the United Kingdom after November Oscar: Reflections on the Law and Policy’ (1995) 61(2) *Journal of Air Law and Commerce* 331, Footnote 1 and Marvyn E Bennun GM, ‘Flying Safely, the Prosecution of Pilots, and the ICAO Chicago Convention: Some Comparative Perspectives’ (2009) 74 *Journal of Air Law and Commerce* 737, 771-774.

the fog, the PIC had to carry out a Category III landing,<sup>191</sup> which he had never executed before. The aircraft almost touched the roof of a hotel in an attempt to land. His second attempt succeeded, and there were no fatalities, which still led to the prosecution of the PIC.

The basis of the prosecution was “breaking regulations on low-cloud landings.”<sup>192</sup> There were two legal bases for this prosecution.<sup>193</sup> The first was Article 55 of the Air Navigation Order 1995, which provides that “a person shall not recklessly or negligently act in a manner likely to endanger an aircraft or any person therein.”<sup>194</sup> The second ground was Article 56 of the same Order, which provides that “[a] person shall not recklessly or negligently cause or permit an aircraft to endanger any person or property.”<sup>195</sup> While Article 55 was applied to endangering passengers, the charge under Article 56 addressed the endangerment of third parties on the ground.<sup>196</sup>

The PIC was found guilty of endangering passengers but not for endangering the third parties on the ground. For the breach of Article 55, the jury found that the PIC had negligently endangered the aircraft and passengers.<sup>197</sup> This was based on the prosecutor’s arguments that “it would have been catastrophic” if the PIC had not succeeded in the second attempt.<sup>198</sup> On May 8, 1991, a jury at Her Majesty’s Crown Court in Isleworth held that the PIC had negligently endangered the safety of the aircraft and the passengers.<sup>199</sup>

191 Under the most recent edition of Annex 6, the Category III approach means a “decision height lower than 30m (100ft) or no decision height and a runway visual range less than 300m or no runway visual range limitations.” However, the Category III approach is also defined as follows: “an aircraft to approach until it is 200 feet (61 m) over the ground, within a 1/2 mile (800 m) of the runway. At that point the runway should be visible to the pilot; if it is not, they perform a missed approach.” See, ICAO, *Annex 6 Operation of Aircraft*, vol Part I – International Commercial Air Transport – Aeroplanes (12th edn, 2022) for the first definition mentioned. For the second definition, see, as an example, Hussain M, ‘November Oscar Incident’ (2022) <<https://mudassir-hussain120.medium.com/november-oscar-incident-34191581d490#:~:text=Back%20in%20November%201989%2C%20on,or%2012%20feet%20of%20disaster.>> accessed 13 October 2024. CAT III approach is an instrument landing.

192 Connett D, ‘Pilot in Near Miss Found Dead in Car’ *Independent* (3 December 1992) <<https://www.independent.co.uk/news/uk/pilot-in-near-miss-found-dead-in-car-1561147.html>> accessed 13 October 2024.

193 See, Bennun ME, ‘Prosecuting Professional Pilots in the United Kingdom after November Oscar: Reflections on the Law and Policy’ 61 *Journal of Air Law and Commerce* 331, 333.

194 Air Navigation Order 1989 of the UK, Article 50. Currently, this is Section 240 of the ANO 2022

195 Air Navigation Order 1989 of the UK, Article 51. Currently, this is Section 241 of the ANO 2022.

196 See, Schedule 12 on Article 111(6) of the ANO 1995.

197 Wilkinson S, *The November Oscar Incident* (Air and Space Smithsonian 1993 Issue Autumn 1993, 1993) 4. The case is unreported.

198 Stafford S, ‘British Airways Pilot Guilty of Negligence in Near-Crash’ *United Press International* (8 May 1991) <<https://www.upi.com/Archives/1991/05/08/British-Airways-pilot-guilty-of-negligence-in-near-crash/3098673675200/>> accessed 13 October 2024.

199 See, Wilkinson S, *The November Oscar Incident* (Air and Space Smithsonian 1993 Issue Autumn 1993, 1993).

In this case, a commentator argued that in this particular case, the prosecution, which is currently delegated to the UKCAA, did not comply with the general policy of the CPS of the time to discourage criminal prosecution against offences involving certain factors, stipulating the following:<sup>200</sup>

*"[A] prosecution is less likely to be needed if, amongst other factors, the offense was committed as a result of a genuine mistake or misunderstanding – though this must be balanced against the seriousness of the offence – or if the loss or harm can be described as minor and was the result of a single incident, particularly if it was caused by a misjudgement."*<sup>201</sup>

Although this incident occurred before the introduction of Just Culture in 2006, this argumentation aligns with that concept. Indeed, Just Culture is designed not to apportion blame on honest mistakes.<sup>202</sup>

A second criticism pertained to the fact that the negligence of the PIC was hard to determine. This happens especially when judges or juries are less aware of the complexities of international civil aviation.<sup>203</sup> Although Bennun referred to the Road Traffic Act 1988 of the UK and tried to interpret it based on Article 111(2) of the ANO 1995 analogically,<sup>204</sup> his conclusion was that the interpretations were inconsistent and unclear. Such lack of clarity hurts the paradigm of legal certainty.

Moreover, the court did not examine the aircraft's operator's responsibilities. According to the provisions of ICAO Annex 6,<sup>205</sup> for commercial airline pilots, British Airways, as an operator, was also responsible for the actions of the PIC in the operation of the aircraft. This responsibility has been codi-

200 Again, these unavailable official records include the relevant incident report and judgment. According to the public online search, because this event was a serious incident, the investigation board did not investigate as they were involved in other fatal accident investigations. The PIC also did not report this event, although he might have had to do so based on Article 94 of the Air Navigation Order 1989 of the UK. The PIC argued that "because he had at least initiated the go-around from decision height and had landed successfully out of the second approach, it did not constitute an 'occurrence,'" to which only a few of the juries agreed. See, Skybrary, 'B741, British Airways, London Heathrow UK, 1989 (Legal Process – Flight Crew)' (Unknown) <<https://skybrary.aero/articles/b741-british-airways-london-heathrow-uk-1989-legal-process-flight-crew>> accessed 13 October 2024 and Wilkinson S, *The November Oscar Incident* (1993) 8.

201 Bennun ME, 'Prosecuting Professional Pilots in the United Kingdom after November Oscar: Reflections on the Law and Policy' 61 *Journal of Air Law and Commerce* 331, 347, citing Crown Prosecution Service, 'The Code for Crown Prosecutors 6.5 (1994) note 61 and 62.

