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## **Ryanair flight no. FR 4978. Legal aspects of the hijacking of a Polish plane in Belarus on 23 May 2021**

### **Abstract**

This article is devoted to a legal analysis of the events of 23 May 2021 involving a Polish Boeing 737-800 with registration number SP-RSM, performing a flight from Athens to Vilnius, specifically the actions of the Belarusian authorities (air traffic services and special services) that led to the forced landing of this aircraft in Minsk, which allowed the arrest of Roman Protasevich and his partner. The basis of the considerations in the first part of the article is the interpretation of the relevant international and Belarusian law in the context of the revealed circumstances surrounding the incident under investigation. The author's aim was to answer the question of whether the actions of the Belarusian authorities were legal. Ultimately, it was shown that on 23 May 2021, a number of legal rules governing air navigation were violated in relation to the Polish aircraft, which raises the question of who should bear responsibility for it and on the basis of which legal norms. The second part of the article is devoted to this issue. The conclusion is that under international law, the responsibility for the illegal forced landing of Boeing 737-800 should be borne by the Belarusian state, and under internal criminal law regulations - by individual Belarusian officials.

### **Keywords:**

Ryanair flight  
no. FR 4978, flight,  
aircraft, hijacking,  
Chicago Convention,  
Roman Protasevich

The article is devoted to a legal analysis of the events that occurred on 23 May 2021 involving a Polish Boeing 737-800<sup>1</sup>, SP-RSM operating a Ryanair flight no. FR 4978 from Athens to Vilnius via Belarus, specifically the actions of the Belarusian authorities (air traffic control and probably the special services of the Republic of Belarus) that led to the unscheduled landing of the aforementioned plane in Minsk. This, in turn, made possible the detention of Roman Protasevich<sup>2</sup>, an anti-Lukashenko opposition activist, and his partner Sofia Sapiiega.

The primary objective of the deliberations was to answer the question of whether the actions of the Belarusian authorities, resulting in the landing of Boeing 737-800, SP-RSM in Minsk, were legal, i.e. whether and which legal norms were or could have been violated. Subsequently, an analysis was carried out with the aim of indicating whether, in the present case, a breach of the law results in liability and, if so, whose and what liability. The research objective was realised on the basis of an analysis of the relevant legislation and the available academic literature on aviation and international law, the journalistic literature on the described incident, as well as official documents, i.e. the indictment filed by the US against the Belarusian officials involved in the incident on 23 May 2021<sup>3</sup>, and

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<sup>1</sup> The number given indicates the model of the aircraft. The aircraft involved in the 23 May 2021 incident was on that date and is still registered in Poland (flight FR 4978 was operated by Ryanair Sun S.A., registered in Poland (RYS) on behalf of Ryanair Designated Activity Company (RYR) based in Ireland - both are part of the Ryanair Group) and marked with the letters SP-RSM. This designation is a code used in aviation registries. It is unique to the aircraft in question and, in accordance with the convention provisions (Article 20 of the *Convention on International Civil Aviation, signed at Chicago on 7 December 1944*, hereinafter: the Chicago Convention), must be applied to the exterior of the aircraft. The code indicates the country of registration and has a function analogous to a car licence plate. The letters FR stand for Ryanair.

<sup>2</sup> Belarusian journalist and opposition activist, currently a political prisoner. He was editor-in-chief of the Nexta channel - one of the few independent media outlets available in Belarus.

<sup>3</sup> *Indictment USA vs. Leonid Mikalaevich Churo, Oleg Kazyuchits, Andrey Anatolievich LNU (last name unknown), and FNU LNU (first name unknown, last name unknown)*. Churo is currently the director of Belaeronavigatsia, a state enterprise providing air navigation services in Belarus. According to US authorities, he was the one who personally passed information to Belarusian controllers about the bomb on board the plane coded SP-RSM. Kazjuczic is Chura's deputy. His role, according to the cited indictment, in the 23 May 2021 incident was to instruct the Belarusian air traffic authorities on how to falsify reports about the events of 21 May 2021, in order to conceal the fabrication of the bomb threat and the involvement of the Belarusian security services. Anatolyevich and Doe are, according to the US

the *Report of the ICAO<sup>4</sup> Fact-Finding Investigation, Event involving Ryanair flight FR4978 in Belarus airspace on 23 May 2021* (the ICAO Report).

In order to determine the relevant provisions for flight FR 4978, reference must first be made to its nature. As already indicated, the aircraft performing this flight was registered in Poland. Pursuant to Article 17 of the Chicago Convention, aircraft have the nationality of the state in which they are registered. In view of the above, the provisions of, *inter alia*<sup>5</sup>, the Polish *Act of 3 July 2002 Aviation Law* (hereinafter: u.p.l.) will apply to Boeing 737-800, SP-RSM. Pursuant to Article 1(3) of the cited act, (...) *civil aviation includes all types of aviation, with the exception of state aviation, i.e. state aircraft, the crews of such aircraft and state airports used exclusively for take-offs and landings of state aircraft*. It can be inferred from the above provision that a civil aircraft is any aircraft that is not state-owned. Given that flight no. FR 4978 was operated by a Polish private commercial company, there is no doubt that the aircraft operating the flight cannot be treated as a state aircraft. An additional argument, also based on the content of Article 1(3) of the u.p.l. and confirming the civil nature of flight FR 4978, is that it started and ended at a civil airport. The civil nature of flight FR 4978 also follows from Article 2(2) of the u.p.l. The cited provision provides a legal definition of a Polish state aircraft. It is: *a) an aircraft used by the Armed Forces of the Republic of Poland (military aircraft), b) an aircraft used by organisational units of the Border Guard, the Police and the State Fire Service (law enforcement aircraft)*. *A contrario*<sup>6</sup>, an aircraft that is used by private legal entities

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authorities, officers of the Belarusian secret services. Doe, together with Chura, conveyed false information about the bomb threat to Belarusian controllers and personally directed radio messages from the Minsk air traffic control tower to the crew of Boeing 737-800, SP-RSM, to induce them to land at that airport. Doe kept Anatolievich, who was his superior in the Belarusian special services, informed of the course of events.

- <sup>4</sup> A specialised UN organisation dedicated to developing and implementing international regulations governing the safety of international air navigation and to promoting the development of air transport for safe and orderly development. It was established under the Chicago Convention.
- <sup>5</sup> The use of the phrase 'inter alia' is due to the complexity and multilevel nature of the sources of aviation law, which results in certain events and related legal relations being regulated by many different norms, the scopes of which often partly overlap.. See: K. Myszona-Kostrzewa, in: *Prawo lotnicze. Komentarz* (Eng. Aviation Law. Commentary), M. Żylicz (ed.), Warszawa 2016, p. 33.
- <sup>6</sup> *Argumentum a contrario* (from Latin 'argument from contradiction') - an inference based on the principle that if a legal norm binds consequences only to the facts mentioned in it, then these consequences do not bind to other facts. After: Encyklopedia PWN,

in the form of commercial law companies cannot be treated as a state aircraft under any circumstances. The statement concerning the nature of flight FR 4978 is of crucial importance in the context of determining the relevant rules of international law. The civilian nature of the flight under consideration makes the Chicago Convention the primary piece of international law governing the most important issues relating to its organisation, conduct, safety and status. The demonstration of the civilian status of Boeing 737-800, SP-RSM on the basis of the provisions of Polish law falls, importantly, within the norms contained in this convention. Indeed, pursuant to Article 3 of that act, only aircraft used in military, customs and police service are deemed to be state aircraft. With a view to further considerations, it is worth stressing that the Chicago Convention, while distinguishing state aircraft from civil aircraft, grants the latter greater privileges, which is justified mainly on grounds of safety<sup>7</sup>.

