

INTERNATIONAL AIR LAW MOOT COURT COMPETITION 2015

CASE OF AIRCRAFT ONBOARD INCIDENT

SYLVANIA V. FREEDONIA

MEMORIAL SUBMITTED ON BEHALF OF THE STATE OF FREEDONIA

TEAM NUMBER 36- RESPONDENT

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LIST OF ABBREVIATIONS

BASA	Bilateral Air Services Agreement
Compromis	Statement of Agreed Facts
Hague Convention	1970 United Nations Convention on the Supression of Unlawful Seizure of Aircraft
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
1963 Tokyo Convention	1963 Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft
Para.	Paragraph
Paras.	Paragraphs
Tokyo Convention	Consolidated Text of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) and the Protocol to Amend the Convention on Offences Certain Other Acts Committed on Board Aircraft, Montreal, 2014
US	United States
VCLT	1969 Vienna Convention on the Law of Treaties

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Statement of Agreed Facts Compromis Between the State of Sylvania (Applicant) and the State of Freedonia (Respondent) to submit to the International Court of Justice the differences Between the Parties concerning an Aircraft Onboard Incident

STATEMENT OF RELEVANT FACTS

A. INTRODUCTION

The present dispute arises from several issues between the State of Sylvania (Applicant) and the State of Freedonia (Respondent) in the framework of their air transport relations as regulated by a Bilateral Air Services Agreement (BASA) and refers to the differences between the Parties concerning an aircraft onboard accident.

B. BACKGROUND FACTS

1. Air transportation between Sylvania and Freedonia

Air transportation between the State of Sylvania and the State of Freedonia is regulated by a Bilateral Air Services Agreement (BASA), which permits the deployment of in-flight security officers on flights between the two States.

Freedonia Airlines is 100% owned by the State of Freedonia.

2. The incident onboard Flight 1933

(a) The reaction of the flight attendant Gloria Teasdale

On June 1, 2014, Freedonia Airlines Flight 1933 departed from the international airport at Sylvania City, the capital city of Freedonia, bound for Freedonia City, Freedonia. About half way through Flight 1933, while the aircraft was still operating in Sylvaniaian airspace, one of the flight attendants, Gloria Teasdale, glanced out the window while making her rounds. Suddenly she began screaming that there was a gremlin sitting on the wing of the aircraft. As a result, a number of passengers began to panic, whereas Teasdale raced over to the nearest emergency exit door and attempted to open it.

(b) The actions of two passengers Harpo and Chico

Harpo and Chico, two Sylvaniaian passengers onboard Flight 1933, traveling to Freedonia to visit their older brother Zeppo, were sitting adjacent to the emergency exit, which the flight attendant attempted to open. Upon hearing Teasdale scream about the gremlin and witnessing her attempt to open the emergency exit, they leapt out of their seats and began to physically restrain Teasdale. However, the flight attendant continued to scream and struggled as Chico pulled her away from the fire escape and Harpo pinned her against the cabin floor.

(c) The actions of the in-flight security officer Rufus T. Firefly

Consistent with the BASA Agreement between the States of Sylvania and Freedonia, which permits the deployment of in-flight security officers on flights between the two States, onboard the aircraft was, also, an in-flight security officer, Rufus T. Firefly.

Unfortunately, Firefly was in the lavatory when the flight attendant first began screaming. Even though he did not witness her attempt to open the emergency exit door, upon exiting and hearing the screaming, he asked one of the other flight attendants what all the commotion was about. The flight attendant said that he had just been in a conversation on the cabin phone with the chief pilot, Captain Trentino, who asked that “somebody get control out there”.

For this reason, Firefly ran toward the scene of disturbance and immediately drew his firearm, which he was authorized to carry consistent with the BASA Agreement, against Harpo and yelled “Stop!”. Nevertheless, Harpo was deaf and, as a consequence, did not understand the command, thus continuing to struggle with Teasdale. Firefly struck Harpo across the head with his weapon, rendering him unconscious and, then, approached Chico, who was standing next to Harpo, and fastened restraints around Chico’s wrists.

3. The actions of Captain Trentino and the reaction of the Sylvaniaian authorities

(a) The diversion of Flight 1933 by Captain Trentino

Captain Trentino decided to divert Flight 1933 to the nearest airport, which happened to be in the city of Zandar, Sylvania, and notified the Sylvanian civil aviation authorities that he would be delivering a passenger or passengers to Sylvanian custody. Upon arrival in Zandar, Captain Trentino interviewed Firefly, Teasdale, Chico and some of the other passengers to learn more about the incident. Then, he informed the Sylvanian police authorities who had come onboard the aircraft that he was delivering Chico and Harpo, who was still unconscious, to their custody and intended to continue the flight to Freedonia without them.

(b) The reaction of the Sylvanian authorities

However, the Sylvanian authorities refused to allow Captain Trentino to resume the flight until they had conducted their own interviews with everyone on board. After a number of hours, they concluded their investigation and they decided to take Firefly into custody instead. The Sylvanian authorities also advised that, in their view, there was no reason to charge Chico with any crime, since he said that he was anxious to continue to Freedonia City to make contact with his older brother, Zeppo. For this reason, the Sylvanian authorities refused to allow Captain Trentino to deliver or disembark Chico, instead recommending that he be taken as contracted to Freedonia City with the rest of the passengers onboard Flight 1933.

(c) The reaction of Captain Trentino and the completion of Flight 1933

As a response to the actions of the Sylvanian authorities, Captain Trentino responded that he intended to deliver Chico to Freedonian custody as soon as he crossed the Freedonian border. After Flight 1933 resumed operation, Captain Trentino, consistent with his prior notification to the Sylvanian authorities, landed the aircraft at the airport of Marxiana, a Freedonian city. There Captain Trentino disembarked Chico and delivered him to the local authorities, who decided to charge

Chico under Freedonian criminal law for his actions onboard. Flight 1933 was, then, completed, as it reached the airport of the Freedonia City.

4. The proceedings after the completion of Flight 1933 by both the Freedonian and the Sylvania authorities

Following the completion of Flight 1933, the Freedonian ministry of foreign affairs contacted the Sylvania government about the arrest and detention of Firefly, which the ministry claimed to be illegal given his special status as a Freedonian in-flight security officer.

Sylvania and Freedonia proceeded to prosecute and sentence Firefly and Chico respectively under each state's national criminal laws. Both received mild punishments and have since exhausted all appeals and local remedies and their judgments have now become final.

Freedonia asked that the matter be submitted to arbitration, but when it became apparent that the States would not be able to even agree on the terms of arbitration, Sylvania referred the dispute to the International Court of Justice seeking a declaratory judgment about the legality of each State's actions under and interpretation of the Tokyo Convention, leaving aside any national law claims.