202 Sections 1.4.4 and 2.5 of this research.

203 See, Syed M, *Black Box – denken : maak van je fouten een succes* (Kosmos Uitgevers 2015) and Wilkinson S, *The November Oscar Incident* (1993)

204 Bennun ME, 'Prosecuting Professional Pilots in the United Kingdom after November Oscar: Reflections on the Law and Policy' 61 *Journal of Air Law and Commerce* 331, 332-338.

205 Standard 3.4.1.4.

fied in Article 28 of the ANO 1989.<sup>206</sup> Under Article 99 of the same Order, the operator could have also been prosecuted. Indeed, the prosecuted PIC claimed that the operator influenced his decision.

#### 4.3.4.2 Cases of John Hoare

In 2019 and 2020, Airman Hoare was prosecuted for low flying.<sup>207</sup> He was witnessed flying below 500 feet during a paramotor flight,<sup>208</sup> which was, and still is, prohibited.<sup>209</sup> The grounds for prosecution were Article 249(2) of the ANO 2022 prescribing compliance with the UK Standardised Rules of the Air where low flying is prohibited, and or, in conjunction with Article 265(6) providing that non-compliance with any provisions in Chapter 1 of Schedule 13 Part 2 referring to Art. 249(2) of the ANO 2022 is an offence and is punishable. He pleaded guilty.<sup>210</sup>

As compared to other cases, this case is rather straightforward. ANO 2022 regulates the flying altitude to promote the safety paradigm. The pilot pleaded guilty. As the altitude is clearly mentioned in various provisions of the regulation, the prosecution did not hamper the paradigm of legal certainty.

#### 4.3.4.3 Case of the Shoreham Air Show crash of 2015

On August 22, 2015, a tragic accident occurred at the Shoreham Royal Air Force Association air show, resulting in the crash of a Hawker Hunter T7 G-BXFI aircraft piloted by Airman Hill.<sup>211</sup> According to the facts of the case, eleven individuals lost their lives in the accident,<sup>212</sup> while the pilot survived with injuries.<sup>213</sup> Subsequently, both the police and the AAIB launched investigations. The police collected approximately 330 statements from

206 ANO 1989, Article 28 (2): *“The operator of an aircraft registered in the United Kingdom shall not permit any person to be a member of the crew thereof during any flight for the purpose of public transport (except a flight for the sole purpose of training persons to perform duties in aircraft) unless such person has had the training, experience, practice and periodical tests...”*

207 See, UKCAA, ‘CAA Successful Prosecutions 1 April 2019 to 31 March 2020’ (2021) 4. In addition to the case referred to in this Section, Hoare had been multiple times prosecuted for ‘deliberately’ low flying since 2010 and the most recently, in 2023. See, UKCAA, ‘CAA Successful Prosecutions: 1 April 2015 to 31 March 2016’ (2016) and UKCAA, ‘CAA Successful Prosecution Results from 1 April 2010 to 31 March 2011’ (2011).

208 See, Burnham-on-sea, ‘Gliding Enthusiast Banned from Flying Above Burnham and Brean Beaches’ (2020) <<https://www.burnham-on-sea.com/news/gliding-enthusiast-banned-from-flying-above-burnham-and-brean-beaches-for-3-years/>> accessed 13 October 2024.

209 UK Standardised Rules of the Air, Annex I – Rules of the Air, SERA. 5005(f).

210 See, UKCAA, ‘CAA Successful Prosecutions 1 April 2019 to 31 March 2020’ (2021) 4.

211 See, Air Accidents Investigation Branch of the UK, ‘Aircraft Accident Report AAR 1/2017 – G-BXFI, 22 August 2015’ 7-160.

212 See, Air Accidents Investigation Branch of the UK, ‘Aircraft Accident Report AAR 1/2017 – G-BXFI, 22 August 2015’ 11.

213 *Sussex Police v Secretary of State for Transport & Anor* [2016] EWHC 2280 (QB) (28 September 2016) § 5 [*Sussex Police v Secretary of State for Transport & Anor* (2016)].

persons who had attended the air show.<sup>214</sup> The AAIB's completed investigation revealed the absence of a flight recorder but the presence of two video recording cameras in the cockpit.<sup>215</sup>

The Chief Constable of Sussex Police applied to the Transport Secretary of State in the UK for the disclosure of the pilot's statements and other items.<sup>216</sup> This application required a delicate balance to be made between the public interest in transparency, effective crime investigation and detection, and potential impacts on future AAIB investigations.<sup>217</sup> The British Airline Pilots Association (BALPA), the labour union of the British Airline, raised concerns about the disclosure criteria.<sup>218</sup> Legal provisions, such as Article 14 of the EU Regulation 996/2010 and Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulation 1996,<sup>219</sup> supported non-disclosure of specific accident data and safety information in alignment with international Standards.<sup>220</sup>

The High Court conducted a balancing test to assess the potential harm to future investigations against public interest in disclosure.<sup>221</sup> It evaluated each piece of evidence separately, rejecting the pilot's statements with

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214 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 6.

215 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 7.

216 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 40. Initially, the application included experiments and test results that were private in nature towards people other than the pilot. However, later, the Chief constable decided not to seek disclosure. *See*, [2016] EWHC 2280 (QB) §§ 51-54.

217 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 3.

218 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 4: "The British Airline Pilots Association ("BALPA") also appeared in the public part of the hearing in this case and made submissions in opposition to the Chief Constable's application for disclosure. In particular Mr. Martin Chamberlain QC submits on behalf of BALPA that the Court cannot order disclosure in a case such as this unless the criteria for the making of a production order in the Police and Criminal Evidence Act 1984 ("PACE") are satisfied. In the alternative, he submits that, in conducting the balancing exercise which has to be performed by this Court, a weighty factor militating against disclosure should be the fact that, as he submits, those criteria in PACE are not satisfied." For the definition of a balancing test, *see* Section 3.4.2.2 of this research.

219 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 24. art 14 of the UK Regulation 996/2010 and Regulation 18 of the Civil Aviation (Investigation of Air Accidents and Incidents) Regulations 1996.

220 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 26.