In analysing the actions taken by the Belarusian authorities with respect to flight FR 4978 operating in Belarusian airspace, it is of paramount importance to correctly reconstruct the scope of Belarus' sovereign powers over this part of its territory<sup>8</sup>. With regard to this issue, Article 1 of the Chicago Convention states: *The contracting States recognize that each State has complete and exclusive sovereignty over the airspace above its territory. Airspace extends to the entire atmosphere around the Earth from its surface to outer space*<sup>9</sup>. The use of the word „recognize”<sup>10</sup> in the original English version leads to the conclusion that the Chicago Convention does not create a new right with

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<https://encyklopedia.pwn.pl/haslo/argumentum-a-contrario;3871009.html> [accessed: 18 X 2022] - editor's note.

<sup>7</sup> See, for example, Article 5 of the Chicago Convention, which, inter alia, creates the right to enter or overfly the territory of a State Party without landing and the right to land for non-commercial purposes without prior authorisation for any other civil aircraft of the contracting States not engaged in scheduled international air service.

<sup>8</sup> The airspace above the land surface or territorial waters of a specific country constitutes the state space of that country. See: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe publiczne w zarysie* (Eng. Public international law in outline), 10th edition, Warszawa 2004, pp. 236–237.

<sup>9</sup> Currently, the norms of international law do not precisely define the upper limit of airspace and therefore do not state where space begins. See: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 176.

<sup>10</sup> In addition to English, the original languages of the Convention are Russian, French and Spanish. Due to inaccuracies in the translation of a normative act, its interpretation should be made on the basis of the original language. See: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 93.

regard to airspace, but is declaratory in nature and confirms the existence of a customary norm<sup>11</sup>. This thesis is supported by the fact that a State's sovereignty over its airspace was already defined in the *Convention Relating to the Regulation of Aerial Navigation signed at Paris on 13 October 1919*<sup>12</sup>. The recognition of sovereignty over the airspace of the States Parties to the Chicago Convention in accordance with the principle of sovereignty<sup>13</sup> is in line with the fact that this principle is a fundamental norm of international law, recognised by the entire international community and conditions its functioning<sup>14</sup>. Pursuant to Article 2(2) of the UN Charter, it is on the principle of sovereign equality of all its members that the United Nations is based. As Wojciech Góralczyk and Stefan Sawicki note: *The authority of a state over its territory is referred to as sovereignty or territorial sovereignty. (...) All persons and things within the territory of a state are subject to its authority and law, and the presumption supports the idea that each state may act on its own territory as it wishes, i.e. as its interests dictate*<sup>15</sup>. Territorial sovereignty also extends to a state's airspace. The confirmation or reflection of the cited international norms in the Belarusian legal order is the provision contained in Article 2 of the *Aviation Code of the Republic of Belarus dated 16 May 2006*,

<sup>11</sup> B. Hartzenberg, *The rights and obligations of a state under article 3bis of the Chicago Convention pursuant to an intrusion of its sovereign air space by civilian aircraft (during peace time)*, University of Pretoria 2019, pp. 12–13.

<sup>12</sup> Article 1 of the Convention stated: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory".

<sup>13</sup> It is worth pointing out that in the early period of the development of aviation law, coinciding with the beginning of the twentieth century, two concepts competed for the guiding principle governing the airspace: the principle of sovereignty and the principle of freedom of the airspace referring to the principle of freedom of the high seas advocated by the United States. See: A. Engvers, *The Principle of Sovereignty in the Air. To what extent can it be upheld against aerial intruders*, University of Lund 2001, Master's thesis, pp. 8-11. Later on, i.e. during the work towards the enactment of the Chicago Convention, the United States also opted for the principle of freedom of the airspace in order to ensure favourable conditions for its aviation industry. As a result of American efforts, the Chicago Convention was supplemented by the *International Air Services Transit Agreement, opened for signature at Chicago on 7 December 1944*, and the *International Air Transport Agreement of 7 December 1944*, in which states granted themselves a number of aviation privileges. On the development of rules governing the use of airspace, see also: A.I. Moon Jr., *A Look at Airspace Sovereignty*, "Journal of Air Law and Commerce" 1963, vol. 29, no. 4, pp. 330–333.

<sup>14</sup> B. Hartzenberg, *The rights and obligations...*, p. 1.

<sup>15</sup> W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 126.

*no. FR 117-Z*<sup>16</sup> (hereinafter: Aviation Code of the Republic of Belarus), which states that: *The Republic of Belarus shall have full and exclusive sovereignty over the airspace of the Republic of Belarus*<sup>17</sup>.

It follows from the norms that can be reconstructed from the provisions cited above that Belarus' sovereign power over its airspace is an exclusive and total power, which theoretically suggests (Góralczyk and Sawicki use the term "presumption" in their definition of sovereignty) that, with regard to this space, the Belarusian authorities can do whatever they deem right or useful, according to the Roman *paremia*: *Quidquid est in territorio, est etiam de territorio* (all things within the territory of a state are subject to its authority and law).

Such a conclusion, however, is not appropriate and does not take into account the fact that no state functions in a vacuum, but in the environment of other sovereign states with which it must arrange its relations<sup>18</sup>. These relations are shaped by international law<sup>19</sup>, also known as the law of nations<sup>20</sup>, whose primary and undisputed sources are international agreements and international custom<sup>21</sup>. The binding

<sup>16</sup> The Code is available at: <https://etalonline.by/kodeksy/> [accessed: 6 VIII 2022].

<sup>17</sup> In Poland, too, Article 4 of the u.p.l. grants the Republic of Poland complete and exclusive sovereignty over its airspace. (For translations from Russian, the author used Google Translate) - editor's note.

<sup>18</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* (Eng. Public international law), 8th edition, Warszawa 2004, pp. 200–201.

<sup>19</sup> The term "international law" appeared in the literature in the 18th century. Janusz Symonides reports that it was first used in 1780 by Jeremy Bentham and introduced into the Polish language by Franciszek Kasperek. See: R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, p. 19.

<sup>20</sup> The term 'law of nations' is a literal translation of the Latin term '*ius gentium*'. On the other names that have been used or proposed to be used for the branch of law in question, see: R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, p. 19; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 18.