ISSUES

The State of Freedonia will argue the following contentions:

- a. Have the Sylvania authorities acted in violation of the Tokyo Convention by refusing to allow Captain Trentino to disembark or deliver Chico in Zandar?
- b. Were the actions taken by Captain Trentino and other Freedonian representatives with regard to Chico's delivery and detention in Marxiana entirely in accordance with the Tokyo Convention and was sufficient notice provided?
- c. Does Sylvania lack jurisdiction over Firefly's actions because of his status as an on-duty, in-flight security officer operating on board a Freedonian Airlines flight, and because Captain Trentino had neither disembarked nor delivered Firefly to Sylvania authorities?
- d. Were Firefly's actions with regard to Harpo and Chico entirely consistent with the Tokyo Convention, or alternately, were they immunized by the Tokyo Convention, thus rendering the Sylvania authorities wrong to prosecute him under Sylvania law?

SUMMARY OF ARGUMENTS

The Sylvaniaian authorities have violated the Tokyo Convention by refusing to allow Captain Trentino to disembark or deliver Chico in Zandar, as both the duty to deliver and the duty to disembark is unconditional for the State that receives delivery or disembarkation. In any case, the disembarkation of Chico at Zandar would be lawful as the aircraft commander had reasonable grounds to believe that person on board the aircraft, namely Chico, had committed on board the aircraft an act which may or did jeopardize the safety of Teasdale. Additionally, his decision to disembark was also lawful as Chico had committed on board the aircraft a serious offense, namely he assaulted physically Teasdale. The actions taken by Captain Trentino and other Freedomian representatives with regard to Chico's delivery and detention in Marxiana were entirely in accordance with the Tokyo Convention and sufficient notice was provided. Captain Trentino acted in conformity with Articles 8 and 9 of the Tokyo Convention by disembarking Chico at Marxiana since the latter's actions jeopardized good order and discipline on board Flight 1933. Furthermore, Captain Trentino had the right to deliver Chico to Freedomian custody under Article 9 of the Tokyo Convention since he had committed a serious offence. In addition to that, Captain Trentino provided sufficient notice to the Sylvaniaian authorities in accordance with Article 9 para. 2 and Article 13 para. 5 of the Tokyo Convention. In the third part of the Respondent's argumentation it is submitted that Sylvania lacks jurisdiction over Firefly's actions. This argument is based upon the duties and the exoneration from responsibility, namely on Articles 6 and 10 of the Tokyo Convention. Firstly, Firefly lawfully proceeded to physically restraining Harpo and Chico, since he had the official authorization on behalf of Captain Trentino. Even without such authorization, Firefly would still be entitled to take the aforementioned measures, since he had reasonable

grounds to believe that his action was immediately necessary to protect the safety of the flight attendant from an act of unlawful interference committed by Harpo and Chico against Teasdale. In any case, Sylvania would still lack jurisdiction over Firefly's actions, because Firefly acted within the scope of his official duties and, therefore, enjoys exoneration from responsibility. In any case, Sylvania lacks jurisdiction over Firefly's actions because the aircraft commander, Captain Trentino, did not proceed to either the disembarkation or the delivery of Firefly to Sylvaniaian authorities under Article 12 or 13 para. 1 respectively. As a result, the Sylvaniaian authorities were wrong to prosecute him under Sylvaniaian law.

STATEMENT OF JURISDICTION OF THE COURT

The State of Freedonia claims that the International Court of Justice has jurisdiction over the present dispute concerning incidents on board an aircraft, arisen between the State of Sylvania and the State of Freedonia. The jurisdiction of the Court derives from Article 24 of the Tokyo Convention, which establishes the above mentioned jurisdiction in the case of disputes concerning the interpretation or application of the Tokyo Convention and under the prerequisite that within six months from the request for arbitration of one of the disputing states there has been a failure to agree over the terms of the arbitration's organization. Furthermore, the dispute must be brought to the adjudication of the ICJ in conformity with its Statute. In particular, the jurisdiction can derive from a Special Agreement (Compromis) between the Applicant and the Respondent, pursuant to Article 36 (1) of the Statute of the International Court of Justice. The latter states that parties can agree to bring for adjudication their dispute before the ICJ, as it was agreed in many cases, such as the *Asylum* case (Columbia v. Peru), 1950, the *North Sea Continental Shelf* cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany/ Netherlands), 1968, the *Gabcíkovo-Nagymaros Project* case (Hungary v. Slovakia), 1997, *et alia*.

Indeed, the present case is based upon a dispute over the legality of each of the disputing States' actions, hence over the application of the Tokyo Convention, as well as over the interpretation of said Treaty. After Freedonia's request for the submission of the dispute to arbitration, the States were unable to agree over the terms of arbitration. Therefore, Sylvania referred the dispute to the adjudication of the ICJ seeking for a declaratory judgment over the application and interpretation of the Tokyo Convention. Thus, with a Special Agreement (Compromis) notified to the Court in 2015, the State of Sylvania and the State of Freedonia agreed to bring the case before the ICJ, leaving aside any national law claims.

ARGUMENT

A. THE SYLVANIAN AUTHORITIES ACTED IN VIOLATION OF THE TOKYO CONVENTION IN REFUSING TO ALLOW CAPTAIN TRENTINO TO DISEMBARK OR DELIVER CHICO IN ZANDAR

By refusing the disembarkation or delivery of Chico in Zandar, the Sylvanian authorities have violated the Tokyo Convention. "Disembarkation" and "delivery" are not defined in the Tokyo Convention. Under Article 32 of the 1969 Vienna Convention on the Law the Treaties¹, when the interpretation of a treaty leaves the meaning ambiguous or obscure, recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. As expressed by the *travaux préparatoires* of the 1963 Tokyo Convention, in the case of disembarkation, namely the decision of the aircraft commander to offload a person from the aircraft, neither is the disembarked person turned over to the local authorities, nor is the State of landing obliged to take any measures². This is also verified by the opinion of distinguished publicists, which are regarded as a means for the determination of rules of law under Article 38 paragraph 1 (d) of the Statute of the International Court of Justice. In particular, in the case of disembarkation no further action by the authorities of the place of disembarkation is contemplated, whereas in the case of delivery the delivered person is subject to further legal process of the State taking delivery³. In short, disembarkation and

¹ Vienna Convention on the Law of Treaties, (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS, 331

² ICAO Report of the Special Sub-Committee of the Legal Committee for the Modernization of the Tokyo Convention Including the Issue of Unruly Persons (Montreal 22-25 May 2012) LC/SC-MOT-WP/1; IATA Guidance on Unruly Passengers Prevention and Management (2015) 35

delivery are not regarded as identical concepts and for this reason they constitute separate legal regimes, each one entailing different legal consequences⁴.

