

INTERNATIONAL AIR LAW MOOT COURT COMPETITION 2015

CASE OF AN INCIDENT ONBOARD AN AIRCRAFT

STATE OF SYLVANIA V. STATE OF FREEDONIA

MEMORIAL SUBMITTED ON BEHALF OF STATE OF SYLVANIA

TEAM NUMBER 5-A

Table of Contents

LIST OF ABBREVIATIONS	iv
LIST OF SOURCES.....	v
A. INTERNATIONAL CONVENTIONS.....	v
B. JUDICIAL DECISIONS	vi
1. International Court of Justice.....	vi
2. Permanent Court of International Justice.....	vi
3. National Decisions	vi
i. United States of America.....	vi
ii. Israel.....	vii
C. DOCUMENTS OF INTERNATIONAL ORGANIZATIONS AND ASSOCIATIONS	vii
1. UN General Assembly	vii
2. International Civil Aviation Organization	vii
3. International Air Transport Association	viii
D. ARTICLES	viii
1. Published articles	viii
E. OTHER SOURCES.....	viii
1. Newspaper articles	viii
2. Other articles	viii
STATEMENT OF RELEVANT FACTS.....	ix
ISSUES.....	xi

SUMMARY OF ARGUMENTS.....	xii
JURISDICTION OF THE COURT	xiv
ARGUMENT.....	1
A. SYLVANIAN AUTHORITIES ACTED CONSISTENTLY WITH THE TOKYO CONVENTION IN REFUSING THE DISEMBARKATION OF CHICO AT ZANDAR.1	
1. The Tokyo Convention’s role in international legal disputes.	1
2. The Vienna Convention on the Law of Treaties.	2
3. The Authority of the Aircraft Commander	3
i. Defining reasonableness as intended by the Tokyo Convention’s drafters.	5
ii. Application of the objective standard in <i>Eid v. Alaska Airlines</i> and the current case.7	
iii. Captain Trentino’s failure to state a reason behind his desire to disembark Chico. ...	9
B. CAPTAIN TRENTINO’S ACTIONS IN DELIVERING CHICO TO THE AUTHORITIES IN MARXIANA WERE INCONSISTENT WITH THE PROVISIONS OF THE TOKYO CONVENTION, AS WAS THE FAILURE TO NOTIFY SYLVANIAN AUTHORITIES OF THE ACTIONS TAKEN AGAINST CHICO.	10
1. Captain Trentino did not have a reasonable basis for delivering Chico to Freedomian authorities in Marxiana.	10
2. Freedomia Failed in its obligation to notify Sylvanian authorities of the actions taken against Chico.....	12
i. Diplomatic Protection and the Vienna Convention on Consular Relations.....	12
ii. The notion that Captain Trentino’s declaration qualifies as proper notification as required by the Tokyo Convention.	13

**C. THE TOKYO CONVENTION GRANTS SYLVANIA THE JURISDICTION TO
ARREST AND PROSECUTE FIREFLY FOR HIS ACTIONS ON BOARD FLIGHT**

1933..... 15

1. The conditions set forth in the Tokyo Convention enable a State to assert jurisdiction over occurrences on board aircraft..... 15

i. International Treaties and Customary Law establish jurisdiction via the principle of territorial sovereignty..... 16

**D. FIREFLY’S ACTIONS WITH REGARD TO HARPO AND CHICO WERE
INCONSISTENT WITH THE TOKYO CONVENTION AND THE ACTIONS OF THE
SYLVANIAN AUTHORITIES IN DETAINING, ARRESTING, AND PROSECUTING
FIREFLY WERE CONSISTENT WITH THE TOKYO CONVENTION..... 17**

1. Firefly’s actions towards Harpo and Chico were improper according to the Tokyo Convention..... 17

i. An IFSO acts via authorization from the air commander. 18

ii. An IFSO acts unilaterally without authorization from the aircraft commander. 18

iii. Defining reasonable preventative measures as intended by the Tokyo Convention’s drafters. 20

2. It was lawful for Sylvanian authorities to detain, arrest, and prosecute Firefly. 22

SUBMISSIONS 24

LIST OF ABBREVIATIONS

IATA	International Air Transport Association
ICAO	International Civil Aviation Organization
ICAO Doc	International Civil Aviation Organization Document
ICJ	International Court of Justice
IFSO	In-flight Security Officer
UN Doc	United Nations Document
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
VCCR	Vienna Convention on Consular Relations
VCLT	Vienna Convention on the Law of Treaties

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STATEMENT OF RELEVANT FACTS

The following events took place in-flight on board Freedonia Airlines Flight 1933 [hereinafter “Flight 1933”] bound for Freedonia City, Freedonia from Sylvania City, Sylvania. Midway through the flight, flight attendant Gloria Teasdale [hereinafter “Teasdale”] glanced out of a window and then suddenly and inexplicably began screaming. Panic ensued as Teasdale then attempted to open the exit door, while the plane was mid-flight. Seated near this door were brothers Chico and Harpo. Chico and Harpo were Sylvanian nationals traveling to Freedonia to visit their brother Zeppo. Sensing potential disaster if the aircraft door was opened, Chico and Harpo got up from their seats and pulled Teasdale away from the door. Harpo held Teasdale on the ground while the brothers attempted to prevent her from harming herself or anyone else.

In-flight security officer Rufus Firefly [hereinafter “Firefly”], unaware that Teasdale had attempted to open the door, was informed by a flight attendant that the aircraft’s pilot, Captain Trentino, had given the order “someone get control out there” via the cockpit telephone. Without further inquiry, Firefly ran towards where they were located, drew his firearm, and yelled “stop.” Harpo was deaf and unable to hear Firefly’s order. Firefly then took his firearm and struck Harpo on the head, knocking him unconscious. Firefly then placed Chico in restraints. Captain Trentino immediately decided to divert the flight to the closest airport which was located in Zandar, Sylvania. Captain Trentino notified Sylvanian Civil Aviation Authorities that he had passengers he would be delivering into custody.