221 The High Court referred to the decision of the Outer House of the Court of Session in Lord Advocate 2015 SLT 450, which conducted the balancing test on criminal matters. However, the decision intended not to create any precedence as then technical investigators of the AAIB would need to be challenged to disclose relevant accident investigations. *See* *Sussex Police v Secretary of State for Transport & Anor* (2016) § 28 and Lord Advocate 2015 SLT 450 (Lord Jones) §§ 58-60. In this test, three references were made based on cases in Australia, New Zealand, and Canada. However, the High Court also found these cases less relevant as these cases were not determined based on the balancing test. *See* also, [2016] EWHC 2280 (QB) §§ 30-34.

respect to concerns about adverse impacts on technical investigations aimed at enhancing the safety of flight.<sup>222</sup> However, the footage recorded from cameras in the cockpit was deemed justifiable for disclosure, given its voluntary recording for leisure and commercial purposes.<sup>223</sup>

In 2018, Mr. Hill faced charges of gross negligence manslaughter, for which he was eventually acquitted.<sup>224</sup> The Coroner sought disclosure of the film footage, expert reports, and transcripts to highlight the incompleteness of the AAIB investigation.<sup>225</sup> The Court again conducted an independent balancing test, now weighing “harm or detriment” to future AAIB investigations against the “benefit” of examining the Coroner’s reasons for seeking the mentioned materials and information collected during the AAIB investigation.<sup>226</sup> The Court concluded that there was no credible evidence of deficiencies in the AAIB investigation,<sup>227</sup> leading to the rejection of the Coroner’s application.

#### 4.3.5 Concluding remarks of Section 4.3

Based on the above analysis, the UKCAA enforces prosecution as one of its enforcement tools under Article 12 of the Chicago Convention (1944) in order to promote safety.<sup>228</sup> UK air law covers a wide range of offences based on rules of the air and other flight and manoeuvre rules, with an explicit scheme for the punishment of aviation-related crimes based on criminal air law, functioning as a *lex specialis*.

While the level of transparency may fluctuate,<sup>229</sup> it follows from the above examination of UK rules and case law that applicable regulations provide

222 *Sussex Police v Secretary of State for Transport & Anor* (2016) §§ 41-45.

223 *Sussex Police v Secretary of State for Transport & Anor* (2016) § 49.

224 *HM Senior Coroner for West Sussex v Chief Constable of Sussex Police & Ors* [2022] EWHC 215 (QB) (04 February 2022) § 6. In the end, the pilot was found not guilty. [*HM Senior Coroner for West Sussex v Chief Constable of Sussex Police & Ors* (2022)].

225 The High Court recognised that it was the task of the Coroner to delve into these matters for a “full, fair and fearless investigation.” See *HM Senior Coroner for West Sussex v Chief Constable of Sussex Police & Ors* (2022) § 45.

226 *HM Senior Coroner for West Sussex v Chief Constable of Sussex Police & Ors* (2022) §108.

227 *HM Senior Coroner for West Sussex v Chief Constable of Sussex Police & Ors* (2022) § 12 and § 126.

228 See Chapter 3 of this research.

229 Sometimes, the prosecution records, which are yearly updated, provide not only a short summary of facts for each case and the relevant court but also breached provisions for some years. The shared records might not provide a full interpretation of the judgment of the court but would still enhance clarity as the facts of the cases would make the pilots aware of their actions. For the records of prosecution, see UKCAA, ‘Enforcement and prosecutions – CAA’s regulatory enforcement role, and recent court actions’ (U/A) <<https://www.caa.co.uk/our-work/about-us/enforcement-and-prosecutions>> accessed 13 October 2024. For prosecution-related official news releases of the UK, see, UKCAA, ‘News’ <<https://www.caa.co.uk/news?tag=Prosecutions>> accessed 13 October 2024.

accessible guidelines for pilots to be aware of potential criminal liability, which benefits the paradigm of legal certainty.

However, except for the summary of facts and punishments, the UKCAA does not provide the full case report of each criminal prosecution to the public, and not all court cases are published. While the applicable regulations are clearly published and accessible via internet sites, pilots and other aviation actors cannot always ascertain how these regulations are applied in practice.

#### 4.4 THE REPUBLIC OF KOREA (ROK) REGIME

##### 4.4.1 The participation of the Republic of Korea (ROK) at the Conference preparing the Chicago Convention (1944) and in the ICAO

###### 4.5.1.1 *The Chicago Convention (1944)*

The ROK acceded to the Chicago Convention (1944) in 1952.<sup>230</sup> The Convention entered into force for the ROK in December of the same year.<sup>231</sup>

As an international treaty, the Chicago Convention (1944) has the same binding force as the domestic law of the ROK.<sup>232</sup> Thus, the ROK is a State that has adopted ‘monism’: international law is part of its domestic legal order. International law here directly applies as if it were domestic law.

###### 4.5.1.2 *The implementation of ICAO SARPs with reference to the criminal liability of pilots*

The most recent Universal Safety Oversight Audit Programme (USOAP) results of the ROK date back to 2008.

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230 US Department of State, ‘Depositary – Treaty Affairs – 01 Convention on International Civil Aviation, done at Chicago December 7, 1944.’ (2019) <<https://www.state.gov/convention-on-international-civil-aviation-chicago>> accessed 13 October 2024.

231 US Department of State, ‘Depositary – Treaty Affairs – 01 Convention on International Civil Aviation, done at Chicago December 7, 1944.’ (2019) <<https://www.state.gov/convention-on-international-civil-aviation-chicago>> accessed 13 October 2024.

232 *Constitution of the Republic of Korea* (entered into force 25 February 1988, Constitution No 10, fully revised 29 October 1987), art 6: “(1) Treaties duly concluded and promulgated under Constitution and the generally recognised rules of international law shall have the same effect as the domestic laws of the Republic of Korea.”

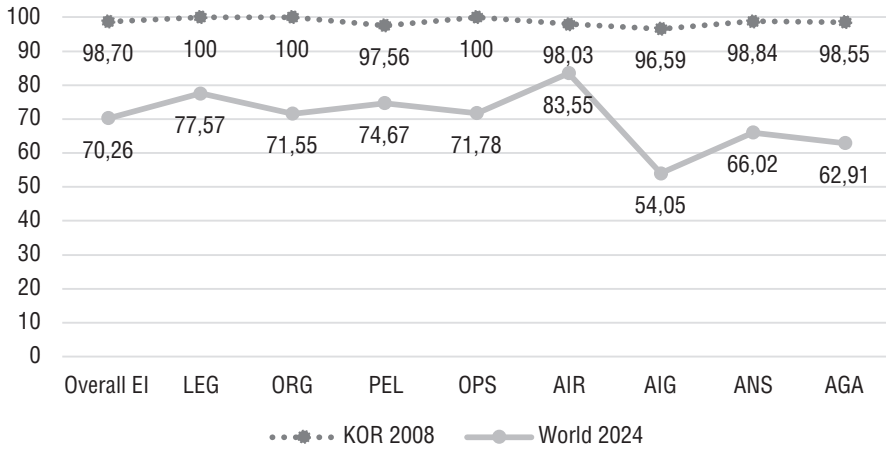


Figure 4 USOAP Result Comparison – the ROK v. Global Average (13 October 2024)

The above Figure shows that the ROK implemented nearly all SARPs, which were established in 2008, demonstrating strong support for the paradigm of safety. ICAO has not conducted a USOAP in the ROK since 2008.

