

IN THE  
INTERNATIONAL COURT OF JUSTICE

March, 1971

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CASE NO. 1

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AEGEA and  
BARCELONA                      Applicants

v.

FRANCONIA                      Respondent

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MEMORIAL FOR APPLICANT

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Timothy F. Prugh  
Richard A. Sinkfield  
Agents for Aegea  
and Barcelona

Charles G. Burr III  
Barton T. Jones  
Charles J. Todd  
on the Memorial

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## JURISDICTION

Jurisdiction of the International Court of Justice  
"comprises all cases which the parties refer to it." I.C.J.  
STAT art. 36, para. 1. The parties have accepted the juris-  
diction of the Court and have waived preliminary objections.  
Compromis at 5.

STATEMENT OF FACTS

The facts in this dispute have been stipulated by the parties. Compromis at 5. Applicant's memorial incorporates these facts by reference.

QUESTIONS PRESENTED

1. Whether Applicants are entitled to reparations from Franconia for the illegal detention of Aegean and Barcelonan nationals and for failure to grant them access to Franconian courts.
2. Whether Franconia is obligated by the Barcelona-Franconia Extradition Treaty of 1933 to extradite the hijackers to Barcelona.
3. Whether Franconia's implied complicity with and failure to exercise due diligence to prevent the wrongful acts of the hijackers obligates Franconia to compensate Applicants for resulting damages.
4. Whether Applicants are responsible for incidental damages resulting from the lawful responses to the wrongful acts of the hijackers.

### SUMMARY OF ARGUMENT

A state may not prevent an alien from leaving its territory when the alien has fulfilled his local obligations. This rule applies with special force to diplomatic personnel and UN employees. The Aegean and Barcelona nationals owe no obligation to Franconia. Therefore, Franconia's continued detention of these nationals, as well as her refusal to allow them access to courts, constitutes a compensable international delict.

Franconia is obligated by treaty to extradite the hijackers to Barcelona. She is not relieved of this obligation by unreasonably characterizing the acts of the hijackers as political crimes.

Franconia was under a duty to take reasonable measures to protect the aircraft and passengers once they had landed. Franconia must compensate the Applicants for the destruction of their respective interests in the aircraft because of her failure to exercise due diligence. Franconia's implied complicity with the hijackers renders her liable for damages resulting from the hijackers' wrongful acts. No acts or omissions by the Applicants prior to the hijacking relieved Franconia of her responsibility.

The Applicants' interceptor airplanes entered Franconia in the lawful exercise of self-defense and hot pursuit in an attempt to prevent the hijacked aircraft from landing. The Applicants are not responsible for any damage resulting from that act. Finally, the cessation of air service into Franconia is not attributable to the Applicants and is not a compensable delict.

## ARGUMENT

### I.

AEGEA AND BARCELONA ARE ENTITLED TO REPARATIONS FROM FRANCONIA FOR THE ILLEGAL DETENTION OF AEGEAN AND BARCELONAN NATIONALS AND FOR FAILURE TO GRANT THEM ACCESS TO FRANCONIAN COURTS.

- A. The cumulative effect of the prior practice of states, existing multilateral conventions, authoritative opinions, and Franconia's consent to the Tokyo Convention establishes a rule of international law which makes Franconia liable for the detention of the Aegean and Barcelonan nationals.

State practice prohibits the detention by one state of the nationals of another in instances of air hijacking. Passengers and crew were released by the state of landing following almost all of the 120 illegal seizures of aircraft occurring from July, 1967, to July, 1970. Horlick, The Developing Law of Air Hijacking, 12 HARV. INT'L L. J. 33, 43 n. 65 (1971). It has been recognized that any exceptions to this rule "could only have the result of creating a situation of anarchy, lawlessness, and danger to all air travellers of all nations regardless of nationality or ideology." 61 DEP'T STATE BULL. 245 (1969).

This norm of state practice has been recognized and codified in multilateral conventions. Article 11 of the Tokyo Convention of 1963 recognizes the right of passengers and crew aboard a hijacked aircraft to continue their

journey as soon as possible. THE TOKYO CONVENTION ON OFFENSES AND CERTAIN OTHER ACTS COMMITTED ON BOARD AIRCRAFT art. 2, open for signature September 14, 1963, T.I.A.S. No. 6768 (entered into force December 4, 1969). This Article "clearly represents the barest minimum of agreement among nations with any aviation interest at all," Horlick, supra, at 38, and thus demonstrates consent to an international norm by all major air powers which is binding upon states whether or not they are parties to the Tokyo Convention. ICAO Resolution, in 61 DEP'T STATE BULL. 275 (1969); The North Sea Continental Shelf Cases [1969] I.C.J. 3, 43; The Anglo-Norwegian Fisheries Case [1951] I.C.J. 116; C. AMERASINGHE, STATE RESPONSIBILITY FOR INJURIES TO ALIENS 28 (1967). Similar provisions against the detention of innocent aliens are contained in other multilateral conventions dealing with hijacking. HAGUE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT art. 9, open for signature December 16, 1970, 64 DEP'T STATE BULL. 50, 54 (1971); THE MONTREAL DRAFT CONVENTION ON THE UNLAWFUL SEIZURE OF AIRCRAFT, March 16, 1970, I.C.A.O. Doc. 8865 LC/159, 9 INT'L LEGAL MATERIALS 669 (1970).

