

Memorial on behalf of the State of Icara in the Aerial Accident Case (Icara v.
Mercuria)

A. Table of Contents

- a. Table of Contents
- b. List of Abbreviations
- c. List of Sources (treaties, jurisprudence, literature, etc.)
- d. Statement of Relevant Facts
- e. Issues
- f. Summary of Arguments
- g. Jurisdiction of the Court
- h. Arguments
 1. The existence of an international obligation
 - a. Who is responsible for providing air navigation facilities in the territory of Mercuria?
 - b. Can Mercuria relinquish its contractual responsibilities to Icara through a treaty which Icara is not a party to?
 - c. Can Mercuria transfer its international responsibility to another entity (PatriControl)?
 - d. What standards must Mercuria meet when providing air navigation facilities?
 2. Negligence
 - a. Did the PatriControl controller provide proper ATS?
 - b. Did PatriControl provide proper ATS?
 - c. What international laws did Mercuria violate?
 3. Standing and the ability to claim compensation
 - a. Does Icara have standing; if Icara does not have standing, may Icara bring suit on behalf of its nationals (diplomatic protection)?
 - b. By violating the legal obligations of a contract, is Mercuria responsible for providing monetary compensation?

i. Submissions

B. List of Abbreviations

- a. Bilateral Air Services Agreement (ASA)
- b. Air Traffic Control (ATC)
- c. International Civil Aviation Organization (ICAO)
- d. United Nations (UN)
- e. Eurocontrol Safety Regulatory requirements (ESARRs)
- f. Traffic announcement (TA)
- g. On-Board Airborne Collision Avoidance System (TCAS)
- h. Resolution Advisory (RA)
- i. Acoustic Short-Term Conflict Alert (STCA)
- j. International Court of Justice (ICJ)
- k. Air Traffic Services (ATS)

C. List of Sources (treaties, jurisprudence, and documents)

1. Treaties

- a. Chicago Convention on International Civil Aviation, 1944
- b. Rome Convention on the Damage Caused by Foreign Aircraft to Third Parties on the Surface, 1952

- c. United Nations Charter, 1945
- d. Vienna Convention on the Law of Treaties, 1969

2. Cases

- a. Chorzow case

3. Documents

- a. Air Traffic Management, ICAO document 4444; Chapter five
- b. Aspin, Larry
- c. Causal Analysis of the ACAS/TCAS Sociotechnical System, <http://crpit.com/confpapers/CRPITV47Ladkin.pdf>
- d. Draft Articles on State Responsibility; http://www.javier-leon-diaz.com/humanitarianIssues/State_Resp.pdf
- e. Draft on Diplomatic Protection
- f. International agreement between Mercuria and Patriarcha (never ratified)
- g. Mercuria's investigation of the accident
- h. Privatization in the Provision of Airport and Air Navigation Services; Tulsi R. Kesharwani

D. Statement of Relevant Facts

- a. Icara: Icarex Airlines was established and is regulated by the laws of the state of Icara. Icarex Airlines is largely owned and controlled by Icara; the airline provides civilian international flights. Icarex's aircraft are registered with the national registry of Icara. Also, Icarex's flight operations and aircraft comply with internationally recognized safety standards. The airline may legally operate, due to Icara's consent, international flights to a third state by virtue of ASA's between Icara and another state. Icara has an ASA with the state of Montania enabling Icarex Airlines to operate both scheduled and non-scheduled flights between the capital cities of Icara and Montania; both states have consented to these flights.
- b. Galaxy: CargoGalax Airways was established and is regulated by the laws of the state of Galaxy. CargoGalax Airlines is largely owned and controlled by Galaxian Nationals; the airline transports cargo by air internationally. The airlines' planes are registered with the Galaxian national registry, and their flight operations and aircraft are in compliance with internationally recognized safety standards. CargoGalax Airways was authorized by the state of Galaxy to operate international flights between Galaxy and the state of Limonia by virtue of an ASA; both states are in compliance with the flights. CargoGalax Airways conducts flights between the capitals of Galaxy and Limonia.
- c. Mercuria and Patriarcha: While flying to Montania's and Limonia's capitals, both Icarex aircraft and CargoGalax aircraft fly through the national airspace of the state of Mercuria. Mercuria has given both airlines the permission to fly through its national airspace. Patriarcha, a neighboring state of Mercuria, designated a private air navigation service called PatriControl with the responsibility of providing air traffic control services over all of Patriarcha's national airspace. PatriControl was created