1. The Tokyo Convention is applicable in the dispute between Sylvania and Freedonia

In order to determine whether the State of Freedonia is entitled to raise legal demands over the refusal of Sylvania to accept the disembarkation or delivery of Chico, it is submitted that the above-mentioned treaty is applicable.

(a) Both Sylvania and Freedonia are bound by the Tokyo Convention

The provisions of the Tokyo Convention are binding upon its parties. According to Article 2 paragraph 1 (f) of the VCLT, the term “Contracting State” means a State that has consented to be bound by a treaty, whether or not this treaty has entered into force. Under Article 2 para. 1 (g), a State is also regarded as a “party” to a treaty, when the latter has already entered into force.

In the present case, both the State of Freedonia and the State of Sylvania are parties to the Tokyo Convention as amended by the 2014 Protocol⁵. What is more, neither State has made any reservations to either the Tokyo Convention, or the Protocol⁶. Therefore, they are both bound by the amended Tokyo Convention as a whole.

³ Jiefang Huang, *Aviation Safety Through The Rule of law- ICAO Mechanisms and Practices* (Kluwer Law International, 2009) 115; IATA (n 2)

⁴ René Golstein ‘La Convention Relative aux Infractions et à Certains Autres Actes Survenant à Bord Des Aeronefs et Les Pouvoirs du Commandant d'Aéronef’ (1964) 18 *Revue française de droit aérien*, 19, 37; J. Huang (n 3) 115; Jacob Denaro, ‘In-Flight Crimes, The Tokyo Convention and Federal Juridicial Jurisdiction’ (1969) 35 *Journal of Air Law and Commerce* 171, 178

⁵ *Compromis* paragraph 1

⁶ *Clarifications* paragraph 3

(b) The dispute between Sylvania and Freedonia falls under the material scope of the Tokyo Convention

Under Article 1 of the Tokyo Convention, the latter “shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a contracting state, while that aircraft is in flight. This definition aims at covering all the period during which an aircraft engages in international aviation⁷ .

(i) The action was committed on board an aircraft registered by Freedonia

According to Article 17 of the 1944 Chicago Convention on Civil Aviation, “Aircraft have the nationality of the State in which they are registered”. In other words, registration is an evidence of the nationality that the aircraft bears⁸. In the present case, the aircraft in question is registered to Freedonia⁹, under the terms of the Chicago Convention.

(ii) The action was committed on board an aircraft in flight

Under the scope of the Tokyo Convention, actions committed on board an aircraft being in-flight are covered. Following the amendment of the 1963 Tokyo Convention in 2014, Article 1 paragraph 3 states that, “an aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation”. This provision expresses the view that the aircraft commander must be able to take internationally established measures for the protection of persons, goods and the

⁷ H. J. Rutgers *Conventions on penal law regarding aircraft* (Drukkerij Elinkwijk 1979)

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⁸ J.C. Cooper ‘National Status of Aircraft’ (1950) 17 *Journal of Air Law and Commerce* 292, 307

⁹ Clarifications paragraph 4

aircraft, the latter being considered as a “closed universe”¹⁰ or a “sealed unit”¹¹. In the present case, Chico' s action against Teasdale, namely the physical assault, was committed on board the aircraft during an international flight, that is the “Freedonia Airlines Flight 1933”, which had departed from the international airport of Sylvania City, bound for Freedonia City in Freedonia. For those reasons, the material scope of the Tokyo Convention indeed covers the dispute in question and as the two States are bound by the provisions of this treaty, it is applicable in the present case.

2. The Sylvanian authorities by refusing the disembarkation of Chico breached article 12 of the Tokyo Convention

Under Article 12 of the Tokyo Convention, “Any Contracting State shall allow the commander of an aircraft registered in another Contracting State to disembark any person pursuant to article 8 paragraph 1”. With a view to securing good order, discipline, as well as the safety of an aircraft or of persons or property therein, the duty of a Contracting State to accept such disembarkation is deemed as unqualified¹² or unconditional¹³. Therefore, as by its nature, said obligation is not limited by a condition and is not depending on an uncertain event or contingency in order to be created¹⁴. Hence, the lawfulness of the commander's decision to disembark a person does not affect the duty of the state of landing to accept the disembarkation. In the

¹⁰ I. H. P Diederiks-Verschoor, *An Introduction to Air law* (Kluwer Law International 2006) 295

¹¹ I. H. P Diederiks-Verschoor, *Ibidem*

¹² Robert Boyle and Roy Pulsifer, ‘The Tokyo Convention on offenses and certain other acts committed on board aircraft’ (1964) 30 *Journal of Air Law and Commerce* 305, 311; H. J. Rutgers(n 8) 88

¹³ H. J. Rutgers *ibidem*

¹⁴ Bryan Garner *Black's Law Dictionary* (West Group 2009) 580, 1208, 1209, 1691

present case, the aircraft commander was hampered to disembark Chico by the Sylvania authorities, even though such discretion is not provided by the Tokyo Convention. It must be highlighted that the Sylvania authorities were not entitled to examine whether Captain Trentino's decision to disembark Chico was reasonable or not. Thus, by failing to fulfill the duty imposed by Article 12, Sylvania acted inconsistently with the Tokyo Convention. In any case, disembarkation of Chico would be lawful in the context of the Tokyo Convention: Article 8 paragraph 1 grants the aircraft commander the discretion to disembark a person in so far as it is necessary for the purpose of protecting the safety of the aircraft, or of persons or property therein, or for the purpose of maintaining good order and discipline on board. However, pursuant to Article 1 paragraph 1 (b), this right is limited only to the cases where the commander has reasonable grounds to believe that a person has committed on board the aircraft an act which may or does jeopardize the safety of persons therein or which jeopardize good order and discipline on board. The commander's decision must be based on reasonable factual grounds, exercised in good faith¹⁵ and the test of reasonableness of such grounds seems to be subjective¹⁶. In the present case, Captain Trentino's decision was indeed based on reasonable grounds, as due to Chico's assault over Teasdale the safety of a person on board was jeopardized, namely the safety of the flight attendant. The incident described had also caused disorder on board. Hence, Captain Trentino was indeed entitled to demand the disembarkation of Chico at Zandar.