Prohibitions against the detention of aliens aboard

hijacked aircraft as evidenced by state practice and multi-lateral agreement represent a specific application of the customary rule that a state may not prevent an alien from leaving its territory when the alien has fulfilled his local obligations. E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD 98-99 (1928); 1 L. OPPENHEIM, INTERNATIONAL LAW 690 (8th ed. H. Lauterpacht ed. 1963); E. VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW Bk. 2 Ch. 8 § 108, at 146 (G. Gregory transl. 1892); 24 DEP'T STATE BULL. 947 (1951). The cumulative effect of these various indications of state consent create a customary rule of international law which requires Franconia to release immediately the innocent passengers and crew; her refusal to do so constitutes a compensable international delict.

Furthermore, Franconia expressly adopted all the duties and obligations of the Tokyo Convention of 1963 vis-à-vis Aegea when she ratified the Aegean-Franconian Bilateral Air Agreement of 1966. A specific condition of the Bilateral Air Agreement, presently in effect, is that both states "will adhere to and perform the obligations imposed by the Tokyo Convention of 1963." Compromis at 2. Franconia's statement of understanding which accompanied the signing of the treaty was not an effective reservation of

obligations under that treaty. A state may not formulate a reservation to a treaty that is incompatible with the overall object and purpose of the treaty. VIENNA CONVENTION ON THE LAW OF TREATIES art. 19(c), [1969] 63 AM. J. INT'L L. 875, 881 U.N. Doc. A/Conf. 39/27 (1969); 1 D. O'CONNELL, INTERNATIONAL LAW 251, 259 (1965). One purpose of the Bilateral Air Agreement is to ensure, by means of the Tokyo Convention, that both states will be able to provide effectively for the safety of their nationals involved in air travel. In addition, Franconia's agreement to submit all disputes arising out of actions prohibited by the Tokyo Convention for resolution in accordance with Article 24 of the Convention is evidence of her consent to the norms contained therein. These manifestations of consent, taken together with Aegea's reliance over a period of 4 years on Franconia's implied acceptance of the terms of the Convention, serve to bind Franconia to the Convention's norms, including the right of innocent aliens freely to continue their journey.

The right of all the passengers and crew aboard the hijacked aircraft to leave Franconia is applicable with special force to Benjamin Boerr, Barcelona's ambassador to Aegea, and to Bunnar Baromozov, a UN employee engaged in official business at the time of the hijacking. Boerr is

entitled to all privileges and immunities customarily accorded diplomatic personnel; in addition to those he has as a national of Barcelona. Diplomatic agents are considered to be the personification of the sovereign state they represent. Schooner Exchange v. McFadden 11 U.S. (7 Cranch) 116 (1812); 1 H. GROTIUS, DE JURE BELLI AC PACIS § 12 at 1 (1646 ed. F. Kelsey transl. 1925); H. WHEATON, ELEMENTS OF INTERNATIONAL LAW 246 (8th Dana ed. of 1866 G. Wilson ed. 1936). They are entitled to a higher degree of protection under international law than that accorded to private persons. Respublica v. de Longchamps, 1 U.S. (1 Dall.) 111, 116 (1784); VIENNA CONVENTION ON DIPLOMATIC RELATIONS art. 29, supra; E. BORCHARD, supra note 1, at 216; E. SATOW, A GUIDE TO DIPLOMATIC PRACTICE 176-180 (4th ed. N. Bland ed. 1957). Among the most important and well-established of diplomatic privileges is the right of unimpeded transit through third countries. Bergman v. De Sieyes, 71 F. Supp. 334 (1946); New Chile Gold Mining Co. v. Blanco 4 T.L.R. 346 (1888); C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 62-72 (1967); HARVARD RESEARCH IN INT'L LAW, DIPLOMATIC PRIVILEGES AND IMMUNITIES art. 15, Comment at 85-89 (1932). Franconia's detention of Boerr disrupted the

orderly conduct of diplomatic affairs between Barcelona and Aegea and constituted a compensable international delict. The I'm Alone (Canada v. U.S.), 2 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 703-08 (1941); G. SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 173 (5th ed. 1967).

