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From Athens to Vilnius with A Near-Fatal Detour to Minsk? The Issue of Demarcation Between Civil and State Aircraft

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ABSTRACT

On 23 May 2021, the Belarusian authorities forced a Ryanair flight from Athens to Vilnius to land in Minsk, citing a bomb threat that turned out to be a false alarm. The aircraft was carrying 123 passengers, fortunately none of them were injured in the incident, but one person - a journalist - who had been declared an extremist and persecuted by the Belarusian Government, was immediately detained by the Minsk authorities following the emergency landing. The purpose of this paper is to present the relevant regulatory environment governing the case and, as far as possible, to assess Belarusian behavior in the light of the regulation. However, during the discussion, I will not attempt to judge the case, but rather to highlight the dilemmas surrounding it and similar events like 9/11, such as the problem of the demarcation between civil and state aircraft, the use of weapons against aircraft, the self-defense of states, or the conflict between the human rights of those on board and those on the ground (mainly in the light of the Chicago Convention, the so called San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and the United Nations Charter). „There are only two emotions on a plane: boredom and terror.” (Orson Welles)

Keywords: Chicago Convention, Forced Landing, Civil Aircraft, Human Rights, 9/11



INTRODUCTION

On 23 May 2021, the Belarusian authorities forced a Ryanair flight from Athens (Greece) to Vilnius (Lithuania) to land in Minsk, citing a bomb threat. The aircraft approaching its destination was informed by the Belarusian air traffic controller that there was an explosive device (bomb) on board which was believed to be detonated over Vilnius. In response to the pilots' doubtful questions, Vilnius being closer than Minsk at the time, the dispatcher confirmed that the Belarusian authorities had ordered the plane to land in Minsk. The pilots declared a state of emergency and turned back towards Minsk, where they were escorted by Belarusian Air Force fighters until landing.

Later, the Belarusian President said that the news of the bomb had come from Swiss intelligence, but the Swiss Foreign Ministry denied this, and that there had been any communication with the Belarusian, Lithuanian or Greek authorities. Shortly afterwards, it was confirmed that a person on the flight - a journalist - who had been declared an extremist and persecuted by the Belarusian Government, was on board and was immediately detained by the Minsk authorities following the emergency landing. The existence of an explosive device on board was not verified and proved to be a false alarm. The world's leading powers have expressed their clear displeasure at the Belarusian handling of the case and diplomatic controversy has been sparked, with international aviation organizations condemning the state's behavior.

The civil aircraft, originally flying between two EU capitals, was carrying 123 passengers, none of them were injured in the incident.

The purpose of this paper is to present the relevant regulatory environment governing the case and, as far as possible, to assess Belarusian behavior in the light of it. However, during the discussion, I will not attempt to judge the case, but rather to highlight the dilemmas surrounding it and similar events.

First of all, it should be noted that the Belarus is one of the 193 members of the ICAO (International Civil Aviation Organization), as are Poland and Lithuania, *i.e.* a party to the Chicago Convention signed on 7 December 1944, but not a member of the European Union (the other states listed are). Greece is an observer with consultative rights to the ICAO.

ICAO is a specialized agency of the United Nations. It was established in 1944 by the Chicago Convention, and the 44th article details its objectives, which present a rather complex picture: ICAO develops the principles and technical standards of international aviation - with emphasis on safe and regular development, promotes the science of aircraft operation, develops air routes and facilities, creates safe, regular, efficient and economical air transport for the people, meets the needs of air transport, contributes to the development of civil aviation safety - it does all this without discrimination between States, on the principle of equality. During its activities, it develops standards and recommendations (SARPS - International Standards and Recommended Practices), which publishes as appendices (so-called Annexes) to the Chicago Convention.¹

Furthermore, one of the most important achievements of the Chicago Convention is the declaration of the so-called five freedoms of the air. (It should be noted that there are actually nine freedoms of the air, five of which are named in the Chicago Convention and four others can be derived from it.) The first and seventh freedoms seem to be the most relevant in the light of the events in Minsk. The First Freedom of the Air guarantees a state the right to fly over other states without landing (for non-commercial purposes); the states overflown are obliged to tolerate this (excluding the possibility of charging for

¹ It should be noted that ICAO is not only a quasi-legislator, but also a quasi-judicial body, as contracting states can refer their disputes to the ICAO Council. *See: ATTILA SIPOS, AZ UNI- ÉS MULTILATERÁLIS SZABÁLYOZÓI SZEREP A LÉGI KÖZLEKEDÉSBEN. AZ EGYSÉG MEGTEREMTÉSE ÉS ILLÚZIÓJA.* (2018).

the overflight).² The Seventh Air Freedom further states that a state may transport from another state to a third state without affecting its own.

