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Is it a Bird? Is it a Plane? Is it a Human Rights Violation?

The Application of the European Convention on Human Rights on Hijacked Aircrafts

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1 Introduction

1.1 Background

On the 23rd of May 2021, just before going in for landing, flight FR4978 took an unexpected detour. On route from Athens to Vilnius and about to exit Belarusian airspace, its pilots were contacted by the Belarusian airspace authority. Officials informed them of “a potential security threat on board”,¹ directed them to divert to Minsk (despite being closer to Vilnius) and sent a fighter jet as an escort. While Belarusian authorities claimed to have received an anonymous bomb threat, no explosives were ever found on board the aircraft. However, before authorizing the aircraft to take off for its original destination, Belarusian authorities arrested two passengers: dissident Belarusian journalist Roman Protasevich, and Russian law student Sofia Sapega.

Neighboring states quickly labeled the event a “state hijacking” and “act of state terrorism”.² The European Union has since banned Belarusian aircraft from entering EU airspace,³ as well as added further persons and entities to the existing sanction regime against Belarus.⁴ Furthermore, a report by the International Civil Aviation Organization on possible violations of international aviation law was expected in the wake of its session in mid-September.⁵

The incident marks the first time that a commercial airline has been ‘hijacked’ by a state through use of force.⁶ It shows the lengths to which Belarusian president Aleksandr Lukashenko is willing to go in order to repress dissidents. As it turns out, neither international airspace security nor human rights will stand in the way of “Europe’s last dictator”.⁷

¹ The New York Times, *Belarus Forces Down Plane to Seize Dissident; Europe Sees ‘State Hijacking’*, 23 May 2021, <www.nytimes.com/2021/05/23/world/europe/ryanair-belarus.html> [accessed 3 October 2021].

² See *ibid* on these statements by the Greek Foreign Ministry and the Polish Prime Minister, respectively.

³ *Council Regulation (EU) 2021/907 of 4 June 2021 amending Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus*, EUT L 197, 4.6.2021, p. 1–2.

⁴ *Council Implementing Regulation (EU) 2021/997 of 21 June 2021 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus*, EUT L 219, 21.6.2021, p. 3–44.

⁵ International Civil Aviation Organization, *Update on fact-finding investigation into Ryanair flight FR4978*, 16 June 2021, <www.icao.int/Newsroom/Pages/Update-on-factfinding-investigation-into-Ryanair-flight-FR4978.aspx> [accessed 3 October 2021].

⁶ *Belarus Forces Down Plane to Seize Dissident; Europe Sees ‘State Hijacking’*, (n. 1).

⁷ The Economist, *Why Belarus is called Europe’s last dictatorship*, 25 May 2021, <www.economist.com/the-economist-explains/2021/05/25/why-belarus-is-called-europes-last-dictatorship> [accessed 3 October 2021].

1.2 Purpose and Research Question

The incident involving flight FR4978 has triggered several different provisions and treaties, on both the regional and global level. Although any possible violation of international law should certainly be investigated from all possible perspectives, this is (if possible) even more so in such a novel event as the present one. The purpose of this thesis is thus to establish whether the event falls within the scope of the *Convention for the Protection of Human Rights and Fundamental Freedoms*⁸ ('the European Convention' / 'the Convention'). To define it more precisely:

- Does the European Convention apply to the incident on the 23rd of May 2021, in which Belarusian authorities diverted a Polish-registered, commercial aircraft on route from Greece to Lithuania, and thereafter arrested two of its passengers, and if so: how?

1.3 Delimitations

Although relevant for those involved, this thesis will not investigate possible violations of any rights under the Convention. The unprecedentedness of the incident, and thus also the relevant general legal issue, relates to the scope of the Convention, rather than any specific right under it. That is not to say that there are no circumstances concerning the arrest as such which might warrant a closer analysis. It is only to say that the unprecedentedness of the incident lays not in the actual arrest, but rather the 'scene of the crime': a state-hijacked aircraft.

1.4 Outline

The thesis begins with an introduction, presenting the background to the issue, the purpose and research questions of the thesis, as well as a general outline (Chapter I). The following part deals with the scope of the European Convention, analyzing the incident from three different perspectives (Chapter II). In the final part, all conclusions are summarized and related to the bigger context of European peace and security (Chapter III).

⁸ Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950 (entered into force 3 September 1953), 213 UNTS 221.