and is regulated by the laws of the state of Patriarcha. In 1952, Patriarcha and Mercuria reached an agreement giving PatriControl the sole responsibility of providing ATC for a portion of airspace controlled by Mercuria which is adjacent to the border of Patriarcha. Due to this agreement, PatriControl has been responsible for providing ATC services for the above mentioned block of airspace continuously since 1952. The agreement between Patriarcha and Mercuria shifting ATC responsibilities from Mercuria to Patriarcha was signed and submitted to both Parliaments to be ratified, but the agreement has not been ratified by either government or registered with the ICAO. Article five of the agreement between Mercuria and Patriarcha states Patriarcha is “liable for damages caused by its negligence, or that of its agents or any other person acting on its behalf, in relation to the provision of air traffic services falling under the agreement”; although Article thirty requires the agreement to be ratified in order to take effect. PatriControl operates under the international safety rules of ICAO, the rules and procedures created by Eurocontrol regarding Delegation of ATS, and ESARRs as applied by legislation of Mercuria and Patriarcha.

- d. The Accident and Damages: On December 23, 2006, a CargoGalax flight and Icarex flight collided in mid-air while flying to the capitals of Limonia and Montania. The collision took place in the portion of Mercurian airspace controlled by PatriControl. All fifty passengers aboard the Icarex flight along with the six crew members, and the three crew members on the CargoGalax flight were killed. The debris from the flights fell onto both Mercurian and Patriarchan land. In Mercuria, a football stadium was seriously damaged, and both players and spectators attending the match were killed or severely injured. Moreover, private citizens were injured and property was destroyed in both countries.
- e. Events of the Flight as provided by Mercuria’s investigation:
 1. The CargoGalax flight was cleared by PatriControl to climb to 36,000 feet at 11:29:50. At 11:30:11, the Icarex flight reported in to PatriControl at an altitude of 36,000 feet. Therefore, the two planes were flying strait toward one another.
 2. At 11:34:42, a TA was made simultaneously on both flights by their TCASs by saying “traffic traffic”. The TCAS is independent of all ground based systems or ATC units.
 3. At 11:34:49, PatriControl personnel alerted the Icarex flight of the conflicting traffic and instructed them to descend to 35,000 feet. The Icarex flight began to descend, but did not confirm their descent with PatriControl.
 4. At 11:34:56, both flights TCASs generated a RA for the Icarex flight to ascend and for the CargoGalax flight to descend.
 5. At 11:34:58, the PatriControl’s STCA sounded at the controller’s workstation, but the controller did not notice the alarm.