In summary, the Chicago Convention is the founding document of international civil aviation. The objectives of the Convention are scattered throughout, but concrete conclusions can be drawn from them. In its preamble, it sets as its objective the importance of development and safe development and requires reasonableness and economy in their implementation. As a convention within the framework of the United Nations, it also states the equality of States (peoples) in air transport, in accordance with the Charter. Article 4 emphasizes the prohibition of abuse (which is linked to the objectives of the Convention: it is abuse which is incompatible with the objectives of the Convention). Lastly, in defining the objectives of the Chicago Convention, I believe that the objectives of the ICAO (described above) cannot be ignored.

The Protocol amending the Chicago Convention, signed in Montreal on 10 May 1984, introduced Article 3 bis, which introduces a general prohibition of the use of force or coercion against civil aircraft and details its rules. States are therefore entitled, in the exercise of their sovereignty, to force an aircraft flying over their territory to land if they have reasonable grounds for concluding that it is being used for a purpose incompatible with the objectives of the Chicago Convention, such as the placing of an explosive device on board as a weapon of some kind, for terrorist purposes.³ It is important to note that even in the event of interception of such an aircraft, the safety of persons on board or the safety of aircraft property cannot be compromised and States are obliged to refrain

² Article 5 of the Chicago Convention. Scheduled flights also require additional permission from the State overflown (Article 6 of the Chicago Convention). "The Chicago Convention," in *Routledge Handbook of Public Aviation Law* (New York, NY : New York, 2016.: Routledge, 2016), 21–44, <https://doi.org/10.4324/9781315297774-7>.

³ Paragraph b) of Article 3 bis of the Chicago Convention. "The Chicago Convention."

from the use of weapons against civil aircraft.⁴ (In relation to the inserted Article 3 bis, an extreme view may be taken that the principle of sovereignty under the UN Charter may be an exception to its application, which seems to be confirmed by the fact that Article 1 of the Chicago Convention provides that a State “has complete and exclusive sovereignty over the airspace above its territory” and that the provisions of the Chicago Convention are subject to the UN Charter. However, I agree with the view that an interpretation of the rules on such a basis would render Article 3 bis meaningless and void.)⁵ Finally, Paragraph d) of Article 3 bis further strengthens the guarantees of use contrary to the objectives of the Convention by obliging States to take appropriate steps to prohibit such use of aircraft registered or operated in their State.

Reference should also be made to the issue of the status of aircraft. An aircraft is defined by law as “any structure whose stay in the atmosphere results from interaction with the air other than the action of air forces acting on the surface of the earth”.⁶ In the sense of a purely physical definition, aircraft is therefore a broad concept, and in addition to passenger aircraft, many other devices - even a simple kite - can be considered aircraft. The (legal) status of an aircraft can be interpreted in several dimensions, but the most important for our topic is the distinction between state ownership and civil or state⁷ aircraft.

⁴ Paragraph a) of Article 3 bis of “The Chicago Convention.”

⁵ Robin Geiß, “Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3bis of the Chicago Convention, and the Newly Adopted German Luftsicherheitsgesetz,” *Michigan Journal of International Law* 1 (2005): 255.

⁶ Point 5 of Section 71 of “Hungarian Act XCVII on Air Transport” (1995).

⁷ The Chicago Convention consistently uses the terminology 'state aircraft', but some authors use the terms 'state' and 'military' aircraft as synonyms. The San Remo Manual on International Law Applicable to Armed Conflicts at Sea, on the other hand, is known to distinguish between the terms 'state aircraft', 'military aircraft' and 'civil aircraft'. It is important to emphasize that, in my view, although both terminologies may indeed be correct, *i.e.* the adjectives 'state' and 'military' may be used synonymously behind the term 'aircraft', and, in fact, there is no confusion in the definitions generally used in international law, I wish to stick consistently in this paper to the adjective 'state' as used in the Chicago Convention, by considering military aircraft as state aircraft, unless otherwise indicated.