2 The Scope of the European Convention

2.1 Article 1 of the European Convention

For Convention rights to apply, it must first be established that a particular situation falls within the scope of application of the Convention. A scope of application consists of three categories: a *temporal*, a *territorial*, and a *personal*, or put differently: *when*, *where*, and *to whom* the treaty applies. As will be seen going forward, these scopes often intertwine. However, for educational purposes they will nevertheless be analyzed separately. The relevant provision concerning the scope of the Convention is article 1, which establishes the obligation to respect human rights:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

2.2 The Temporal Scope

When the Convention applies is not expressly stated in article 1. As a general principle of international treaty law, however, treaties bind the signatories from the time of entry into force until denunciation.⁹ This is the case also with the Convention.¹⁰ The Convention entered into force on the 3rd of September 1953.¹¹ The temporal scope of the Convention thus extends to the incident. Still, although the Convention as such has entered into force, it must also be ascertained whether it has done so in respect of each relevant state. Since this is linked to the personal scope of application, it will be discussed in the next section.

2.3 The Personal Scope

Unlike that of *when*, the issue of *to whom* the Convention applies is expressly stated in article 1. The ‘High Contracting Parties’ are obliged vis-à-vis ‘everyone within their jurisdiction’ to secure the rights under the Convention. The issue of the personal scope of the Convention is thus one of defining these two terms, which in turn answers the questions of whether Mr. Protasevich and Ms. Sapega are entitled to Convention rights, and if so vis-à-vis which actors.

⁹ C. Grabenwarter, *European Convention on Human Rights: Commentary*, C.H. Beck; Hart; Nomos; Helbing Lichtenhahn Verlag, 2014, p. 10. See also, United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969 (entered into force 27 January 1980), 1155 UNTS 331, arts. 24 (entry into force), 26 (*pacta sunt servanda*), and 28 (non-retroactivity of treaties).

¹⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms* (n. 8), arts. 58 and 59.3.

¹¹ European Court of Human Rights, *European Convention on Human Rights*, <www.echr.coe.int/Pages/home.aspx?p=basictexts&c> [accessed 3 October 2021].

Starting with the latter, the Convention does not put any restrictions on *who* it protects. It protects everyone, regardless of nationality or residency.¹² Seeing as article 1 speaks of “everyone *within the jurisdiction* [emphasis added]” of the state parties, the personal scope is somewhat related to the territorial (which is discussed in the next section). Still, the purely personal scope of the Convention extends to everyone who was on board the aircraft during the incident (but not necessarily *everywhere*).

The next question is *who* the Convention obliges to secure the rights of ‘everyone’. Article 1 employs the rather archaic term ‘High Contracting Parties’. However, the term simply means ‘parties to the Convention’, or those state which have signed and ratified the Convention. Signature is open to any member of the Council of Europe,¹³ the membership of which in turn is open to any European state.¹⁴ Presently, all Council of Europe members are party to the European Convention (which was also true at the time of the incident).¹⁵ The only European states not party to the Convention are thus Kazakhstan, Vatican City, and Belarus.¹⁶ Since the personal scope of the Convention does not extend to Belarus (the state, not the territory), Belarusian authorities were not obliged to secure any rights under the Convention to the passengers of flight FR4978. But the fact that the aircraft was intercepted by Belarusian authorities does not *per se* preclude any responsibility on the part of any state actually party to the Convention.

2.4 The Territorial Scope

As it turns out, it all boils down to the territorial scope and the question of *where* the Convention applies. The incident occurred on board an aircraft, intercepted while on route over Belarus and then diverted to land in Minsk. Since then, Mr. Protasevich and Ms. Sapega have been detained in Belarus. Since the incident began, they have thus been located in Belarus, either in its airspace (during flight) or on its territory (after landing). Having established that Belarus is not party to Convention, the question is thus if there is any other tie through which these individuals can be

¹² The draft term ‘all persons residing’ was replaced with ‘everyone’ to include “all persons in the territories of the signatory States, even those who could not be considered as residing”, see *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. III, Martinus Nijhoff, 1976, p. 260.

¹³ *Convention for the Protection of Human Rights and Fundamental Freedoms* (n. 8), art. 59.1.

¹⁴ *Statute of the Council of Europe*, 5 May 1949 (entered into force 3 August 1949), 87 UNTS 103, art. 4.

¹⁵ Council of Europe, *Simplified Chart of signatures and ratifications: Convention for the Protection of Human Rights and Fundamental Freedoms*, 5 August 2021, <www.coe.int/en/web/conventions/by-subject-matters?module=signatures-by-treaties&codeMatiere=3&numSTE=005> [accessed 3 October 2021].