Upon arrival in Zandar, Captain Trentino interviewed Chico, Teasdale, Firefly, and other passengers about the incident. He then informed the Sylvanian police that he was delivering Chico and Harpo (still unconscious) to their custody. The Sylvanian authorities refused to allow Captain Trentino to continue the flight until they had conducted their own interviews with

everyone on board. As a result of their investigation, Sylvanian authorities refused to disembark Chico as well as to charge him with any crimes. Instead, they took Firefly into custody and notified Freedomian authorities that he would be criminally charged for assaulting Harpo. Sylvanian authorities recommended that Chico continue on Flight 1933 with the rest of the passengers. Captain Trentino became furious at these actions and told the Sylvanian authorities he intended to deliver Chico to Freedomian custody as soon as he crossed the Freedomian border.

After Flight 1933 was back in the air, the cabin was silent and uneventful until Captain Trentino entered Freedomian airspace and immediately diverted the plane to Marxiana. Once at Marxiana, Captain Trentino disembarked and delivered Chico to Freedomian authorities, explaining the incident involving Teasdale. Freedomian authorities arrested and decided to criminally charge Chico for his conduct aboard the flight. Flight 1933 then completed its trek to Freedomia City. Two days after the flight landed, Sylvania authorities, still unaware that Chico had been delivered in Marxiana, were contacted by Zeppo who was curious as to the whereabouts of his brothers. Sylvania and Freedomia prosecuted and sentenced Firefly and Chico respectively under each states criminal code.

ISSUES

The State of Sylvania will argue the following contentions:

1. Sylvanian authorities acted consistently with the Tokyo Convention in refusing the disembarkation of Chico at Zandar.
2. Captain Trentino's actions in delivering Chico to the authorities in Marxiana were inconsistent with the provisions of the Tokyo Convention, as was the failure to notify Sylvanian authorities of the actions taken against Chico.
3. The Tokyo Convention grants Sylvania jurisdiction to arrest and prosecute Firefly for his actions on board Flight 1933.
4. Firefly's actions with regard to Harpo and Chico were inconsistent with the Tokyo Convention and the actions of the Sylvanian authorities in detaining, arresting, and prosecuting Firefly were consistent with the Tokyo Convention.

SUMMARY OF ARGUMENTS

The Tokyo Convention is an international agreement that governs the handling of unruly passenger incidents on board international flights. The Tokyo Convention establishes power for aircraft commanders and others to act when the safety of an inflight aircraft is jeopardized as well as sets guidelines for jurisdiction to prosecute those who commit offences that disrupt good order and discipline on board an international flight. In interpreting the Tokyo Convention, the court should strive to apply its provisions in a manner that is consistent with similar principles of international law.

The State of Sylvania will first show their refusal to disembark Chico in Zandar was in accordance with the Tokyo Convention. The Tokyo Convention grants aircraft commanders the right to disembark or deliver passengers who pose a danger to other passengers on board the aircraft and/or disturb the discipline of the flight. However this power is not unlimited. The Tokyo Convention conditions the disembarkation of a passenger on the aircraft commander's reasonable belief that the passenger interfered with the safety of the flight or those thereon. Following a thorough investigation, Sylvanian officials determined Chico had not interfered with the safety of Flight 1933. Therefore Captain Trentino's attempt to disembark Chico was not supported by reasonably objective evidence and Sylvania was not bound to accept his disembarkation.

Second, the State of Sylvania will illustrate that Chico's delivery in the state of Freedonia violated the Tokyo Convention. Captain Trentino was unable to furnish sufficient evidence to prove he had reasonable grounds to believe Chico posed a threat to the security of the flight. This was evident in that Sylvanian authorities had conducted an extensive interview with those on board the flight and had concluded that Chico did not deserve to be disembarked.

Additionally, once the flight was back in the air Chico did not at all act in a way to disrupt order on the flight. Therefore Chico's delivery was not based on evidence that he ever jeopardized the safety of the flight. Additionally, the State of Freedonia never notified the State of Sylvania of Chico's delivery and detention. This not only violated the Tokyo Convention but other international diplomatic obligations as well.

Next, the State of Sylvania will assert its right to arrest and prosecute Firefly for his actions on board Flight 1933. Though the Tokyo Convention focuses jurisdiction on the State of Registry, it also permits the (non-registry) State of landing jurisdiction provided certain conditions are met. In light of the fact that each of the conditions required by the Tokyo Convention was met, the State of Sylvania was proper in asserting jurisdiction over Firefly's actions. This is consistent with the international legal theory of territorial jurisdiction as the occurrence on board the flight happened in Sylvania airspace, and the plane landed in Sylvania territory.

Finally, the State of Sylvania will prove that Firefly's actions towards Chico and Harpo on Flight 1933 violated the Tokyo Convention and therefore Sylvania authorities were proper to arrest and prosecute him. In an attempt to take control of the situation involving Harpo, Chico, and Teasdale, Firefly's conduct was both overly-forceful and unnecessary as more reasonable means were available and proper. As such he is not protected by Tokyo Convention immunity and Sylvania authorities, after conducting a thorough investigation appropriately arrested and prosecuted him.

JURISDICTION OF THE COURT

This dispute is brought under Article 36, Paragraph 1 of the Statute of the International Court of Justice [hereinafter referred to as “ICJ”]: “The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.” The State of Sylvania and State of Freedonia both accept the compulsory jurisdiction of the ICJ.