In its self-assessment, the ROK also confirms that it has fulfilled all obligations reflecting the safety paradigms imposed by Articles 12 and 26 of the Chicago Convention (1944) pertinent to the criminal liability of pilots, as laid down in the protocol questions Chapter 3 of this study mentions.<sup>233</sup>

#### 4.4.2 Legislative framework of the ROK

##### 4.4.2.1 Introduction

The criminal liability of pilots is governed by general criminal law and special criminal air law.<sup>234</sup> As to the general criminal law, the Criminal Act of 2021 stipulates that “[t]he criminality and punishability of an act shall be determined by the law in effect at the time of the commission of that act.”<sup>235</sup> The applicability of general criminal law extends to acts committed by any person on board a Korean aircraft, that is, an aircraft registered in the ROK.<sup>236</sup>

233 The self-assessment result of South Korea downloaded on 5 August 2024. When the test was conducted is unclear from the database. See also, Korea Office of Civil Aviation, ‘Aeronautical Information Publication (E-AIP)’ (Effective 25 July 2024) <<https://aim.koca.go.kr/eaipPub/Package/history-en-GB.html>> accessed 13 October 2024.

234 Unless provided otherwise, this research relies on the translation of the legislative framework of the ROK made by the Korea Legislation Research Institute, which is checked by the author of this research.

235 Criminal Act of 2021 of the ROK [Enforced on December 9, 2021] [Law No. 17571, December 8, 2020, partially revised], hereinafter the “2021 Criminal Act”, art 1.

236 2021 Criminal Act, art 4.

As to criminal air law, the Aviation Safety Act of 2023 addresses the criminal liability of pilots, specifically the conduct of the pilot.<sup>237</sup> As will be explained below, the Aviation and Railway Accident Investigation Act of 2021 provides views on the safety paradigm.<sup>238</sup>

#### 4.5.2.2 *General criminal law*

Chapter XV of the 2021 Criminal Act of the ROK pertains to crimes of traffic obstruction.<sup>239</sup> Composed of six articles, five provisions of Chapter XV are relevant for the prosecution of pilots.

Under Articles 186 and 187 of this act, the deliberate obstruction of air traffic by destroying or damaging navigational facilities, as well as the intentional crashing or destruction of a passenger aircraft, constitutes a serious offence. Article 187 imposes an additional penalty when such acts result in injury or death to passengers or crew members,<sup>240</sup> thereby elevating the severity of the offence beyond what Article 186 outlines.<sup>241</sup>

Furthermore, Article 189 of the Criminal Act provides that if the commission of the offences described above under Article 187, such as crashing or destroying a passenger aircraft, occurs as a result of negligence, occupational negligence, or gross negligence, these acts are still subject to punishment.<sup>242</sup> Given this element of negligence, the sanctions under Article 189 are less severe than those applicable under Article 187, as Article 189 addresses non-deliberate acts. Additionally, the attempted commission of these offences is also punishable under Article 190 of the Criminal Act.

However, there have been cases where pilots were prosecuted based on Article 268 of the Criminal Act, which covers “occupational or gross

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237 Aviation Safety Act [Enforced on September 20, 2024] [Law No. 20396, March 19, 2024, Partially revised], hereinafter the “2024 Aviation Safety Act”

238 *The Aviation and Railway Accident Investigation Act* (Presidential Decree No. 32125, Nov. 16, 2021) Art 28(2)

239 2024 Aviation Safety Act, Chapter XV, Crimes of Traffic Obstruction

240 2021 Criminal Act, Article 187: “A person who overturns, buries, crashes or destroys a train, electric car, automobile, vessel, or aircraft in which persons are actually present, shall be punished by imprisonment with labor for an indefinite term or for at least three years.”

241 2021 Criminal Act, Article 186: “A person who, by damaging or destroying a railroad, light-house or its signal or by any other means, obstructs traffic of a train, electric car, automobile, vessel or aircraft, shall be punished by imprisonment for at least one year.” To be punished under Article 186, there should be a concrete danger or concrete result of obstruction against the air traffic.

242 2021 Criminal Act, Article 14: “An act performed through ignorance of the facts that constitute a crime by neglect of normal attention, shall be punishable only when prescribed so by a statute.”

negligence” resulting in death or injury,<sup>243</sup> even outside the air traffic. In these cases, courts must interpret the term “occupational or gross negligence” based on specific circumstances and relevant regulations, including aviation-related laws. For further details on these interpretations, see the following section on criminal air law.

#### 4.5.2.3 *Criminal air law*

- *2024 Aviation Safety Act in the ROK*

Chapter XII of the 2024 Aviation Safety Act in the ROK concerns aviation-related penalty provisions.<sup>244</sup> Pilots may lose their license when they fail to perform their duties as pilots, when they navigate an aircraft without the required qualifications, or when they take off without approval from the ATC centre.<sup>245</sup> These are administrative sanctions rather than a criminal penalty.

Criminal liability is at issue under the ROK regime when a crash occurs. Pilots may be prosecuted for causing a crash, regardless of whether it is a passenger or cargo aircraft.<sup>246</sup> The provision does not specify if a crash means an occurrence, incident, or accident. If there are fatalities, which then becomes an accident according to the ICAO definition, a harsher minimum punishment applies as compared to a crash without fatalities regulated under Article 138 of the 2023 Aviation Safety Act.<sup>247</sup>

If a person “endangers aviation by destroying aerodrome, airfield, airport facilities or navigation safety facilities or by other means”, that person can be punished by imprisonment with prison labour of up to ten years.<sup>248</sup> A

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243 2021 Criminal Act, Article 268 (Death and Injury by Occupational or Gross Negligence): A person who causes the death or injury of another by occupational or gross negligence, shall be punished by imprisonment for not more than five years or by a fine not exceeding 20 million won. [This Article Wholly Amended on Dec. 8, 2020]

244 2024 Aviation Safety Act.

245 2024 Aviation Safety Act, art 43 (17), (18) and (19).

246 2024 Aviation Safety Act, art 138 (crime of endangering aircraft in flight): (1) A person who crashes, capsizes, or destroys an aircraft, light sport aircraft, or ultra-light vehicle in flight with people aboard shall be punished by death, life imprisonment, or imprisonment with labour for at least five years. (2) A person who crashes, capsizes, or destroys an aircraft, light sport aircraft, or ultra-light vehicle in flight with people aboard for committing a crime referred to in Article 140 shall be punished by death, life imprisonment, or imprisonment with labour for at least five years. Article 140 refers to another offence endangering Aviation.