Baromozov's status as an UN employee engaged in official UN business reinforces his general customary right to depart from Franconia. Article 105 of the UN Charter obligates all member states to grant to representatives and officials of the UN such privileges and immunities as are necessary for the independent exercise of their UN duties. U.N. CHARTER art. 105. Franconia is a member of the UN. Furthermore, no member state may hinder in any way the functioning of a UN operation. Report of the Rapporteur of U.N. Committee IV/2, U.N.C.I.O. Doc. 933 IV/2/42, at 3 (1945). Franconia's continued detention of Baromozov, who was en route to a UN peace-keeping mission in the Republic of Damascus, has prevented the effective functioning of Baromozov in this mission. Barcelona has standing to raise the issue of Franconia's interference with official UN operations on behalf of her national. When a state's right to protect its nationals coincides with the UN's right of functional protection, neither the state nor the Organization has any priority as to who is entitled to bring an international

claim. Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations [1949] I.C.J. 174.

B. Franconia's refusal to allow the Aegean and Barcelonan nationals access to Franconian courts is a denial of justice for which Franconia is liable.

The minimum standard of justice recognized by the community of nations requires Franconia to allow the Aegean courts to seek their prompt release. A compensable "denial of justice" occurs whenever there is a refusal, unwarranted delay or obstruction of access by an alien to a state's courts. L. Sohn, R. Baxter, Convention on the International Responsibility of States for Injuries to Aliens art. 6 (Draft No. 12 1961); 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 527 (1943). This customary standard of international law requires that a state's treatment of aliens demonstrate "universal respect for, and observance of, human rights and fundamental freedoms," \_\_\_\_\_, STATE RESPONSIBILITY [1956] 2 Y.B. INT'L L. COMM'N 173, U.N. Doc. A/CN. 4/96 (1956), and must be no less favorable than the treatment accorded to nationals in like circumstances. 1 L. OPPENHEIM, supra, at 682; G. SCHWARZENBERGER, supra, at 105. Franconia's arbitrary refusal to allow the Aegean and Barcelonan nationals access to her courts constitutes a compensable international delict.

## II.

FRANCONIA IS OBLIGATED UNDER THE TERMS OF THE BARCELONA-FRANCONIA EXTRADITION TREATY OF 1933 TO EXTRADITE THE HIJACKERS TO BARCELONA.

Franconia is obligated under the terms of the Barcelona-Franconia Extradition Treaty of 1933 to surrender the hijackers to Barcelona for the following extraditable crimes: the murder of the Barcelonan security guard, the theft and destruction of the aircraft leased to Barcelona, and the kidnapping of the Barcelonan passengers and crew. 1933 Barcelona-Franconia Extradition Treaty, compromis at 3. Franconia's treaty obligations are not changed by the severance of diplomatic relations between Barcelona and Franconia. VIENNA CONVENTION ON THE LAW OF TREATIES art. 63 [1969] U.N. Doc. A/Conf. 39/27, 63 AM. J. INT'L L. 875, 895 (1969). Franconia must fulfill her obligation to extradite the hijackers to Barcelona because of the fundamental rule of international law that treaties must be performed in good faith, i.e., pacta sunt servanda. VIENNA CONVENTION ON THE LAW OF TREATIES art. 26, supra, at 884; 2 C. HYDE, INTERNATIONAL LAW 1369, 1454 (2d ed. 1947); F. VATTEL, supra, bk. 4 ch. 4 § 36, at 356.

The acts of the hijackers were not political crimes which might relieve Franconia of her treaty obligation to

extradite the criminals. A political crime is an act directed against the state, or its constitutional order, or otherwise inextricably involved in conditions disturbing the constitutional life of the country. In re Castioni, 1 Q.B. 149 (1891); Green, The Nature of Political Offenses, 3 SOLICITER Q. 213, 231-232 (1964). The murder of the security guards, the theft and destruction of the aircraft, and the kidnapping of passengers and crew could only have an incidental effect upon the constitutional order of Barcelona. Therefore, while the hijackers' acts may have contained an element of political motivation, they were not political crimes under principles of customary international law.

The provision of the Barcelona-Franconia Extradition Treaty, permitting a nation to define a political offense, must be limited by the standards of reasonableness and the international conditions prevailing at the time the interpretation was made. HARVARD RESEARCH IN INT'L LAW, DRAFT CONVENTION ON THE LAW OF TREATIES art. 19(a), at 937 (1935); M. McDOUGAL, H. LASSWELL, J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 20 (1967). Franconia's refusal to extradite the hijackers because their acts were political crimes runs counter to the international consensus

regarding air hijacking and Franconia's domestic law,

Public Law 1234. Hijacking is recognized as a

"danger to the safety of the aircraft, crew, and passengers distinctly out of proportion to the needs of most hijackers; thus this exposure of innocent bystanders to danger should not be excused by its political colorings."

