

PART IV

AN ATTEMPT TO ANALYZE THE RESPONSIBILITIES OF THOSE INVOLVED IN THE CERMIS AFFAIR

1. INTRODUCTION

While the previous sections of this report have illustrated the activities of the Committee, giving a critical overview of the voluminous and complex documentary material it has provided, this part will undertake to provide an overall reconstruction of the responsibilities involved.

This reconstruction in no way intends to bring into question the legal status of the acquittal of the two pilots by the competent judicial authorities of the United States, whose capacity to decide is in no way challenged, based as it is on the application of rules enshrined in international treaties. Nor is there any intention to call into question the consequences of such rulings, even as regards the responsibilities of the American chain of command. As to the ruling and its legal effects, the Committee is duty-bound to respect it, as is appropriate for the legitimate jurisdictional act of a foreign legal system.

The same position is adopted – although obviously in a different regulatory framework – concerning the findings established by the rulings of the Italian ordinary and military judiciaries concerning the responsibilities of the competent military personnel.

The assessments expressed here by the Committee are of a political nature, and do not intend to produce legal consequences but only to contribute to ascertaining the truth, in accordance with the intentions of the Chamber of Deputies expressed in the resolution establishing the Committee itself.

From this point of view, the attempt to reconstruct the events – especially in the case of the US pilots – should not appear contradictory.

Indeed, far from contradicting what has been stated above and far from being a merely academic exercise, this reconstruction has the exclusive aim of seriously and clearly performing one of the main tasks assigned to this Committee: to shed full light on the events, the causes and the responsibilities at all levels for the incident of 3 February 1998 in the municipality of Cavalese, involving the violent impact of a US aircraft engaged in a training flight with the Cermis cablecar system, which, by severing the cables, caused a gondola to fall to the ground, killing all twenty passengers on board (Article 1, Section A, of the resolution establishing the Committee)

2. THE RESPONSIBILITY OF THE AIRCREW

2.1 The nature of the aircrew's negligence

In view of the documents examined and the hearings conducted, the information acquired by the Committee enables it, within the

framework of the Italian legal system, to proclaim the responsibility of all the members of the crew in causing the mishap for the offences that the Italian public prosecutor's office of the Court of Trento had defined (pursuant to Article 81 paragraph 1 of the Italian Criminal Code [c.p.]) as concurrent counts of contribution to multiple negligent homicide (the joint effects of Articles 113 and 589 paragraphs 1 and 3 c.p.) and contribution to negligent endangerment of public transportation resulting in disaster (Article 432, paragraphs 1 and 3, and Article 449 c.p.).

The psychological attitude of the military personnel involved in mission EASY 01 can indeed be qualified in terms of negligence, both generic and specific (see Article 43, paragraph 1 c.p.).

The former offense would consist in not having observed normal rules of diligence, prudence and appraisal, flying at extremely low altitude and at high speed over inhabited areas. Such generic negligence is all the more evident when it is considered that it was a contact flight carried out in ideal weather conditions. To this should be added the fact that, since all the crew were experts, each with a considerable number of flight hours, a very different level of expertise, prudence and diligence could have been expected of them. Once it had been ascertained that none of them in that moment was subject to an incapacitating pathology (only Capt. Schweitzer had been classified as NPQ [not physically qualified] due to a long-term problem with kidney stones – see US Command Investigation Board – but neither before the mishap nor after did he appear to have complained of such problems or to have resorted to medical care), that there was excellent visibility that day and that the plane's altimeter (operating correctly, as was all the other instrumentation on board: the aircraft, it should be remembered, had been designated « safe for flight » before takeoff: see the chapter on the Trento trial) was deliberately not turned on (despite the fact that the NATOPS manual requires its use during low-level flight), it would certainly appear to exclude the possibility that they were not aware they were proceeding in a manner entirely in breach of regulations, as well as in conditions which were objectively hazardous in view of the particular environment – both in terms of nature and human settlements – over which they were flying.

Nor could such observations be invalidated by the alleged lack of recent training in low-level missions. In the 30 days prior to the mishap, the aircrew concerned had made the following sorties (as acknowledged by the Command Investigation Board on 10 March 1998):

Capt. Ashby, seven sorties, totaling 14.5 hours;

Capt. Schweitzer, 8 sorties, totaling 18.5 hours;

Capt. Raney, 11 sorties, totaling 21.9 hours;

Capt. Ashby, 6 sorties, totaling 10.7 hours.

It is true (see page 28-29 of the report of the Command Investigation Board on 10 March 1998) that Capt. Ashby had made his last

low-level flight on 3 July 1997, and so, like Capt. Raney, had made no low-level sorties in the six months leading up to the incident, while in the same period Capt. Schweitzer had made only two, of which only one as ECMO1, and Capt. Seagraves had made one (on 13 January 1998, before his deployment to Aviano). However, training is used only to maintain and/or improve the level of practical and theoretical skills of the crew while, in this case, their perception of the risk entailed in such senseless flight conduct (without there being the slightest mission justification) can only have been based on their acquired patrimony of knowledge and experience, considering the total number of flight hours of each of the crew members on board the EA-6B aircraft that day (see previous chapters). Indeed, precisely this lack of sufficient recent training in low-level flight should have encouraged them to act less carelessly.

Specific negligence, on the other hand, would consist in the manifest violation of orders, since the American airmen neither respected the flight plan in terms of course, altitude or speed, nor did they abide by ordinary safety regulations (all attributes of order and discipline). This, however, would tend to exclude any argument about a possible exemption with regard to the performance of a duty referred to Article 51 c.p., which, by its very nature and in the light of the Italian legal system, presupposes compliance with the legal order. In this instance, that legal order was intentionally disregarded.