247 2024 Aviation Safety Act, art 139 (crime of causing injuries or death by causing danger to aircraft in flight): “A person who causes injuries or deaths of people by committing a crime referred to in Article 138 shall be punished by death, life imprisonment, or imprisonment with labour for at least seven years.”

248 2024 Aviation Safety Act, art 140 (Crime of endangering aviation): “A person who endangers aviation by destroying aerodromes, airfields, airport facilities, or navigation aids or by other means shall be punished by imprisonment with labour for up to 10 years.” <Amended on Oct. 24, 2017>.

PIC who deserts an aircraft is also punishable.<sup>249</sup> Moreover, a breach of reporting obligations may also lead to a prosecution. Persons, including PICs, who make false reports after an accident may be fined.<sup>250</sup>

In contrast, outside of these specified behaviours, the 2023 Aviation Safety Act does not make behaviours of the PIC punishable for breaches of local flight and manoeuvre rules. In the latter event, this Act entitles the Korean competent aviation authorities to revoke or suspend an Air Operator Certificate of an airline if the airline does not comply with applicable safety rules.<sup>251</sup> Again, this is an administrative sanction rather than a criminal penalty.

If the PIC does not comply with flight rules, although such breaches do not cause an accident, it may lead to the imposition of an administrative sanction, including suspension and revocation of his/her certificate of qualifications.<sup>252</sup> Such administrative sanctions may also be imposed if a pilot navigates an aircraft without meeting the required qualifications for these responsibilities.<sup>253</sup> Because the Korean Aviation Safety Act does not attach the possibility of prosecution and criminal liability to such behaviour (of non-compliance with flight rules), I consider that this regime does not align with my analysis of Article 12 of the Chicago Convention (1944).<sup>254</sup>

As detailed in secondary legislation, the PIC must report accidents, serious incidents or any safety occurrences to the competent aviation authorities. Also, the PIC must provide such information in case of accidents, serious incidents or any safety occurrences involving another aircraft.<sup>255</sup>

Article 60 of the 2023 Aviation Safety Act allows the competent authority to choose not to punish pilots administratively. However, if the reported accidents are caused by gross negligence or wilful misconduct, the license of the reporting or reported pilots may be suspended or cancelled.<sup>256</sup> The competent authority is then obliged to impose administrative sanctions.<sup>257</sup>

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249 2024 Aviation Safety Act, art 143; *See also* art 134 paras 1 and 3 of the Enforcement Rules of the Aviation Safety Act of the ROK [Enforcement September 12, 2023] [Ministry of Land, Infrastructure and Transport Ordinance No. 1252, September 12, 2023, partially revised].

250 2024 Aviation Safety Act, art 158.

251 2024 Aviation Safety Act, art 91. Since the end of 2023, a new legislation has entered into force to impose punishments on the representatives of the airlines to be punished if an accident occurs.

252 2024 Aviation Safety Act, art43(21).

253 2024 Aviation Safety Act, art43(18).

254 *See* Section 3.3.2 of this research.

255 2024 Aviation Safety Act, art 62 (4) and (5).

256 2024 Aviation Safety Act, art 43 (1)2.

257 2024 Aviation Safety Act, art 43 (1)2.

In short, the 2023 Aviation Safety Act shows that not only criminal liability but also administrative proceedings may be involved in violations of flight and manoeuvre rules as locally implemented. Such sanctions may also be imposed without an accident being caused by the violations.

- *2021 Aviation and Railway Accident Investigation Act*

While the 2023 Aviation Safety Act regulates the overall safety of air navigation and transport, since 2006, the Aviation and Railway Accident Investigation Act of 2021 governs aviation accident investigations in the ROK.<sup>258</sup> Enforcement decrees and manuals assist the application of the act.<sup>259</sup> This Act also establishes the accident investigation board and requirements described in ICAO Annex 13,<sup>260</sup> next to the manual, representing the practical working scheme for accident investigations.

The Act of 2021 protects information collected during technical accident investigations by accident investigations and when national security and privacy of persons related to an aviation accident are hampered.<sup>261</sup> The scope of the protected information matches the protected evidence under ICAO Annex 13,<sup>262</sup> demonstrating support for the safety paradigm and, at the same time, limiting vertical transparency.<sup>263</sup> Nevertheless, the provisions do not prevent the Ministry of Transport from conducting its own fact-finding investigations in case of violations to impose administrative sanctions.<sup>264</sup>

- *Introduction of a new law: Serious Accidents Punishment Act of 2022*

Since 27 January 2022, the Serious Accidents Punishment Act has been introduced in the ROK.<sup>265</sup> This particular legislation applies to business

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258 *The Aviation and Railway Accident Investigation Act* (Presidential Decree No. 32125, Nov. 16, 2021) Art 28(2).

259 *Enforcement Decree of The Aviation and Railway Accident Investigation Act* (Presidential Decree No. 32125, Nov. 16, 2021) and Ministry of Transport in the ROK, 'Aircraft Accident and Incident Investigation Manual' (6th rev. 2021).

260 Section 3.4.2.2 of this research and the *Manual of Aircraft Accident and Incident Investigation – Part I – Organization and Planning* (Doc 9756 – Part I) (2015).

261 *Enforcement Decree of The Aviation and Railway Accident Investigation Act* (Presidential Decree No. 32125, Nov. 16, 2021) Art 28 (1).

262 *Enforcement Decree of The Aviation and Railway Accident Investigation Act* (Presidential Decree No. 32125, Nov. 16, 2021), art 28(2).

263 Even with the presence of the *Official Information Disclosure Act* (Act No. 17690, Dec. 22, 2020) of The ROK, which ensures the "people's rights to know and to secure people's participation in state affairs and the transparency of the operation of state affairs," Article 4 limits the applicability of this Act to exclude the government of information by other acts, which must include the protection in Article 28 of the Aviation and Railway Accident Investigation Act of 2021. Therefore, for safety promotion, the transparency paradigm is hampered.

264 See Section above on 2024 Aviation Safety Act of the ROK.

265 Serious Accidents Punishment Act [Enforcement Date 27. Jan 2022.] [Act No.17907, 26. Jan, 2021, New Enactment]

entities that closely impact public safety, including the operation of public transport, like commercial aircraft.<sup>266</sup> This Act prescribes offences and punishments in case of serious accidents impacting the physical safety of citizens or employees. According to Article 6 of the Act, business owners and responsible managing officers can become criminally liable for causing these accidents,<sup>267</sup> if the owners and managing officers did not implement preventive measures for hazards or risks leading to an accident.<sup>268</sup> According to the definitions provided in the same act,<sup>269</sup> a CEO or head of the safety division can fall under this category.