6. At 11:35:01, PatriControl instructed the Icarex flight to descend to 35,000 feet. The Icarex flight crew immediately confirmed PatriControl's command.
 7. At 11:35:17, the CargoGalax flight also began to descend, but the PatriControl controller failed to notice the aircraft's descent. The TCAS is not connected with the ground, so PatriControl did not know the TCAS and RA of the CargoGalax flight had instructed the pilot to descend.
 8. At 11:35:24, the Icarex flight's TCAS and RA instructed the pilot to "increase climb, increase climb". Five seconds after the command, the two flights collided in mid-air.
- f. PatriControl's errors during the incident:
1. PatriControl's visual STCAs, which appear on a controller's monitor 120 seconds before two planes close to within less than twelve kilometers horizontally, were not functioning after 11:13:00 on the day of the collision due to technical work (a foreseeable incident). Moreover, the supervisor gave the controllers an inadequate assessment of the problem.
 2. On the day of the accident, there was only one controller in the control room when the accident took place. Usually, the control room has two controllers and two assistants on duty. The decision to leave one controller on duty was an agreement between controllers and was known and accepted by PatriControl management. At the time of the accident, there was one controller working two work stations, switching between stations every so often. Finally, the workstations the controller was responsible for managing were not similar in design.
 3. Mercuria and PatriControl: The state of Mercuria did not inspect PatriControl, and did not have any oversight regarding PatriControl's actions. Therefore, Mercuria was unaware of PatriControl's international safety violations prior to the investigation.
- g. Additional Information:
1. Icara, Mercuria, Patriarcha, Montania, and Limonia are all members of the ICAO, and have made no reservations regarding the relevant standards of the annexes to the Chicago Convention
 2. Icara, Mercuria, and Patriarcha are all parties to:
 - a. the Vienna Convention on the Law of Treaties
 - b. the Chicago Convention on international civil aviation of 1944
 - c. the International Air Services Transit Agreement of 1944
 - d. the Montreal Convention for the unification of certain rules for international carriage by air of 1999
 3. Icara is a party to the Rome Convention on damage caused by foreign aircraft to third parties on the surface of 1952
 4. Icara and Mercuria are Eurocontrol contracting states

E. Issues for Icara

- a. The existence of an International obligation
 1. Who is responsible for providing air navigation facilities in the territory of Mercuria?
 2. Can Mercuria relinquish its contractual responsibilities to Icara through a treaty which Icara is not a party to?
 3. Can Mercuria transfer its international responsibility to another entity (PatriControl)
 4. What standards must Mercuria meet when providing air navigation facilities?
- b. Negligence
 1. Did the PatriControl controller provide proper ATS?
 2. Did PatriControl provide proper ATS?
 3. What international laws did Mercuria violate?
- c. Standing and the ability to claim compensation
 1. Does Icara have standing; if Icara does not have standing, may Icara bring suit on behalf of its nationals (diplomatic protection)?
 2. By violating the legal obligations of a contract, is Mercuria responsible for providing monetary compensation?

F. Summary of Arguments

- a. Is there an International obligation?
 1. Mercuria has exclusive sovereignty over the airspace above its territory and therefore is responsible for providing airports, radio service, meteorological services, and any other air navigation facilities needed to ensure safe international air navigation.
 2. The treaty that both Icara and Mercuria are parties to manages their rights and duties to one another. Therefore, Mercuria's treaties with any other states, regardless of ratification status, do not give Mercuria the right to relinquish their responsibilities to Icara.
 3. Delegating government authority to a private company does not alleviate Mercuria's international duties to Icara. Furthermore, Mercuria is responsible for the actions of the entity it delegates government powers to, and may not use internal law as a reason to violate a treaty.
 4. Mercuria is obligated to carry out its international duties and must adhere to the common rules and practices of international organizations to which it is a member. Mercuria is responsible for notifying the proper authorities if internationally recognized rules and standards are not met.
- b. Negligence
 1. The PatriController failed to maintain an adequate distance between the two aircraft in order to allow them to safely avoid one another. If the controller had maintained an adequate distance between the two aircraft, the use of the RA and the

TCAS would not have been needed and the accident would have been avoided.

2. Inadequate provisions were taken by the supervisor to properly inform controllers of the technical work scheduled on the visual STCA system on the day of the accident. Furthermore, the internal arrangement leaving one controller on duty instead of the required two controllers and two assistants, known and tolerated by PatriControl's management, did not meet aviation safety standards making an accident more likely to occur.
3. Mercuria is responsible for the actions of its private agents and therefore should have conducted inspections to ensure PatriControl was not violating safety standards. Mercuria must employ the legal capability to inspect and certify the private sector to ensure safe air navigation. Mercuria failed to inspect the actions of PatriControl, private agents acting within their territory making Mercuria responsible for their actions, and has violated international standards and rules.

c. Standing and the ability to claim compensation

1. Mercuria has not fulfilled its contractual duties to Icara. Moreover, the damages suffered by Icara and its nationals give Icara standing (something to gain or lose) and should be considered when determining compensation. If Icara does not have standing, Icara can utilize diplomatic protection on behalf of its nationals and corporations. The norm of exhausting all local remedies before petitioning the ICJ is not needed when the injured parties do not and never will be able to establish a sufficient connection with the state whose airspace the accident occurred.
2. The failure by a state to adhere to a treaty is customarily repaid with compensation, and money is the proper reparation in this case.