<sup>21</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, pp. 76–77; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 62. According to Article 38 of the Statute of the International Court of Justice (hereinafter: the ICJ Statute), the Court, which is charged with ruling on the basis of international law in disputes referred to it, will apply: (1) international conventions, either general or special, establishing rules expressly recognised by States; (2) international custom, as evidence of the existence of a common practice accepted as law; (3) general principles of law, recognised by civilised nations. In addition, and subject to the provisions of Article 59 of the ICJ Statute, the ICJ takes into account, in its judgements, judicial decisions and the opinions of the most eminent experts in the public law of various nations as a means of assisting in the determination of legal rules. Some representatives

of a state by the norms of international law limits its sovereignty<sup>22</sup> and raises the question of the interrelation of domestic and international law<sup>23</sup>. This issue is subject to the regulation of a country's domestic laws<sup>24</sup>.

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of the doctrine of international law point out that the sources of international law are one thing, and the grounds on which the ICJ bases its judgments are another. See: R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, pp. 76–77; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, pp. 62–63. In support of their position, the aforementioned authors cite the argument that Article 38(3) of the ICJ Statute refers to general principles of law, not just general principles of international law, and that even in the wording of Article 38, court judgments and opinions of legal experts are not considered as separate sources of law, but only as a means of assisting in the knowledge of the law. The cited authors also point out that the ICJ also has the power to rule on the basis of the principle of equity if the states involved in the dispute being decided agree to this. With regard to general principles of law, a different position, i.e. granting them the role of an independent source of international law, is adopted, inter alia, by Tadeusz Jasudowicz, see *ibid.* *O zasadach ogólnych prawa uznanych przez narody cywilizowane – garść refleksji* (Eng. On the general principles of law recognised by civilised nations - a handful of reflections), in: *Pokój i sprawiedliwość przez prawo międzynarodowe. Zbiór studiów z okazji 60 rocznicy urodzin Profesora Janusza Gilasa* (Eng. Peace and Justice through International Law. A collection of studies on the occasion of the 60th anniversary of the birth of Professor Janusz Gilas), C. Mik (ed.), Toruń 1997, pp. 143–144; Stanisław E. Nahlik, see *ibid.*, *Wstęp do nauki prawa międzynarodowego*, Warszawa 1967, p. 373, quoted by: T. Jasudowicz, *O zasadach ogólnych prawa...*, p. 144; Anna Kociołek-Pęksa and Jerzy Menkes, see the same, *Problematyka sankcji i countermeasures w prawie międzynarodowym publicznym – wymiar filozoficzno prawny* (Eng. The issue of sanctions and countermeasures in public international law - a philosophical and legal dimension), Wrocław 2017, p. 88.

<sup>22</sup> B. Hartzenberg, *The rights and obligations...*, pp. 13–14, 20, 38. According to Hans Aufricht, states that are dependent on international law but independent of other actors are to be considered relatively sovereign. On the difference between relative and absolute sovereignty see: H. Aufricht, *On Relative Sovereignty*, "Cornell Law Review" 1944, no. 137, p. 141. As to why states are obliged to comply with the norms of international law, there are various theories: normativist, solidarityist, naturalist (sometimes referred to as the doctrine of basic fundamental rights of states and referring to the law of nature), positivist (voluntarist, indicating that the foundation on which the existence of international law is based is the will of states as expressed either in customary norms, i.e. common practice recognised by states, or in convention norms). See further: R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, pp. 21–22. The voluntarist theory found expression in the judgment of the Permanent Court of International Justice of 7 September 1927 in the Lotus ship case: "The rules of law binding upon States (...) emanate from their own free will. (...) Restrictions upon the independence of States cannot (...) be presumed". The judgment is available at: [http://www.worldcourts.com/pcij/eng/decisions/1927.09.07\\_lotus.htm](http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm) [accessed: 14 VIII 2022].

<sup>23</sup> In this context, the question of the hierarchy of the two systems becomes particularly important.

<sup>24</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, p. 27.

The influence of international law in determining the scope of Belarus' sovereignty over its airspace and its de facto overriding role is set out in Article 4 of the Aviation Code of the Republic of Belarus. Pursuant to it: *The legislation of the Republic of Belarus on the use of airspace and aviation is based on the Constitution of the Republic of Belarus and consists of the Aviation Code, other laws of the Republic of Belarus, acts of the President of the Republic of Belarus, rules for the use of the airspace of the Republic of Belarus, aviation regulations and other legal acts.* What is particularly important in the context of the considerations carried out in this article, it follows from Article 4(2) of the cited act that if an international agreement lays down rules other than those provided for by domestic legislation on the use of airspace and aviation, the provisions of the international agreement shall apply. The supremacy of international law vis-à-vis national airspace regulations is also confirmed by the constitutional regulations of Belarus, notably Article 8 of the Belarusian Constitution, which states: *The Republic of Belarus recognises the supremacy of the generally recognised principles of international law and ensures that its legislation complies with them.* This provision is of great importance if one considers that, in principle, each state is free to determine the relationship between its domestic law and international law<sup>25</sup>. For it is evidence of a voluntary decision by Belarus to recognise the supremacy of international law.

In addition to the rules and international custom generally accepted by civilised nations, the bulk of international law binding on sovereign states derives from treaties concluded by those states, which are a fundamental and, moreover, an increasingly important source of the law under consideration<sup>26</sup>. The basic issues concerning the conclusion of international treaties by states are regulated by the *Vienna Convention on the Law of Treaties drawn up in Vienna on 23 May 1969* (hereinafter: the Vienna Convention). Pursuant to Article 6 of this act, every State has the capacity to conclude treaties. The consent of a State

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<sup>25</sup> Ibid.

<sup>26</sup> See: M. Olesiuk-Okomska, *Umowa międzynarodowa jako źródło polskiego prawa karnego* (Eng. An international agreement as a source of Polish criminal law), in: *Umiejdzynarodowienie krajowego obrotu prawnego* (Eng. Internationalisation of national legal transactions), vol. 2, I. Kraśnicka, W. Hryniewicka-Filipkowska (eds.), Białystok 2017, p. 33; R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, p. 106; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 66. The increased importance of international agreements as a source of international law is also indicated by the preamble to the Vienna Convention.



to be bound by a treaty implies that the State entering into it voluntarily assumes the obligations arising therefrom, which must be fulfilled in good faith by the State party<sup>27</sup>. Moreover, it follows from Article 27 of the Vienna Convention that (...) *a party may not invoke provisions of its domestic law to justify its failure to implement a treaty.*

The arguments carried out lead to a conclusion which is the most important for the assessment of the behaviour of the Belarusian authorities in relation to flight no. FR 4978. Well, the scope of Belarus' authority over its airspace does not derive only from the principle of sovereignty and, therefore, is not of an absolute, unlimited character. The territorial sovereignty of Belarus over the airspace belonging to this country (the catalogue and the manner of implementation of specific and permissible actions) is co-shaped by many additional norms of international law. They have both the character of customary law and result from the provisions of positive law in the form of international agreements, among which the Chicago Convention should be mentioned in the first place, as well as from the law-making resolutions of the ICAO<sup>28</sup>. In the context of these considerations, Article 3 bis of the Chicago Convention (hereinafter: Article 3 bis) is of fundamental importance. The provisions it contains were not included in the original version of the Convention. Article 3 bis was not enacted until an extraordinary session of the ICAO Assembly<sup>29</sup> in 1984. This was in response to the downing by the USSR of Korean passenger aircraft KAL 007 (269 persons on board), which had inadvertently violated the territorial space of the USSR<sup>30</sup>. The Republic of Belarus ratified the article in question in 1996. It formally entered into force in 1998, when it was adopted by

<sup>27</sup> See in this regard Article 26 of the Vienna Convention. In the aforementioned judgment delivered on 7 September 1927 in the Lotus ship case, the Permanent Court of International Justice stated: "(...) every State remains free to adopt the principles which it regards as best and most suitable".