3. By refusing the delivery of Chico in Zandar the Sylvania authorities breached Article 13 of the Tokyo Convention

¹⁵ H. J. Rutgers (n 8) 74

¹⁶ Sami Shubber *Jurisdiction Over Crimes On Board Aircraft* (Martinus Nijhoff 1973), 222; Rutgers (n 8) 74

According to Article 13 of the Tokyo Convention, “Any Contracting State shall take delivery of any person whom the aircraft delivers pursuant to article 9, paragraph 1”. The obligation to take delivery is also regarded as an absolute one¹⁷ and hence strict fulfillment according to the terms of the engagement [in question] without any alternatives to the obligor is required¹⁸. The above-mentioned duty does not entail any further obligation of taking the delivered person in custody¹⁹. In the present case, Captain Trentino was not allowed to deliver Chico at Zandar²⁰ and thus the Sylvanian authorities failed to act in conformity with the absolute duty arising out of Article 13. In any case, Captain Trentino' s decision to deliver Chico to the Sylvanian authorities was lawful. Article 13 is the legal corollary of Article 9 paragraph 1 of the Tokyo Convention, which states that “the aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed on board the aircraft an act which, in his opinion, is a serious offense”. The Tokyo Convention grants the aircraft commander the discretion to judge when a person must be delivered, whereas the commander's decision must be based on reasonable factual grounds, thus rendering this judgment subjective, limited ultimately by an objective criterion²¹, namely the commander must believe that a serious offense has been committed. The Tokyo Convention does not define the criteria, which determine the seriousness of an offense. Therefore, as seen from the *travaux préparatoires* of the 1963 Tokyo Convention, which are taken into consideration pursuant to Article 32 of

¹⁷ H. J. Rutgers (n 8) 91

¹⁸ Bryan Garner (n 15) 1179

¹⁹ Rutgers (n 8) 91

²⁰ *Compromis* paragraph 16

²¹ S. Shubber (n 17) 222; Rutgers (n 8) 74

the 1969 Vienna Convention on the Law of Treaties²², the Drafters failed to reach to an agreement in terms of the “seriousness” of an offence²³. A reliable guidance as to the meaning of the term “serious offence” can be found in the generally accepted measure of punishment which is attached to an offence in domestic penal codes²⁴, whereas serious offenses may also include the ones against the person²⁵. In the present case, Chico committed physical assault against the flight attendant Teasdale, which constitutes a criminal offense in most domestic legal systems²⁶. Hence, Captain Trentino had indeed reason to believe a serious offense had been committed and therefore his decision to deliver Chico to the Sylvania authorities was lawful.

B. THE ACTIONS TAKEN BY CAPTAIN TRENTINO AND OTHER FREEDONIAN REPRESENTATIVES WITH REGARD TO CHICO’S DELIVERY AND DETENTION IN MARXIANA WERE ENTIRELY IN ACCORDANCE WITH THE TOKYO CONVENTION AND SUFFICIENT NOTICE WAS PROVIDED

1. Captain Trentino acted in conformity with Articles 8 and 9 of the Tokyo Convention

(a) Captain Trentino acted in conformity with Article 8 of the Tokyo Convention by disembarking Chico at Marxiana

²² *Supra* Argument A

²³ S. Shubber (n 17) 223

²⁴ R. Golstein, (n 4) 37; Rutgers (n 8)75

²⁵ S. Shubber (n 17) 225

²⁶ Article 266 of Canadian Criminal Code; General Laws of Massachusetts (Section 13 A); Illinois Criminal Offenses, Criminal Code of 2012, Section 12-1; German Criminal Code (Bundesgesetzblatt),Section 223

Article 8 of the aforementioned Convention provides that the aircraft commander has the right to disembark a person in the territory of any State if he has reasonable grounds to believe that such a person has committed, or is about to commit, on board the aircraft an act contemplated in Article 1 para. 1 b). However, the essential prerequisite is that the disembarkation of such a person must be necessary in order either to protect the safety of the aircraft, persons and property therein, or to maintain good order and discipline on board²⁷. The prerequisites set by said article are met in the present case.

(i) Freedonia is the State of landing

Neither the 1963 Tokyo Convention nor the Tokyo Convention as amended by the 2014 Protocol provide a precise definition of the terms “landing State” and “the State in which an aircraft lands”. Several States²⁸ have argued on whether such terms refer to the State of scheduled landing or whether they include States, in which an aircraft lands because of a diversion. As aforementioned said Convention must be interpreted in accordance with international law and specifically Article 31 para. 1 of the 1969 VCLT. It is well settled that the interpretation of a treaty must begin with the search of the ordinary meaning of its terms²⁹. The drafters of the 1963 Tokyo Convention did not make any discrimination between the State of the scheduled landing and States in which aircraft land as a result of diversions. The latter have not been excluded from the provisions of the aforementioned Convention nor by the Convention as amended by the 2014 Protocol. However, in April 2014 the ICAO Working Group on Jurisdiction decided to consider diversions in order to avoid a situation where, as a result of a diversion, passengers would have themselves in a

²⁷ Sami Shubber (n 17) 217

²⁸ ICAO Report of the Working Group on Jurisdiction, International Conference on Air Law, Montréal, 26 March to 4 April 2014, ICAO DCTC Flimsy No. 2

²⁹ *Medellin v. Texas*, 552 (2008) U.S. Supreme Court 491, 518-19

jurisdiction they would not expect to arrive in, and so could not have had any expectation that they would be subject to the laws of that jurisdiction³⁰. The working group concluded that a State could not be considered as a landing State when the aircraft land in it as a result of diversion. Even in that case, Captain Trentino had the right to disembark Chico because Freedonia was the State of scheduled landing and it is indifferent whether the aircraft landed in Marxiana or Freedonia City, since Freedonian law is applicable in the present case.

(ii) Chico's actions jeopardized the safety of persons and good order and discipline on board Flight 1933

The Tokyo Convention applies to offences against penal law and 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 board³¹. Article 8 of the Tokyo Convention provides the commander of the aircraft with the right to disembark a person when he has reasonable grounds to believe that it has committed an offence or an act that jeopardized the safety of the aircraft, persons or property therein³². In *Zikry v. Air Canada*, the Magistrates Court of Haifa held that reasonableness had to be determined as a matter of fact, not law³³. In the present case, Chico and his brother, Harpo, physically restrained Teasdale, a flight attendant, thus putting at risk the safety of the latter. In addition to that, they jeopardized good order and discipline on board by physically assaulting a crew member. ICAO Security

³⁰ ICAO (n 29) 2

³¹ Consolidated Text of the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) and the Protocol to Amend the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Montréal, 2014

³² *Ibidem*

³³ *Zikry v. Air Canada*, Civil File No.10972 (Magistrates Court of Haifa 2006), *Eid v. Alaska Airlines* 1716/05 A (United States Court of Appeals)

Manual on the Implementation of the Security Provisions of ICAO Annex 6 provides a four-tiered scheme of threat levels, which is a very useful tool for determining the seriousness of an unruly and disruptive passenger incident. Physically abusive behaviour towards a crew member is among the threats listed by ICAO³⁴. Therefore, Captain Trentino had reasonable grounds to believe that Chico's actions imperil good order and discipline on board, and jeopardize Teasdale's safety.