In addition to the flight plan, the aircrew were shown to have violated:

the minimum altitude of 1000 feet imposed by the U.S. Marine Corps Order (T&R) for Prowler aircraft. This is a specific safety measure established by the American military authorities for training missions on aircraft such as the EA-6B;

the minimum altitude of 2000 feet prescribed for flights over the Trentino area by the 1st ROC Monte Venda message of 16 August 1997, published on August 29 in the FCIF of the 31st Fighter Wing; the fact that the records referred to as « Low Level SOP » used by the VMAQ-2 Squadron contained a navigation chart indicating the 2000-foot limit on the AV047 BD course enables us to deduce that this limit was known or could have easily been known by the American military personnel;

the minimum altitude of 1000 feet for winter flights, i.e. from 1 November to 30 April, and in any case over snow-covered ground, a regulation contained in the USAF MCI 11-F-16 message; there can be no doubt that the US military personnel were aware of this, as was also acknowledged by the Command Investigation Board. In fact, the documentation retrieved from the cockpit of the Prowler indicated these limits. This contradicts the statements of the aircrew to the Board that they were unaware of it;

the ban on overflying built-up areas (Cavalese, in the case in point) at a distance of less than one nautical mile;

the speed permitted over Italian territory, which was 450 knots at altitudes below 2000 feet, while at the moment of the mishap the aircraft was traveling at about 540 knots, equivalent to 1000 kph;

the SMA 175 message of 21 April 1997, which was intended to prohibit low-level training flights for the troops deployed in Italy for Operation Deliberate Guard; although the US Commander of Striking Forces South did authorize training flights for the Prowlers of the VMAQ-2 deployed at Aviano (which is mentioned in the Command Investigation Board's report), such a directive could never have had precedence over the agreement reached with the Italian authorities and reported in the aforementioned message concerning minimum altitudes;

the obligation to use updated maps, such as the Italian charts that were regularly delivered by the Italian Aeronautical Charts Information Center (CIGA) to the commanders of the 31st FW and which, unlike the American maps, indicated the Cermis cable car; it should be emphasized that US airmen were under no obligation to use only the American maps provided by the National Imagery and Mapping Agency (NIMA) of the US Department of Defense. If they had used the diligence required for the type of task they were carrying out, they should have compared the maps provided to them and noticed the greater accuracy of the Italian ones.

Obviously, the latter violation would not have had any causal role if (see below) the pilot had deliberately and rashly decided, from the outset of the mission, to pass beneath the cableway (which would demonstrate full prior awareness of the obstacle). The other violations are all causally sufficient to produce the mishap, particularly those concerning the flight altitude, since there can be no doubt that if the aircraft had kept to the altitude prescribed by regulations and specified in the flight plan, it would have been in an entirely safe position with respect to the cableway below.

Nor could the causal relationship between the conduct described and the mishap ever be considered suspended, pursuant to Article 41 c.p., by the fact that the cablecar suspension cables were not marked in such a way as to make them visible from a greater distance, since colored balls and other similar marker systems would clearly not have been perceptible earlier or more easily than the yellow gondola of the cable car, which the pilot of the Prowler was certainly able to see thanks to the ideal visibility conditions.

On the other hand, the aircrew would appear to be extraneous to the matter of the legitimacy of the authorization for flight EASY 01, since this mission was one for which, quite apart from any other assessment, the aircrew would be justified, in this case, as having performed their duty.

There appears to be no doubt that the aircrew – consisting of military personnel subject to a legal relationship of subordination – had every reason to consider the order to proceed with mission EASY 01 (in itself, obviously, in no way criminal) as fully in line with the service performed and legitimately received from their own superiors.

2.2. Willful negligence.

The specific and generic negligence of the entire aircrew would also appear to be aggravated by the circumstances regarding the foreseeability of the event pursuant to Article 61(3) c.p. More specifically, it would appear to have been a clear example of what Italian criminal law literature defines as *colpa cosciente* or *colpa con previsione* (approximately, willful negligence or willful misconduct), which is distinguished by the fact that the mishap, although not intentional, is nevertheless abstractly foreseen by the subject, who nevertheless proceeds in the conviction that he will be able to avoid it.

This is clearly a type of negligence which – however conceptually independent and separate – lies on a subtle borderline in legal practice with another psychological attitude: that of *dolo eventuale* (approximately, prospective intentional wrongdoing). In this case, the subject anticipates the occurrence of an event that is not the objective of his action, in the sense that there is the probability or even only the possibility that it will take place but – even without wishing the event to occur – he accepts the risk his action involves.

The fundamental difference between the two forms of subjective element is to be found in anticipation of the event. As the Court of Cassation has ruled on a number of occasions, in *dolo eventuale* the prospective occurrence of the event is so concretely possible that the subject – in desiring the action – accepts the risk, so that his volition can be considered to include the prospective event associated with the primary action. The acceptance of risk shall be considered to form part of the volition where the subject anticipates the wrongful event as certain or highly probable, in other words as a necessary or highly likely consequence of his own action.

In the case of *colpa cosciente*, on the other hand, it is clear that the event remains such an abstract hypothesis in the mind of the subject as to be no longer perceived as practically possible, perhaps because the subject counts on his own abilities to avoid it, meaning that it is in no way desired by him.

In the subject's perception of the concrete possibility that the anticipated event will take place, the realization that the event presents itself as objectively likely is not sufficient, since it is necessary to consider his real anticipation and volition, i.e. his reckless or negligent appraisal of the actual circumstances (see Court of Cassation ruling no. 6581 of 29 April 1989, hearing 15/07/1988).

On these assumptions, bearing in mind the imprudent appraisal of the level of risk in the places involved in the flight, it would appear reasonable to rule out the possibility that the pilot of the Prowler and the other members of the crew had perceived the impact with the cable car suspension cables as actually possible, assuming that – relying excessively on their own experience and skills – they felt that they would be able to avoid the mishap. Otherwise, we would have to assume that they would also have accepted the risk of losing their lives with the sole aim of descending below the prescribed flight altitude. The clear disproportion between the event desired and the events anticipated is so great as to exclude this hypothesis, also considering

the presence of more than one person on board the aircraft (acceptance of a real risk of causing a mishap is improbable in the case of an individual, but even more so in the case of four persons).

Confirmation of the view that the aircrew did not really fear they were heading towards a catastrophic accident is demonstrated by the fact that they took the video camera on board the plane. This would suggest they intended to film or photograph scenic views of the terrain along the flight path.

These conclusions appear to be well founded regardless of the three hypotheses that in theory could be formulated (see the chapter on the Trento trial) concerning the intentions of the pilot at the moment the plane approached the cable way: whether Capt. Ashby did not notice the cable car suspension cables, or whether, realizing there was an obstruction, he attempted an emergency maneuver or, finally, whether he had recklessly intended to pass under the cables from the beginning of the mission, it would be in any case appear that the aircraft should not for any reason have been on that course, at that height and at that speed, and that the distinction between the three hypotheses might be useful only to establish the degree of negligence (obviously higher in the third and last hypothesis, i.e. that of the foolhardy maneuver knowingly attempted as proof of skill and courage). The degree of negligence would, in turn, have been significant (pursuant to Article 133, paragraph 1(3), c.p.) only for the purposes of quantifying a possible sentence following a trial which, as mentioned, was not held in Italy because the United States declined to waive its priority jurisdiction.

2.3 The position of each member of the crew

The violations mentioned above would appear to be ascribable to the responsibility of each member of the crew.