<sup>28</sup> The ICAO Council adopts, by a two-thirds majority, international standards and recommended practices on a number of civil aviation issues, known as SARPs (*Standards and Recommended Practices*). They become binding on states three months after their adoption, unless a majority of states object. See: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 109.

<sup>29</sup> It is one of the organs of ICAO. The modus operandi and tasks of the ICAO Assembly are derived from Articles 48 and 49 of the Chicago Convention.

<sup>30</sup> A. Engvers, *The Principle of Sovereignty...*, p. 35; B. Hartzenberg, *The rights and obligations...*, pp. 8–9.

the required number of States<sup>31</sup>. The cited article codifies a number of norms concerning the powers of a State vis-à-vis an aircraft flying through its airspace. It implies, firstly, the right to intercept a civilian aircraft, in which case the lives of those on board and the safety of the aircraft must not be endangered, and secondly, a relative prohibition on resorting to the use of weapons against a civilian aircraft in flight.

The applicable rules and specific procedures for the interception of aircraft are set out in Annex 2 to the Chicago Convention (*Rules of the Air*), issued under Article 37 of that Act, in international standards and recommended methods and rules of practice (SARPs), as well as in national Aeronautical Information Files<sup>32</sup>. Interception of civil aircraft can only be carried out under specific circumstances. These include, for example, failure to maintain communications, in particular failure to respond to calls, and entry into the airspace concerned without explicit or implicit consent, in particular into prohibited space, restricted airspace or active danger zone<sup>33</sup>. The reference of the examples indicated to flight FR 4978 leads to the conclusion that no circumstance permitting the interception of the Polish aircraft occurred. At the same time, for the sake of argument, it should be added that no such interception took place. It is true that a Belarusian military MIG was scrambled in connection with the events of 23 May 2021, but it took no action against the Boeing 737-800, SP-RSM. According to the ICAO Report, its pilots were unaware that a Belarusian fighter jet was flying towards them<sup>34</sup>.

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<sup>31</sup> Given the fact that Belarus is formally bound by Article 3 bis, it should be pointed out only in passing that, insofar as it defines a norm in the form of a prohibition on the use of weapons against civilian aircraft, it is generally regarded by international law doctrine as a declaratory provision that does not create new norms (already functioning as customary law), but merely confirms their existence. See: A. Engvers, *The Principle of Sovereignty...*, p. 43; B. Hartzenberg, *The rights and obligations...*, pp. 24–25.

<sup>32</sup> *Aeronautical Information Publication (AIP)* - documents issued with the participation of the national administration of a country, which constitute a collection of aeronautical information of a permanent nature. They contain, inter alia, data on aerodromes, airways and procedures in force, which are relevant to air navigation. In Belarus, the publication of AIPs is handled by Belaeonavigatsia.

<sup>33</sup> See also: *Zasady przechwytywania cywilnych statków powietrznych* (Eng. Rules for the interception of civil aircraft), Dla pilota, 26 V 2021, <https://dlapilota.pl/wiadomosci/dlapilota/zasady-przechwytywania-cywilnych-statkow-powietrznych-przez-wojskowe-konstrukcj> [accessed: 1 VIII 2022].

<sup>34</sup> ICAO Report, p. 43.

On the question of the relative prohibition of the use of weapons against civilian aircraft, it should be noted that, according to Article 3 bis(a), the relativity of this prohibition stems from the fact that: *This provision should not be interpreted so as to alter in any way the rights and obligations of States established by the UN Charter.* Of particular relevance here is Article 51 of the Charter defining the natural right of any Member of the United Nations against whom an armed aggression has been committed to individual or collective self-defence. Article 3 bis's inclusion of the right to self-defence in the context of civilian flights makes it possible to interpret the State's right to take defensive action if a civilian aircraft commits an armed aggression. This concept is not defined in the UN Charter<sup>35</sup>. Nevertheless, its intuitive understanding leads to the irresistible conclusion that none of the actions of the crew of Boeing 737-800, SP-RSM taken on 23 May 2021 can be considered the commission of an armed aggression within the meaning of Article 51 of the UN Charter. This, in turn, implies that there are no grounds for invoking Article 3 bis of the Chicago Convention in order to possibly justify the actions taken by the Belarusian authorities with respect to flight no. FR 4978. Guided by the fairness of the considerations, however, it should be noted that they did not explain their actions by the need to repel an armed aggression.

A more in-depth discussion is required of the provisions contained in Article 3 bis(b)<sup>36</sup>. Pursuant to them, the Contracting States recognise that each of them, in the exercise of the rights of its sovereignty, has the right to require a civil aircraft flying over its territory to land at a designated airport without permission or when there are reasonable grounds for believing that it is being used for any purpose incompatible with the Convention<sup>37</sup>. Since the Boeing operating flight no. FR 4978 had the appropriate authorisation to enter Belarusian airspace, there is therefore no basis for concluding that

<sup>35</sup> On the difficulties involved in defining precisely the concept of armed robbery, see: P. Łaski, *Uwagi na temat siły i jej stosowania w prawie międzynarodowym* (Eng. Observations on force and its application in international law), "Zeszyty Naukowe Uniwersytetu Szczecińskiego. Acta Juris Stetinensis" 2015, no. 4, pp. 66–67.

<sup>36</sup> Belinda Hartzenberg reports that paragraphs b, c and d were added to Article 3 bis largely on the initiative of the USSR to relax the prohibition on the use of weapons against civilian aircraft. See also: *The rights and obligations...*, p. 24.