(iii) The disembarkation of Chico was necessary for the maintenance of good order on board Flight 1933

The Tokyo Convention is applicable only when the aircraft is in-flight³⁵, as it is defined by the Convention in Article 1 para 3 a). According to said Article the aircraft is considered to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened. The definition of "in flight" is not the same as the term "flight" as it is defined in the ICAO Statistics Manual. According to the latter, a Flight is defined as the operation of an aircraft on a flight stage or number of flight stages with the same flight number whereas flight stage is the operation of an aircraft from take-off to its next landing³⁶. The term "in flight" as defined by the Tokyo Convention seems to correspond to the term flight stage. In the present case, there were three different flight stages. The first one from Sylvania City to Zandar, the second one from Zandar to Marxiana and the final from Marxiana to Freedonia City.. Captain Trentino tried to disembark Chico at Zandar in order to ensure the safety of the aircraft, persons and property on board.

³⁴ IATA (n 2) 28

³⁵ Brian F. Havel, Gabriel S. Sanchez *The Principles and Practice of International Aviation Law* (Cambridge 2014) 194, David MacKenzie *ICAO: A History of the International Civil Aviation Organization* (Toronto Press 2010) 254

³⁶ ICAO, Reference Manual on the ICAO Statistics Programme (2013) ICAO Doc 9060/5

However, the Sylvania authorities refused disembarkation³⁷ thus acting inconsistently with Article 12 of the Tokyo Convention. The alleged offender was still on board the aircraft and the safety of the aircraft was still in peril. As aforementioned, under Article 31 para. 1 of the VCLT a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in the light of its object and purpose. The purpose of the Tokyo Convention was in part to encourage countries to punish crimes and certain non-criminal acts committed on board³⁸. In any case, the crimes committed on board the aircraft should not remain unpunished. Therefore, Captain Trentino acted consistently with the purpose of the Tokyo Convention by delivering Chico to Marxiana after the refusal of the Sylvania authorities to disembark or deliver the latter.

(b) Captain Trentino had the right to deliver Chico to Freedomian custody under Article 9 of the Tokyo Convention since he has committed a serious offence.

(i) The local authorities in Marxiana were the competent authorities to deliver Chico. As aforementioned, the local authorities in Marxiana were the competent authorities to deliver Chico as Article 9 of the Tokyo Convention refers to the competent authorities of any State in which the aircraft lands, including landing after diversions.

(ii) Chico has committed a serious offence

The Tokyo Convention grants the power to the aircraft commander to deliver any person that he has reasonable grounds to believe has committed on board the aircraft an act, which, in his opinion, is a serious offence to the competent authorities of any Contracting State. This is provided by article 9 of the Tokyo Convention. As

³⁷ *Compromis* paragraph 16

³⁸ P. B Larsen, J. Sweeney, J. Gillick *Aviation Law: Cases, Laws and Related Sources* (Martinus Nijhoff Publishers 2012) 137

aforementioned, said Convention does not provide with a definition of serious offence, scholars generally agree that the guidance as to the meaning of the latter is the generally accepted measure of punishment that is attached to an offence in the penal codes of the majority of civilized nations³⁹. There are several international crimes that although they do not constitute serious international crimes, explicitly, or implicitly provide for the theory of universality. Under Article 3 para. 3 of the Tokyo Convention criminal jurisdiction exercised in accordance with national law is not excluded. This is similarly provided by Article 4 para 3. of the 1970 Hague Convention⁴⁰. In Article 7 of said Convention it is stated that the authorities of the State to whose attention an alleged offender is brought must decide in the same manner as in the case of any ordinary offence of a serious nature under the law of said State⁴¹. Captain Trentino was entitled to decide under Freedonian Law whether Chico has committed a serious offence. In the case at hand, he had reasonable grounds to believe that Chico by physically restraining Teasdale⁴² has committed a serious offence. This constitutes an assault, which is defined as an intentional act by one person that creates an apprehension to another of an imminent harmful or offensive contact⁴³. In the majority of penal codes, criminal assault is punished with a fine or imprisonment⁴⁴. In the United States Code, for instance, it is explicitly provided the extraterritorial of American Criminal law concerning assaults committed

³⁹ H. R. Rutgers (n 8) 74

⁴⁰ United Nations *Convention for the Suppression of Unlawful Seizure of Aircraft*, (hereinafter the 1970 Hague Convention) 16 December 1970 UN Treaty Series 1973

⁴¹ M. S. Bassiouni *The History of Universal Jurisdiction and its Place in International Law in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Pennsylvania Press) 56

⁴² *Compromis* paragraph 6

⁴³ B. A. Garner (n 15) 122

⁴⁴ U.K. Criminal Justice Act 1988 section 39 Canadian Criminal Code 266

on board aircraft⁴⁵. Hence Captain Trentino acted in conformity with Article 9 to deliver Chico to the authorities in Marxiana.

2. The authorities in Marxiana acted in conformity with Article 13 of the aforementioned Convention

Article 13 of the Tokyo Convention provides that any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, para.1 of said Convention. Upon being satisfied that the circumstances so warrant, any Contracting State shall take custody or other measures to ensure the presence of any person of whom it has taken delivery. In the present case, Captain Trentino delivered Chico to the local authorities to Marxiana pursuant to Article 9 para.1 of the Tokyo Convention. Since the latter were the competent authorities as mentioned above, Chico's delivery was in accordance with article 13.

3.Captain Trentino provided sufficient notice concerning the actions taken against Chico

(a) Captain Trentino provided sufficient notice to the Sylvania authorities in accordance with Article 9 para. 2 of the Tokyo Convention

Captain Trentino provided sufficient notice concerning his actions taken against Chico. The latter notified the Sylvania authorities as soon as possible for his intentions to deliver passengers to their custody⁴⁶, pursuant to Article 9 para.2 of the Tokyo Convention. Said article provides that the aircraft commander shall as soon as practicable and if possible before the landing in the territory of a Contracting State,

⁴⁵ 49 Unites Sources Code 46506 C. Doyle *Extraterritorial Application of American Criminal Law* Crs Reports for Congress 41, J. Scheb, J.Scheb II, *Criminal Law and Procedure* (Wadsworth 2013) 163

⁴⁶ *Compromis* paragraph 13

notify the authorities of such State of his intention to deliver any passenger and the reasons thereof⁴⁷.

(b) The State of Freedonia provided sufficient notice for the actions against Chico in accordance with Article 13 para. 5 of the Tokyo Convention

According to the aforementioned Article, when a State has taken a person into custody, it shall immediately notify the State of nationality of the detained person of the fact that such person is in custody and of the circumstances that warrant his detention⁴⁸. In this case, this notification has been done *ex ante* by Captain Trentino, when he notified the Sylvanian authorities about his intention to deliver Chico to Freedonian custody as soon as he crossed the Freedonian border⁴⁹.