ARGUMENT

A. SYLVANIAN AUTHORITIES ACTED CONSISTENTLY WITH THE TOKYO CONVENTION IN REFUSING THE DISEMBARKATION OF CHICO AT ZANDAR.

1. The Tokyo Convention's role in international legal disputes.

While returning from a funeral for a slain fellow police officer in New York City, New York, three Utah police officers suddenly became victim to a woman who after arguing with her husband became combative, attempting to kick and spit on the officers as they tried to calm her.¹ Within a few hours of this woman's behavior aboard the flight, anyone with a television, computer, or smart device was privy to information that the Utah police officers had restrained and sedated the woman and that the plane made an emergency stop in Chicago, Illinois whereat the woman was disembarked before the plane continued to its final destination.² Twenty-four hour news cycles and worldwide access to social media make it obvious that this type of unruly inflight conduct has become increasingly common throughout the airline industry.³ In the period between 2007 and 2013 there were over 28,000 reported cases of unruly passenger incidents on board aircraft in flight. These include violence against crew and other passengers, harassment and failure to follow safety instructions.⁴

¹ Associated Press, "Flight diverted to Chicago as Utah officers held to restrain passenger" *Chicago Tribune* (Chicago 5 January 2015). <<http://www.chicagotribune.com/news/local/breaking/chi-flight-diverted-to-chicago-as-utah-officers-help-restrain-passenger-20150105-story.html>> accessed 20 January 2015.

² *Ibid.*

³ IATA, "Unruly Passengers" 2015 <<http://www.iata.org/policy/Pages/tokyo-convention.aspx>> accessed 10 January 2015.

⁴ *Ibid.*

Though this incident was on a flight between two United States cities, and involved United States citizens and law enforcement, a more complicated situation arises when onboard incidents affect the interests of multiple countries. The Convention on Offences and Certain Other Acts Committed on Board Aircraft [hereinafter the Tokyo Convention] governs the means by which States address these onboard incidents in international settings.⁵ The Tokyo Convention makes it unlawful to commit acts which jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board.⁶ The Tokyo Convention also sets forth a number of guidelines vesting various parties and States power to take action towards those who commit said acts on board an aircraft. In the instant case, this Court is tasked with interpreting the Tokyo Convention.

2. The Vienna Convention on the Law of Treaties.

The Tokyo Convention was composed in 1963 by International Civil Aviation Organization [hereinafter ICAO], and amended multiple times including in 2014, with the intent and purpose to achieve some degree of international uniformity in dealing with unruly passengers aboard aircraft.⁷ According to Article 31 of the Vienna Convention on the Law of Treaties [hereinafter referred to as VCLT] “a treaty shall be interpreted in good faith in accordance with the ordinary meaning given to its terms of the treaty in their context and in the

⁵ (adopted 14 September 1963, entered into force 4 December 1969) 704 UNTS 219 as amended by the Montreal Protocol of 2014.

⁶ Tokyo Convention art 1 para 1(b).

⁷ ICAO ‘Minutes, International Convention on Air Law’ (1963) ICAO Doc. 8565-LC/152-1 at 153 [hereinafter Tokyo Diplomatic Conference Minutes].

light of its object and purpose."⁸ The VCLT is not retroactive and was adopted six years after the Tokyo Convention.⁹ Nevertheless, in the *Case Concerning Kasikili/Sedudu Island*, the International Court of Justice [hereinafter referred to as "ICJ"] held that even though the treaty at issue preceded the VCLT and the parties were not members to the VCLT, its provisions, particularly Article 31, were still applicable inasmuch as they reflected customary international law.¹⁰ Therefore, in accordance with customary international law, the ICJ should interpret the various provisions of the Tokyo Convention in order to accomplish its intended goals.

3. The Authority of the Aircraft Commander

An entire chapter of the Tokyo Convention is devoted to granting aircraft commanders' authority to take action when a passenger on their aircraft has become unruly.¹¹ After all, the aircraft commander is ultimately in control of the flight as he is the authority figure in an enclosed universe where no other law enforcement or judicial actors are present.¹² While a brief reading may easily portray the Tokyo Convention as an instrument that allows aircraft commanders and crew unlimited power over unruly passengers, the Tokyo Convention does have limits. One such limitation allows State parties to hold aircraft commanders accountable for their decisions to unreasonably disembark passengers.

⁸ (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁹ *Ibid.*

¹⁰ (*Botswana v Namibia*) [1999] ICJ Rep 1045.

¹¹ Tokyo Convention ch 3.

¹² ICAO "Minutes, International Convention on Air Law" (n 3).

Under Article 12 of the Tokyo Convention, a contracting State *must* allow an aircraft to disembark any person pursuant to Article 8 Paragraph 1.¹³ Article 8 paragraph 1 of the Tokyo Convention governing the disembarkation of passengers declares that "the aircraft commander may disembark in the territory of any State in which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in Article 1¹⁴."¹⁵ Read in conjunction, Article 12 and Article 8 paragraph 1 of the Tokyo Convention facially appear to be clear instructions that would, in the instant case, require Sylvania to permit Chico to be disembarked. However a closer examination of Article 8 paragraph 1 of the Tokyo Convention provides Sylvania grounds to dispute and even refuse Chico's disembarkation.

When applying Article 8 paragraph 1 of the Tokyo Convention, the key determination for the court is whether or not the aircraft commander's belief that a person has or is about to commit an act contemplated in Article 1 of the Tokyo Convention is based upon reasonable grounds. It logically follows that an aircraft commander lacking reasonable grounds to believe that a person has committed such an act cannot rely on the Tokyo Convention to disembark said person. Sylvania therefore asserts that Captain Trentino unreasonably believed that Chico committed an act contemplated by Article 1 and as such did not have the legal authority to disembark Chico at Zandar.

¹³ Tokyo Convention art 12 para 1.

¹⁴ Tokyo Convention art 1 para 1 (acts contemplated in Article 1 include para 1(c) offences against penal law, and para 1(b) acts which whether or not they are offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order and discipline on board).

¹⁵ Tokyo Convention art 8 para 1.

i. Defining reasonableness as intended by the Tokyo Convention's drafters.

No provision within the Tokyo Convention attempts to define reasonableness, reasonable belief, or any other variation of the term. Furthermore, no standards are enumerated that would instruct a court on how to analyze an air commander's reasonable belief that there is unrest (within the meaning of Article 1 of the Tokyo Convention) on board the aircraft. Instead, this ambiguous term is left at the mercy of the reader. It is well settled in customary international law that a court "will resort to the legislative history and other aids of statutory construction only when the literal words of the statute create ambiguity or lead to an unreasonable interpretation."¹⁶ Therefore, in order to understand and fairly rule on an aircraft commander's reasonable belief, this Court must look outside of the text of the Tokyo Convention.