We can rule out the possibility of mere concurrence of independent negligent actions, since all members of the crew were on the same aircraft, each fully aware of the dangerous actions of the others. There appears to be no doubt as to the extreme negligence of the pilot, Capt. Richard Ashby, who was personally entrusted with actually piloting the plane. As for the other members of the crew, it is necessary to distinguish between two hypotheses, which while they differ are basically similar in terms of the responsibility they involve. The first is that the other airmen on board the aircraft had caused or encouraged the pilot to violate the above-mentioned regulations, thus giving rise to a situation of *cooperazione colposa*, or negligent contribution by means of commissive conduct, in which there was a common desire not to comply with the restrictions on the mission. The second is that, through simple negligence, they did not apply pressure on their colleague to prevent him from continuing his reckless flight conduct.

The former hypothesis could be supported by the presence of a video camera, of a 35 mm cine camera, and of a camera on board the aircraft. A highly significant indication is that other, if not all, members

of the aircrew intended – as had often occurred on other flights – to take videos and photographs from the cockpit, whether to keep as souvenirs or to give proof of their daring and skill in flying at extremely low altitude through the Alpine valleys and mountains.

Although ignored by the Command Investigation Board, this observation appears by no means marginal and would suggest negligence of considerable importance, attributable in equal measure to all those who agreed with the decision to knowingly raise the level of risk of the flight in order to exhibit a souvenir and/or boast of daring and skill at a later date.

Nevertheless, there appears to be a significant degree of negligence even if the hypothesis is one merely of *cooperazione omissiva*, or omissive contribution. Even if the intention of flying at extremely low altitude was not shared by all the other members of the crew, and bearing in mind that under Italian law (Article 40 c.p.), violation of a legal obligation to prevent an event is equivalent to causing it, it appears undeniable that Capts. Joseph Schweitzer, William Raney and Chandler Seagraves were guilty of contributing to causing the mishap since each of them failed to carry out the specific tasks they were assigned.

In order to better understand the arguments expounded above, it should be stressed that the inquiries conducted revealed that, in at least three stages of the flight, there were serious violations of the flight plan and other regulations in force (see the chapter on the accident itself), so it would appear that we can exclude the hypothesis that the mishap took place due to an unforeseen initiative of the pilot alone, one so rapid and unforeseeable as to prevent the others from intervening in time to return the flight to its regular course. On the contrary, the continual violations throughout most of the flight and the absence of any emergency communication from the plane to the control tower before impact with the cablecar suspension cables appear to rule out the hypothesis that everything happened suddenly and/or without there being the possibility of effective intervention by the other members of the aircrew.

Considering that the NATOPS manual specifies that each member of the crew shall perform their duty with a spirit of shared responsibility, and that personnel acting as ECMOs are obliged to be constantly aware of the state of the aircraft and the operating environment, as well as to intervene with the pilot should there be a risk of collision, it appears undeniable that negligence equivalent to that of Capt. Ashby is also attributable to Capt. Schweitzer, who was present as the first electronic countermeasures officer (ECMO1) and, in such a position, was also responsible for re-plotting such sections of the flight plan as may have been required during the mission. He was also responsible for navigation, as well as for the navigation and communication systems, with the obligation to assist the pilot with weapons (not relevant in this case) and to assist him in lookout routing, considering the limited visibility from the pilot's seat.

In short, the ECMO1 can be considered responsible for the way the entire mission is carried out.

Nevertheless, although he had the authority, responsibility and effective opportunity (he was sitting right next to the pilot), Capt. Schweitzer failed to prevent Capt. Ashby from disregarding the flight plan and the minimum altitude limits so markedly and so repeatedly.

The same holds is true – with a degree of negligence which is still significant in criminal terms and is substantially the same – for Capts. William Raney and Chandler Seagraves, who were present in the posts of ECMO2 and ECMO3, with responsibilities for pre-flight preparations and, during the flight, for assisting the pilot in identifying dangers to the flight.

In essence, Capts. Raney and Seagraves would appear not to have fulfilled the principle task they had been assigned, ie. identifying threats to the safety of the flight, even though the blatant difference between the prescribed and actual height and speed was certainly so great as to make the degree and nature of the risks perfectly evident. This means that, since it was clear that the plane was proceeding at extremely low altitude and, at the very least, already deviating from the flight plan, ECMO2 and ECMO3 should have deduced from that the fact they did not hear the acoustic alarm signal that the altimeter was not functioning. They should therefore have pointed this out to their two colleagues sitting in front of them in the cockpit (from their position, ECMO2 and ECMO3, like ECMO1, were not able to see the RadAlt, but the helmets of all the crew members were equipped with the acoustic signal that sounds as soon as the plane descends below the set height). The fact that they did not do this would suggest there is no explanation other than that they were aware the RadAlt had been intentionally disabled or that all of them had decided to ignore the acoustic alarm signal, which would be equally serious in terms of responsibility.

Furthermore, the fact that the crew members were all of the same rank, albeit with different duties within the mission, rules out the possibility that any of them had failed to intervene out of fear of a superior officer.

Finally, the line of defense adopted by the crew members during the administrative inquiry and the court martial in America is obviously utterly insufficient to absolve them of the responsibility asserted here, since the above arguments provide sufficient demonstration that it is inconceivable that they could not have known the regulations concerning the minimum altitude or that the altimeter did not work, or that they were not able to perceive the dangerousness of their flight conduct.

3. THE AMERICAN CHAIN OF COMMAND

3.1 *The Marine Corps*

Internal disciplinary inquiries

An examination of the responsibilities for the tragedy cannot be confined solely to the conduct of the crew of EASY 01. The very

circumstances of the event raise questions that involve the entire American chain of command.

In this regard, an examination of the records of the courts martial held in the United States provided the Committee with invaluable unpublished information concerning the case and made it possible to reconstruct the initial reactions that the tragedy provoked within the Marines Corps.

On 5 February 1998, two days after the accident, Major General M. D. Ryan, then Commander of the 2nd Marine Fighter Wing, and thus the direct superior of the VMAQ-2 Squadron deployed in Aviano, called a meeting of all the officers of the VMAQ squadrons then present at Cherry Point, the headquarters of Marine air operations. Facing more than 75% of Prowler pilots, the general read the headlines and negative comments of the newspapers concerning the Cavalese tragedy. This was the beginning of a dramatic encounter, described by one of the participants as « shock therapy ». Commenting on the incident, he stated that two facts were clear: the flight plan established a minimum altitude of 2000 feet and at the moment of the mishap, the plane was flying at an altitude of less than 1000 feet. According to the general, there was no possible explanation for the fact, except that the crew had intentionally been flying acrobatically and at low level (« flat-hatting »), consciously violating regulations. The general went further: he explicitly accused the entire community of Prowler pilots of being known for not respecting the rules and for reveling in low-level flying. He announced in front of his men that he would start an internal inquiry to discover all those who had violated the rules and get rid of them.