This notification, done by the aircraft commander, is valid, in terms of article 13 para. 5 of the Tokyo Convention, keeping in mind that, in general, the aircraft commander has two major roles: Not only is he the supreme representative of the airline operating the aircraft, but he has also a kind of governmental authority⁵⁰. Captain Trentino, as the aircraft commander of Flight 1933, is the supreme representative of the airline operating the aircraft. Freedonia Airlines is 100% owned by the State of Freedonia⁵¹. Hence, Captain Trentino, who in any case has a kind of governmental authority as the aircraft commander, is the supreme representative of the State of

⁴⁷ R. Rutgers (n 8) 76

⁴⁸ G.F. FitzGerald 'Offences and Certain Other Acts Committed on Board Aircraft: The Tokyo Convention of 1963' (1964) 2 The Canadian Yearbook of International Law Volume 200

⁴⁹ *Compromis* paragraph 17

⁵⁰ Jacob W. F. Sundberg 'The aircraft Commander in Legal Turbulence' in *Air Worthy: Liber Amicorum I.H.P. Diederiks-Vershoor* (Deventer 1985) 175; Article 29 of the ICAO *Convention on Civil Aviation (hereinafter Chicago Convention)*, 7 December 1944, (1994) 15 U.N.T.S. 295

⁵¹ *Compromis* paragraph 4

Freedonia. Therefore, the State of Freedonia provided sufficient notice of the actions taken against Chico upon arrival of the Flight in Marxiana.

C. SYLVANIA LACKS JURISDICTION OVER FIREFLY’S ACTIONS BECAUSE OF HIS STATUS AS AN ON-DUTY, IN-FLIGHT SECURITY OFFICER OPERATING ON BOARD A FREEDONIAN AIRLINES FLIGHT, AND BECAUSE CAPTAIN TRENTINO HAD NEITHER DISEMBARKED NOR DELIVERED FIREFLY TO SYLVANIAN AUTHORITIES

1. Sylvania lacks jurisdiction over Firefly’s actions because of his IFSO status

(a) Firefly is an in-flight security officer, having thus a special status

According to Annex 17 to the 1944 Convention on International Civil Aviation (hereinafter 1944 Chicago Convention), an in-flight security officer is a person who is hired, trained and approved by the Government of the State of the aircraft operator to travel on the aircraft in order to protect the aircraft and its passengers against unlawful acts⁵².

Rufus T. Firefly is indeed an in-flight security officer on board Flight 1933, who was commissioned by the Freedonian Airlines, a company 100% owned by the State of Freedonia⁵³, namely the State of the aircraft operator. Besides, Firefly was lawfully deployed as an in-flight security officer on board Flight 1933 under the Bilateral Air

⁵² Annex 17 to the Chicago Convention, *Safeguarding International Civil Aviation Against Acts of Unlawful Interference*, 9th edition, March 2011, Chapter 1. Definitions; ICAO, DCTC Doc No. 24 “Authority in handling offences and certain other acts committed on board aircraft” 21/3/14, 4.1; ICAO Legal Committee, 35th Session, Doc.10014-LC/35, 2:71 (b)

⁵³ Compromis, para. 4

Services Agreement (BASA) between Freedonia and Sylvania, which permits the deployment of in-flight security officers on flights between the two States⁵⁴.

(i) Firefly is charged with the duty of taking reasonable preventive measures

Although the 1963 Tokyo Convention did not provide for the existence of In-Flight Security Officers (IFSOs) on board, such officers are nowadays being increasingly deployed on international flights⁵⁵. For this reason, the IFSO status is ambiguously addressed in Article 6 para. 3 of the Tokyo Convention. Therefore, the interpretation of said article is of paramount importance. In this respect, recourse must be made to Article 32 of the Vienna Convention on the Law of Treaties⁵⁶, according to which the meaning of a treaty may be confirmed or determined via supplementary means of interpretation, including the preparatory work of a treaty. In the present case, the IFSO status can be enlightened through the preparatory work of the Protocol to the Tokyo Convention.

According to the relevant ICAO preparatory documents, in-flight security officers have the responsibility to take the necessary measures to handle acts of unruly passengers which endanger the safety of the aircraft⁵⁷. More specifically, under Article 6 para. 3 of the Tokyo Convention, an in-flight security officer may take reasonable preventive measures without the authorization required in certain cases for the aircraft commander when he has reasonable grounds to believe that such

⁵⁴ Clarifications, para. 13

⁵⁵ ICAO, DCTC Doc No. 4 “Background of the legal work related to unruly passengers prior to the 35th Session of the Legal Committee” 22/1/14

⁵⁶ Ian Sinclair *The Vienna Convention On The Law Of Treaties*, 2nd edition (Melland Schill Monographs In International Law 1984) 141-142

⁵⁷ ICAO, DCTC Doc No. 24 – 21/3/14 – “Authority in handling offences and certain other acts committed on board aircraft – para. 4.2)

action is immediately necessary to, *inter alia*, protect the safety of persons from acts of unlawful interference.

Said article is applicable in the present case, since Firefly acted in conformity with his official duties as an in-flight security officer. First of all, there is indeed an act of unlawful interference, which is defined as an “act or attempted act that could jeopardize the safety of civil aviation”⁵⁸. The aforementioned term refers to offences against penal laws and acts which, whether or not they are penal offences, may or do jeopardize the safety of the aircraft or of persons or property therein or which jeopardize good order or discipline on board⁵⁹. In the present case, the physical assault of Harpo and Chico against Teasdale constitute an act of unlawful interference, since it jeopardized the safety of the flight attendant onboard Flight 1933. Secondly, Firefly had reasonable grounds to believe that his action to physically restrain two of the passengers, namely Chico and Harpo, was immediately necessary to protect the safety of the flight attendant Gloria Teasdale. At this point, it must be underlined that Firefly’s actions were undertaken in conformity with the order of Captain Trentino⁶⁰. As a result, Firefly proceeded to reasonable preventive measures: He first ordered Harpo to stop physically restraining the flight attendant and, as Harpo did not abide by his orders, proceeded to the necessary preventive measures to secure the safety of Gloria Teasdale⁶¹. Therefore, Firefly acted in conformity with his duties arising from Article 6 para. 3 of the Tokyo Convention.