¹⁶ Council of Europe, *47 Member States*, <www.coe.int/en/web/portal/47-members-states> [accessed 3 October 2021]. This only includes internationally recognized states.

said to have been within the territorial scope of the Convention. For example, the aircraft was registered in Poland and on route from Greece to Lithuania, three states party to the Convention.

As stated above, article 1 extends the Convention to everyone “*within the jurisdiction*” of the contracting states. The term ‘jurisdiction’ was first truly defined by the European Court of Human Rights (the Court) in the *Banković* case.¹⁷ Applying the general rules of interpretation,¹⁸ the Court held that the term is ordinarily understood as “primarily territorial”.¹⁹ It further supported this definition with reference to state practice and the *travaux préparatoires*.²⁰ Although “much of the reasoning in *Banković* has been superseded by subsequent case-law”,²¹ this notion of jurisdiction as ‘primarily territorial’ is still the starting point of any discussion on the territorial scope of the Convention.²²

However, the Court also noted certain “recognized instances” of extraterritorial jurisdiction, namely “cases involving the activities of diplomatic or consular agents abroad and on board craft and vessels registered in, or flying the flag of, that State”.²³ In subsequent case-law, the Court no longer relies on the presence of ‘diplomatic and consular agents’, meaning that extraterritorial jurisdiction can be established without the presence of such agents. For example, in *Hirsi Jamaa*, Italian military ships had intercepted vessels transporting immigrants off the

¹⁷ P. Lorenzen *et al.*, *Den Europæiske Menneskerettighedskonvention - med kommentarer: Art 1–9*, 3 ed., Jurist- og Økonomforbundets Forlag, 2011, p. 84; *Banković and Others v. Belgium and Others* (Decision) [Grand Chamber], no. 52207/99, ECHR 2001-XII.

¹⁸ See *Vienna Convention on the Law of Treaties*, (n. 9), art. 31.

¹⁹ *Banković and Others v. Belgium and Others* (n. 17), § 59.

²⁰ *Ibid.*, § 62–63. For a discussion on *Banković*, see R. Lawson, “Life after *Banković*: On the Extraterritorial Application of the European Convention on Human Rights”; and M. O’Boyle, “The European Convention on Human Rights and Extraterritorial Application: A Comment on Life after *Banković*”, both in F. Coomans and M. Kamminga (eds.), *Extraterritorial Application of Human Rights Treaties*, Intersentia, 2004, p. 83 and 125 respectively. Lawson criticizes the Court for not addressing the fact that the drafters meant to “widen as far as possible the categories of persons who are to benefit by the guarantees contained in the Convention”, see Lawson, p. 88; *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. II, Martinus Nijhoff, 1975, p. 200. But as O’Boyle points out, that statement was made in the context of whether the Convention should apply to non-residents; as acknowledged by Lawson, the drafters never considered any extraterritorial application of the Convention, see O’Boyle, p. 132–133; *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, vol. III (n. 12), p. 260.

²¹ B. Rainey *et al.*, *Jacobs, White, and Ovey – The European Convention on Human Rights*, 8th ed., Oxford University Press, 2021, p. 92. For example, the Court introduced the concept of a “legal space...of the Contracting States”, see *Banković and Others v. Belgium and Others* (n. 17), § 80. The concept has not been used since. On the contrary, the Court has applied the Convention on acts taking place in both Kenya and Iraq, see *Öcalan v. Turkey* [Grand Chamber], no. 46221/99, § 91, ECHR 2005-IV; *Al-Skeini and Others v. the United Kingdom* [Grand Chamber], no. 55721/07, § 149, ECHR 2011.

²² Rainey (n. 21), p. 92. See also *Ilaşcu and Others v. Moldova and Russia* [Grand Chamber], no. 48787/99, § 312, ECHR 2004-VII; *Medvedyev and Others v. France* [Grand Chamber], no. 3394/03, § 63–64, ECHR 2010; *Hirsi Jamaa and Others v. Italy* [Grand Chamber], no. 27765/09, § 71, ECHR 2012.

²³ *Banković and Others v. Belgium and Others* (n. 17), § 73.

Libyan coast. The Court recognized that acts on board a vessel flying a state's flag fall within the extraterritorial jurisdiction of that state,²⁴ even though there are no diplomatic or consular agents present on board. The Italian crew was, however, made up entirely of military agents.