It would seem, therefore, that the general did not consider the Cermis tragedy to be the result of an isolated or occasional episode.

The general went beyond mere words: the following day he relieved Lieutenant Colonel Steven Watters from command of the VMAQ-3 Squadron, the group of Prowlers deployed in Aviano in 1997, later replaced by VMAQ-2. The reason for this severe decision was a report that, with a sense of timing that was hardly coincidental, the legal officer of VMAQ-3 sent Gen. Ryan, in which the Squadron Commander was accused of misconduct in flight. After relieving Lt. Col. Watters of his command, the general started an administrative inquiry into the facts reported. This was entrusted to his assistant, Brig. Gen. William Bowden. During this inquiry, a video registration was found of a low-level flight of a Prowler based at Aviano that had taken place on 3 April 1997. The recording shows that the flight clearly contravened OPNAV regulations: the aircraft concerned was flying too low over inhabited areas and was flat-hatting in mountainous areas. The course taken by that Prowler was AV047, the same as the mishap flight of February 3, 1998. One of the aircrew on flight was the squadron captain, Lt. Col. Watters, who took no action to prevent or correct the pilot's misconduct.

The administrative inquiry also shows that the day after the Cermis tragedy, Lt. Col. Watters summoned all the officers in his squadron to a meeting. The aim of the encounter was to inform all those present

of the mishap and its consequences. But at the end of the meeting, the commander made a recommendation to his men: if any of them had copies of video recordings of low-level flights, they were strongly encouraged to make them disappear. According to Gen. Ryan, these statements were unbecoming an officer and gentleman, especially in consideration of the status of commanding officer and of the importance of the meeting at which they were made.

For this reason, and for the omissive conduct during the flight of 3 April 1997, Lt. Col. Watters, at the end of the disciplinary proceedings against him in April 1998, was punished with 14 days confinement to barracks, a penalty of \$ 2,472 per month docked from his salary for two months, and the obligation to hold a conference in each of the VMAQ squadrons on the « lesson » learned and on how to avoid such situations in future.

In the following days and weeks, Brigadier General Bowden carried out another administrative inquiry on behalf of Major General Ryan into the conduct of the Prowler squadrons deployed at Aviano.

During this inquiry, he questioned all the officers – after reminding them of their rights in as much as they were suspected of violating their orders – on their flight conduct during the period in which they had been deployed at Aviano.

The investigation concentrated on ascertaining what negligence there may have been on the part of the VMAQ-2 supervisors and their bearing on the mishap. As a result, four officers of that squadron – the Commander, the Executive Officer, the Operations Officer and the Safety Officer – were disciplined. The hearing was held on 6-8 August 1998, judged by Lt. General Pace, commander of Marine Forces Atlantic.

Following the hearing, the Safety Officer – Maj. Max Caramanian – and the Squadron Commander – Lt. Col. Muegge – were found guilty of dereliction of duty for the way in which the information concerning the flight restrictions was (or rather, was not) made known to the VMAQ-2 pilots. As a result, Muegge was relieved of his command.

The episodes referred to above are mentioned in the documentation presented to the court martial by Ashby's defense. They are not admitted as evidence but were in any case attached to the case records. The documentation refers only to the outcome of the inquiry and does not throw light on activities carried out during the administrative investigations. In relation to the declarations by Maj. Gen. Ryan, there are a number of sworn statements by those who were present at the meeting. The proceedings against Lt. Col. Watters are documented in the disciplinary punishment report signed by Gen. Ryan himself.

Through the Rome Embassy and during a visit to the Pentagon on 20 November 2000, on the basis of these findings, the Committee made a formal request to the government of the United States to obtain a complete copy of the documentation concerning the disciplinary proceedings resulting from the Cermis mishap, and to hear Gen. Ryan and Gen. Bowden directly.

None of the Committee's requests were granted, on the basis of the argument that such records were non-admissible.

This prevented the Italian authorities and the public from obtaining information of clear interest for the overall reconstruction of responsibility for the tragedy and, probably, for the drafting of regulations and procedures that would prevent other such events in the future. The decision to withhold information about the full results of the inquiry into the behavior of air units deployed in Italy also makes it possible to presume that, in the absence of other motives, there are serious reasons for embarrassment for the Marines Corps concerning the conduct of its pilots.

Although incomplete, the information acquired by the Committee, assessed together with the data already in the possession of the Italian investigating authorities, does in any case make it possible to state some certainties concerning the flight conduct of the pilots deployed at Aviano and about their commanders. The most striking statement in terms of its content, context and, above all, the rank of its author is undoubtedly that of Maj. Gen. Ryan, an officer at the highest levels of Marine Corps aviation, according to which the Prowler pilots are known to be undisciplined and tend to carry out low-level flights in contempt of the regulations. That these statements are neither artificially or emotionally exaggerated, dictated by anger in the heat of the moment, can be inferred not only from the level of character which must be presumed in a high-ranking officer with such an important post, but also from the Watters affair. As stated, the commander himself of the Prowler squadron deployed at Aviano took part in one of these « low-level hot-dogging flights » over the mountains, without respecting flight safety regulations. It was no accident that this occurred on AV047: this route took aircraft over some of the world's most beautiful and spectacular mountains, as confirmed by the pilots themselves during the court martial. They were so beautiful as to be worth immortalizing on video to take back home (the VMAQ-3 meeting called by Watters took place at the Cherry Point base in North Carolina). The fact that Watters felt the need to ask the men in his squadron to get rid of all the videos of those flights means at least two things: first, that there was more than one video, involving a number of flights. Watters would not have exposed himself in front of the entire squadron with a request « unbecoming an officer » if he had only intended to obtain the video of his flight of 3 April 1997. He could simply have approached the author of the video separately or, at most, the other three members of the crew on that flight. Secondly, it means that the flight conduct shown by those recordings was patently and deliberately irregular, as can be seen in the video that – unfortunately for him – Watters was not able to dispose of in time.

It is therefore no coincidence that the crew of EASY 01 also used a personal camera and video camera during the flight and then erased the recording. On that route, the use of cameras was customary among the crews and, probably, one of the reasons for violating the regulations establishing the minimum flight altitude.

It can thus be stated with certainty that the conduct of the crew of flight EASY 01 was not an isolated episode of intentional violation of flight safety regulations by the Marine aircrews deployed at Aviano in those years.

This leads to questions about the joint responsibility of the direct commanders of the aircrew which caused the incident and, in more general terms, about the effective ability of the American chain of command to exercise control.

3.2 The VMAQ-2 Squadron

Failure to distribute FCIF 97-16.