State affiliation is defined on the basis of the *lex bandi* principle: “aircraft have the nationality of the State in which they are registered”.⁸ The consequence of this regulation is that the aircraft's flight deck is the (moving) quasi-state territory of the registering state, over which it has jurisdiction. (Registration is governed by the rules of ICAO Annex 7 and by certain state laws.)⁹

There is no accepted definition of civil and state aircraft in international law, and the Chicago Convention only uses an overly general definition (requiring exceptions and footnotes) when it states that “aircraft used in military, customs and police services shall be deemed to be state aircraft”.¹⁰ The lack of definition also leads to a series of serious consequences. On the one hand, the Chicago Convention, as the highest basic document for international civil aviation, should and can only be applied to civil aircraft. On the other hand, civil aircraft are defined by the concept of state aircraft, *i.e.* all aircraft that are not state aircraft are civil. Although this rather flexible regulation has been carefully elaborated over the decades by the legal practice, it has been and still is the basis for many disputes on interpretation and application. In practice, the status of an aircraft can only be determined in the light of its intended use, the quality of the crew on board, the flight plan and the aircraft's cargo,¹¹ as well as other characteristics and circumstances (*e.g.*, ownership, nature of the operator, quality of the pilot and commander, registration, on-board documentation, *etc.*). This of course leads to many difficulties in examining and judging each specific event, as in the case at hand (and this is compounded by mixed situations, such as civil aircraft performing state functions or civil aircraft carrying weapons in peacetime in addition to passengers). The Articles 62 and 63 of the San Remo Manual on the International Law Applicable to Armed

⁸ Article 17 “The Chicago Convention.”.

⁹ “The Polish Supremacy Mark: SP” (n.d.).

¹⁰ Paragraph b) of Article 3 of “The Chicago Convention.”

¹¹ Attila Sipos, “A Polgári Légi Jármű Jogi Státusza,” *Repüléstudományi Közlemények*, no. 3 (2017): 278.

Conflicts at Sea, of which provide a number of examples, may be helpful in assessing specific cases, especially in mixed situations, but it is often only a guide, as it is often not applicable, especially in the context of 'ordinary' scheduled air transport.

We will see its relevance in the following discussion of possible alternatives to Belarus' conduct, and I will conclude by mentioning the concepts of self-defense and the use of arms in international law in the context of the relevant regulatory framework. Under Article 51 of the UN Charter, a state has the right to self-defense in the event of an armed attack (but is obliged to bring it promptly to the attention of the Security Council).¹² The invocation of self-defense by some states has subsequently been found to be unlawful in several cases, and in practice there are also a smaller number of cases in which the legality of self-defense has been upheld. Among the conditions for its existence, reference should be made to the following. 1. Point 4 of Article 2 of the UN Charter prohibits the use of force, while Article 51 refers to armed attack as a condition of self-defense; the two concepts are not only grammatically distinct but must also be distinguished in their interpretation. Although this difference in terminology has led to many practical difficulties and disputes, international lawyers generally agree that it is not possible to respond to all armed violence in self-defense. Thus, the level of armed aggression requires a definition (even on a case-by-case basis), which must therefore be sufficiently serious to result in the lawfulness of self-defense. Moreover, the armed attack must be committed by the State. An armed attack which, although sufficiently serious, is not attributable to the State is not a legitimate self-defense. In examining the conditions of self-defense, it is not possible to have regard only to the UN Charter, but it is also necessary to take account of customary international law. The requirement of proportionality requires that

¹² Katalin Siska, *A Nemzetközi Jog Alapkérdései a Nemzetközi Kapcsolatok Elméletének És Történetének Viszonylatában: Tankönyv Közigazgatási Menedzsereknek* (Debrecen: Debreceni Egyetemi Kiadó, 2010). and Katalin Siska and Sándor Szemesi, *A Nemzetközi Jog Története* (Debrecen: Kossuth Egyetemi Kiadó, 2006).

the use of force in self-defense must be proportionate to the attack and of the same magnitude as the attack. The requirement of necessity means that the attacked State may use self-defense only to repel and repulse the attack, and only as long as it is necessary to do so. The time factor should also be mentioned here: the need to repel and repulse an attack can no longer be necessary if it is not an immediate response to the attack.