<sup>37</sup> ICAO now recognises that the phrase "use for a purpose incompatible with the Convention" means any activity that poses a risk to safety. See: M.T. Huttunen, *The right of the overflown state to divert or intercept civil aircraft under a bomb threat: an analysis with regard to Ryanair flight 4978*, "Journal of Transportation Security" 2021, no. 14, p. 298.

the legality of forcing it to land could be based on the absence of that authorisation. The most important question in the context of assessing the conduct of the Belarusian authorities is therefore whether, in the circumstances, there was a reasonable basis for concluding that the aircraft operating flight FR 4978 was being used for a purpose incompatible with the Chicago Convention. In order to answer this question, it is first necessary to ascertain the consequences in terms of compliance with international law of the placement of an explosive on board a civilian aircraft by a terrorist organisation. Further argument will show that at least two positions can be argued with regard to this question. In Mikko T. Huttunen's view, such an act does not render the aircraft incompatible with the purpose of the Convention. According to him, the unlawful act is the placement of the bomb, while the aircraft itself, on which the explosive is placed, is still used in accordance with the relevant legal regulations, assuming that the crew does not know about the bomb and performs the flight in good faith. If we consider, in Huttunen's view, that the placement of the bomb implies that the aircraft is being used in contravention of the Convention, then we would also have to consider that it is being used in violation of the Convention when it is hit by a missile. The conclusion to be drawn from the reasoning presented is that Article 3 bis does not confer on a State in whose space an aircraft with an explosive on board is located the power to require that aircraft to land at a designated aerodrome. This view becomes even more correct if it is seen that the *ratio legis* of the introduction of Article 3 bis was to lay down rules for dealing with an unrecognised aircraft entering the airspace concerned without authorisation. This argues that the powers conferred by Article 3 bis should not be applied to recognised aircraft (in particular when their civil nature is confirmed) and those which enter the airspace in question with the appropriate authorisation<sup>38</sup>. On the other hand, the comparison between shooting down an aircraft by a missile and blowing it up by detonating the payload placed in it raises some doubts. It seems that the two situations cannot be equated. Hitting an aircraft with a missile is an event completely external to it and in such a case there is no justification - as artificial and incompatible with linguistic convention - for considering that the aircraft was used as a tool to provide a target for the missile hitting it. The situation is different when an explosive is placed on board an aircraft, in which case the aircraft becomes a tool for the transfer

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<sup>38</sup> Ibid., p. 300.

of the charge. A transfer that makes it possible to detonate the explosive at the right time. For a particular terrorist group, depending on its objectives and strategy, the moment of detonation will be decisive. There is no doubt that blowing up an empty aircraft on the runway and destroying it in flight, with innocent civilians on board, will have completely different overtones. In view of the above, it must be considered that there are arguments to assume that if there was indeed an explosive charge on board Boeing 737-800, SP-RSM, which was about to explode over Vilnius, then there was nevertheless a use of the aircraft in a manner inconsistent with the Chicago Convention. Obviously, in such a hypothetical situation, the use incompatible with the purpose of the Chicago Convention was not made by the crew of the aircraft, but by the terrorists who placed the bomb on board. This, in turn, would lead to the conclusion that the Belarusian authorities, pursuant to Article 3 bis(b), had the right to demand that the aircraft carrying flight FR 4978 land in Minsk. When interpreting that Article 3 bis can be applied to aircraft with an explosive on board, it is of fundamental importance to analyse the circumstances that occurred, and therefore to determine whether there was indeed an explosive on board Boeing 737-800, SP-RSM. The events of 23 May 2021 are described in the most detail in the ICAO Report on the incident and in the indictment filed by the US authorities against the Belarusian officials. A reading of these documents leads to the conclusion that there was no bomb on board the Polish aircraft and that its alleged existence was an operation by Belarusian special services. A number of identified circumstances support the above statement. First and foremost, no explosives, traces of explosives or devices that could serve or be part of an explosive device were found during checks of the aircraft both at the Athens airport before take-off and, very importantly, in Minsk after the forced landing, as well as at the destination airport in Vilnius<sup>39</sup>. Also, the content of the e-mail<sup>40</sup> with the information about the bomb, as well as the circumstances of its sending, suggest that the whole incident was an operation of the Belarusian special services. In the context of the content of the analysed message, it is significant that the Hamas allegedly responsible for sending it

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<sup>39</sup> ICAO Report, p. 40.

<sup>40</sup> The e-mail contained the following: “We, Hamas soldiers, demand that Israel cease fire in the Gaza Strip. We demand that the European Union abandon its support for Israel in this war. We know that the participants of Delphi Economic Forum are returning home on May 23 via flight FR 4978. A bomb has been planted onto this aircraft. If you don't meet our demands the bomb will explode on May 23 over Vilnius. Allahu Akbar”.

categorically denied having any connection with its creation and sending<sup>41</sup>. Moreover, the ceasefire demand contained in it referred to a conflict in which a ceasefire had taken place two days earlier<sup>42</sup>. The information provided by the Lithuanian aviation authorities during the ICAO investigation of the incident under review shows, in turn, that the email in question was sent at 09:25 UTC<sup>43</sup> (12:25 local time) to Vilnius airport, at 09:26 UTC (12:26 local time) to Athens airport, at . 09:27 UTC (12:27 local time) to Sofia airport, at 09:28 UTC (12:28 local time) to Bucharest airport, at 09:34 UTC (12:34 local time) to Kiev airport and only at 09:56 UTC (12:56 local time) to Minsk airport. Meanwhile, the Belarusian air traffic controller informed the crew of Boeing No. 737-800, SP-RSM of the bomb threat as early as 09:30 UTC. This raises the question of how the Belarusian authorities knew about the bomb nearly half an hour before being informed of it. During the ICAO investigation, the Belarusian authorities, in order to clarify this inconsistency, reported that they had already received the first email at 09:26 UTC. However, information obtained from Switzerland via the Lithuanian authorities shows that only one e-mail was sent to Minsk airport (to info@airport.by) at exactly 09:56:45 (12:56:45 local time)<sup>44</sup>. While it is true that Belarus showed the Fact-Finding Investigation Team (FFIT)<sup>45</sup> a copy of the email received at 09:25 UTC (12:25 local time) to the Minsk airport mailbox (address: info@airport.by), the FFIT was not provided with saved electronic copies of this correspondence in its original format. This was explained by the fact that it was automatically overwritten. FFIT was only provided with an image

<sup>41</sup> *Hamas denies its role in incident with Ryanair jet*, Tass, 25 V 2021, <https://tass.com/world/1293399> [accessed: 28 VIII 2022].

<sup>42</sup> The content of the e-mail referred to the conflict that erupted in the Gaza Strip on 10 May 2021. For more on these events, see: *Israel strikes in Gaza after fire balloons launched*, BBC, 16 VI 2021, <https://www.bbc.com/news/world-middle-east-57492745> [accessed: 28 VIII 2022]. A ceasefire was reached on 21 May 2021, see: V. Pietromarchi, M. Gadzo, C. Newton, *Israel and Hamas claim victory as fragile ceasefire holds*, Al Jazeera, 21 V 2021, <https://www.aljazeera.com/news/2021/5/21/jubilation-in-gaza-as-ceasefire-takes-effect-palestine-israel-live> [accessed: 28 VIII 2022].

<sup>43</sup> *Coordinated Universal Time, Universal Time Coordinated* – a standard time established on the basis of TAI (International Atomic Time - an international standard of time measurement created in 1955, based on the averaging of time measured by many caesium atomic clocks around the world), taking into account the irregularity of the Earth's rotation and coordinated with solar time.