The Committee learned that, as indicated above, the Commander and the Safety Officer of VMAQ-2 were found guilty and punished by the Marine Corps for not having distributed the necessary information on flight restrictions to the squadron. Even though it does not have access to the full findings of the administrative inquiry, it is clear that this refers to the failure to distribute information to the pilots about the ban on flying below 2000 feet over the territory of Trentino-Alto Adige issued by the Italian authorities on 16 August 1997 and published in FCIF 97-16 (Flight Crew Information File) of the 31st FW, dated 29 August 1997.

The investigation carried out during the administrative and criminal proceedings in the United States established that VMAQ-2 did not take into the slightest consideration this flight restriction over Trentino-Alto Adige in the planning and execution of flights. From August 1997 to the date of the mishap, the flights of this squadron on route AV047 (the most commonly used for low-level flight) were always planned for 1000 feet, as admitted by Lt. Col. Muegge himself, who flew AV047 three times ignoring the restriction. According to the statements made during the various trials, neither the Squadron Commander, nor the Safety Officer, nor the VMAQ-2 pilots (with one exception, it appears) were even aware of the existence of FCIF 97-16.

It is reasonable to have serious doubts about the truthfulness of these statements by the squadron members, for they appear more as attempts to help fellow servicemen on trial, as well as being a form of self-defense in the disciplinary proceedings, since it came to light only after the Cermis disaster, that the entire squadron, including the Commander, had been violating that regulation for months.

Indeed, a number of elements indicate that the squadron was (or should have been) aware of the restriction. First, as Fallon, the investigator in Ashby's trial testified, two navigation cards indicating the 2000-foot limit imposed under FCIF 97-16 were found on the aircraft that carried out mission EASY 01 (one on the front seat and one on the rear seat). It may be that the navigator used different maps or interpreted that limit as not binding or solely as part of a general policy, as testified by the Executive Officer of the squadron, Maj. Slyman. But it would hardly be reasonable to talk of ignorance. All the

more so because Col. Rogers, commander of the operations group of the 31st FW based in Aviano, testified in detail about the initiatives taken to circulate the information to all the units deployed in Aviano in August 1997. The document was sent to all the units and was taken up in the subsequent weekly meeting, at which the operational chief of the 31st FW informed all the units based in Aviano about the new restrictions.

The Marines, however, proved to be less than diligent in collecting information about the Italian flight theater: indeed, it was shown that, unlike the other units stationed at Aviano, they were often represented by a low-ranking officer at the briefings and their mailbox, which was used to send them the various notices, was not checked regularly.

In the best of circumstances, therefore, VMAQ-2 and in particular its Commander, Lt. Col. Muegge, must be considered to have acted negligently, paying little attention to the receipt and distribution of information concerning the flight regulations in force in the country where they were stationed, if not of having ignored them completely. As can be seen in a general examination of the trial information, the Marines felt themselves to be independent and separate from the rest of the airmen (American and non-American) based in Aviano.

It should however be emphasized that this conduct of the Commander of VMAQ-2 and, in more general terms, the inadequate circulation of information, in no way diminishes the responsibility of the crew of EASY 01, who quite certainly were aware of the 1500-foot limit over built-up areas and of the general 1000-foot limit for Prowlers, both of which they violated by a considerable margin.

Planning EASY 01.

Although Lt. Col. Muegge paid for not having distributed all the information by being relieved of his command, this does not appear to be the most serious breach of regulations that can be attributed to him.

Lt. Col. Muegge was the commander of a small group of pilots (less than a dozen) and was a pilot himself. As such, he could not have been unaware and in full control of the attitudes and flight conduct of the members of his squadron. Here we are not referring to the technical control of conduct in flight, which can be (only partially) effected using technical instruments such as radar, but to the qualities typical of commanding officers, which also demand a certain degree of awareness and control over the private lives of subordinates, especially when deployed abroad on combat missions.

The use of private video recording equipment during missions is not something that can escape the notice of the commander of such a small group, even if only because such equipment was used for the prime purpose of showing others what had been seen (and done) during flights. The trial proceedings referred to above show that it is reasonable to consider that such equipment was regularly used by the pilots – and by their commanders – without any attempt at conceal-

ment. As an example, the use of a video camera on mission EASY 01 was noted by at least three corporals who testified: Cpl. Cottrell referred to the delay in turning on the aircraft engines, while waiting for the two video tapes which were rushed to the crew by Cpl. Packman and Cpl. Ransom. The use of this equipment, even though not expressly prohibited, certainly constituted a hazard for low-level contact navigation (i.e. looking at the ground – looking at the map, and vice versa), which is very difficult to carry out if one is concentrating on filming or taking photographs. And yet it would appear that Captain Muegge never reacted in any way to such conduct.

Apart from flight safety, there is another aspect concerning the use of recording equipment which makes such conduct even more alarming. AV047 was one of the three routes available to the squadron for low-level flights. Of these, it is the only one in a mountainous area and thus, at Lt. Col. Muegge himself explained, it is also the easiest, since the greatest difficulty in low-level flying is orientation and the recognition of reference points on the ground.

Nevertheless, this route is also one that provides superb scenery, which can then be shown to friends at home (as done by Muegge's unfortunate predecessor, Lt. Col. Watters). And it is by far the most commonly used route for low-level training flights, the decision being made by the Squadron Commander. One therefore wonders just how useful such training flights were to pilots who were so interested in the landscape. These doubts become all the greater if we consider mission EASY 01 in particular: the pilot, Ashby, had recently been selected for promotion as an F18 pilot. In ten days his detail period in Italy was to come to an end and he was to return to America for training on F18 aircraft, which are completely different. He had carried out his last low-level training flight with the Prowler just over six months previously.

The navigator, Schweitzer, had carried out his last low-level flight just over three months before, and thus did not need any further training.

The Operations Officer of the VMAQ-2 himself, who gave evidence at the Ashby trial, admitted there had been no priority for low-level training flights for Deliberate Guard. They were carried out in the redeployment zone only to maintain the special skills of the pilots, in order not to have to start special training again in America.

One flight every six months was the standard established by the Marine pilots' Training and Readiness Manual.

Neither the pilot nor the navigator thus needed special training.

If it was neither an operational nor training flight, what then was the purpose of EASY 01? The explanation may possibly be found in the video camera, which it should be noted contained two tapes, and in the camera taken aboard by the crew in a most nonchalant manner: much evidence would suggest that this may have been a « bonus flight » granted by superiors to a colleague who was leaving for a promotion and who was thus gratified with a last chance to take home a unique souvenir.