In *Bakanova*, however, no state agents of any kind were on board. Still, the Court found that Lithuania was obliged to investigate the death of a crew member on a Lithuanian private ship outside the coast of Brazil, stating that extraterritorial jurisdiction is triggered by "activities on board of ships registered in, or flying the flag of, that State".²⁵

But states are not responsible for all acts on board craft and vessels flying its flag. The Court recognizes that certain "special features" of a case may absolve a state of its obligations, including (but not exclusively) the flag under which a vessel sails, the state in which it is registered, the nationality of its owning company, as well as the level of control exercised by its captain.²⁶

Regarding the level of control exercised by the captain of a ship, the Court's considers both *de jure* and *de facto* control. Sometimes they go together, such as when Turkish agents arrested a Turkish national on board a Turkish aircraft standing on the airport in Nairobi. As soon as the suspect was arrested, he was both legally (*de jure*) and physically (*de facto*) in the control of the state agents.²⁷

But *de facto* control may also arise independently of *de jure* control, like when a French warship intercepted a Cambodian ship suspected of smuggling large quantities of narcotics. From the boarding of the ship by French military agents, and during the journey back to France, during which the crew were confined to their cabins, France "exercised full and exclusive control over the [ship] and its crew, at least *de facto*".²⁸

Likewise, *de jure* control does not presuppose *de facto* control. This is the case, for example, when the territory of a state is partially occupied by another state or a separatist regime. In such situations, the Court has stated that even when a state is *de facto* prevented from exercising authority over parts of its territory, it still has jurisdiction over its own territory.²⁹

However, the Court has also stated that such a military occupation "reduces the scope of that jurisdiction", although the state must still use all "legal and diplomatic means available to it *vis-*

²⁴ *Hirsi Jamaa and Others v. Italy* (n. 22), § 77.

²⁵ *Bakanova v. Lithuania*, no. 11167/12, § 63, 31 May 2016.

²⁶ *Ibid.* See also *Medvedyev and Others v. France* (n. 22), § 65–67; *Rantsev v. Cyprus and Russia*, no. 25965/04, § 243, ECHR 2010.

²⁷ *Öcalan v. Turkey* (n. 21), § 91.

²⁸ *Medvedyev and Others v. France* (n. 22), § 66–67

²⁹ See, e.g., *Ilaşcu and Others v. Moldova and Russia* (n. 22), § 333; *Mozer v. the Republic of Moldova and Russia* [Grand Chamber], no. 11138/10, § 100, 23 February 2016.

à-vis foreign States and international organizations, to continue to guarantee the enjoyment of [Convention rights].”³⁰ This stems from the notion that obligations under the Convention “must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities”.³¹ Although this statement by the Court has been made in the context of the reach of states’ positive obligations under the Convention, in particular concerning the right to life, they may also, *mutatis mutandis*, be applied to the issue of extraterritorial jurisdiction.³²

However, one must be careful not to confuse ‘jurisdiction’ with ‘state responsibility’. For example, the obligation of contracting states to not extradite individuals to a third state in which they may be exposed to torture or other inhuman treatment is not an issue of jurisdiction, but one of state responsibility. The extraditing state is not responsible for the torture itself but rather for having created, by means of extradition, a situation where an individual faces torture. Since the act of extraditing the individual is clearly taken within the jurisdiction of the state, there is no issue of extraterritorial jurisdiction but only one of state responsibility.³³ Still, this is not always clear, even to the Court itself.³⁴

Going back to the present case, the aircraft was registered in Poland.³⁵ Its passengers were thus within Poland’s jurisdiction unless any ‘special features’ absolve Poland of its obligations under the Convention. The fact that the aircraft was (and still is) owned by a company based in Poland further supports Polish jurisdiction.³⁶ Things get more complicated, however, when trying to establish the level of control exercised by the commander of the aircraft.

Under Polish law, an aircraft commander exercises full and exclusive control over both crew and passengers and is authorized to take coercive measures if necessary.³⁷ It is thus clear that

³⁰ *Ilaşcu and Others v. Moldova and Russia* (n. 22), § 333. See also *Mozer v. the Republic of Moldova and Russia* (n. 29), § 100. In the latter case, the Court specifies that the state is obliged to “continue to guarantee the enjoyment of [Convention rights] to those living there [emphasis added]”, see *ibid*, § 100. The statement is, however, made in the context of a partial occupation of the territory of a state. *Mutatis mutandis*, it means that even when states have no *de facto* control over their ships and aircraft, they are still obliged to use available means to ensure the continuous respect for Convention rights to the passengers of such vehicles.

³¹ *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII. This was repeated also in *Mastromatteo v. Italy* [Grand Chamber], no. 37703/97, § 68, ECHR 2002-VIII.

³² Lawson (n. 20), p. 106.

³³ O’Boyle (n. 20), pp. 126–127.