<sup>44</sup> ICAO Report, p. 19.

<sup>45</sup> Unit set up by ICAO to investigate the events of 23 May 2021.

(screenshot) of the email, which meant that the metadata was not available for review. It is significant that, according to the US authorities, representatives of the Belarusian special services were already at Minsk airport at 6:45 UTC, i.e. even before the take-off of Boeing 737-800, SP-RSM<sup>46</sup>. Another piece of evidence confirming the orchestration of the incident under review by the Belarusian authorities is that during the communication between the crew of Boeing 737-800, SP-RSM and the Belarusian control tower, Belarusian officials relayed that emails with the bomb message had been sent to a number of airports. They could not have known this, as the e-mails in question to individual airports were sent separately. FFIT has not received sufficient explanations about this<sup>47</sup>.

In conclusion, if there were reasonable grounds to believe that a Polish aircraft was used to carry an explosive device in order to detonate it at a place and in circumstances chosen by terrorists and therefore for an objective incompatible with international law, then there are substantive arguments, as set out above, to assume that the Belarusian authorities had the right under Article 3 bis to require the Boeing operating the flight in question to land in Minsk. Assuming, and in the light of the information available this is the only acceptable conclusion, that there were no such grounds, one concludes that the Belarusian authorities and the officials acting on their behalf committed a violation of a number of rules under international law. It is also worth noting that even with, as shown, the counterfactual assumption of the presence of an explosive on board Boeing 737-800, SP-RSM, the actions of the Belarusian authorities taken on 23 May 2021 must still be considered to be in breach of many rules of the law of nations concerning the provision of safe air navigation.

The state's obligation to ensure the smooth operation of air traffic is part of the premise that from sovereignty over airspace derive not only powers but also duties for countries. Among them is the obligation to provide assistance to aircraft in their territory and in distress. The expression of this obligation is first and foremost Article 25 of the Chicago Convention, which provides, *inter alia*, that: *Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find*

<sup>46</sup> *Indictment USA vs. Leonid Mikalaevich Churo...*, p. 5.

<sup>47</sup> M.T. Huttunen, *The right of the overflown state...*, p. 292; ICAO Report, pp. 11–12. In the US authorities' indictment of Belarusian officials, the fact that they were aware of the bomb threat e-mails being sent to other airports was identified as one of the most important pieces of evidence proving that the threat was fabricated by Belarusian special services.

*practicable, and to permit, subject to the control by its own authorities, the owners of the aircraft or the authorities of the State in which the aircraft is registered to provide such measures of assistance as may be required by the circumstances.* It follows from the aforementioned standard that air traffic control is obliged to provide the aircraft with a bomb on board with the maximum possible assistance. It is to respond promptly to all its requests, to notify the competent authority designated by the State of the aircraft at risk and to exchange the necessary information with the operator or his designated representative, as well as to take action to expedite all phases of the flight and, in particular, to ensure that the aircraft lands as soon as possible at a safe airport<sup>48</sup>. An analysis of the events of 23 May 2021 clearly shows that these requirements were not met. The information cited both in the ICAO Report and in the US indictment against the Belarusian officials indicates that the Belarusian authorities did not provide the crew of the Polish aircraft with reliable information, nor did they ensure the exchange of information and communication between the aircraft and its operator, i.e. representatives of the RYR or RYS companies. The available information further shows that the crew, when asked about the reliability of the bomb information, received the answer that the threat code was red, which in aviation nomenclature means the highest degree and certainty of danger. Although in the first minutes after receiving the warning, the Boeing 737-800, SP-RSM did not change course, it turned back to Minsk after assessing the degree of danger. At the same time, representatives of the RYR and RYS<sup>49</sup> contacted Minsk airport at least twelve times to obtain more detailed information. In particular, they demanded that a copy of the e-mail be sent, which did not happen. The failure to send the e-mail is crucial, because already after the incident, in the course of investigating it and after receiving more data, the representatives of the mentioned companies stated that if they had had the e-mail in their possession, they would not have marked the threat with a code red<sup>50</sup>. It should also be noted that the Minsk airport to which the Polish plane was diverted was not the nearest available<sup>51</sup>.

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<sup>48</sup> These issues are specifically addressed in Annex 11 (entitled *Air Traffic Services*) to the Chicago Convention in Section 2.23 *Handling of Aircraft in Emergency Situations*.

<sup>49</sup> ICAO Report, p. 13

<sup>50</sup> *Ibid.*, pp. 23–24

<sup>51</sup> *Indictment USA vs. Leonid Mikalaeovich Churo...*, p. 9.



In conclusion, it has to be said that what has been said so far has shown that the actions of the Belarusian authorities in connection with flight FR 4978 were contrary to international law. This leads to the question of who should be held responsible for this action and on the basis of which regulations. These issues will be discussed later in this article.

Under the norms of international law, it will be possible to attribute liability directly to the Belarusian state, which is due to the fact that all states, as members of the international community, are obliged to comply with the norms of international law and perform the obligations assumed<sup>52</sup>. International liability is in the nature of a legal relationship that generally arises from an international tort or international crime. This relationship will in principle exist between, on the one hand, the offending state and, on the other hand, the state or states whose interest has been violated. Where a State, by its conduct, violates a norm of an *erga omnes* nature, i.e. concerning an issue of importance for the entire community (such an issue is undoubtedly air navigation safety), liability may be extended<sup>53</sup>.

The issue of state responsibility, and in particular the codification of the most important rules, was the subject of many years of work by the UN International Law Commission (ILC) since the 1950s. Finally, the draft articles on the responsibility of states for internationally wrongful acts were adopted at the 53rd session of the ILC in 2001 and endorsed by the UN General Assembly by resolution FR 56/83 of 12 December 2001<sup>54</sup>. The articles of the ILC are based on the general premise that (...) *any conduct of a state that is recognised as wrongful under international law gives rise to international responsibility* (Article 1). The source of state responsibility is a breach of an international legal obligation, an international crime or an international tort<sup>55</sup>. The derivation of Belarus' responsibility

<sup>52</sup> W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 165.

<sup>53</sup> A. Zbaraszewska, *Dylematy międzynarodowej odpowiedzialności państw* (Eng. Dilemmas of international responsibilities of states), "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, book 1, pp. 47–48.

<sup>54</sup> *Responsibility of States for Internationally Wrongful Acts 2001. Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.* (Articles on the Responsibility of States for Internationally Unlawful Acts. Text adopted by the ILC at its 53rd session in 2001 and submitted to the General Assembly as part of the Commission's report of the said session; hereinafter: Articles of the ILC).