A further query arises at this point: was the souvenir simply a video of the mountain scenery – or was it also that of a stunt, some sort of test of ability to brag about with his comrades-in-arms? This question is prompted by the Watters case: less than one year previously, on the same route, the Commander of the Prowler squadron deployed in Aviano, before VMAQ-2, filmed a very low-level flight for which he was later punished. After the Cermis tragedy, he encouraged his men to get rid of any similar tapes.

It should be borne in mind that the tapes did not only contain bucolic scenes of the Alps, but were kept by those who made them to brag to their colleagues. The invitation by Lt. Col. Watters was targeted at pilots who had returned to the United States months earlier, since he was well aware how many tapes there were in circulation and what they contained. Otherwise, why should they not have been shown to Gen. Ryan when he bluntly reprimanded them for being a bunch of undisciplined daredevils?

Similarly, the first thought that crossed the minds of Schweitzer and Ashby, immediately after their emergency landing at Aviano, was to get rid of the two tapes made during the flight and replace them. There can only be one explanation: they contained proof of their improper and rash conduct. Since the situation had gone awry, they had to be disposed of immediately.

There are also some indications that the « skill test » to be recorded – at least in the tragic flight that led to the disaster, but possibly in other cases as well – actually involved the Cermis cableway. First of all, there was the phrase by the navigator, Schweitzer (which he himself quoted during the Ashby trial) who shouted that the target was in sight. But what was the target of that flight? There was no set target; just reference points chosen by the crew. Is it reasonable to believe that the VMAQ-2 pilots – and those pilots in particular, who had frequently flown at low level on that route – were unaware of the cables crossing the valley? And that the target was precisely those cables? As their Commander, Muegge, said, all the pilots knew there were ski resorts on that route. Perhaps they had even gone skiing there.

Last, the flight conduct of the crew in the moments immediately prior to the incident also suggest they were aware of the cableway: after entering Val di Fiemme, they pushed the plane to the maximum speed technically possible (540 knots) – well above the 420 knots authorized – and went into a rapid descent (at 2400 feet per minute), which brought the plane to an altitude (357 feet) 65% below the minimum authorized altitude for Prowlers under any circumstances. This was an almost incredibly reckless maneuver, one that can only be explained if there was a conscious attempt to pass under the cablecar suspension cables. The attempt failed only because the gondolas were passing at that moment, thus lowering the level of one cable.

The impossibility of obtaining the results of the Marine Corps inquiry and hearing the officers who conducted the investigation, due to lack of cooperation by the Americans, has prevented the Committee from clarifying the serious doubts surrounding the reasons for the way the flight was conducted. We are thus unable ascertain the effective

existence of a « cableway club » in VMAQ-2, as was suggested at the American court martial. But, when considered together with the documentation already available to the Italian investigators, the information gathered by the Committee makes the hypothesis anything but implausible.

Lt. Col. Muegge's conduct and leadership cannot in any event be free from grave censure. He proved himself to be an inadequate commander, whether he only acquiesced to the irregular flight conduct of his pilots, or participated directly in the disastrous action of EASY 01 by planning a « bonus flight » in the guise of a training flight, regardless of whether he may have known of the existence of a « cableway club ». His inability to command and control the men, even if he was not in complicity with them, certainly played an important role in causing the Cermis tragedy.

The large body of evidence pointing to reckless or, at the very least, extremely negligent conduct on the part of the Marine squadrons deployed at Aviano and their commanders also lead to queries about the effectiveness of control in the chain of command and about the control of such units.

3.3 The 31st Fighter Wing of the US Air Force

It should be pointed out immediately, with an emphasis at least equal to that used so far to highlight the negligent conduct which led to the tragedy, that the pilots of the 31st Fighter Wing of the US Air Force have never engaged in flight conduct comparable to that of the units deployed at Aviano. The fact of being deployed in Italy, forming part of a clearly defined chain of command and being informed and aware of local flight regulations, ensured that no problems of any nature arose concerning the flights of this unit.

The 31st FW was charged with providing assistance to the flight units based there, including the Marine VMAQ squadrons. This assistance included briefing and updating on local flight regulations. This duty was performed by means of the distribution of updates in the internal mailboxes of each unit, as well as weekly meetings at which the latest information was disseminated and special attention was paid to the most important changes. The commanders of each NATO unit deployed at the base were invited to the meetings.

FCIF 97-16 was distributed through this system, although testimony showed that most of the VMAQ-2 pilots remained unaware of it. It is clear that the way in which the information was disseminated was inadequate. On the one hand, it should be noted that, unlike other units, the VMAQ squadrons generally sent a lower ranking officer to the weekly meetings. On the other, as has already been stated, it appears that the mailbox of this unit was regularly full of uncollected documents. This further confirms that the squadron, which was only passing through Italy, demonstrated little interest in local rules.

Responsibility for this can only partly be attributed to the senior officers of the 31st FW (Brig. Gen. Peppe, Commander, and Col.

Rogers, chief of the operations group). They had no command authority over the deployed units, not even to ascertain if the information provided during the weekly meetings was being distributed. In other words, they had no control over flight conduct or the internal organization of the other units.

Even in this context, there was possibly room for a less bureaucratically passive attitude: a call for more effective participation at the meetings or, at the very least, collection of information from the mailbox, might nevertheless have been considered part of the responsibilities of those in charge of the 31st FW and might have prevented ignorance (or the alibi of ignorance) of FCIF 97-16.

3.4 Commander Striking Forces South (COMSTRIKEFORSOUTH)

During the period of deployment at Aviano, combat command (COCOM) of VMAQ-2 was held by the Commander of the Marine Corps Forces Atlantic. Operations control (OPCON) was transferred from this Commander (specifically, through the Commander-in-Chief US in Europe, the Supreme Allied Forces Commander in Europe – SACEUR-NATO – the Commander in Chief Allied Forces Southern Europe – CINCSOUTH-NATO) to the Commander Striking Forces South – COMSTRIKEFORSOUTH – while tactical control (TACON) was delegated to the Commander of the 5th ATAF for « Deliberate Guard » missions, including training flights related to this operation.

As regards training to meet needs other than those of DG operations, missions with different objectives were authorized by COMSTRIKEFORSOUTH, although DG missions had priority and were not to be interfered with. Non-DG mission planning (including functional checkflights, training flights, etc), to be carried out in accordance with the T&R Manual, were approved by the Squadron Commander (Lt. Col. Muegge).

It should be recalled that, during its deployment, VMAQ-2 had carried out 69 training missions (out of a total of 254, of which 164 related to DG operations); of these, 11 (out of 23 scheduled), including mission EASY 01 of 3 February 1998, had been carried out at very low level. The other 12 had been canceled due to adverse weather conditions or the unavailability of aircraft.