The Tokyo Convention's drafting history reveals that the drafters intended the aircraft commander's right to disembark to encompass a two-pronged subjective/objective test.¹⁷ This is explained as meaning that any measure an air commander decides to take must not only be based on a subjectively "reasonable" belief but must also be objectively "necessary" to protect the safety of the aircraft.¹⁸

In addition to the drafting history, this court should utilize domestic court decisions as persuasive guidance for interpreting the Tokyo Convention. This is supported by the ICJ's decision in the *Avena and other Mexican Nationals* case which involved an interpretation of the

¹⁶ VCLT art 32; *United States v Flores*, 968 F2d 1366, 1370 (1st Cir 1992); *Olympic Airways v Hussein*, 540 US 644 (2004).

¹⁷ Tokyo Diplomatic Conference Minutes at 147.

¹⁸ *Ibid.*

Vienna Convention on Consular Relations [hereinafter referred to as “VCCR”]. In *Avena*, the ICJ stated “if the Court finds that the obligations accepted by the parties to the VCCR include commitments as to the conduct of their municipal courts in relation to the nationals of other parties, then in order to ascertain whether there have been breaches of the VCCR, the Court must be able to examine the actions of those courts in the light of international law.”¹⁹ Because several provisions of the Tokyo Convention allow for States to impose judicial action against foreign nationals who violate the Tokyo Convention, the ICJ in this case should examine the actions of State Parties’ individual municipal courts.

Determination of standards for assessing an aircraft commander’s reasonable beliefs is not a new topic for debate among Courts and legal scholars tasked with interpreting the Tokyo Convention.²⁰ Some legal authorities prefer to give great deference to an aircraft commander’s subjective opinion at the time his decision is made, while others prefer that an aircraft commander provide objective evidence to support his belief that actions he took were both necessary and reasonable.²¹ The former theory was dealt two severe blows in recent years. First was the *Eid v. Alaska Airlines* case in which the 9th Circuit Court of Appeals of the United States of America held that an objective standard of reasonableness was the preferred standard under which an aircraft commander was to be judged.²² Second, on the heels of the *Eid* decision,

¹⁹ (*Mexico v. United States of America*) (Judgment), [2004] ICJ Rep 12.

²⁰ ICAO (Special Sub-Committee), “Report of the Rapporteur of the Special Sub-Committee on the Preparation of an Instrument to Modernize the Convention on Offences and Certain Other Acts Committed On Board Aircraft of 1963” (5 July 2012) ICSO Doc LC/SC-MOT-WP/1[hereinafter called the Special Sub-Committee Report].

²¹ *Ibid.*

²² 621 F3d 858 (9th Cir 2010), citing to Tokyo Diplomatic Conference Minutes at 155.

in the spring of 2014, the International Air Transport Association [hereinafter referred to as IATA] proposed an amendment to Article 10 of the Tokyo Convention that would grant a high degree of deference to aircraft commanders when any of their actions become subject to review; however this amendment was never successfully added to the Tokyo Convention.²³ Because the International Civil Aviation Organization [hereinafter referred to as “ICAO”] Diplomatic Conference failed to accept the amendment, ICAO notes that the informed decision in *Eid v. Alaska Airlines* would be taken as an affirmation that the objective standard is the preferred method of assessing the reasonableness of an aircraft commander’s actions.²⁴ This conforms to the general principle of law that, the decision of a legislative body to leave a particular precedent undisturbed raises a presumption that the body in question considered the case law principle to be correct.²⁵

ii. *Application of the objective standard in Eid v. Alaska Airlines and the current case.*

This court should apply the objective standard set forth in *Eid v. Alaska Airlines* and adopted by ICAO to hold that Captain Trentino’s actions were not reasonable. In the *Eid v. Alaska Airlines* case, the captain was informed via phone about a disturbance on board his aircraft and immediately diverted the plane to disembark the alleged offenders.²⁶ The record

²³ ICAO, “International Conference on Air Law, Amendment to Article 10 of the Tokyo Convention 1963” (2014) http://www.icao.int/Meetings/AirLaw/Documents/DCTC_15_en.pdf accessed 15 January 2015.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Eid v Alaska Airlines, Inc*, 621 F3d 858, 864 (9th Cir 2010).

showed he never asked any questions or even looked through the cockpit window to verify the claim.²⁷ Likewise, in the current case, Captain Trentino decided to divert the plane to Zandar after speaking with a flight attendant. This was before he ever took measures to educate himself on the nature of the dispute in the cabin. At this point, Trentino had already made up his mind to disembark passengers, having no indication about what had actually occurred in the cabin. In the *Eid* case the court stated even if the captain initially had grounds to believe the alleged offenders were disruptive, those grounds dissipated once the local and federal law enforcement agencies exonerated the alleged offenders and cleared them to continue flying.²⁸ Similarly, even if the court decides Captain Trentino initially held a reasonable belief that an anonymous offender (Chico) had been involved in the disturbance, the reasonableness of this belief became null once authorities conducted an investigation and made an informed decision declaring it safe for Chico to continue on the flight. Furthermore Captain Trentino also conducted an investigation himself at which point Chico would have explained his involvement in incident with Teasdale. During Captain Trentino's investigation other witnessing passengers likely corroborated Chico's version of the events. Therefore Captain Trentino had no reasonable grounds on which to base Chico's disembarkation. Because Captain Trentino lacked a reasonable belief that Chico posed a threat to aircraft safety, order, and discipline, it was proper for Sylvanian officials to refuse Chico's disembarkation.