³⁴ See *Al-Adsani v. the United Kingdom* [Grand Chamber], no. 35763/97, § 39, ECHR 2001-XI. The Court states that the prohibition of torture has “some, limited, extraterritorial application” in case of extradition.

³⁵ *Belarus Forces Down Plane to Seize Dissident; Europe Sees ‘State Hijacking’* (n. 1).

³⁶ Airfleets.net, *Boeing 737 NG / Max MSN 44791*, <www.airfleets.net/ficheapp/plane-b737ng-44791.htm> [accessed 3 October 2021].

³⁷ Ustawa z dnia 3 lipca 2002 r. prawo lotnicze [Aviation Law of 3 July 2002], Dz. U. 2002, vol. 130, item 1112, art. 115. Cf. *Bakanova v. Lithuania* (n. 25), § 53.

Poland, through the aircraft commander, exercised *de jure* control over the passengers from the moment they entered the aircraft (despite being in Athens) until the moment they left it. As soon as the aircraft took off, the commander also exercised *de facto* control over the passengers, since they were, quite naturally, confined to the aircraft. When the aircraft was later intercepted by the Belarusian jetfighter, I would argue that the commander lost the *de facto* control over the aircraft. The incident can be compared to that of a military occupation. From the interception until the aircraft left Minsk, Poland's jurisdiction on board the aircraft was reduced. It then re-exercised full jurisdiction from the moment that the aircraft left Minsk until it landed in Vilnius, seeing as the aircraft commander exercised both *de jure* and *de facto* control during this journey.

3 Concluding Remarks

Let's return first to the research question put forward in the beginning of this thesis. Yes, the European Convention does apply to the incident on the 23rd of May 2021. It does so because the scope of the Convention extends to the time, place, and actors of that very incident. Not all actors, however. Even though it was Belarusian authorities that intercepted the aircraft and later arrested two of its passengers: Mr. Protasevich and Ms. Sapega, Belarus has not ratified the Convention and therefore has no obligations under it. Of those states that have, in fact, ratified the Convention, Poland has jurisdiction over the aircraft. This jurisdiction is, however, reduced during the critical part of the incident, namely the period from which the aircraft was intercepted until it left Minsk.

What this entails for the question whether this incident amounts to a violation of Convention rights lays outside the scope of this thesis. I would say, however, that none of the passengers that got to finish the journey from Athens to Vilnius will be able to make a case against Poland in front of the European Court of Human Rights. The opposite has been suggested for Mr. Protasevich and Ms. Sapega. Some jurists argue that Poland has an obligation to secure their release.³⁸ Trying to keep the distinction between jurisdiction and state responsibility, I can only say that such a proposition is in line with the findings in this thesis, namely that even when it has only reduced jurisdiction (*i.e.* during the time of their arrest), Poland is still obliged to use all legal and diplomatic means available to secure the rights of Mr. Protasevich and Ms. Sapega. To what lengths Poland has to go is, however, an issue of state responsibility, not jurisdiction.

³⁸ The Conversation, *Belarus kidnapping: what international law says about capture of dissident journalist Roman Protasevich*, 25 May 2021, <theconversation.com/belarus-kidnapping-what-international-law-says-about-capture-of-dissident-journalist-roman-protasevich-161511> [accessed 3 October 2021].

Looking at the bigger context, it can be argued that Poland's actions will have little impact on the situation for Mr. Protasevich and Ms. Sapega. Without in any way underestimating Poland's diplomatic powers, it is surely the actions of major international organizations such as the European Union or the International Civil Aviation Organization rather than those of a single state that will affect the situation in Belarus in general and the situation for Mr. Protasevich and Ms. Sapega in particular. Nevertheless, the fact that Poland has jurisdiction over the incident, and possibly also substantive obligations related to it, makes sure that the rights of Mr. Protasevich and Ms. Sapega are not forgotten among all other concerns that arise from the situation in Belarus. These organizations are also fora in which Poland may fulfil its diplomatic obligations.

A few things can also be said about extraterritorial jurisdiction *in abstracto*. It was not too long ago that the Court first began defining jurisdiction, namely in the 2001 *Banković* decision. As a result, the Court's case-law has so far been related to where extraterritorial jurisdiction 'begins' (when a person *comes* within a state's jurisdiction) rather than where it 'ends' (when a person *leaves* such jurisdiction). This also explains the lack of clarity (due to few cases on the matter) on the distinction between jurisdiction and state responsibility. Hopefully, these issues will receive more attention going ahead, both in Strasbourg case-law and legal doctrine. After all, "the law on 'jurisdiction' is still in its infancy."³⁹

³⁹ O'Boyle (n. 20), p. 138.

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