As ascertained by the CIB (the DeLong Commission), the Marine squadrons stationed in Aviano, such as VMAQ-2, were under the command of COMSTRIKEFORSOUTH for non-DG training, but this Commander did not monitor how training missions were carried out on a day-to-day basis, nor did he provide any regulations or guidelines concerning the training. The CIB added that the non-NATO (i.e. national) chain of command and control was complicated and slow to react, although it had not caused the accident.

As we have seen (and as the CIB did not fail to point out), there are a number of doubts about the effective utility of the EASY 01 mission, especially considering that the pilot, who was about to be assigned to a different type of aircraft, would almost certainly have

never flown again on the EA-6B. As a result, some concern might have arisen about the possible effectiveness, continuity and correctness of the control exercised by the Squadron Commander and by the immediately superior command. This is because a training program is normally based on criteria and guidelines drawn up by superior bodies, which ensures that the aims, objectives, content, types of flight, and their allocation and priorities, etc. are all taken into consideration. And it is normal (since this, in particular, is one of its principal tasks) for a command above the squadron level to carry out regular checks into the way a certain program is carried out, to assess and verify its suitability and effectiveness, and to suggest means to make the training more productive.

As regards the chain of command, which was deemed complicated and cumbersome, the CIB provided no clarification concerning the relationship between the VMAQ-2 Commander and COMSTRIKEFOR-SOUTH in national terms. The fact that this chain demonstrated weaknesses in the linearity of command relationships was confirmed by the CIB itself, which drafted a specific recommendation concerning the creation of a chain of command which would provide for operational control of the USMC squadrons deployed in support of NATO operations. This was intended both to clarify and unify command authority and responsibility for non-NATO missions and for training in the theater. This would parallel procedures adopted by other services.

The Tricarico-Prueher Commission also pointed out that the command and control relationships prior to the accident were complicated and somewhat unclear: they may have helped create an environment in which there was insufficient emphasis on the need to become familiar with and abide by the established flight procedures. In particular, it was ascertained, again before the accident, that although the VMAQ squadrons stationed in Aviano came under COMSTRIKEFOR-SOUTH in the NATO chain of command, this command (despite being assigned to a US general) was responsible for supervising NATO assignments within the framework of Operation Deliberate Guard (and thus had no responsibility for non-DG training flights by US aircrews). Nevertheless, it was not responsible, at least formally, for all the activities connected with the responsibilities of each national military unit, as this was the responsibility of the US Commander in Chief Europe (CINCEUR), who in turn delegated command to subordinate levels along a chain of command that differed in part from that of NATO. This command structure was not sufficient to ensure adequate surveillance.

The successive delegations of authority along the US chain led to a reduction, if not a complete breakdown, of control by the USMC commands above VMAQ-2. It can thus be argued that excessive discretionary powers were delegated to the Squadron Commander concerning training decisions not specifically related to operations in Bosnia and in evaluating the need for or advisability of training missions.

At the same time, it seems unusual and unconvincing that the authority which wielded operational control, as was the case for COMSTRIKEFORSOUTH, was not aware of the training program that the Squadron Commander intended to implement and that was actually under way. It is all the more difficult to comprehend considering that COMSTRIKEFORSOUTH was also responsible for authorizing training missions.

It is thus possible to subscribe to the opinion of the CIB that COMSTRIKEFORSOUTH did no more than authorize non-DG training missions without examining the substance of the missions and without issuing directives. In this view, COMSTRIKEFORSOUTH simply issued a general authorization for non-DG training, meaning that, at that particular time, there were no overriding DG priorities and thus the aircrew and the aircraft involved could be removed from NATO operations to carry out other duties. In this case, there remains the question as to the identification of another authority above VMAQ-2 in the US chain of command in the Marine Corps Forces Europe or even the Marine Corps Forces Atlantic.

In this regard, the findings of the Tricarico-Prueher Commission, according to which the responsibility for US activities (including training flights) lay with the US Commander in Chief Europe (CINCEUR) seems highly plausible. The officer in question at the time was the Supreme Allied Forces Commander in Europe (SACEUR), Gen. Clark.

The series of delegations of command authority and the distinction between the control and command functions of the US and NATO chains of command effectively left the Marines deployed at Aviano with considerable and unique autonomy of action, without effective control over their activities. Unfortunately, as we have seen, the squadrons took considerable advantage of this situation.

4. THE ITALIAN CHAIN OF COMMAND

4.1 The chain of command at Aviano and the COA/COM of Martina Franca

Since the base at Aviano is subject to Italian sovereignty and command, just as sole responsibility for air traffic control throughout the country is Italian, it is logical that this report should examine the conduct of Italian military authorities concerning flight EASY 01.

Both the criminal proceedings which involved the Italian chain of command – one held by the Military Court of Padua, the other by that of Bari (see related sections) – concluded with requests for dismissal from the examining magistrates, who followed two different, albeit far from incompatible, lines of approach.

In fact, the examining magistrate of the Military Court of Padua focused on the technical argument that the oft-mentioned SMA 175 of 21 April 1997, which prohibited low-level training flights for troops stationed in Italy for Operation Deliberate Guard, did not contain an

« assignment of responsibility » as referred to in Article 117 c.p.m.p. This consideration was fundamentally inclusive of the question concerning the nature of the note, communicated for information purposes only to the base commander at Aviano, who at that time was not yet Col. Durigon. The examining magistrate at the Military Court of Bari emphasized that SMA 175 could not be considered to have imparted mandatory instructions so far as the COA/COM chief of Martina Franca was concerned, signifying that criminal responsibility could not be asserted. He also added that it could not be qualified as a formal assignment of responsibility given individually to Lt. Col. Carratù, as the subjective element of the offense (in other words, the awareness of having been assigned a responsibility) was lacking. All the same, it is reasonable to argue that it would appear technically more precise to speak of a lack of the objective element of the criminal offense in point, rather than of a lack of the subjective element, given the particular legal concept of « assignment of responsibility » in the Military Criminal Code.

Nor do the opinions expressed by the examining magistrates of Padua and Bari diverge concerning the nature (prescriptive or otherwise) of SMA 175 of 21 April 1997, in view of the fact that the former – who makes only brief mention of the issue – nevertheless stated that the communication for information purposes only, even though not involving an assignment of responsibility pursuant to Article 117 c.p.m.p., nevertheless entailed the obligation for all recipients to apply the regulation concerning low-level flights (see below).

For both judicial authorities, the key issue was that no violation of Article 117 c.p.m.p. could be ascertained, in view of the fact that neither the commander of the Aviano base, Col. Durigon, nor Lt. Col. Carratù of COA/COM of Martina Franca, had been assigned a « responsibility », since the communication of SMA 175 on 21 April 1997 could not be considered as such.