The lawfulness of self-defense is generally based on the actual attack, but in fact at least on the actual and imminent threat; action against alleged attacks is unlawful. This brings us to the concept of preventive self-defense, which has two sub-categories: preemptive self-defense against an attack which has not yet occurred but is imminent, and preventive self-defense against a more distant attack which has not yet occurred and is not imminent. Accordingly, while the practice of preemptive self-defense is considerably more permissive (particularly in view of the modern and highly destructive nature of the means of warfare), preventive self-defense, which is largely based on assumptions, is prohibited; any recognition of the latter could lead to the right of self-defense being extinguished.¹³

I have already referred to the question of the interpretation of the use of arms in the definition of self-defense. It can be seen that the concept of the use of arms is surrounded by similar difficulties as the concepts of civil and state aircraft. Just as the seriousness of the armed attack is decisive for the lawfulness of self-defense, so is the violence used against an aircraft. Again, Paragraph a) of Article 3 bis of the Chicago Convention prohibits States from using weapons against civil aircraft. In the light of the above, the concept cannot be identified with the concept of violence under the UN Charter (at most it can be only partially related to it); not all acts of violence are necessarily armed (assault),¹⁴ in my view the use of weapons implies violence that goes beyond the level of aggression. It should also be borne in mind

¹³ Gábor Kajtár, "Az Erőszak Tilalma," accessed March 13, 2023, <http://ijoten.hu/szocikk/az-eroszak-tilalma>.

¹⁴ Kajtár.

that 'apprehension' within the meaning of Paragraph a) of Article 3 bis inevitably involves at least one lesser form of violence, which of course cannot endanger the safety of persons and property. In conclusion, the prohibited conduct is the use of weapons in the most serious form of violence; when used against an aircraft, it is in fact synonymous with shooting.

The research after the literature review, the theoretical frameworks and identifying the key concepts related to the case, encompasses legal documents, and international conventions. The purpose of these steps are to gain a deep understanding of the regulatory environment, historical context, and precedents relevant to the incident.

A legal analysis is conducted to examine the regulations and international conventions governing the actions of states in situations involving civil aviation. Key legal documents to be considered include the Chicago Convention on International Civil Aviation, the San Remo Manual on International Law Applicable to Armed Conflicts at Sea, and the United Nations Charter. These sources provide the necessary legal framework to evaluate the behavior of the Belarusian authorities and the implications for international law. This analysis provides valuable insights into dilemmas arising from the incident.

To enrich the discussion and provide broader perspectives, a comparative analysis will be conducted. The research examines similar incidents, such as the events surrounding 9/11. By comparing these incidents, the paper aims to identify common themes, legal precedents, and provide a basis for potential best practices for addressing the dilemmas associated with such situations.

By employing a comprehensive research methodology, including literature review, legal analysis, case study, and the comparative analysis, this paper aims to present an analysis of the Belarusian authorities' actions in the forced landing of the Ryanair flight. The research will provide valuable insights into the regulatory

environment and the dilemmas faced in incidents involving civil aviation, shedding light on the complex interaction between international law, human rights, and state sovereignty.

EVALUATION OF EVENTS, ALTERNATIVES - DILEMMAS

The events can be evaluated according to the relevant rules listed in the previous chapter as follows.

As explained, the operation of the scheduled service concerned initially involved three States – Poland as the operator of the service, Greece as the State of departure and Lithuania as the country of arrival. It was also noted that all three, apart from Greece, are party to the Chicago Convention, as is Belarus, which became involved in the chain of events. The Convention thus applies to them and is binding on them; Greece applies the rules on international civil aviation relevant here by virtue of other international treaties and principles. (It should be noted here that the prohibition on the use of arms in Paragraph a) of Article 3 bis of the Chicago Convention is in fact a codification of customary international law, which therefore applies to all four States – and to the international community as a whole – even in the absence of the adoption of the Chicago Convention.)

Consequently, Air Freedoms (or equivalent rights) are also enforced among the States involved in the events. The First and Seventh Freedoms of the Air, as detailed above, have therefore allowed the Polish airline to operate between the Greek-Lithuanian states. (Ryanair, of course, also holds the relevant state licences for scheduled air services.)

However, it is difficult to assess the case from the very beginning of our investigation. In any case, the determination of the status of aircraft is a crucial issue (since, I repeat, the Chicago Convention applies only to civil aircraft), which requires several

questions to be addressed. A private company (such as an airline) carrying civilians on scheduled flights with privately owned aircraft can easily lead to the easy recognition that the aircraft's classification is clearly civil, but, as I have indicated earlier, determining whether the aircraft was of state or civil status requires a complex examination of the circumstances. The flight crew of the aircraft in this case, including in particular the pilots and flight attendants, were identified as civilian personnel employed by Ryanair (although it is possible that State personnel, such as those performing official or public duties, may be on board a civil aircraft, it is not a State aircraft in all the circumstances of the case; this was not the case in our case and such a factor did not complicate the assessment). I should also note here that, in other respects, the case-law does not regard the shipper or airport ground handling staff as persons performing a public task.