²⁷ *Ibid.*

²⁸ *Ibid* at 872.

iii. *Captain Trentino's failure to state a reason behind his desire to disembark Chico.*

Finally, when utilizing his powers under Article 8 of the Tokyo Convention, to disembark a passenger, the aircraft commander shall report the facts of and reasons for such disembarkation to the authorities of the State in which it occurs.²⁹ Though he conducted his own investigation upon landing at Zandar, Captain Trentino did not report the reason for Chico's disembarkation. Therefore his disembarkation of Chico was not in accordance with Article 8 of the Tokyo Convention. Without being informed of the reason for disembarkation, Sylvanian officials, through their own independent efforts, investigated the incident and concluded there were no reasonable grounds to suspect Chico was a threat to aircraft safety. Had Captain Trentino communicated his reason for disembarkation, it is possible that Sylvanian officials could have cooperated with him to further investigate or understand his assessment. However this was not the case, and therefore this court should hold that Sylvanian officials made an informed and legally acceptable decision to refuse Chico.

²⁹ Tokyo Convention art 8 para 2.

B. CAPTAIN TRENTINO'S ACTIONS IN DELIVERING CHICO TO THE AUTHORITIES IN MARXIANA WERE INCONSISTENT WITH THE PROVISIONS OF THE TOKYO CONVENTION, AS WAS THE FAILURE TO NOTIFY SYLVANIAN AUTHORITIES OF THE ACTIONS TAKEN AGAINST CHICO.

1. Captain Trentino did not have a reasonable basis for delivering Chico to Freedonian authorities in Marxiana.

Article 9 of the Tokyo Convention grants an aircraft commander the power to deliver to competent authorities any person whom in *his opinion* has committed a *serious offence* on board.³⁰ However, as previously discussed these powers are not absolute. The air commander is obligated to present evidence and facts that support his reasonable belief that an alleged offender committed a serious offence.³¹ Further support for this principle can be found in the Israeli case of *Zikry v. Air Canada*.³² In *Zikry v. Air Canada* the court faced two key questions: 1) “whether reasonable grounds [existed to support] the suspicion that the plaintiff had committed an offence on board the aircraft,” and 2) “whether the actions taken against [the plaintiff] were reasonable.” In *Zikry v. Air Canada* the court held that reasonableness indeed was a matter for the fact finder to determine, not a matter of law.³³

As previously discussed, Captain Trentino did not have a reasonable (within the intended meaning of the treaty) justification for ordering Chico off the plane in Zandar. This is illustrated

³⁰ Tokyo Convention art 9 para 1.

³¹ Tokyo Convention art 9 para 3.

³² (Magistrate Court of Haifa, 2006), Civil File No. 1716/05.

³³ *Ibid.*

by the fact that Chico had been deemed safe to remain on the flight. As such, his involvement in the disturbance on the flight cannot be a legal basis for Captain Trentino's decision to deliver him in Marxiana.

Furthermore, the record is void of Chico committing a "serious offence" between the time when he was allowed to continue on the flight in Zandar and his delivery in Marxiana that would warrant his delivery into custody. The record clearly shows the opposite, stating that during the flight, all passengers, including Chico, sat in silence. This conduct would certainly not qualify as a *serious offence* as written in Article 9 of the Tokyo Convention. "Serious offences" though not defined by the Tokyo Convention are considered actions which jeopardize the safety of the aircraft.³⁴ In the 2012 study of the Tokyo Convention, the ICAO Council special legal subcommittee agreed to leave the term as a broad one rather than list specific offences.³⁵ This was due to the fact that characterization of offences varies considerably from State to State, reflecting variations among national legal systems.³⁶ Moreover, new kinds of disruptive behavior have emerged, and will likely continue to emerge, with changing conditions on board aircraft, including technological developments and new security procedures.³⁷ However ICAO has declared that offences such as physical, sexual, and verbal assault against crew members and passengers are serious offences.³⁸ By sitting silently on the aircraft, it is safe

³⁴ Special Sub-Committee Report at 22.

³⁵ Michael Jennison, "ICAO Adopts Flawed Protocol to Amend the Tokyo Convention of 1963" (2014) 27(2) Air & Space Lawyer 9.

³⁶ *Ibid* at 11.

³⁷ *Ibid*.

³⁸ Special Sub-Committee Report at 22-23.

to presume Chico did not commit any serious offence and thus his delivery in Marxiana was improper. The State of Sylvania argues Captain Trentino's delivery of Chico was not based on the commission of any offence, but instead as retaliation for Sylvania refusing to disembark Chico and instead arresting Firefly.

2. Freedonia Failed in its obligation to notify Sylvanian authorities of the actions taken against Chico.

Article 13 Paragraph 5 of the Tokyo Convention plainly states that "when a State has taken a person into custody, it *shall immediately* notify the State of nationality of the detained person."³⁹ The State of Sylvania urges this court to interpret Article 13 paragraph 5 of the Tokyo Convention as imposing an obligation on the State of Freedonia to notify Sylvanian authorities of Chico's detention and arrest in Marxiana. This interpretation would be consistent with other principles of international law concerning States' responsibility to provide notification when taking legal actions against foreign citizens.

i. Diplomatic Protection and the Vienna Convention on Consular Relations.

Diplomatic protection is a concept embraced by customary international law that encompasses a government's right to take actions in an effort to protect their citizens whose interests or rights have been injured while abroad. These services include assistance when a State's citizens have been detained by a foreign government. Global acceptance of diplomatic protection has been illustrated by its codification in Article 36 paragraph 1 (c) of the VCCR.⁴⁰ In

³⁹ Tokyo Convention art 13 para 5.

⁴⁰ [adopted 24 April 1963, entered into force on 19 March 1967] 596 UNTS 261 (VCCR).

the case concerning the *Military and Paramilitary activities in and against Nicaragua*, the ICJ held that even if principles of customary international law are codified into treaties, the former continues to exist simultaneously with the latter.⁴¹ Therefore even if the State of Freedonia and/or State of Sylvania are not parties to the VCCR, the identical customary law provisions (in this case diplomatic protection) are unaffected and continue to apply between them.