This Act has not been specifically enacted for civil aviation but generally for the high-risk industrial sectors in order to promote the safety paradigm therein. The Corporate Manslaughter and Corporate Homicide Act of 2007 in the UK was a model for this legislation in ROK. By punishing the business owners and responsible managing officers that have the most impact on the safety of employees, like pilots, this Act aims to protect safety by decreasing the number of accidents. If airlines do not train pilots properly, if such is judged to be a breach of the safety obligation of this Act, and the pilots cause accidents, the managing director may be prosecuted and punished.

This particular Act is interesting as the government recognises the organisational factor, which was discussed in Chapter 2 of this study. The impact of airliners as operators within the scope of ICAO Annex 6 is also visible here. This emphasises the role of operators impacting the performance of pilots, which is aligned with the safety paradigm. However, how this approach can be translated into impact on the criminal liability of pilots is still unclear in the absence of pertinent case law.

#### 4.4.3 Enforcement

Under the Criminal Procedural Act of the ROK, a public prosecutor is tasked with the institution of public prosecutions.<sup>270</sup> However, the public

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266 Serious Accidents Punishment Act, Arts. 1 and 2.

267 Serious Accidents Punishment Act, art 6.

268 Serious Accidents Punishment Act, art 4.

269 This Act defines the business officer to be “a person who operates his or her own business or a person who conducts business by using the labor of others” and “responsible managing officer” to be “a person who represents the business and is authorized and responsible to exercise general supervision over the business, or a person who takes charge of safety and health affairs in a corresponding manner” or “[t]he head of a central administrative agency, the head of a local government, the head of a local public enterprise under the Local Public Enterprises Act, and the head of a public institution designated pursuant to Articles 4 through 6 of the Act on the Management of Public Institutions” in art 2.

270 Criminal Procedure Act [Act No. 18799, Feb. 3, 2022], Ar. 246 (Principle of Public Prosecution by State).

prosecutor may decide not to institute a public prosecution considering such factors as the age, character and conduct, intelligence and environment of the offender; the offender's relation to the victim; the motive for the commission of the crime, the means and the result thereof and the circumstances after the commission of the crime.<sup>271</sup>

While the Korean criminal and aviation legislation is rather detailed, it is not always clear how the two branches of law are interrelated. It could be argued that the specific aviation acts are identified as a *lex specialis* and, hence, prevail over general criminal law, as well as general procedural law. However, it is questionable whether a strict *lex specialis* approach is justified in terms of legal certainty. General criminal and criminal procedural law is also part of the legal regime of the ROK. Case law (see next section) may shed light on this interrelationship.

In addition, public prosecutors' duties have a relatively wide margin of discretion when it comes to including or excluding persons in the process of prosecution, whereas several institutions are involved with the enforcement of the law, meaning that enforcement can take place through other processes than criminal prosecution. Illegal behaviour may be punished by criminal sanctions, administrative sanctions, or both. Coupled with the complexity of international air law, legal certainty is reduced by this regime.

#### 4.4.4 Case law<sup>272</sup>

##### 4.4.4.1 The 1989 KAL Tripoli crash

On 27 July 1989, Korean Air flight 803 crashed while approaching Tripoli Airport, Libya, while visibility was limited to 240 m because of fog. This crash resulted in 78 fatalities and 95 persons being injured.<sup>273</sup> The PIC, co-pilot, and flight engineers were prosecuted based on the results of the technical investigation. The grounds of prosecution were breaches of Articles 57

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271 Criminal Procedure Act, art 247 (Principle of Discretionary Indictment), in conjunction with art 51 of the Criminal Act [Act No. 17571, Dec. 8, 2020].

272 There may be more administrative proceedings than criminal proceedings on organizations like an airline or flight school or cancellation of pilots' licenses. See, Supreme Court of The ROK, 2017Du47045, sentenced on October 17, 2019 [Cancellation of flight suspension order] after the accident of an Asiana Air flight in San Francisco, Seoul District Court 2004decision 2003NU 15401, Judgment on the accident and cancellation of the AOC, Seoul Administrative Court, 2014 Guhap 14303, sentenced on May 22, 2015 [Cancellation of suspension of validity of aviation worker qualification], and Busan District Court, 2015 Guhap 1374 decision, and Seoul Central District Court 2018. 2. 8. Sentence 2017 No 981 Decision Violation of Aviation Act.

273 The ROK Ministry of Foreign Affairs, 'Korean Air (KAL) Flight 803 crash in Libya, 1989' (1989) <<http://opendata.mofa.go.kr/mofadocu/resource/Document/57226.page>> accessed 13 October 2024.

and 132 of the 1988 Aviation Act,<sup>274</sup> in conjunction with Article 268 of the Criminal Act.<sup>275</sup>

These provisions prescribe that the PIC must take the necessary measures to rescue passengers and prevent danger to persons or objects on the ground or the water and that he/she may not leave the aircraft before the passengers.<sup>276</sup> If the PIC fails to comply with this procedure, he/she will be punished by imprisonment for a maximum of five years. The PIC may simultaneously be subject to the provisions of the Criminal Act in case the PIC's behaviour causes death or injury to persons, in this case, passengers, if the court qualifies such behaviour as negligence or gross negligence.<sup>277</sup>

According to the readout of the black box, the PIC forced the aircraft to land despite notification of the thick fog at the Tripoli Airport and subsequent notice by the ATC to advise diversion. The PIC was also aware of the malfunctioning of the instrument landing system at the airport, which is why he instructed the first officer to conduct a visual investigation of the runway. At an altitude of 800 feet, the runway was not visible. Subsequently, the PIC was notified to climb up, which he did not accept. The prosecutor charged the pilot with occupational negligence.<sup>278</sup>

Referring to Standard 5.12 of ICAO Annex 13 concerning non-disclosure of cockpit voice recordings and airborne image recordings and any transcripts from such recordings, as well as statements taken from persons by the accident investigation authority in the course of their investigation,<sup>279</sup> the

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274 Aviation Act [Enforced into force on March 5, 1988] [Act No. 3996, partially revised on December 4, 1987] (hereinafter the "1988 Aviation Act"), art 57(4) prescribes the authority of the PIC as follows: "In the event of imminent danger to the aircraft during navigation, the pilot-in-command must take necessary measures to rescue passengers and prevent danger to persons or objects on the ground or the water, or the pilot-in-command shall not leave the aircraft unless he or she has made the passengers or other people on board leave." Article 132 of the Aviation Act of 1988 provides that if the PIC violates the provisions of Article 57 (4), he shall be punished by imprisonment for not more than five years.