The flight plan and the cargo of the aircraft involved in the case also lead to the conclusion that it must have been a civil aircraft, since it was carrying passengers for the private transport of civilians. (However, in relation to the shipment, the following should be noted. On the one hand, there are no detailed data on the cargo and mail of the aircraft, and it should also be borne in mind that it is not uncommon for a civil aircraft to carry military equipment, such as weapons, if you like, along with the passengers' baggage, but, in the circumstances of the case, this fact alone, even if it had been so, would not directly and unequivocally result in the aircraft being classified as state aircraft. On the other hand, it must be established that the aircraft is a kind of cargo of the passenger himself. When classifying the transported cargo, it should be considered whether the passengers on board are military, state or civilian, which already makes the assessment more difficult.

Although in our case it is probably reasonable to say that the aircraft was civilian, the foregoing leads to a series of dilemmas: how many soldiers, in addition to civilians, must be on board the aircraft to qualify as a state aircraft; whether the ratio of civilians to soldiers

is the determining factor, or whether the number of soldiers must necessarily be greater; but perhaps even a single soldier among hundreds of passengers may raise doubts as to the civilian status of the aircraft.) But it is even more difficult to draw conclusions about the use of the aircraft. First of all, it must be established that the use is to be understood as the current use. To illustrate the importance of this, I will use the most significant event¹⁵ in the history of the development of aviation security, the terrorist attacks of 11 September 2001, as an example. As is well known, during the incident, terrorists hijacked, diverted and flew four aircraft into iconic US buildings, including the World Trade Center's twin towers and the Pentagon,¹⁶ killing more than six thousand people. The US government (President) has been criticized on numerous occasions for not using an armed strike against the hijacked planes, which would have taken the lives of those on board (but unfortunately, they were killed anyway), but could have saved thousands of lives on the ground and in the buildings involved.

As we have seen, the prohibition on the use of weapons applies to the United States even though it is not a party to the Chicago Convention, which is in fact a codification of customary international law. However, the use of weapons is prohibited against civil aircraft. Whether the aircraft was indeed a civil aircraft is a matter of interpretation, since the perpetrators of the foreign state were using the aircraft for state (military, terrorist) purposes at the time. This is further complicated if we also take into account the interpretation of

¹⁵ Many authors refer to the events of September 11, 2001 as having changed the world and brought international terrorism to a new level; it is common to distinguish between the "pre-September 11" and the "post-September 11" worlds. (See for instance: Ildikó Ernst, "A Nemzetközi Légiközlekedés Védelme (PhD Diss)," *University of Pécs* (2007). and Katalin Siska, "Gondolatok a Török Külpolitika 21. Századi Útkereséséről," *Jura*, no. 1 (2018).

¹⁶ The fourth aircraft was supposed to have targeted the White House or the Capitol in Washington D.C., but the passengers managed to regain control of the aircraft, saving the target and possibly hundreds, perhaps thousands, of other lives. The aircraft eventually crashed into a field in Pennsylvania less than a quarter of an hour from the presumed target.

the German Constitutional Court¹⁷ that the aircraft used for the terrorist attack were used as weapons against the US state and the civilian population (or to intimidate the population and disrupt the social and economic order of the state); although the aircraft used for the terrorist attack were (for the moment) used for military (war) purposes.

The question of use is therefore a complex one, and it must be remembered that at the time the threat was detected, the sequence of events was not yet known, *i.e.* the decision-maker could not have known the nature and type of the hijacking, the purpose or method of the hijacking, or that it would fly into a building and kill thousands of people. Obviously, this is also the reason why the US has not taken any action in self-defense. If this had not been the case, and the US had launched an armed attack on the aircraft, classified as a state (military) aircraft – or on any other legal basis, such as self-defense – it could have saved thousands of lives, but the purpose and manner of the attack would probably never have been known, which would have certainly made the US action illegal by the international community. The responsibility that led to all these painful findings is not diminished by the fact that the US decision-maker did not have sufficient opportunity for due reflection in the time between the detection and knowledge of the consequences and the time they occurred.