Additionally the United Nations General Assembly [hereinafter referred to as UNGA] adopted the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live, confirming the international position that the right of access to the authorities of a detainee's home State is to be a highly regarded human right.⁴²

To assure consistent practices with the aforementioned, and highly regarded legal authorities, as well as consistently following its own precedent, this Court should hold that the State of Freedonia violated Article 13 paragraph 5 of the Tokyo Convention when it failed to notify the State of Sylvania of the actions against Chico. It is a fact that upon Chico's delivery and arrest in Marxiana, Freedonia did not provide any notification. Sylvania only became aware of Chico's detention after Zeppo inquired as to Chico's whereabouts.

ii. *The notion that Captain Trentino's declaration qualifies as proper notification as required by the Tokyo Convention.*

This court should reject the notion that Captain Trentino's declaration to Sylvanian authorities while in Zandar suffices as a notice under Article 13 paragraph 5 of the Tokyo Convention. This article articulates the exact type of notice that a State should provide: "... it

⁴¹ (*Nicaragua v United States of America*) (Merits) [1986] ICJ Rep 14.

⁴² UNGA Res 40/144 (13 December 1985) UN Doc A/RES/44/144.

shall immediately notify the ... State of nationality of the detained person.... that such person is in custody and of the circumstances which warrant his detention.”⁴³ At the time Captain Trentino made his statement in Zandar, Chico was not even in the State of Freedomia and thus nowhere near Freedomian custody. Proof of this is found in the fact that Chico was able to exercise his free will and continue onwards to Freedomia City as a regular, unrestrained passenger. As such Captain Trentino's declaration at Zandar was not notice at all but rather an emotional threat.

Application of Article 13 paragraph 5 of the Tokyo Convention to reject Captain Trentino's declaration as notification would be consistent with the aforementioned VCCR. Article 36 paragraph I (b) of the VCCR, which, as a reminder, was a mere codification of customary international law, requires a State of detention to inform “without delay” foreign nationals who have been “arrested or committed to prison” of be given notice “without delay” of their right to have their embassy or consulate notified of that arrest.⁴⁴ Captain Trentino's declaration at Zandar was well before Chico was arrested in Marxiana and as such, there was no way by which Sylvania authorities knew Trentino carried out his threat. The ICJ held in the *LaGrand* case that a state breaches its obligations to another under the VCCR by failing to inform an arrested alien of the right to consular notification.⁴⁵ Sylvania authorities were not made aware of Chico's actual arrest until Zeppo contacted which serves as strong evidence that Chico was never provided with consular notification. This is because had he been granted timely consular notification, Sylvania officials would have had knowledge of his delivery much sooner. In order to encourage consistency among international theories and practices, this court

⁴³ Tokyo Convention art 13 para 5.

⁴⁴ VCCR art 36 (1) (b).

⁴⁵ (*Germany v United States of America*) Judgment, [2001] ICJ Rep 466.

should find that the State of Freedonia's failure to notify the State of Sylvania of Chico's delivery is not saved by Captain Trentino's declaration but rather such notification never occurred at all and thus Freedonia violated Article 13 paragraph 5 of the Tokyo Convention.

C. THE TOKYO CONVENTION GRANTS SYLVANIA THE JURISDICTION TO ARREST AND PROSECUTE FIREFLY FOR HIS ACTIONS ON BOARD FLIGHT 1933.

1. The conditions set forth in the Tokyo Convention enable a State to assert jurisdiction over occurrences on board aircraft.

For the State of Sylvania to legally take action against Firefly in response to his conduct against Harpo and Chico, the State of Sylvania must establish its right to exercise jurisdiction for occurrences on board aircraft. Being a state of non-registry, the State of Sylvania must establish certain factors before it may assert jurisdiction in this case. Article 3 Paragraph *2bis(a)* of the Tokyo Convention grants a contracting State jurisdiction over offences committed on board aircraft as the State of landing when the 1) aircraft on board which the offence is committed has the last point of take-off or next point of intended landing within its territory, 2) the aircraft subsequently lands in its territory with the alleged offender still on board, and 3) the safety of the aircraft or of persons therein, or good order and discipline on board, is jeopardized.⁴⁶

In this case, the State of Sylvania can establish jurisdiction because each of these factors is clearly fulfilled. First, the last point of take-off was Sylvania City which is within Sylvanian territory. Second, after taking off from Sylvania City, the aircraft subsequently landed in Zandar, Sylvania with Firefly still on board. Third and finally, as will be discussed below in Section V, Firefly had jeopardized the safety, good order, and discipline on board the aircraft. Therefore

⁴⁶ Tokyo Convention art 3 para *2bis* (a).

each requirement of Article 3 paragraph 2*bis*(a) of the Tokyo Convention is met and the State of Sylvania may legally assert jurisdiction over the incident on board the aircraft and its participants, including Firefly.

- i. *International Treaties and Customary Law establish jurisdiction via the principle of territorial sovereignty.*

The Tokyo Convention's drafters' intent for the State of Sylvania to have jurisdiction over actions in its airspace is supported by other treaties and principles of customary international law. Article 1 of the Convention on International Civil Aviation [hereinafter referred to as the Chicago Convention], provides that every State has complete and exclusive sovereignty over the airspace above its territory.⁴⁷ The acts committed by Firefly occurred within Sylvanian airspace.

The Permanent Court of International Justice [hereinafter referred to as PCIJ] in the classic case of the *S.S. Lotus*⁴⁸ noted that no rule of international law exists that would prohibit a State from exercising criminal jurisdiction over a foreign national who commits acts outside of the State's national jurisdiction. In other words, there is no international legal theory that would prevent Sylvania from exercising criminal jurisdiction over Firefly for actions committed in the State of Sylvania. In the celebrated United States Supreme Court case *Schooner Exchange v. McFaddon*,⁴⁹ the court held that, each sovereign State enjoys exclusive and absolute jurisdiction within its own territory. The court declared that any restriction imposed from an external source

⁴⁷ (Adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.