The case can be more clearly expressed by recalling that the assignment of a responsibility – in the formal legal sense used in Article 117 – must be specifically conferred *ad personam*, with the delineation of the time, the context, purposes, procedures, manner and activities required of the assignment. The performance of an obligation connected to the functional position of an individual serviceman is quite another matter (even if an immediate and *erga omnes* prescriptive nature is attributed to SMA 175).

Consequently, bearing in mind the principle of the strict application of criminal norms, which rules out analogical extension, it can only be agreed that Article 117 was not applicable in the case in point, neither in the case of Col. Durigon, nor that of Lt. Col. Carratù. Other offenses provided for by the Military Criminal Code (insubordination, dereliction of duty, etc.) were not applicable either.

Nor can it be argued that a different formulation of Article 117 or other provisions of the Military Criminal Code would have made it possible to prevent (through the discouragement implicit in the punishment provided for by law) or to punish more adequately the conduct found in this case: however much room it leaves for improvement, the

current system of criminal sanctions was and is certainly adequate (leaving aside the general obsolescence of the code, which regards various aspects of the issue). Conversely, an extension of the scope of the norm so as to cover any form of violation of the functional duties of a serviceman would be difficult to propose, both from the point of view of criminal law policy (since it would be excessively and indiscriminately repressive) and from the point of view of constitutional legitimacy, since the provision would cease to be a « blank » criminal regulation to be applied to a specific case and become absolutely indeterminate and, as such, violate the principle of *nullum crimen sine lege*.

It is worth examining the matter more closely: the Cermis tragedy was not a matter of deficiencies in criminal law, but rather matters of a different order. In other words, a broader range of possible actions in court would not have affected the crux of the problem which emerged from the work of this Committee. This principally concerned: the attribution of jurisdiction between the sending State and the receiving State, which is an aspect of international law; the effectiveness of the powers of the Italian military commander of the bases used by the United States in Italy; and last, Italy's tendency to acquiesce to American initiative (see below).

Other responsibilities in the Italian chain of command cannot be attributed, not even as regards the prescriptions of the Criminal Code which punish negligent homicide and negligent endangerment of public transport – the charges advanced by the prosecutor in Trento against the American servicemen: although flight EASY 01 violated the provisions of SMA 175, this was not itself sufficient to cause the mishap without the irregular flight conduct of the aircrew, which was itself decisive. Conversely, even if the planned altitude of the flight had been greater than 2000 feet, in accordance with SMA 175, this would not have prevented the reckless conduct of the crew, also bearing in mind what appears to have been the negligent tolerance of their commanders (see above).

In other words, neither the conduct of the base commander of Aviano, nor that of the head of the COA/COM of Martina Franca had a causal or contributory relation with the tragedy. This explains why the Trento prosecutor did not also bring charges against Col. Durigon on the basis of the initial hypothesis of contribution to multiple negligent homicide and negligent endangerment of public transport, preferring the less serious charge envisaged under Article 117 c.p.m.p., and later referring judicial examination to the Military Court of Padua.

The negligence to be attributed to Col. Durigon appears to be of a very different nature. As mentioned, it was precisely the lack of real operational powers of the commander of Aviano to prevent the flights which makes it impossible to identify any feasible actions that might have prevented the mishap. It is clear that this was an indispensable logical step for any charge of criminal liability for negligence. In fact, the Grosso Committee on the reform of the Criminal Code, which sought to implement the best trends in jurisprudence and doctrine, also stress its importance.

Nevertheless, this does not justify the inaction shown by the Aviano base commander.

The purpose of SMA 175 was explicitly to minimize the socio-environmental impact of low-level flights. Some authorities were direct recipients for action, while others – including the Aviano commander and the head of the COA/COM in Martina Franca – received it for information purposes only (with addresses «to» and «info» respectively). But communication for information purposes only has by its very nature a minimum content which cannot be considered as no more than an end in itself, since every report, by its very nature, is designed to ensure that the recipient bears it in mind in the execution of his ordinary professional duty. A more limited interpretation would totally debase that particular form of address, in practical terms making the choice of recipients for the information totally irrelevant.

This casts a different light on the importance of whether the note in question was of a prescriptive nature or not. In fact, it is almost a false problem since, in line with the text of the order dismissing the case issued by the examining magistrate of the Military Court of Padua, the recipient «for information purposes only» also has an obligation to observe the measures communicated to him. In other words, a recipient for action and a recipient for information purposes have the same obligation, meaning that both were to take account of the restrictions on low-level flights limits in their actions. The sole difference that while the former has to take immediate and unreserved action to implement all such initiatives as may have been appropriate to ensure compliance with provisions of the message received, referring to his superiors if necessary, the latter was under an obligation to take action only at such time as the occasion might arise; in other words only if (see the case of Col. Durigon) he had received a DFS which did not comply with the restrictions, as in the case of EASY 01.

On the basis of this premise, message SMA 175 was sufficient to oblige the commander at Aviano to make a report, if nothing else, to the Italian Air Staff and to contact the American officers to call attention to the fact that EASY 01 conflicted with current low-level flight regulations. This is also explicitly recognized in the reasons, with which we concur, for the dismissal of the case by the examining magistrate of the Military Court of Padua.

The combined effect of abstaining from action which, unfortunately, all too often has an even greater impact than explicit measures, and the absence of real operational powers, induced the Italian commander of the Aviano airbase (who was nevertheless the primary institutional liaison for his American counterparts on the base) not even to carry out his duty to inform the American command that the flight did not comply with SMA 175 of 21 April 1997, even though this was provided for by the technical arrangements governing the relationship between military authorities. And yet this would have helped to underscore the importance for Italian military authorities of minimizing the impact of low-level flights on the local population and environment and, at the same time, would have helped make their already excessively careless American counterparts more aware of their

responsibilities. Furthermore, if the Americans had continued to flout the regulations, Col. Durigon should have informed his superiors, as expressly provided for in the Memorandum of Understanding of 30 November 1993.

This is not a mere question of form, it is more a matter of being sufficiently credible to insist on compliance than one of technical or legal powers.

Lt. Col. Carratù's position differs from that of Col. Durigon since he had no institutional liaison function with the American command at Aviano. His job was the purely technical one of « deconflicting » flights (for all Italian airspace, which involved a considerable workload). To this should be added that the flight schedule had already been communicated via the operations office and via the Italian command at the Aviano airbase, making it reasonable to assume that the flight schedule did not contain irregularities. All this appears to provide reasonable justification for the fact that Carratù did not detect non-compliance with instructions contained in SMA 175 and, consequently, did not alert his superiors.