Horlick, supra, at 48; see also 60 DEP'T STATE BULL. 213

(1969). The International Transport Workers Federation has asserted that decisions to extradite hijackers "should not be concerned with the alleged motive, but with the crime committed against the international community." Int'l Transport Workers Federation Statement of Feb. 19, 1969, in Horlick, supra, at 48 n. 82. A number of the members of the ICAO Subcommittee on the Unlawful Seizure of Aircraft have declared that the existence of political motives should not be a basis for refusal of extradition. Subcommittee of the Legal Committee on the Subject of the Unlawful Seizure of Aircraft, I.C.A.O. Doc. 8838-LC/157, at 21 (1969); 64 DEP'T STATE BULL. 50, 51 (1971). A recent United States-Spanish extradition treaty considers aircraft hijacking an offense so serious as to preclude its characterization as a political crime. N.Y. Times, Nov. 26, 1970, at 78, col. 5 (city ed.). In addition, the UN General Assembly has adopted a resolution

condemning aircraft hijacking "without exception whatsoever" and calling upon governments to ensure that persons who perpetrate such acts are prosecuted. G.A. Res. 2551 (XXIV), Dec. 12, 1969. The Court should disallow Franconia's refusal to extradite the hijackers in view of this international consensus that the rights of political asylum must be subordinated to the need to suppress hijacking.

### III.

FRANCONIA IS OBLIGATED TO COMPENSATE AEGEA AND BARCELONA FOR DAMAGES RESULTING FROM THE WRONGFUL ACTS OF THE HIJACKERS.

- A. Franconia is liable in damages because of her lack of due diligence in preventing the wrongful acts of the hijackers and in prosecuting the wrongdoers.

The Franconian authorities were under a duty to take all necessary measures to prevent injury to the hijacked aircraft and the passengers and crew once the aircraft landed in Franconia. William E. Chapman (U.S. v. Mexico), Opinions of Commissioners 121, 123-124, 130 (1931); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 165 (1965); 1 L. OPPENHEIM, supra, § 164, at 365. When a state fails to provide reasonable protection against the wrongful acts of private persons directed at aliens and alien-owned property, the state becomes implicated in those acts, thus giving rise to international responsibility. H. BRIGGS, THE LAW OF NATIONS 172 (2d ed. 1952); C. FENWICK, INTERNATIONAL LAW 301 (4th ed. 1965); M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 20 (1962); 1 L. OPPENHEIM, supra, § 149, at 337. In judging Franconia's responsibility for the destruction of the aircraft, the Court must inquire "whether effective use was made of all available measures." L. Sohn, R. Baxter, supra, art. 3,

comment to para. 1. Franconia's actions did not meet this standard. The Franconian National Police made "no effort" to stop the hijackers from destroying the plane. Compromis at 2. As a result of this failure to exercise due diligence, Franconia is liable in damages to Aegea for an amount equivalent to the value of the aircraft, and to Barcelona for an amount equivalent to the value of her leasehold interest in the plane. L. Sohn, R. Baxter, supra, art. 31.

In addition, Franconia is liable in damages for her failure to prosecute and impose appropriate penalties upon the BLF guerrillas for the crimes of hijacking, murder, robbery, kidnapping and willful destruction of the aircraft. A state is required to enforce appropriate sanctions against individuals who have inflicted injury upon an alien or upon alien-owned property in violation of the criminal laws of the state. Gertrude Parker Massey (U.S. v. Mexico) Opinions of the Commissioners 228, 230 (1927); Laura M. B. Janes, et al. (U.S. v. Mexico), Opinions of Commissioners 108, 123 (1927); RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 183. Franconian Public Law 1234 defines "aircraft piracy" as the wrongful exercise of control over an aircraft in flight. Compromis at 4. All civilized legal

systems recognize murder, robbery and kidnapping as criminal acts. Franconian authorities did not institute criminal proceedings against the hijackers in spite of the seriousness of the offenses involved. This lack of due diligence in prosecuting the hijackers constituted an affront to the governments of Aegea and Barcelona and deprived them of their right to judicial redress. Therefore, Franconia is liable to Aegea and Barcelona for damages resulting from the kidnapping and murder of their nationals and for the destruction of their respective interest in the aircraft.

Eden is not a party entitled to bring a claim for the destruction of the hijacked aircraft on behalf of her citizens who are shareholders of Aegean National Airlines. Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Second Phase [1970] I.C.J. \_\_\_\_\_, 9 INT'L LEGAL MATERIALS 227 (1970). Furthermore, preliminary objections to the Court's jurisdiction, including Eden's status as a potential claimant, must be raised prior to pleadings on the merits. S. ROSENNE, THE WORLD COURT 86 (1962). Such objections have been waived in the instant case. Compromis at 5.