(ii) Firefly enjoys exoneration from responsibility due to acting within his duties

⁵⁸ ICAO Annex 17 to the 1944 Chicago Convention, Chapter 1. (2009) Article 1 (a) of the 1970 Hague Convention (n 44)

⁵⁹ R. Abeyratne “A Protocol to Amend the Tokyo Convention of 1963 Some Unanswered Questions” (2014) *Air & Space Law* 39, no.1, 55

⁶⁰ *Compromis* paragraph 8

⁶¹ *Compromis* paragraphs 9-11

According to Article 10 of the Tokyo Convention, in-flight security officers cannot be held responsible in any proceeding on account of the treatment undergone by the person against whom the actions were taken, given that their actions were taken in accordance with the Convention⁶². Thus, in-flight security officers enjoy exoneration from responsibility in the case where they are acting within the scope of their official duties⁶³. Therefore, the only prerequisite set by the abovementioned article is the fact that this protection is only available for actions taken in accordance with the Convention⁶⁴.

IFSOs' intervention during flight is consistent with the Tokyo Convention if it constitutes either an act based on the aircraft commander's request or authorization according to Article 6 (2), or a preventive measure based on reasonable grounds and taken without any request or authorization if it is necessary for the aircraft's safety according to Article 6 (3).

In the case at hand, Firefly acted in conformity with Article 6 para. 2 of the Tokyo Convention. At the time he was informed by one of the flight attendants for Captain Trentino's message "somebody get control out there"⁶⁵ and decided to intervene by striking Harpo across the head rendering him unconscious and by fastening restraints around Chico's wrists⁶⁶. Captain Trentino's claim was clear and concrete; the safety of the aircraft had to be maintained and the most appropriate person onboard the aircraft was Firefly⁶⁷.

⁶² ICAO Legal Committee, 35th Session, Doc.10014-LC/35, p.2-12, at 2:65

⁶³ ICAO, LC/SC – MOT – WP/1 – 7/5/12 – Working Paper – Special Sub-committee of the Legal Committee for the Modernization of the Tokyo Convention including the Issue of Unruly Passengers – Montreal, 22-25/5/2012, para. 8.

⁶⁴ H. J. Rutgers (n 8) 81

⁶⁵ *Compromis* paragraph 8

⁶⁶ *Compromis* paragraph 11

⁶⁷ ICAO, DCTC 7, Doc. No 7, Draft Protocol To Amend The Tokyo Convention of 1963- Authorities and Protections for In-flight Security Officers, 23/1/14, 2.2

Apart from the issue of whether Captain Trentino's message was directed to Firefly or not, Firefly's actions were also in conformity with Article 6 para. 3 of the Tokyo Convention. He did have reasonable grounds to believe that it was necessary to intervene and take all measures appropriate to maintain the safety of the aircraft and the passengers therein. The term "reasonable grounds" could lead to the conclusion that a person would be required to have substantial basis for his belief and, thus, no actions based on facts would be adequate to support his/her belief that a person had committed or was about to commit the act under consideration⁶⁸. Firefly was necessary to act immediately after reaching the scene of the disturbance. Seeing Teasdale screaming and Harpo pinning her⁶⁹, he had to put an end to the commotion and restore the aircraft's safety. Hence, Firefly, who acted in complete accordance with the Tokyo Convention, is entitled to enjoy exoneration from responsibility, as provided in Article 10 of said Convention.

(b) Sylvania does not have jurisdiction over Firefly's actions due to his special status. The exoneration from responsibility for in-flight security officers acting within their official duties limits the jurisdiction for initiating proceedings against them only to the State of registry of the aircraft. This means that if the State of registry decided to deploy in-flight security officers and such State is willing to accept responsibility for potential damages caused by them, jurisdiction dealing with them should only rest with the State of registry⁷⁰. In this case, the State of registry is the State of Freedonia, since it is the owner of the Freedonian Airlines. Therefore, Sylvania lacks jurisdiction

⁶⁸ J. Campbell *"Get Off My Plane": The Need For Extreme Deference To Captains And Crews On International Flights Under The Tokyo Convention Of 1963* Journal of Air Law and Commerce (2012) 385

⁶⁹ *Compromis* paragraph 11

⁷⁰ Paul Fitzgerald, "Air Marshals: The Need for Legal Certainty", 357, 406, 75 J.A.L.C., 2010

over Firefly's actions because of his status as an on-duty, in-flight security officer operating on board a Freedomian Airlines flight.

2. Sylvania lacks jurisdiction over Firefly's actions because Captain Trentino had neither disembarked nor delivered Firefly to Sylvanian authorities

In any case, Sylvania lacks jurisdiction over Firefly's actions because the aircraft commander, Captain Trentino, did not proceed to either the disembarkation or the delivery of Firefly to Sylvanian authorities under Article 12 or 13 para. 1 respectively, which establish certain duties for the Contracting States.

More specifically, Article 12 creates an obligation for the Contracting State to allow the disembarkation of a person by the commander of an aircraft registered in another State, whereas Article 13 para. 1 establishes an absolute duty upon the Contracting State to take delivery from the aircraft commander of any person who has committed a serious offence⁷¹. If the abovementioned articles were applicable in the present case, namely if Captain Trentino had either disembarked or delivered Firefly, the Sylvanian authorities would be obliged to either allow disembarkation or take delivery of the in-flight security officer and, as a consequence, retain jurisdiction over his actions as the State of landing. Nevertheless, the aircraft commander did not proceed to disembarkation or delivery of Firefly to the Sylvanian authorities. Therefore, Sylvania is not entitled to exercise jurisdiction over Firefly's actions.

D. FIREFLY'S ACTIONS WITH REGARD HARPO AND CHICO WERE ENTIRELY CONSISTENT WITH THE TOKYO CONVENTION, OR ALTERNATELY, WERE IMMUNIZED BY THE TOKYO CONVENTION AND AS A RESULT THE SYLVANIAN AUTHORITIES WERE WRONG TO PROSECUTE HIM UNDER SYLVANIAN LAW

⁷¹ *Supra* note 7, p. 91

1. Firefly acted consistently with the Tokyo Convention concerning the treatment of Harpo and Chico

(a) Firefly acted in conformity with Article 6 para. 2 of the Tokyo Convention

According to Article 6 (2) of the Tokyo Convention “the aircraft commander may require or authorize the assistance of other crew members and may request or authorize, but not require, the assistance of in-flight security officers or passengers to restrain any person whom he is entitled to restrain”. It is the Respondent's submission that Firefly's actions were under the scope of the aircraft commander's request. In fact, Firefly was informed by one of the flight attendants for Captain Trentino's message “somebody get control out there”⁷². Given the incident taken place onboard at that time, the aforementioned message of the aircraft commander constituted a request for assistance, in terms of art. 6 (2). According to same article, addressees of such a request by the aircraft commander are onboard passengers or in-flight security officers. Being such an officer, Firefly acted as requested by Captain Trentino and intervened by striking Harpo across the head rendering him unconscious and by fastening restraints around Chico's wrists⁷³.

Therefore, Firefly's actions, following the claim of Captain Trentino “somebody get control out there”, are justified as actions responding to aircraft commander's request. By acting, thus, in complete accordance with the Captain's request, Firefly's actions were entirely consistent with Article 6 (2) of the Tokyo Convention.