G. Jurisdiction of the Court (or other body vested with adjudicatory power)

- a. Both states are parties to the ICJ's Statute, and have voluntarily agreed to the compulsory jurisdiction of the ICJ. Therefore, Mercuria, as well as Icara, must submit itself to the ICJ's decision regarding the above mentioned issues.

H. Argument

*Existence of international obligations

a. Chicago Convention duties

1. Mercuria has sovereignty over the airspace above its territory and is responsible for the actions which take place in said territory¹.
2. Mercuria is a party to the Chicago convention and must carry out the obligations of that convention. Therefore, Mercuria has agreed to provide radio services, airports, meteorological

¹ Chicago Convention, Article 1

services, and any other facilities needed to ensure safe air navigation².

b. International agreement between Patriarcha and Mercuria

1. The rights and duties between states are governed by the treaty or treaties which both states are party to³. Therefore, Mercuria's treaty with Patriarcha, regardless of ratification status, does not permit Mercuria to waive its international duties to Icara. Also, Mercuria may not utilize the Rome Convention against Icara because Mercuria is not a party to that convention. Article 23 of the Rome Convention states, "This Convention applies to damage caused in the territory of a contracting state by an aircraft registered in the territory of another contracting state." Mercuria is not a contracting state and therefore can not use this convention⁴. Since Icara was not negligent for the collision, the Icaran government is not responsible for any of the deaths or damages that resulted, Mercuria is responsible.
2. The international agreement made between Patriarcha and Mercuria in 1952 was not ratified by the Parliaments of either state, and therefore never entered into force⁵. The agreement was not registered with the UN or ICAO as well. A state who is party to a treaty which has not been registered with the UN may not use said treaty before an entity of the UN⁶. Therefore, Mercuria may not use the 1952 agreement in an ICJ case. The 1952 agreement is irrelevant.
3. Article five states Patriarcha is, "liable for damages caused by its negligence, or that of its agents or any other person acting on its behalf, in relation to the provision of air traffic services falling under the agreement". Article five may not be used as customary law because there is no evidence the article was ever put into practice by either state; in fact, it is possible that Patriarcha was hesitant to ratify the treaty because their government did not want to assume this duty⁷. Furthermore, Article 30 states the convention has to be ratified in order to enter into force (the agreement was never ratified by either Parliament).

c. Mercuria's delegation to PatriControl

1. Being a sovereign state, Mercuria may not use its own national laws as an excuse to not perform the contractual duties of a treaty. Moreover, Mercuria is responsible for actions taken by private entities who are delegated functions of the state such as

² Chicago Convention, Article 28

³ Vienna Convention, Article 30

⁴ Rome Convention of Damage caused by Foreign Aircraft to Third Parties on the Surface

⁵ Vienna Convention, Article 14

⁶ United Nations Charter, Article 102

⁷ Mercuria and Patriarcha international agreement

ATS. Therefore, Mercuria is responsible for the actions taken by corporate entities in its territory⁸.

2. A state would not be responsible for damages and injuries to foreigners if the state took the necessary precautions to prevent injuries from occurring. Mercuria failed to take the proper precautions to monitor PatriControl and their conduct to avoid possible accidents.
 3. Therefore, Mercuria, who conducted no oversight, is responsible for damages and injuries suffered by foreigners if private entities, who have been delegated government power, act in a manner contrary to international law⁹.
- d. Mercuria's international duties
1. When a state ratifies a treaty and it enters into force, that treaty is binding upon the ratifying state and they must abide by said treaty¹⁰.
 2. Article 28 of the Chicago Convention states, "air navigation facilities must be provided in accordance with the standards and practices recommended or established pursuant to the Convention". Therefore, every state party to the Chicago Convention must attempt to establish similar procedures and regulations. The ICAO has been delegated the power to create aviation rules, international standards, and ATC practices¹¹. It is a contracting state's duty to notify the ICAO if it chooses to deviate from any ICAO standards¹². Mercuria gave no notifications, and is therefore bound by the rules and procedures of the ICAO. Mercuria is responsible if entities under its control fail to comply with ICAO rules and standards.