B. Franconia is liable for damages because of her legally implied complicity in the wrongful acts of the hijackers.

Taken together, Franconia's various acts and omissions

in her dealings with the BLF guerrillas support a legally implied complicity with the BLF's activities and renders Franconia responsible for damages resulting from those activities. First, evidence points to the conclusion that agents of the Franconian government were engaged in inciting armed insurrection by the BLF in Barcelona immediately prior to the hijacking. Compromis at 2. Subversive activities stemming from official sources and directed against the peace and security of another state are a violation of established principles of international law. The Alabama Claims (United States - Great Britain Arbitration), 4 Papers Relating to the Treaty of Washington 49 (1872); 7 G. HACKWORTH, supra, at 383-387; C. ROSSEAU, DROIT INTERNATIONAL PUBLIC 334 (1953). It was reasonably foreseeable that Franconia's incendiary activities, which had already produced three violent border clashes in Bemen province, would lead to serious criminal acts by the BLF such as aircraft hijacking. Second, even if Franconia was not actively directing the BLF's insurrectionary operations, her repeated refusal or failure to take effective "preventive or deterrent measures" indicated complicity with the BLF's actions. L. Sohn, R. Baxter, supra, art. 3, comment to para. 2. Third, once the hijacking

had occurred and the aircraft was within Franconian territory, Franconia made no attempt to prevent its destruction. Fourth, Franconia refused to either fulfill her treaty obligation to extradite the hijackers to Barcelona or to prosecute them under her domestic laws. Finally, Franconia evidenced her complicity with the BLF not only by granting political asylum to the hijackers, but also by conditioning the release of the innocent passengers and crew upon a Barcelonan decree of amnesty for all members of the BLF held or being sought by Barcelona. When a state has engaged in such activity, "its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself. . . ." Laura M. B. Janes, et al. (U.S. v. Mexico), Opinions of Commissioners 108, 114 (1927). Franconia's legally implied complicity with the wrongful acts of the BLF, which amounted to a ratification of those acts, renders her liable in damages to the Applicants for the kidnapping and murder of their nationals, and for the loss of their respective interests in the destroyed airliner, without regard to her actual complicity in these acts. E. BORCHARD, supra, at 217.

C. Franconia's responsibility for the wrongful acts of the hijackers is not mitigated by any acts or omissions of the Applicants.

The facts as stipulated do not raise a necessary inference of contributory fault given the heavy passenger traffic at the airport and the fact that present detection systems have all proved ineffective to some degree. Horlick, supra, at 51-55; N.Y. Times, December 4, 1970, at 43, col. 1 (city ed.). Furthermore, Franconia was not excused from her failure to exercise due diligence to prevent the later destruction of the aircraft even if the Applicants were negligent during the initial boarding. See generally "doctrine of discovered peril," W. PROSSER, LAW OF TORTS 439 (3d ed. 1964). Finally, there was no direct causal relationship between the omissions of Applicants and the destruction of the aircraft.

#### IV.

AEGEA AND BARCELONA ARE NOT RESPONSIBLE FOR DAMAGES RESULTING FROM THE ACTIONS TAKEN IN RESPONSE TO THE ACTS OF THE HIJACKERS.

- A. Aegea and Barcelona acted lawfully in attempting to protect the lives and property of their nationals and are not liable for incidental damages caused by such actions.

All states possess the inherent right to use force for the protection of nationals and their property. J. BRIERLY, THE LAW OF NATIONS 398-401 (6th ed. H. Waldock ed. 1963); I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 298-301 (1963); P. JESSUP, A MODERN LAW OF NATIONS 163-164 (1948). For a state lawfully to undertake such defensive action, the situation must demonstrate: (1) an imminent threat of injury to nationals, (2) a failure or inability on the part of the territorial sovereign to protect them and (3) measures of protection strictly confined to the object of protecting the nationals against injury. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 RECUEIL DES COURS 451, 467 (1952). The imminent threat to Barcelonan and Aegean nationals aboard the hijacked aircraft was unmistakable. The hijackers were armed and had demonstrated their readiness to resort to violence by murdering the Barcelonan and Aegean security

guards. There was no assurance that similar force would not be used against the passengers aboard the aircraft, nor did the government of Franconia demonstrate any willingness to provide adequate protection. When a state is confronted with such a situation, it has no realistic alternative but to take whatever measures are necessary to prevent injury to its nationals. J. BRIERLY, supra, at 427; Fitzmaurice, The General Principles of International Law Considered From the Standpoint of the Rule of Law, 92 RECUEIL DES COURS 5, 173 (1952). The defensive actions by the Applicants were proportionate to the threat. The maneuvers of their interceptor planes were limited to an attempt to defend the passengers and crew aboard the hijacked airliner by preventing its landing in hostile territory. No forces occupied Franconian territory, nor was there any evidence of an attempt by the Applicants to interfere with the domestic security of Franconia in violation of article 2(4) of the UN Charter.