275 Criminal Act [No. 4040, Dec 31, 1988] (hereinafter the "1988 Criminal Act"), art 268: "A person who causes death or injury to a person by negligence or gross negligence in the course of business shall be punished by imprisonment with labor for not more than five years or by a fine not exceeding 50,000 Hwan." The current Criminal Act of the ROK is similarly worded. *See* Section 4.5.2.2.

276 1988 Aviation Act, art 57(4).

277 1988 Criminal Act, art 268.

278 *See*, above and Hangyeorae, 'Tripoli Korean Air Crash Captain Sentenced to 5 Years in Prison' (7 December 1990) <<https://newslibrary.naver.com/viewer/index.naver?articleId=1990120700289114003&editNo=4&printCount=1&publishDate=1990-12-07&officeId=00028&pageNo=14&printNo=794&publishType=00010>> accessed 13 October 2024.

279 The case does not refer to which edition of ICAO Annex 13 its decision is based. However, the reference substance of Standard 5.12, referring to the disclosure of records and an adverse effect on the available information or future accident investigations, has not changed since the introduction of the Standard.

accused pilot argued before the Supreme Court of the ROK that the investigation authorities were not allowed to disclose technical investigation reports. The Supreme Court held that this Standard imposes an obligation on the contracting State that institutes an investigation but not on other States.<sup>280</sup>

In the present case, the investigation was led by the Libyan authority.<sup>281</sup> Therefore, the district court of the ROK could use its findings when prosecuting the pilots. The Korean Supreme Court also emphasised that Standard 5.12 of Annex 13 and the protection referred to in Standard 5.12 do not grant absolute protection from criminal liability,<sup>282</sup> because the same Standard (5.12) allows competent authorities of States to determine that the disclosure or use of the mentioned materials and information “outweighs the likely adverse domestic and international impact such action may have on that or any future investigations.” This exception of the prohibition of disclosure has been introduced in the context of the ‘Just Culture’ concept, as to which see Section 2.5 of Chapter 2 and section 2.5 of Chapter 3.

#### 4.4.4.2 *The 1989 Ullung helicopter crash*<sup>283</sup>

On 27 July 1989, a commercial operation helicopter crashed into the ocean only 1 km away from the shore of the ROK.<sup>284</sup> The PIC was prosecuted

280 Supreme Court 1993.10.12 Case No. 92Do373 Judgment

281 Munhwa Broadcasting Corporation, ‘Korean Air Flight 803 Black Box Recovery [Kim Jong-oh]’ (1989) <[https://imnews.imbc.com/replay/1989/nwdesk/article/1824901\\_30389.html](https://imnews.imbc.com/replay/1989/nwdesk/article/1824901_30389.html)> accessed 13 October 2024.

282 See also, Section 3.4.2.2 and Supreme Court 1993.10.12 Case No. 92Do373 Judgment: “According to the Convention on International Civil Aviation and its Annex 13, the fundamental purpose of an aircraft accident investigation is to faithfully investigate the cause of an accident to prevent the recurrence of similar accidents in the future. Although there is an obligation, disclosure of accident-related data is not always absolutely prohibited, even according to the wording of Article 5.12 of the above Annex D and Article 4 a) of Annex D, which serves as a reference for the application of its interpretation, and is not always absolutely prohibited, and is subject to the decision of the competent authorities. Accordingly, when it is judged that the need for proper exercise of judicial power outweighs the adverse domestic and foreign impacts of using accident-related data in civil and criminal court proceedings, the data can be disclosed.” [translated by the Author] When referring to Standard 5.12, the Court does not differentiate whether the referred ‘Article’ is a Standard or Recommended Practice.

283 Supreme Court 1990. 9. 11. Sentence 90Do486.

284 Munhwa Broadcasting Corporation of Korea, ‘14 dead and missing in a tourist helicopter crash between Yeongdeok, Ullungdo’ (1989) <[https://imnews.imbc.com/replay/1989/nwdesk/article/1824784\\_30389.html](https://imnews.imbc.com/replay/1989/nwdesk/article/1824784_30389.html)> accessed 13 October 2024. The defendant, a pilot, was operating a helicopter with 3 crew members and 16 passengers. During the flight from Ullung Island to Ganggu Heliport, engine No. 1 malfunctioned, and its oil pressure dropped to zero. The pilot attempted to return to Ullung Island, but by operating the damaged engine at full power, the functioning engine No. 2 was overburdened, leading to further loss of power and difficulty maintaining altitude. The pilot failed to take necessary actions to lighten the aircraft’s load or to safely execute an emergency water landing. As a result, the helicopter crashed into the sea due to the pilot’s negligence in following emergency procedures.

under Article 187 of the Criminal Act of 1988, criminalising the crashing of an aircraft, and Article 132 of the Aviation Act of 1988, penalising breaching duties of the PIC, including taking the necessary measures to rescue passengers in case of imminent danger.<sup>285</sup>

In this case, the Supreme Court interpreted the concept of ‘imminent danger’ both objectively and subjectively. On the one hand, objectively, the court defined “imminent danger” as a situation where there is a tangible, immediate risk of the aircraft crashing, overturning, or being destroyed. This level of danger requires the pilot to recognise the situation as critical and act accordingly. On the other hand, subjectively, it involves the pilot’s personal recognition of the imminent danger to the aircraft and the potential harm to human life, physical safety, or property. The court found that, despite recognising the dangerous situation, the PIC did not take the necessary steps to ensure passenger safety or prepare for a possible emergency water landing. Therefore, the court ruled the defendant’s actions as a violation of the Aviation Act.

#### 4.4.4.3 *The case of low-altitude operation of pesticide control aircraft*

The defendant, the PIC, as well as the operations manager of a general aviation service provider, conducted aerial pesticide spraying over the Haenam area in Korea on August 11, 2014, despite poor weather conditions, including strong winds and turbulence.<sup>286</sup> The operation required low-altitude flight at around 6 meters high from the ground, posing a risk of sudden downdrafts. According to the court, as a pilot, the defendant had a duty to anticipate such hazards and take precautions to prevent a crash. However, the defendant proceeded with the spraying without adequate precautions, leading to a sudden downdraft that caused the aircraft to crash into a farm embankment and a rice paddy. The defendant was charged with negligence for causing the crash of an aircraft in operation based on Article 160 of the Aviation Act,<sup>287</sup> Article 70(1) and Article 69(2) of the Criminal Act on detention.