Moreover, while mentioning the very short time available for decision-making, it should not be forgotten that the United States 'needed' an actual attack – or at least the immediacy of an attack – to invoke self-defense, as follows. As events progressed from the stage of a not-yet-occurring but not direct attack to the stage of a still not-yet-occurring but already direct attack, perhaps only minutes elapsed, meaning that the US conduct could easily have been stuck at the level of prohibited preventive self-defense. Finally, it should also be pointed out that self-defense should have been immediately reported

¹⁷ See: BVerfG, Urteil des Ersten Senats vom 15. February 2006, 1 BvR 357/05.

to the Security Council and the use of weapons against civil aircraft to the ICAO Council, a time-consuming task which, in the context of the moment-by-moment change of events, would have only complicated the situation and would have led to a waste of valuable time, which could have made it appear that the US was the cause of the events that were taking place. These observations must, of course, be based on an assessment of the events as an attack. However, a further condition for the invocation of self-defense is that the attack must be attributable to another state; the question is whether, in the short time available, anyone could have established beyond doubt that the aircraft was being piloted by terrorists (Taliban) whose activities were attributable to another state.

The parallel with the events in Minsk is that, while the fact of the explosive device on board has not been proven, the Ryanair flight approached its destination as a similar – quite literally – ticking time bomb, potentially endangering the lives of those on board and on the ground. (Consider, for example, that until it was revealed that the incident was a false alarm, it would have taken a legal basis, or rather, reckless courage, for anyone to treat the news of the explosive device lightly.)

In the light of the events of 11 September, it can be concluded that the Belarusian state should have refrained from using weapons against the flight, as this would have gone beyond the bounds of legality (a statement that is also true of other states, such as Lithuania, which did not have the right to take armed action.) It should be noted that the legality of self-defense would also have been fundamentally questionable in the case of Belarus, since the target of the attack would not have been Belarus but Lithuania anyway.

Another dilemma of extreme importance should be mentioned in connection with the previous problem. No one can be deprived of the right to life and the right to human dignity as interrelated

fundamental rights,¹⁸ which can be considered the most fundamental human right.¹⁹ The state has a duty to respect and protect fundamental rights, and it can therefore lay down obligations to enforce them. Ensuring the right to life requires, on the one hand, active intervention and protection on the part of the State (the 'positive side') and, on the other hand, passivity and refraining from taking life (the 'negative side'). In view of the tragic outcome, I will again use the events of 11 September 2001 as an illustration. In order to guarantee the right to life, the state has a duty to protect its citizens²⁰ and those on the ground and in the buildings affected by the attacks against the attack of a hijacked aircraft approaching them and posing a potentially fatal threat: it would therefore be necessary to intervene, ultimately by armed force, against the 'weaponized' aircraft.

At the same time, the state has a duty to refrain from taking human life, and therefore cannot violate the right to life of those on board the aircraft. Some have argued that it is right to take the lives of those on board, given that, on the one hand, the terrorist act would claim their lives anyway, and it is not the 'shooting' that takes their

¹⁸ Cf. Decision No 23/1990 (X. 31.) of the Hungarian Constitutional Court, with the concurrent opinion of Dr. László Sólyom, Constitutional Judge.

¹⁹ The emergence of human rights is mainly linked to the development of the English, French and American constitutions. Human rights were first enshrined in the UN Charter, and later in 1948 the General Assembly adopted the now binding Universal Declaration of Human Rights. Although some argue that the Turkish peace treaty of independence signed in Lausanne, Switzerland in 1923 was already a human rights treaty (see: Katalin Siska, "A Kisebbségi Jogok Alakulása Törökországban, Különös Tekintettel a Lausanne-i Szerződés Rendelkezéseire," *Iustum Aequum Salutare*, no. 3 (2016): 177.

²⁰ Citizenship is a fundamental and strategic concept of public law that defines the relationship between the state and the individual (Katalin Siska, "Mustafa Kemal Atatürk hatása a török identitás és állampolgárság koncepciójára, különös tekintettel az alkotmányjogi szabályozásra" *Jog-Állam-Politika*, no. 1. (2016): 61.), the essential content of which – status, rights and obligations on both sides – is enshrined in the state's constitution. Citizenship is a modern concept, the first general definition of which certainly appeared in the first edition of the Dictionnaire de l'Académie Française of 1835 (see: Katalin Siska, "Fear Not...! Turkish Nationalism and the Six Arrows System – A State in Search of a Nation", *Hunarian Journal of Legal Studies* (2016): 277. and Katalin Siska, "A női jogok alakulásának áttekintése a Török Köztársaság megalakulásától napjainkig" *Jog-Állam-Politika*, no 2. (2017)).