⁴⁸ (*France v Turkey*) PCIJ Series A No. 10.

⁴⁹ 11 US 116, 136 (1812).

upon territorial jurisdiction would imply a diminution of the State's sovereignty.⁵⁰ It was in a State's interest then, to respect another's territorial sovereignty so that the each State might reciprocate the gesture.

Based on the Chicago Convention and internationally recognized cases, a State's may exercise full and sovereign authority over its territory. Interpreting the Tokyo Convention in a manner consistent with these principles results in the State of Sylvania's right to assert jurisdiction over any incidents occurring within its airspace.

D. FIREFLY'S ACTIONS WITH REGARD TO HARPO AND CHICO WERE INCONSISTENT WITH THE TOKYO CONVENTION AND THE ACTIONS OF THE SYLVANIAN AUTHORITIES IN DETAINING, ARRESTING, AND PROSECUTING FIREFLY WERE CONSISTENT WITH THE TOKYO CONVENTION.

1. Firefly's actions towards Harpo and Chico were improper according to the Tokyo Convention.

As the In-Flight Security Officer [hereinafter referred to as IFSO] aboard flight 1933, Firefly was more than simply a passenger along for the ride. An IFSO's general purpose is to maintain order and good discipline, and ensure the safety of passengers and crew aboard an aircraft.⁵¹ Article 6 of the Tokyo Convention establishes two means by which an IFSO may respond to unruly passengers.⁵²

⁵⁰ *Ibid.*

⁵¹ Jennison (n 33).

⁵² Tokyo Convention art 6 para 2 & 3.

i. An IFSO acts via authorization from the air commander.

Article 6 Paragraph 2 of the Tokyo Convention states that the IFSO may, upon an aircraft commander's authorization, restrain any passenger the aircraft commander may be entitled to restrain.⁵³ The aircraft commander will be entitled to authorize restraint when he has a reasonable belief that an offence or act contemplated in Article 1 has occurred.⁵⁴ When Captain Trentino was informed of the disturbance on board, he shouted directions over the cockpit phone for "somebody [to] get control out there." This open invitation to action could and should be considered authorization for Firefly to act. Captain Trentino did not direct his order at one specific crew member but rather said "someone" which includes the armed IFSO assigned to the flight. The unreasonableness of Captain Trentino's belief that a violation of Article 1 had occurred has been discussed at length. Therefore the Court should find that Firefly actions violated the Tokyo Convention because they derived from Captain Trentino's unreasonably held beliefs.

ii. An IFSO acts unilaterally without authorization from the aircraft commander.

Absent authorization from the commander, Article 6 paragraph 3 of the Tokyo Convention states that the IFSO may take "reasonable preventative measures" when they have "reasonable grounds to believe it is immediately necessary to protect the safety of the aircraft... from an act of unlawful interference and serious offences."⁵⁵ Interpretation of this article begins

⁵³ *Ibid* at para 2.

⁵⁴ *Ibid* at para 1(a) & (b).

⁵⁵ Tokyo Convention art 6 para 3.

with an analysis of how reasonable the IFSO's belief was that action was needed to protect the aircraft was immediately.

As previously illustrated in the *Eid v. Alaska Airlines* and *Zikry v. Air Canada* cases, an assessment of reasonableness requires an objective assessment of one's held belief.⁵⁶ This objective showing requires that evidence tending to support one's belief must be presented to the fact finder. Though *Eid v. Alaska Airlines* and *Zikry v. Air Canada* dealt with assessing an aircraft commander's reasonable belief, this court should examine an IFSO's reasonableness through a similar, if not more constricted lens. In 2012, the Secretariat Study Group, an ICAO sub-committee, proposed to amend the Tokyo Convention in a manner that would grant IFSO's special status and very broad immunity against 3rd party claims.⁵⁷ If accepted, this amendment would have required courts to examine IFSO's reasonably held beliefs with great deference. However this amendment was criticized as being counterintuitive to the ideas and purposes of the Tokyo Convention, and was ultimately rejected.⁵⁸

Firefly must therefore provide tangible facts to show he objectively and reasonably believed that immediate action was necessary to ensure the aircraft's safety. This is a task which Firefly cannot do. The record states that Firefly was not present for the events leading up to Teasdale's restraint; all he saw was Harpo restraining Teasdale on the cabin floor with Chico standing nearby. Being an IFSO, Firefly should also be aware that Article 6 of the Tokyo Convention not only grants IFSO's the right to take action against unruly passengers and crew, but grants similar power to other passengers on board the aircraft as well. With this knowledge it

⁵⁶ *Eid* (n 21), *Zikry* (n 31).

⁵⁷ Special Sub-Committee Report at 28.

⁵⁸ *Ibid.*

was unreasonable for Firefly to jump to an uninformed conclusion that Chico and Harpo were the offenders in this instance.

iii. Defining reasonable preventative measures as intended by the Tokyo Convention's drafters.

Even if this Court decides that Captain Trentino, or Firefly, or both had reasonable grounds to believe an act of unlawful interference or serious offence had occurred and immediate action was necessary, the Court must still assess whether Firefly engaged in “reasonable preventative measures” in order to cease Harpo's unlawful conduct. Based on the facts presented, Firefly did not employ such measures, but rather utilized excessive and unnecessary violence.

In this case Firefly certainly did not employ “reasonable preventative measures” when addressing the ongoing incident. When Firefly inserted himself into the situation, the circumstance revealed one man pinning a flight attendant to the floor. Firefly did not see Harpo with a weapon, nor did he witness Harpo striking or beating the flight attendant. Harpo was merely pinning her down, restraining her. At this point there were a number of actions which Firefly could have taken such as, tackling Harpo, grabbing Harpo, or even asking Chico or nearby witnesses what had occurred. Instead, Firefly chose to draw his weapon in the middle of a full flight. This unnecessary course of conduct immediately placed everyone at risk. Any number of accidents could have resulted in the firearm going off causing passengers or crew members to be killed, wounded, or suffer from cabin depressurization if a bullet pierced a window. These threats to passenger safety would not have been present but for Firefly drawing and wielding his firearm Firefly. Firefly escalated the risk he created when he took said firearm

and struck Harpo across the head, rendering him unconscious. In using his gun to strike Harpo, Firefly risked discharging his weapon and causing the injuries stated above. Again, grabbing Harpo, pushing or pulling him, or even calling on others to restrain him are measures that would have been just as effective and less likely to jeopardize aircraft safety.