Against the prosecution arguing that the PIC failed to exercise due diligence in predicting and responding to the sudden downdraft, which could have been anticipated given the turbulent weather conditions and low-altitude flight, the defendant, the PIC argued based on unforeseeability and inability to avoid the accident. Firstly, the defendant claimed that it was impossible

285 Criminal Law [Enforced on December 31, 1988] [Law No. 4040, December 31, 1988, Partially Amended] art 187 and Aviation Act ([Enacted on March 5, 1988] [Act No. 3996, December 4, 1987, partially amended]) Article 132. Equivalent to the current Article 143 of the Aviation Safety Act.

286 Seoul Central District Court, 2018. 2. 8. Decision 2017No981.

287 Aviation Act [Enforced on January 16, 2015] [Law No. 12817, October 15, 2014, Partially Amended], Article 160. This provision is equivalent to Article 149 of the Aviation Safety Act 2024, discussed in Section 4.5.2.3 of this research.

to predict or detect the downdraft at the accident site due to the lack of advanced equipment or warnings from relevant authorities, thus negating foreseeability. Moreover, the PIC argued that it had followed all necessary safety protocols and that the sudden downdraft gave insufficient time and space to react, particularly at the low altitude required for pesticide spraying.

The court rejected both defence arguments. Evidence from witnesses and the defendant's own statements showed that the defendant was aware of the poor weather conditions, including strong winds and turbulence, yet continued flying. This suggested that the defendant could have anticipated the risk of a downdraft and should have either flown at a higher altitude or postponed the operation. The court found that the defendant's failure to do so constituted negligence, leading to the crash.

#### 4.4.5 Concluding remarks of Section 4.4

The ROK and the other States discussed in Chapter 4 rank highly in terms of the implementation of SARPs laid down in the ICAO Annexes, amongst the highest of all contracting States. The very high degree of implementation of ICAO SARPs contributes to both the safety paradigm, because these SARPs are designed to enhance safety, and to the legal certainty paradigm, because aviation actors, including PICs, can be aware of the applicable rules for navigating their aircraft.

By enacting laws enabling the prosecution of pilots, Korean law is compliant with the obligation under Article 12 of the Chicago Convention (1944). Pursuant to the Korean Aviation Safety Act (2023), pilots may be prosecuted for causing the crash of an aircraft, including by breaching flight rules.

Since case law is somewhat limited, it is not possible to obtain a comprehensive view of what can constitute negligence, giving rise to criminal liability for pilots in the ROK. The court decisions concisely discussed above affirm, however, that negligence may be used to prosecute pilots in the aftermath of an aviation accident or incident.

Case law demonstrates that pilots may be prosecuted on the basis that they have caused injuries and deaths of passengers, as well as damages to the aircraft and infrastructure. In yet other cases, prosecution was based on breaches of applicable flight and manoeuvre rules, in which cases, prosecution was perceived as a tool to promote safety. A further complication in such prosecutions may be that indictments may not adequately represent the complexity of cases as they are not drawn up by aviation professionals but by the public prosecutor, who may not understand fully how to appraise neither the facts and circumstances of an accident nor the implications of violations of aviation rules.

The ROK approach with respect to duties and possibilities in relation to the non-disclosure of records is also reflected in case law. Courts in the ROK consider that the obligation under Standard 5.12 of ICAO Annex 13 does not apply to the admissibility of technical investigation records collected by the investigation authorities of a foreign State. Generally, provisions prohibiting the use of records of accident investigation in criminal proceedings do not have legal force within the legal system of the ROK. These provisions are not aligned with the Standards laid down in ICAO Annex 13, which affects the paradigm of legal certainty because different norms may apply to the same situation.

#### 4.5 CHAPTER CONCLUSION

Chapter 4 discussed domestic legal regimes governing the criminal liability of pilots. In particular, this chapter considered legislation, the enforcement of applicable safety and criminal provisions, and prosecution in the jurisdictions of the US, the UK, and the ROK.

As mentioned in the introduction to this Chapter, these three jurisdictions actively implement ICAO SARPs in their domestic legal systems. There are only minor differences in the level of effective implementation; the average percentage of the implementation of ICAO SARPs is 93.9%. This is higher than the world average implementation level. However, despite the high level of implementation, none of these States have achieved complete standardisation, which might weaken both the safety and the legal certainty paradigm.

Discussion in this chapter reveals that criminal air law in each of the researched jurisdictions shows the features of a special criminal law, creating a high degree of complexity while confirming the problematic relationship of such special regimes with legal certainty. In each jurisdiction, prosecution can be initiated based on general criminal law or special aviation offences, in both cases, in conjunction with international and domestic air law.

Article 12 of the Chicago Convention (1944) dictates that infringement of flight and manoeuvre rules must be a ground for prosecution. That principle laid down in Article 12 of the Chicago Convention (1944) has not always been applied in the selected jurisdictions. Instead, in practice, harm to human life and/or property has served as reason for prosecution in most cases. In the selected jurisdictions, violations of flight and manoeuvre rules, where they do or do not cause harm to human life and/or property, may lead to administrative sanctions or civil liability rather than prosecution and criminal liability.

Three types of enforcement mechanisms were identified. *Firstly*, prosecution can be initiated by a public prosecutor. *Secondly*, prosecution may be diverted to a special entity, such as the CAA. *Thirdly*, administrative enforcement may be preferred over criminal prosecution, leading to administrative sanctions. Particularly where prosecution is conducted by a general prosecution service, there is a risk that it will be based on insufficient knowledge of the complexity and multifaceted aspects of international civil aviation and the rules governing it, hampering consideration of all factors for indictment. This lack of awareness may also arise when the CAA initiates prosecution, as it must, or may wish to, prioritise public policy considerations, taking into account local factors and domestic regulations, whether related to aviation or not.

This chapter reveals the complexity of the pertinent positive law in the selected jurisdictions, with special reference to the effect of the necessary conjunctions between international and domestic criminal air law, as well as domestic general criminal law, as explained in case law in the selected jurisdictions. Where relevant, I refer to the functioning and interplay of the paradigms engaged in this research therein.

On the basis of my analysis of the case law of the three jurisdictions, I conclude that, next to discernible complexity, all paradigms are, to a certain extent, impacted by the applicable regulations, the facts of concrete cases and court decisions. In short, it would seem that none of the paradigms is dominant. I discuss the findings of this chapter in relation to the complexity of the underlying paradigms and their interrelationships in Chapter 5.