lives, but the terrorists themselves, and on the other hand, because, the loss of a few hundred lives at the most and the saving of thousands of others on the ground, and thirdly, because the passengers are in fact part of the aircraft and, in choosing this method of travel, the risk of such rare events was tacitly agreed and accepted. However, the German Constitutional Court decision cited above has shown that this approach is wrong on several points. Sacrificing the lives of innocent people would be a violation of the right to life and dignity even if it could save the lives of a significant number of people. In addition, it should be borne in mind that the wreckage and remains of the downed aircraft also endanger the lives of innocent people on the ground, which could lead to further violations of fundamental rights.

The part of the argument that the passengers are part of the aircraft as a weapon is also wrong, as this objectifies those on board, depriving them of their humanity and ultimately of their human dignity, which is also a violation of fundamental rights. Finally, the passengers are also objectified by the view that their death would have occurred with or without the shooting; they are victims of a desperate situation from which they have no means of escape, they have no control over events or their fate, and therefore, by shooting them, they become victims not only of the terrorists but also of the state.

In my opinion, it should also be borne in mind that until the fatal outcome of the events occurred, no one (or at most only the perpetrator on board) could have been sure of exactly what was going to happen, i.e. that the passengers would lose their lives. Consider the following. Imagine the 'final' moment in time – like a freeze-frame – when the plane has not yet crashed into the World Trade Centre tower, but an arbitrarily small unit of time later the disaster occurs.

If we can see this frame in front of us, then we can say with certainty that the danger is imminent and inevitable. What can we do then? Even if we were able (technically, for example) to stand by and wait for this 'last moment', and then use only an armed attack on the

aircraft (assuming that the wreckage scattered after the shot does not cause any damage or injury), we could say with absolute certainty that the passengers on board would have died even if no weapons had been used. However, if we now move backwards in time from that frame, and as we move further away from it, that certainty diminishes exponentially – which is probably influenced by human nature, by hope. Even if we were able to determine in advance the moment at which the probability of survival of the passengers is at least extremely low, it is doubtful that the use of a weapon would still be physically possible.

To summarize, human life cannot be measured in numbers: less cannot be sacrificed for more life; the protection of life and the right to life of each individual cannot be distinguished on qualitative or quantitative grounds. There is no doubt, therefore, that Belarus would have exceeded the limits of the law if it had used weapons.

It can be concluded that in the case of the Ryanair flight (as in the case of the planes involved in the 11 September attacks), the detection of the alleged threat without the consequences did not provide sufficient grounds for choosing the appropriate method of response, and the immediate threat required acute and immediate intervention. It is therefore reasonable to ask what other means Belarus could have had at its disposal at the time of the recognition of the threat (which, even if real, proved to be a blind alley only after the fact) other than forcing the country to land, if the use of force and arms was not, as explained above, a reassuring solution. What else could the state have done in the event of a bomb threat, which would not have wasted valuable time and would have been not only swift but effective and, at the same time, legitimate intervention?

I refer you back to the beginning and remind you of another prohibition in Article 3 bis: “in case of interception, the lives of persons on board and the safety of aircraft must not be endangered”. Belarus's conduct undoubtedly constituted an 'interception', but there was no threat to the safety of persons or aircraft, nor any harm to

them, and therefore, in the absence of such consequences, Belarus is not responsible for the interception. It must therefore be determined whether Belarus could legitimately have forced the Polish aircraft to land in the light of Article 3 bis, that is to say, whether the conditions in Paragraph b) of Article 3 bis were satisfied.

Paragraph b) of Article 3. bis:

„The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.”

In relation to Paragraph a) of Article 3 bis, it is worth mentioning that, although the opinion among international jurists is not entirely unanimous, the view I have taken is that it does not apply only in the national airspace concerned, and that its territorial scope is not limited. In addition to the grammatical interpretation (the wording is a general prohibition and includes the phrase 'every State must refrain'), this is supported by judicial practice and some historical examples.

Unlike in Paragraph b), where there is a reason to consider that the territorial scope is limited to national airspace. The wording of the provision opens up the possibility of applying the rules in Paragraph b) as “in the exercise of its sovereignty”, and the wording also includes the phrase "above its territory". Both the grammatical and the teleological interpretation thus reflect the right of a state to require a civil aircraft in flight to land or to give other instructions in the

airspace above its territory. (It should be noted that international legal opinion on this point is not entirely unanimous, but there is greater agreement than in the case of Paragraph a).)