*Negligence

- a. PatriControl controller's negligence
 1. Icara's laws do not have a provision regarding which order to follow when TCAS and ATS systems are in conflict with one another.
 2. Furthermore, the ICAO has no direct answer as to how a pilot should react when ATC and TCAS systems are in conflict with one another; in fact Eurocontrol and the ICAO contradict one another¹³.
 3. Therefore, it is logical to assume the pilot is given the responsibility to choose which order to follow in order to avoid a collision. The Icarex pilot followed the controller's instruction which is logical considering the controller should have been in

⁸ Aspin, 2/9/09

⁹ Draft on Responsibility, Article 5-8

¹⁰ Vienna Convention, Article 26

¹¹ Chicago Convention, Article 37

¹² Chicago Convention, Article, 38

¹³ Causal Analysis of the ACAS/TCAS Sociotechnical System, pg. 5

contact with both aircraft and had both aircraft on his monitor. As mentioned above, the control room was not adequately manned resulting in the controller not doing his job properly¹⁴.

4. It was the responsibility of the controller to maintain an adequate distance between the two aircraft in order to avoid a collision. The controller obviously failed this task as a result of having only one controller running two monitors¹⁵.
5. Major errors by the controller include¹⁶:
 1. Not maintaining an adequate distance between the two aircraft.
 2. It took the controller four minutes and thirty eight seconds to realize the two aircraft were approaching each other (the Icara flight reported in at 36,000 at 11:30:11 and CargoGalax was cleared to climb to 36,000 at 11:29:50).
 3. The controller did not notice the STCA alarm when it sounded at his workstation
 4. The controller failed to notice the CargoGalax flight began to descend after he gave an order for the Icarex flight to descend which the Icarex flight confirmed meaning the controller knew the Icarex flight was descending; yet he did not give an order to the CargoGalax aircraft to stop its descent when it began.
 5. The controller was not in contact with the CargoGalax flight at all.
 6. The Icarex pilot was faced with uncertainty due to the conflicting orders from the controller and his on-board TCAS system. His choice to follow the controller's order is consistent with international law.

b. PatriControl's negligence

1. Mercuria's investigation showed there was only one controller in the control room at the time of the accident instead of the required two controllers and two assistants. Therefore, the controller on duty had to monitor two workstations switching between the two every so often. This situation is unacceptable; leaving one controller to do the work required for four greatly increases the likelihood of an accident. The practice of leaving one controller to monitor two counsels was known by PatriControl management yet they took no actions to rectify the situation (like ensuring there were two controllers and two assistants at all times). The inadequate number of controllers in the tower was a factor in causing the accident¹⁷.