The UN Charter, article 51, recognizes the established customary right of member states to act individually in self-defense against an armed attack. This right is available whether the attack emanates from another state

or from private individuals whose actions are attributable to a state. G. SCHWARZENBERGER, supra, at 183; Nanda, The United States' Action in the 1965 Dominican Crisis: Impact on World Order - Part I, 43 Denver L. Rev. 459 (1966). The nationals of any state are an extension of the state itself; thus, an armed attack against its nationals also obligates a state to take defensive measures in their behalf. E. BORCHARD, supra, at 31; D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 91-105 (1958); E. VATTEL, supra, bk. 2 ch. 4 § 71, at 136. Since the actions of the Applicants were justified by the customary right of self-defense, they bear no responsibility for damages resulting from those lawful actions in the absence of demonstrated fault. The Corfu Channel Case [1949] I.C.J. 1, 18, 72: 1 L. OPPENHEIM, supra, § 154, at 343.

Independent of rights granted under the doctrine of self-defense, the Aegean and Barcelonan interceptor aircraft were justified in entering Franconian airspace by the customary right of hot pursuit. Hot pursuit on the high seas is generally defined as the right of a state to pursue foreign wrongdoers outside its territory upon the high seas and under special circumstances into the territorial waters

of another state provided the acts were committed within the jurisdiction of the pursuing state and the pursuit commenced immediately and continued without interruption. GENEVA CONVENTION ON THE HIGH SEAS art. 23(5) (b) April 29, 1958, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force September 30, 1962); N. POULANTZAS, THE RIGHT OF HOT PURSUIT IN INTERNATIONAL LAW 1, 208 (1969). The right of hot pursuit has the overwhelming support of state practice and court authority because it is deemed essential for the effective functioning of both domestic legal systems and of the international legal order. I. BROWNLIE, supra, at 302; 2 G. HACKWORTH, supra, at 700; 1 C. HYDE, supra, at 794; M. McDOUGAL, W. BURKE, THE PUBLIC ORDER OF THE OCEANS 894 (1962); 1 L. OPPENHEIM, supra, § 266, at 604. The conditions for lawful hot pursuit apply equally to ships and aircraft. HARVARD RESEARCH IN INTERNATIONAL LAW, JURISDICTION WITH RESPECT TO CRIME, 29 Supp. AM. J. INT'L L. 436, 516 (1935). Precedent exists for hot pursuit across national frontiers in state practice when such action is necessary to prevent imminent injury to the nationals of a state. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW § 219 at 420, 421 (1906); See also The Times, April 9,

1968, concerning Israel's hot pursuit of members of the El Fatah guerrilla organization into Jordanian territory. Articles 3 and 4 of the Tokyo Convention have codified the customary bases of extraterritorial air jurisdiction and have recognized the right of a state to interfere with an aircraft in flight to exercise its criminal jurisdiction. 1963 TOKYO CONVENTION arts. 3 & 4, supra; Horlick, supra, at 36.

The situation in the instant case demanded that Aegea and Barcelona take prompt measures to intercept the hijacked aircraft in order to prevent their nationals and property from falling into the hands of a hostile power. The hot pursuit by the Aegean and Barcelonan interceptor planes commenced immediately and continued without interruption. Franconia's subsequent detention of the passengers and crew as hostages and her acquiescence in the destruction of the aircraft demonstrates the validity of the attempt to prevent such conduct.

The criminal acts must have been committed within the jurisdiction of the pursuing state for the right of hot pursuit to be lawfully exercised. Aegea and Barcelona had concurrent jurisdiction over the crimes of the hijackers.

Aircraft are considered to bear the nationality of the state of registry; therefore, the crimes committed aboard the in-flight airliner were within the criminal jurisdiction of Aegea. CHICAGO CONVENTION ON INTERNATIONAL CIVIL AVIATION art. 17, December 7, 1944, T.I.A.S. No. 1591, 472 U.N.T.S. 402 (entered into force April 4, 1947); DRAFT CONVENTION ON THE UNLAWFUL SEIZURE OF AIRCRAFT art. 4(1), I.C.A.O. Doc. 8865 LC/159 (March 16, 1970), 9 INT'L LEGAL MATERIALS 669 (1970) [hereinafter cited as the 1970 Montreal Draft Convention]; THE TOKYO CONVENTION OF 1963, art. 3(1), supra; L. McNAIR, THE LAW OF THE AIR 262 (3d ed. M. Kerr, A. Evans eds. 1964). The ICAO Hague Convention of 1970 provides that when an aircraft is leased to, and operated by, an airline of a state other than the state of registry, the state of the airline shall have concurrent jurisdiction with the state of registry. HAGUE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT art. 4, supra; I.C.A.O.: Resolutions Adopted By the Extraordinary Assembly, A17-3(9) (June 16-30, 1970). Thus Barcelona has concurrent jurisdiction with Aegea. In addition, Barcelona had concurrent jurisdiction on the basis of the following customary principles: the territoriality principle, because Barcelona

was an overflowed state during the hijacking; Appendix 30; the nationality principle, because both of the hijackers were Barcelonan nationals; and the passive personality principle, because there was a number of Barcelonan nationals threatened or injured by the criminal offenses of the hijackers. HARVARD RESEARCH IN INTERNATIONAL LAW, JURISDICTION WITH RESPECT TO CRIME, supra, at 445. The fact that hot pursuit was directed against an airliner over which the Applicants exercised original jurisdiction reinforces their rights. In instances of hot pursuit of an aircraft by its own national authorities, the state's jurisdiction extends over the aircraft even while outside its territorial airspace. N. POULANTZAS, supra, at 278.