(b) In any case, Firefly's actions were consistent with Article 6 para. 3 of the Tokyo Convention.

⁷² *Compromis* paragraph 8

⁷³ *Compromis*, paragraph 11

According to Article 6 para. 3 of the Tokyo Convention “an in-flight security officer... may take reasonable preventive measures without authorization when he has reasonable grounds to believe that such action is immediately necessary to protect the safety of the aircraft or persons therein from an act of unlawful interference”.

In fact, among the different opinions⁷⁴ presented at the Diplomatic Conference⁷⁵, there were some serious thoughts concerning IFSOs’ right to act without the authorization of the aircraft commander; an opinion finally adopted by the parties. According to the latter the aircraft commander has indeed the operational control of the aircraft⁷⁶ but IFSOs are supposed to eliminate threats in the passenger cabin. Besides, the aircraft commander cannot assess any situation behind the cockpit door, since in case of an incident of disturbance pilots must remain in the closed cockpit⁷⁷. Given that a simple incident can quickly escalate into serious threats⁷⁸, it is necessary that IFSOs have the ability to intervene to such incidents and terminate them as quickly as possible⁷⁹.

⁷⁴ The Views of Air Navigation Bureau, ICAO on Article VI of the Draft Protocol to Amend the Tokyo Convention (presented by the Secretariat), International Conference on Air Law, Montreal, 26 March to 4 April 2014, DCTC Doc. No. 5.; Draft Protocol to Amend the Tokyo Convention of 1963 - Authority and Protections for In - Flight Security Officers (presented by the United States), International Conference on Air Law, Montreal, 26 March to 4 April 2014, Doc. No. 7, 3

⁷⁵ International Conference on Air Law to Consider Amending the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963) held under the auspices of the International Civil Organization, Montreal, 26 March to 4 April 2014

⁷⁶ Draft Protocol to Amend the Tokyo Convention of 1963 - Authority and Protections for In - Flight Security Officers (presented by the United States), International Conference on Air Law, Montreal, 26 March to 4 April 2014, DCTC Doc. No. 7, 2

⁷⁷ *Eid vs Alaska*, p. 10988-10989; See FAA Crew Training Manual, Common Strategy for Hijack, app. II, p. 21b; DCTC 15, 2.9

⁷⁸ Draft Protocol to Amend the Tokyo Convention of 1963 - Authority and Protections for In - Flight Security Officers (presented by the United States), International Conference on Air Law, Montreal, 26 March to 4 April 2014, DCTC Doc. No. 7, p. 4, at 4.2.1

⁷⁹ ICAO, DCTC 15, Doc No. 15, Amendment to Article 10 of the Tokyo Convention

(i) There was an act of unlawful interference justifying the preventive measures taken by Firefly

As stated above⁸⁰, an “act of unlawful interference” is defined as an “act or attempted act that could jeopardize the safety of civil aviation” and, from Firefly’s perspective, the actions of Harpo and Chico constituted such an act, which justified the adoption of reasonable preventive measures, in terms of article 6 para. 3 of the Tokyo Convention.

(ii) Firefly had reasonable grounds that his intervention was necessary

As it stated above⁸¹, in order for an IFSO to intervene and lawfully take preventive measures to maintain the safety of the aircraft, he/she must have reasonable grounds⁸² that an incident is taking place during flight.

In the case before this Honorable Court, it is important to note that Firefly had to intervene immediately and he realized that as soon as he exited the lavatory, when one of the flight attendants informed him about the incident⁸³. Moreover, the flight attendant informed Firefly about Captain Trentino’s request “somebody get control out there”. Following, when he reached the scene of the disturbance he witnessed Harpo pinning a still-screaming Teasdale⁸⁴. The sequence of these events grounded

1963, 28/2/14, 2.9

⁸⁰ See above, Argument C - 1 - (a) - (i)

⁸¹ See above, Argument C - 1 - (a) - (ii)

⁸² See further: International Conference on Air Law, Tokyo, August-September 1963, Minutes, ICAO Doc. 8565-LC/152-1 155; *Eid vs Alaska*, p. 10971; DCTC - 25, p. 5, at 6.5 (c)

⁸³ *Compromis* paragraph 8

⁸⁴ *Compromis* paragraph 9

Firefly's belief that his intervention was necessary in order to maintain the safety of the aircraft and the passengers therein.

Therefore, Firefly acted in complete accordance with the Tokyo Convention and specifically Article 6 paras. 2 and 3, since there was indeed an act of unlawful interference that made Firefly's intervention necessary, especially after having received Captain Trentino's request.

2. The Sylvanian authorities were wrong to prosecute Firefly, since his actions were immunized by the Tokyo Convention.

In the present case, as proved in the previous claim⁸⁵, Firefly's actions were consistent with the Tokyo Convention, as, in any case, he cannot be held responsible "in any proceeding on account of the treatment undergone by the person against whom the actions were taken", according to Article 10 of the Tokyo Convention. Firefly's actions as an IFSO are "immunized" as "actions taken in accordance with this Convention", in terms of Article 10 of the Tokyo Convention. Therefore, he cannot be held responsible for the treatment of Harpo and Chico. Hence, neither the Sylvanian brothers nor the Sylvanian authorities can accuse Firefly for being responsible for his intervention to the commotion. It was, thus, wrong for the Sylvanian authorities to prosecute Firefly as a person that acted unlawfully concerning Harpo and Chico, Sylvania's nationals.

It is, therefore, submitted that Firefly acted in complete conformity with the Tokyo Convention concerning the treatment of Harpo and Chico. Moreover, Firefly cannot be accused by the Sylvanian authorities since his actions enjoy immunity under the Tokyo Convention.

⁸⁵ See above C - (b) - (ii)

SUBMISSIONS

May it please the Court, for the forgoing reasons, the State of Freedonia, Respondent, respectfully requests the Court to adjudge and declare that:

- The Sylvaniaian authorities acted in violation of the Tokyo Convention by refusing to allow Captain Trentino to disembark or deliver Chico in Zandar;
- The actions taken by Captain Trentino and other Freedonian representatives with regard to Chico's delivery and detention in Marxiana were entirely in accordance with the Tokyo Convention and sufficient notice was provided;
- Sylvania lacks jurisdiction over Firefly's actions because of his status as an on-duty, in-flight security officer operating on board a Freedonian Airlines flight, and because Captain Trentino had neither disembarked nor delivered Firefly to Sylvaniaian authorities;
- Firefly's actions with regard to Harpo and Chico were entirely consistent with the Tokyo Convention, or alternately, were immunized by the Tokyo Convention and as a result the Sylvaniaian authorities were wrong to prosecute him under Sylvaniaian law.

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