¹⁴ Causal Analysis of the ACAS/TCAS Sociotechnical System, pg. 5

¹⁵ Air Traffic Management, Chapter five

¹⁶ Mercuria's investigation

¹⁷ Mercuria's investigation

2. On the day the accident occurred, the STCA was unavailable due to technical work. This was a foreseeable event, yet the supervisor did not take the proper steps to warn the controllers of the situation. The supervisor gave an inadequate briefing to the controllers regarding the technical work¹⁸.
 3. Icara believes these events show PatriControl's actions did not meet ICAO aviation safety standards.
- c. Mercuria's duties
1. The ICAO allows the privation of air navigation facilities, but the state, Mercuria, is still responsible for air navigation consistent with article 28 of the Chicago Convention for the airspace above their sovereign territory.
 2. Mercuria should have been aware that delegating the government function of ATS to a private corporation could result in the disregard of safety standards. The ICAO requires Mercuria to oversee and certify PatriControl's actions within Mercurian airspace to ensure safety standards are met¹⁹.
 3. Mercuria did not inspect PatriControl's operations, nor did Mercuria have any involvement or oversight of PatriControl. Therefore, Mercuria did not meet its duty of ensuring international safety standards were met by PatriControl making Mercuria liable²⁰.
 4. Because Mercuria showed extreme negligence resulting in the accident, Mercuria, not Icara, is responsible for all current and future claims made on behalf of passengers of both the Icarex and CargoGalax flights.

*Standing and the ability to claim compensation

- a. Icara's standing and ability to make claims on behalf of its nationals
 1. The Chicago Convention was created for states by states; it provides for dispute resolution for participating state parties, but provides no recourse for individuals²¹. Thus, the duties broken by Mercuria are owed to the state of Icara.
 2. Icara has standing in this case because the Icaran government wants to ensure the lives and properties of its citizens and corporations are protected. Also, the state of Icara is the only entity with the resources needed to transport its deceased national's home and push for an investigation. The loss of life abroad the Icarex flight has created orphaned children which the Icaran government is responsible for helping to raise. The emotional distress on the children and public and the monetary assistance given by the Icaran government gives Icara a stake in

¹⁸ Mercuria's investigation

¹⁹ Privatization in the Provision of Airport and Air Navigation Services; Tulsi R. Kesharwani

²⁰ Draft on Responsibility, Article 12

²¹ Chicago Convention, Article 84

the case. Furthermore, the loss of the Icarex aircraft amounts to thirty million dollars giving Icara a further stake in the case.

3. Principles of international law dictate that reparation must balance the consequences of the illegal act in order to recreate the circumstances as if the crime had not been committed. All damages caused by Mercuria's negligence are recoverable. Therefore, Mercuria must cover all the initial damages as well as all future damages, costs, or expenditures resulting from the accident²². These damages include compensation for the destroyed aircraft and any other expenditures or costs resulting from the accident (including legal fees).
4. If the ICJ should determine Icara does not have direct standing, Icara will choose to utilize diplomatic protection on behalf of its nationals (sue on their behalf).
5. The use of diplomatic protection still enables this case to be heard in the ICJ because the Icaran nationals injured in the accident will never have any adequate connection with the state of Mercuria making it impossible to use local remedies (there is no connection between the injured aliens and the Mercurian legal system so the case can go directly to the ICJ)²³. Icara has the right to claim monetary compensation against Mercuria for the violation of international law against Icaran nationals²⁴.

b. Reparations

1. It is a custom of international law that when a breach occurs the violating state has a duty to provide compensation to the injured state party²⁵.
2. Icara argues that monetary compensation is the appropriate reparation for the loss of life and damage to property²⁶.
3. Since Mercuria has been proven to be responsible for the collision, the state of Mercuria must provide compensation to the families of those who lost their lives in the football stadium and provide compensation for the damage to property in both Mercuria and Patriarcha.

I. Submissions

- a. All damages resulting from the mid-air collision in Mercuria's airspace on December 23, 2006 is solely Mercuria's responsibility.
- b. The state of Mercuria is responsible for compensating Icara for the destroyed aircraft (30 Million Euros).
- c. Mercuria assures it will not hold Icarex Airlines responsible for all claims made by third parties who were connected with the accident (including CargoGalax Airways), and the present and future claims made on behalf

²² Chorow case

²³ Draft on Diplomatic Protection, Article 15

²⁴ Draft on Diplomatic Protection, Article 3,4

²⁵ Chorow case

²⁶ Draft on Responsibility, Article 5-6

of deceased passengers and crew members of both the Icarex aircraft and the CargoGalax aircraft.

- d. Mercuria is responsible for compensating Icara for all damages, expenditures, costs (including legal costs and lawyer's fees), or injuries which have already been suffered and/or injuries which will be suffered in the future due to the accident.