Since Applicants were engaged in the lawful exercise of the right of hot pursuit, they are not responsible for incidental damages resulting from their attempt to prevent the hijacked aircraft from landing unless it can be shown that such damage was willfully or negligently caused. 1 L. OPPENHEIM, supra, § 155, at 343. Franconia bears the burden of proving such willfulness or negligence. The facts do not sustain that burden. In an attempt to prevent the hijacked aircraft from landing, the Applicants'

planes properly fired their weapons across its bow. This is an internationally accepted warning signal in air and maritime law. N. POULANTZAS, supra, at 284, 285, 290; 1969 U.K. Rules of the Air, Warning Signals to Aircraft in Flight, S. J. 1969 No. 216, SHAWCROSS AND BEAUMONT ON AIR LAW 639, Appendix C, C1431, at 639 (3d ed. P. Keenan, A. Lester, P. Martin eds. 1966). The fact that incidental damages resulted from the commission of this lawful act does not give rise to a compensable delict.

B. Aegea and Barcelona are not responsible for damages resulting from the cessation of air service into Franconia because the actions of the AAPA and the IFAPA are not attributable to those states.

The compromis does not indicate that the AAPA was operating under the control of Aegea. State funding does not, of itself, indicate influence or control over the activities of a private union. Nor is there any evidence of consultation between the AAPA and the Aegean government prior to the union's request for a cessation of air service into Franconia. Aegea bears no responsibility for actions taken by the AAPA. Regarding Barcelona's liability, the facts do not indicate that Barcelona even participated in the cessation of air service into Franconia.

The IFAPA is an autonomous, world-wide labor organization which is not subject to direction or control by any national government. To the extent that Franconia is entitled to any damages for isolation from the international community resulting from her aiding and abetting air hijackers, the liability attaches exclusively to the AFAPA. There is no reasonable chain of proximate causation by which the governments of Aegea and Barcelona can be held responsible for the IFAPA strike.

C. Even if the AAPA actions are attributable to Aegea, the cessation of air service into Franconia was not a compensable delict.

The cessation of air service into Franconia was not a compensable delict. A state is liable only for those injuries inflicted through acts which violate international law. International Fisheries Co. (U.S. v. Mexico) 4 U.N. R.I.A.A. 701 (1931). International free trade and access to transportation facilities are not legally protected state interests. Friedmann, Some Impacts of Social Organization on International Law, 50 AM. J. INT'L L. 475, 496 (1956). It is within the competency of any sovereign state to interrupt economic relations with another state when the continuation of those relations poses a threat to its

security. J. HALDERMAN, THE UNITED NATIONS AND THE RULE OF LAW 39 (1966); 43 DEP'T STATE BULL. 199, 202 (1960). Actions designed to influence the normal intercourse of business are only illegal when enforced by coercion or intimidation. Bouvé, The National Boycott as an International Delinquency, 28 AM. J. INT'L L. 19, 24 (1934). The burden of proving such illegality rests with the state presenting a claim for injuries. Bouvé, supra, at 25; see generally S. ROSENNE, supra, at 409. In the instant case no element of coercion or intimidation was involved in the AAPA request to all IFAPA members to cease air service. It is accepted that a commensurate and nonviolent reprisal in the form of a boycott is a legitimate state action. H. JACOBINI, INTERNATIONAL LAW 263 (rev. ed. 1968). The AAPA's attempt to reduce the threat to world security posed by the non-prosecution of air hijackers constituted a legitimate social interest. This interest justified the cessation of air service into Franconia.

Boycotts are an accepted state practice in attempting to remedy dangerous international conduct. In 1968 and 1969 the IFAPA authorized boycotts of air traffic into states which detained innocent passengers or which refused to punish

hijackers. N.Y. Times, March 27, 1969, at 1, col. 3 (city ed.); id. August 24, 1968, at 16, col. 2; id. September 2, 1969, at 1, col. 2; id. August 18, 1968, § E, at 5 col. 1. The ICAP Council recently voted overwhelmingly to approve a U.S. proposal for multilateral boycotts of air service into countries involved in hijacking for purposes of "international blackmail." 63 DEP'T STATE BULL. 453 (1970); See also N.Y. Times, October 2, 1969, at 69, col. 2 (city ed.).

D. Aegea is not liable for the cessation of mail service to Franconia.

Aegea is not responsible for the cessation of mail service to Franconia. Article 3 of the UPC Charter provides that in the event of "exceptional circumstances", postal service may be temporarily suspended, in whole or in part. UNIVERSAL POSTAL CONVENTION art. 3, T.I.A.S. No. 5881 (entered into force January 1, 1966). Franconia's permissive attitude toward the BLF hijackers has created such a dangerous situation for air traffic into Franconia that it is an "exceptional circumstance." The government of Aegea could not reasonably be expected to employ either military or civilian personnel to fly mail into Franconia when there was every reason to believe that they would simply become additional hostages of the BLF in their scheme of international blackmail.