Whether or not the above position is accepted, none of the above cases will lead to a finding of an infringement in relation to Belarus' conduct. The Ryanair aircraft was in Belarusian airspace when the landing order was issued (or when it was intercepted), and Belarusian jurisdiction therefore extended.

De iure legal consequences under Paragraph b) of Article 3 bis: requiring landing at the designated airport, giving other instructions to the state to end the infringement, arrest, initiating prosecution (e.g. before the ICAO Council); and de facto: subsequent protest or other diplomatic pressure. For legal consequences to apply, one of two conditions must be met: (1) the aircraft flies over the territory of the state without authorization, or (2) the aircraft is used for a purpose inconsistent with the objectives of the Chicago Convention.

Ryanair had the necessary authorization to operate its flight (it had the right to fly over Belarus under the Air Freedoms and the necessary permission to operate scheduled flights), so the Belarusian state's options were limited: to force it to land, it had to conclude on reasonable grounds that the aircraft was operating for a purpose incompatible with the objectives of the Chicago Convention.

The objectives of the Chicago Convention were reviewed in the first chapter, and it was concluded that, although they are not explicitly listed in the Convention as a whole, a comparison of the principles in some articles and the ICAO objectives allows us to draw concrete conclusions. In particular, it can be concluded that an aircraft is incompatible with the objectives of the Convention if it α) is used as a weapon of destruction,²¹ β) is used for activities prejudicial to the national security of a State, γ) is used in violation of the public order of the state concerned, δ) its activities constitute a criminal offence,²²

²¹ "ICAO Doc 9958," n.d.

²² There seems to be a consensus in the jurisprudence and practice of states that the commission of certain (mainly serious) offences is incompatible with the objectives of the

such as illicit drug trafficking, arms smuggling, trafficking in human beings or other serious and frequent offences,²³ and certainly ε) it endangers the safety of flight, (ζ) it violates the sovereignty of the state concerned, or (η) its use is not for peaceful purposes.

The potential danger posed by the explosive device in our case is undoubtedly incompatible with the objectives of the Convention. According to Belarus, the State forced the aircraft to land because of the above.

It can be concluded that the Belarusian conduct met all the above conditions, and no illegality can be established in view of the foregoing. However, in order to qualify the conduct as lawful, we must note that the conclusion must also be 'reasonable cause', i.e., read in conjunction with the second phrase of the first sentence – “reasonable grounds to conclude” – it must also be reasonable on the basis of the grammatical interpretation.

CONCLUSION

In addition to the test of reasonableness set out above, in my view, it cannot be ignored whether the Belarusian authorities – or the authorities concerned – could have had other legitimate, more appropriate and more effective alternatives to the intervention. (Of course, the text of the relevant legislation does not provide for necessity-proportionality requirements, so the consideration of these aspects may be less relevant in determining legality than in the assessment or justification.) I think that the case has highlighted a number of shortcomings and difficulties in addition to the dilemmas that have been discussed. There are issues relating to the legal status of the aircraft, the use of weapons or self-defense, or the vulnerability

Chicago Convention, but it is not clear, and opinions are divided, exactly which offences are meant. Several authors referring to the Tokyo Convention includes virtually any offence.

²³ Based on specific references made at the 25th (extraordinary) Session of the ICAO Assembly. See also: Michael Milde, “Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2),” *Annals of Air and Space Law*, 1986, 125.

of fundamental human rights, but there are also shortcomings in the system of sanctions for breaches of Article 3 bis, or, for example, the abuse of rights. It is also unclear whether it is unreasonable, or even dangerous, for a state, in the exercise of its sovereignty, to force an aircraft to land at its own airport when applying Article 3 bis, even if the airport of a neighboring state is physically closer or even more easily accessible. Or can the requirement of safety periodically override the general principles of sovereignty?

The case before ICAO, which is the subject of this paper, is likely to present the aviation organization with questions and challenges for careful consideration on both fronts – as a quasi-legislator and as a quasi-judge. The decisions in the Belarus conduct case are likely to be precedent-setting; they will also need to be of a nature to shape the practice of law enforcement, to facilitate difficulties of interpretation and to fill gaps. These events have placed a new and serious responsibility on ICAO, but I believe that it is not possible to avoid answering these questions at this time.

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