<sup>55</sup> The issue of state responsibility is a central and at the same time one of the more contentious issues in international law. Janusz Symonides points out that the source

for the actions of 23 May 2021 is also part of the trend of changes in international legal consciousness, manifested in the fact that the concept of sovereignty is evolving along with the development of international law. The responsibility of the state to guarantee the values recognised by the international community is now increasingly emphasised as the most important element of this principle<sup>56</sup>. State responsibility can take the form of restitution, i.e. restoration, payment of compensation, satisfaction and sanctions<sup>57</sup>. A claim for payment of compensation or restitution is available to any subject of international law who has been injured. An international tort (like an international crime) may cause damage to another state, an international organisation or an individual. In the latter case, the state's liability vis-à-vis the individual is generally exercised at the level of domestic law<sup>58</sup>.

In addition to the obligation to repair the damage caused, the state may also be liable in the form of sanctions for its unlawful actions. The principle of sovereign equality governing relations between states means that there is no single supreme authority over states establishing norms and upholding them. The rules of international law are made and enforced by individual states and it is up to them to use coercion if necessary - it can be applied

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of state responsibility is a breach of an international legal duty, an international crime or an international tort. This author states that it is not always possible to put an equal sign between a breach of international law and a tort. See: R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, pp. 150–151.

<sup>56</sup> A. Seibert-Fohr, *Die völkerrechtliche Verantwortung des Staats für das Handeln von Privaten: Bedarf nach Neuorientierung?* (Eng. The responsibility of the state under international law for the actions of private individuals: Need for Reorientation?), "Zeitschrift für ausländisches öffentliches Recht und Völkerrecht" 2013, no. 73, p. 38.

<sup>57</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, p. 155; W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 170. According to Stanislaw Nahlik, three types of sanctions typical of international law can be distinguished: sanctions of a psychological nature, sanctions of a retaliatory nature and organised sanctions. See: S.E. Nahlik, *Wstęp do nauki praw międzynarodowego* (Eng. Introduction to the study of international law), Warszawa 1964, p. 34 and later, after: W. Góralczyk, S. Sawicki, *Prawo międzynarodowe...*, p. 24.

<sup>58</sup> Sometimes it can develop into international liability. The prerequisite for this is that the offending state denies the injured individual redress or a judicial avenue to seek compensation. In such a situation, the state exercising diplomatic protection may transfer the dispute to the international arena. However, given that both Protasevich and his partner are not citizens of the Republic of Poland, in the situation at hand, the solution presented is not an option. At the same time, given the current situation in Belarus, it is only theoretically possible to assume that both of the aforementioned have the right to personally pursue justice before the Belarusian judicial authorities.

individually or collectively<sup>59</sup>. The fact that the application of sanctions is decided on a case-by-case basis by individual states, groups of states or international organisations means that in international law sanctions are referred to as a volitional means of exerting pressure<sup>60</sup>. Sanctions in international law can be organised, when they are based on international agreements that precisely define the situation, type, nature, manner (collectively or individually) and the authority competent to implement them, and unorganised (not resulting, i.e. not directly provided for in the agreement). Non-organised sanctions can range from public reaction to retaliatory measures<sup>61</sup>.

In relation to the Minsk incident under review, on 4 June 2021, Council of the European Union<sup>62</sup> (on the basis of the conclusions of the European Council<sup>63</sup> of 24-25 May 2021, in which EU leaders strongly condemned the unlawful forcing of the Ryanair aircraft to land in Minsk as a threat to aviation safety, condemned the detention of Protasevich and Sapega by the Belarusian authorities and called for the adoption of necessary measures, including the extension, on the basis of the relevant legislation, of the list of sanctioned persons and entities and the announcement of further targeted economic sanctions) strengthened sanctions by banning all Belarusian carriers from flying through EU airspace and from accessing EU airports. Member States were thus obliged to deny landing, take-off or overflight permits through their territory to all aircraft used by Belarusian carriers, including contract carriers. On 21 June 2021, a fourth package of sanctions was imposed on Belarus due to the escalation of serious human rights violations there and the violent repression of civil society,

<sup>59</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, pp. 23–24.

<sup>60</sup> M. Nowicki, *Sankcje jako wolicjonalny środek wywierania presji na państwa naruszające ład międzynarodowy* (Eng. Sanctions as a volitional means of exerting pressure on states that violate the international order), "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu" 2015, no. 406, p. 392; A. Kociołek-Pęksa, J. Menkes, *Problematyka sankcji i countermeasures...*, p. 93.

<sup>61</sup> R. Bierzanek, J. Symonides, *Prawo międzynarodowe...*, p. 25.

<sup>62</sup> Council of the European Union - the main decision-making body of the European Union, based in Brussels. Only in April, June and October do meetings take place in Luxembourg. It was formerly called the Council of Ministers or the Council of Ministers of the European Union.

<sup>63</sup> European Council - the institution of the European Union tasked with setting the direction of its development and policy. It is made up of the Heads of State or Government of the Member States.

the democratic opposition and journalists. As part of this package, a further 78 individuals and eight entities from Belarus were sanctioned, with seven individuals and one entity placed on the sanctions list for unlawfully forcing a Ryanair plane to land in Minsk<sup>64</sup>. Also, the US, in coordination with Canada and the UK, imposed sanctions on Belarus for actions taken against Boeing 737-800, SP-RSM<sup>65</sup>. On 9 August 2021, the anniversary of the rigging of the 2020 presidential election in Belarus, US President Joe Biden signed an *Executive Order Imposing Costs<sup>66</sup> on Alyaksandr Lukashenka and Belarusian Authorities for Ongoing Attacks Against Democratic Freedoms, Human Rights, and International Norms<sup>67</sup>*.

The consequences of the actions taken against Boeing 737-800, SP-RSM do not merely exhaust state responsibility for the breach of international law norms, but could in theory give rise to the liability of specific individuals. In this case, however, the basis for the attribution of liability will not be the law of nations, as individuals are not liable under international law. The exceptions are international crimes, which are crimes against peace, war crimes and crimes against humanity<sup>68</sup> (which we are not dealing with in the present case). In contrast, the source of liability of individuals

<sup>64</sup> The timeline of sanctions imposed by the European Union on Belarus is posted on the official website of the Council of the European Union and the Council of the European Union. See: <https://www.consilium.europa.eu/pl/policies/sanctions/restrictive-measures-against-belarus/belarus-timeline/> [accessed: 27 VIII 2022].

<sup>65</sup> For a comprehensive description of the actions of the US authorities, as well as those of the EU, see the article: *United States Sanctions Belarus for Diversion of Ryanair Flight and Ongoing Repression (2021)*, "American Journal of International Law" 2021, vol. 115, no. 4, pp. 722–728, <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/united-states-sanctions-belarus-for-diversion-of-ryanair-flight-and-ongoing-repression/C547945B8EA10AC004760B8CA22BF543> [accessed: 27 VIII 2022].

<sup>66</sup> Under the cited act, the US authorities froze assets and banned transactions for a number of individuals operating in key sectors of the Belarusian economy for the Lukashenko regime, including defence, security, energy, potassium chloride (potash), tobacco, construction, transport, as well as members of the Belarusian Olympic Committee. The Executive Order of 9 August 2021 is an extension of the sanctions that were imposed on 16 July 2006 under Executive Order 13405.