This court should compare Firefly's actions to those taken by members aboard a 2001 American Airlines flight whereon the infamous "shoe bomber" attempted to ignite explosives hidden in his shoes during a flight from Paris to Miami, Florida.⁵⁹ There the offender was successfully subdued by six different people using belts and plastic cords.⁶⁰ Another case, *Levy v. American Airlines*, involved a flight from Cairo to Zurich during which a passenger attempted to slit his own wrists in the aircraft lavatory.⁶¹ The Drug Enforcement Administration agents the passenger was traveling with restrained him on the floor of the galley area and placed a towel in his mouth to muffle his screaming.⁶² In these cases, both of which arguably involved much more serious offences than Flight 1933, the intent of Article 6 of the Tokyo Convention was fulfilled when the actors took reasonable, but not extreme or excessive, steps to prevent a serious offence from occurring. On the other hand, when Firefly drew his firearm and used it to knock Harpo unconscious, he took measures that can only be described as well beyond reasonable. This is especially true when considering the other means of restraint that could have been successfully executed to get Harpo away from Teasdale. In fact, Firefly not only failed to comply with

⁵⁹ Kelly Wallace, 'Man on jet had explosive in sneakers, feds say' (CNN.COM) 25 December 2001 < <http://edition.cnn.com/2001/US/12/23/plane.investigation/> > accessed 24 January 2015.

⁶⁰ *Ibid.*

⁶¹ 22 F3d 1092 (2d Cir 1994).

⁶² *Ibid.*

Article 6 of the Tokyo Convention which calls for “reasonable preventative measures,” but also directly violated Article 1 of the Tokyo Convention by jeopardizing the safety and good order of persons on board the aircraft.

2. It was lawful for Sylvaniaian authorities to detain, arrest, and prosecute Firefly.

Article 3 paragraph *2bis* of the Tokyo Convention establishes that a State, as the state of landing, is competent to exercise jurisdiction over offences and acts committed on board an aircraft when the aircraft on board which the offence is committed lands in its territory with the alleged offender on board.⁶³ It is therefore clear that the State of Sylvania has jurisdiction over Firefly for his actions aboard the plane because it landed in Sylvaniaian territory. However, Article 10 of the Tokyo Convention provides a thin veil of immunity to those who act in accordance with the Convention.⁶⁴ This immunity protects persons acting under the Convention’s authority from prosecution and any other legal action they may face as a result of their compliance with the Convention. To declare an actor immune from legal action, the court must determine if they “act[ed] in accordance with this convention.”⁶⁵ This phrase implies that aircraft commanders, flight crew, and IFSO’s do not enjoy absolute immunity, because their actions will not be protected if they are not in accordance with the Convention. Once this court finds that Firefly’s actions violated Article 1 of the Tokyo Convention, the question then becomes what legal actions may Sylvania take?

⁶³ Tokyo Convention art 3 para *2bis*.

⁶⁴ Tokyo Convention art 10.

⁶⁵ *Ibid.*

The Tokyo Convention contains provisions governing the steps a State may take towards someone who has violated Article 1 therein. Article 4 of the Tokyo Convention grants discretion for a non-registration State to “exercise criminal jurisdiction over an offence committed on board.”⁶⁶ Article 4 paragraph b of the Tokyo Convention applies to the instant case in that the non-registration state (State of Sylvania) may exercise criminal jurisdiction over an offender (Firefly) when the offence has been committed against a national resident of such state (Harpo).⁶⁷ The steps taken when exercising criminal jurisdiction include arresting, detaining, and prosecuting an alleged offender. Additionally, Article 15*bis* of the Tokyo Convention establishes the right for Sylvanian authorities to initiate appropriate criminal actions against Firefly.⁶⁸ This article grants States the authority to take measures as may be necessary to initiate appropriate criminal proceedings against any person who commits an offence referred to in Article 1 of the Tokyo Convention. According to Article 15*bis* of the Tokyo Convention, after conducting a preliminary enquiry investigation the occurrence on board Flight 1933 pursuant to Article 13 paragraph 4 of the Tokyo Convention, the State of Sylvania was then entitled to criminally detain, arrest, and prosecute Firefly.⁶⁹ This is so because Firefly had committed two offences on board; first, jeopardizing the safety of the aircraft and those on board by wielding his weapon, and second by using his weapon to assault Harpo, rendering him unconscious.

⁶⁶ Tokyo Convention art 4.

⁶⁷ Tokyo Convention art 4 para b.

⁶⁸ Tokyo Convention art 15*bis*.

⁶⁹ *Ibid.*

SUBMISSIONS

May it please the Court, for the forgoing reasons, the State of Sylvania respectfully requests

the Court to adjudge and declare that:

- Sylvaniaian authorities acted consistently with the Tokyo Convention in refusing the disembarkation of Chico at Zandar.

- Captain Trentino's actions in delivering Chico to the authorities in Marxiana were inconsistent with the provisions of the Tokyo Convention, as was the failure to notify Sylvaniaian authorities of the actions taken against Chico.

- The Tokyo Convention granted Sylvania the jurisdiction to arrest and prosecute Firefly for his actions on board Flight 1933.

- Firefly's actions with regard to Harpo and Chico were inconsistent with the Tokyo Convention and the actions of the Sylvaniaian authorities in detaining, arresting, and prosecuting Firefly were consistent with the Tokyo Convention.

The Honorable Court is further requested to declare such guidelines, as it deems fit and essential in the present case.