CONCLUSION

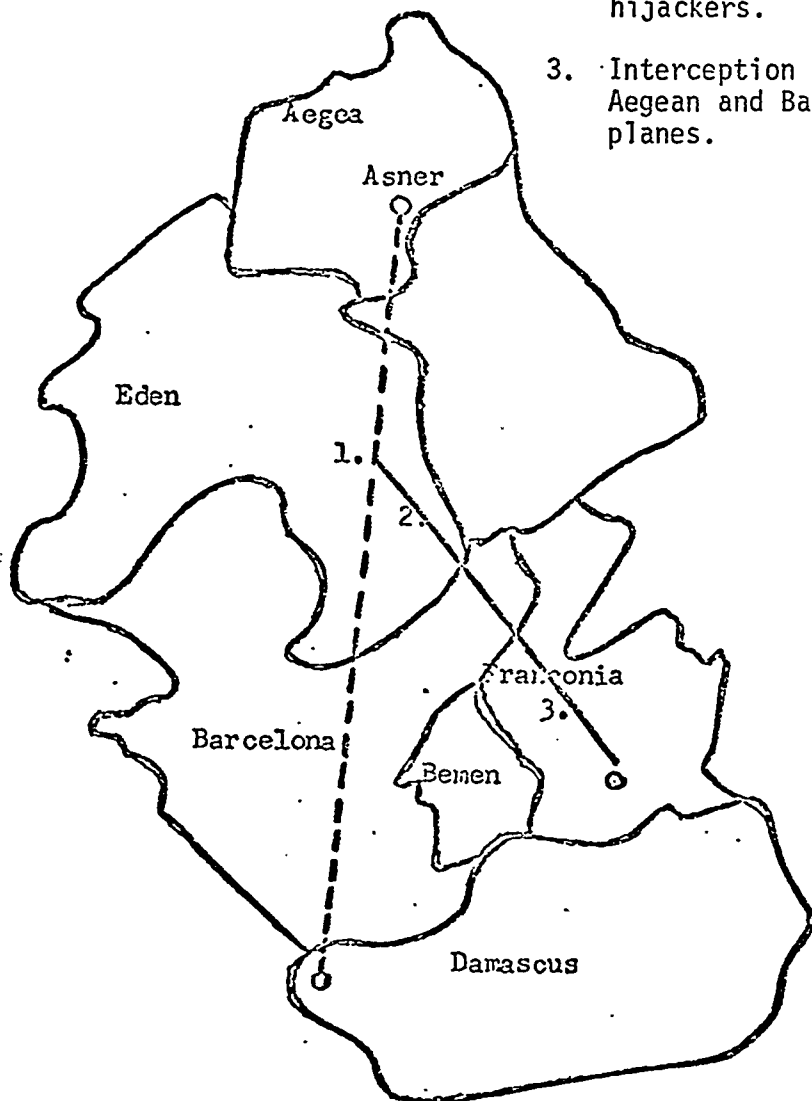
The Applicants respectfully request that this Court order Franconia to release their nationals and to extradite the hijackers to Barcelona; also, that this Court declare Franconia responsible, for payment of compensation to the Applicants for the kidnapping and murder of their nationals and the destruction of the aircraft.

GRAPHIC ILLUSTRATION

----- scheduled flight of aircraft

\_\_\_\_\_ route of aircraft after hijacking

1. Aircraft hijacked.
2. Attempt by security guards to stop hijackers and subsequent murder of the guards by the hijackers.
3. Interception of the aircraft by Aegean and Barcelonan fighter planes.



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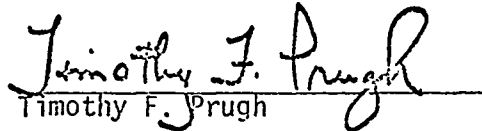
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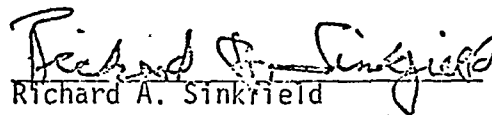
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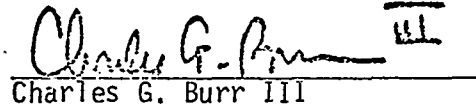
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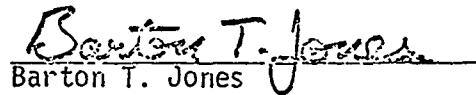
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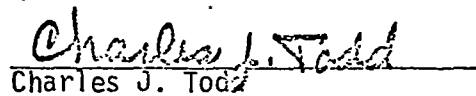
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