<sup>67</sup> *Fact Sheet: Executive Order Imposing Costs on Alyaksandr Lukashenka and Belarusian Authorities for Ongoing Attacks Against Democratic Freedoms, Human Rights, and International Norms*, The White House, 9 VIII 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/09/fact-sheet-executive-order-imposing-costs-on-alyaksandr-lukashenka-and-belarusian-authorities-for-ongoing-attacks-against-democratic-freedoms-human-rights-and-international-norms/> [accessed: 27 VIII 2022].

<sup>68</sup> An exceptionally reprehensible example of a crime against humanity is genocide.

for acts contrary to international law may be internal law, provided that the actions taken, in addition to violating the norms of international law, also fulfil the elements of specific criminal acts set out in internal law<sup>69</sup>. An example of such proceedings is the US indictment against Belarusian officials, in which four citizens of the Republic of Belarus were charged with the offence of air piracy, regulated under Title 49 of the United States Code, Section 46502. Criminal proceedings have also been initiated by Lithuania and Poland in connection with the incident under review. In Lithuania, it is conducted under Article 100 (enforced disappearance) and Article 251 (hijacking of an aircraft, ship or other public or cargo vehicle or fixed platform on the shelf) of the Lithuanian Criminal Code. In Poland, the proceedings are conducted on suspicion of an offence under Article 166 of the Criminal Code (seizure of a ship or aircraft) and Article 189 of the Criminal Code (unlawful deprivation of liberty)<sup>70</sup>.

Conducting criminal proceedings for an act committed abroad, in addition to demonstrating that the conduct in question fulfils the elements of a prohibited act criminalised in the domestic legal order, also requires the demonstration of domestic jurisdiction. In the case of Poland, the application of Polish criminal law to offences committed abroad is regulated in Chapter XIII of the Criminal Code. In order to determine whether the Republic of Poland may prosecute acts committed by Belarusian officials on the territory of Belarus, it is necessary, in the context of the case under consideration, to refer to the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded in Montreal on 23 September 1971* (hereinafter: Montreal Convention). Article 1(e). of the cited act states that (...) *an offence is committed by any person who unlawfully and intentionally communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight*. Applying the content of this provision to the events of 23 May 2021 and the information gathered, it can be concluded with a high degree of probability that, as required by Article 303

<sup>69</sup> The twentieth century saw the beginning of the evolution of the traditional principle of the law of nations, which assumes that only states and international organisations are subject to international law liability. As a result, the view has developed that individuals can now also be directly liable under this law. So far, however, the liability of individuals under international law is limited to the most serious violations - the commission of crimes against peace, war crimes and crimes against humanity.

<sup>70</sup> ICAO Report, pp. 39-40. From the knowledge available to the author, investigations into the 23 May 2021 incident are also underway in Ireland, Greece and Latvia. Belarus has also initiated criminal proceedings (ICAO Report, p. 38).

of the Code of Criminal Procedure, there is at least a reasonable suspicion (which is a condition for the initiation of criminal proceedings) that the Belarusian officials involved in the actions taken against Boeing 737-800, SP-RSM fulfilled the elements of the prohibited act codified in Article 1 of the Montreal Convention. The implementation of the norms arising from the above provision is served in the Polish legal order by, inter alia, Article 166 of the Criminal Code<sup>71</sup>. Poland ratified the aforementioned agreement on 14 November 1974, and therefore, pursuant to the content of Article 113 of the Criminal Code, which states that (...) *irrespective of the provisions in force in the place where the offence was committed, the Polish criminal law shall apply to a Polish citizen and to a foreigner who has not been ordered to surrender, if he or she committed abroad an offence which the Republic of Poland is obliged to prosecute under an international agreement*, the Polish prosecutor's office was entitled and obliged to initiate criminal proceedings. The jurisdiction of the Republic of Poland over Belarusian officials can also be derived from the content of Article 110 of the Criminal Code, which states: *The Polish Criminal Law shall be applied to a foreigner who has committed abroad a criminal act directed against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or a Polish organisational unit without legal personality, and to a foreigner who has committed abroad a terrorist offence*. At this point, however, it should be noted that in the doctrine of criminal law, basing the obligation to prosecute terrorist offences on Article 110 of the Criminal Code (which became possible in connection with the amendment of this provision in 2004<sup>72</sup>) raises significant objections. Firstly, they stem from the fact that Polish jurisdiction in such cases already existed earlier<sup>73</sup> and resulted precisely from the above-cited Article 113 of the Criminal Code, codifying the obligation to prosecute and punish terrorist offences under international agreements. Secondly, in order to prosecute acts committed abroad on the basis of Article 109 of the Criminal Code, pursuant to

<sup>71</sup> The methods of implementing international legal norms into the domestic order are discussed in detail by Jarosław Sozański. See the same: *Implementacja umów międzynarodowych do systemów prawa krajowego ze szczególnym uwzględnieniem Włoch (w tym statusu regionów)* (Eng. Implementation of international agreements into national law systems with particular reference to Italy (including the status of regions)), "Rocznik Nauk Prawnych" 2007, vol. 17, no. 2, pp. 38-42.

<sup>72</sup> Article 110 of the Criminal Code, defining the so-called subject-matter principle of liability, in the original version did not include terrorist offences within its scope.

<sup>73</sup> The 2004 amendment of Article 110 of the Criminal Code thus led to a statutory *superfluum*, i.e. a situation of unnecessary regulation of an already regulated issue.

the regulation contained in Article 111 of the Criminal Code, it is required to fulfil the condition of the so-called double criminality, which does not exist with regard to acts prosecuted on the basis of Article 113 of the Criminal Code. It is true that in the case at hand, the above condition can be easily met<sup>74</sup>, however, due to the objections raised, Polish criminal jurisdiction with regard to the unlawful interference with flight FR 4978 is better derived on the basis of Article 113 of the Criminal Code.

Summarising the considerations, it should be concluded that the analysis of the actions taken on 23 May 2021 by the Belarusian authorities with respect to Boeing 737-800, SP-RSM (reconstructed on the basis of the available materials, primarily the ICAO Report) and assessed through the lens of the relevant provisions of international law and the relevant national legislation leads to the unequivocal conclusion that the behaviour analysed was unlawful and, in the case of the Belarusian State (responsible for the actions of all its authorities pursuant to Art. 4 of the Articles of the ILC) should result in international liability and, as regards individuals, criminal liability. The latter, being internal in nature, will be pursued through domestic criminal proceedings. In the course of these, the circle of persons whose conduct has exhausted the elements of the relevant criminal provisions and to whom guilt will be attributable should be precisely established. Of course, taking into account the current practice of the Belarusian state, one should unfortunately expect that the attribution of criminal responsibility will not be the same as its enforcement, at least until the change of Belarusian authorities. Indeed, it is difficult to expect the current authorities to extradite those involved in the 23 May 2021 incident.

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