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## LEGAL ASPECTS REGARDING LIABILITY FOR SHOOTING DOWN AN AIRCRAFT

### Aspekty prawne dotyczące odpowiedzialności za zestrzelenie statku powietrznego

**Abstract:** *The author will raise the issue of responsibility for shooting down a civil aircraft. The powers of the state, as well as the responsibilities and obligations that are imposed on the state in this matter will be presented. The paper will also define the notion of sovereignty. Then, international documents which govern the responsibility of the state will be discussed. The author will also indicate the origin of the introduction of regulations on the shooting down of aircraft. The author will also provide examples of such incidents involving civil aircraft. In addition, the paper will include the position of the Constitutional Tribunal regarding the matter of shooting down an aircraft. The work will conclude with considerations regarding the legitimacy and reasons for shooting down aircraft. Can we sacrifice one "good" in the name of another?*

**Keywords:** civil aircraft, state responsibility, aircraft, shooting down, the United Nations

**Streszczenie:** *Autorka porusza tematykę odpowiedzialności za zestrzelenie cywilnego statku powietrznego. Zostały wskazane uprawnienia państwa, zakres odpowiedzialności oraz obowiązki nałożone na państwo w tej kwestii. Została również zdefiniowana suwerenność. Następnie, wyodrębniono dokumenty międzynarodowe, które regulują odpowiedzialność państwa. Autorka również wskazuje genezę wprowadzenia regulacji dotyczących zestrzelenia samolotów. Ponadto przedstawiła przykłady takich incydentów z udziałem samolotów cywilnych. Oprócz powyższego, przedstawiono stanowisko Trybunału Konstytucyjnego w sprawie zestrzelenia samolotów. Prace wieńczą rozważania dotyczące zasadności i celów zestrzelenia statków powietrznych. Czy możemy poświęcić jedno „dobro” w imię innego?*

**Słowa kluczowe:** statek cywilny, odpowiedzialność państwa, statek powietrzny, zestrzelenie, Organizacja Narodów Zjednoczonych

## **1. Introduction**

Currently, the phenomenon of terrorism [4,9,11,12,15,30,32] and armed conflict has developed on a large scale. Both Europe and other continents try to prevent on a daily basis new attacks, in which civilians die. In addition, by means of the established alliances, agreements or international organizations, the countries try to protect their citizens from the danger resulting from the current political situation on the territory of a other countries. Unfortunately, peace activities do not always lead to the resolution of conflicts. Then the states are forced to use force to restore security on a certain territory. The purpose of this study is to discuss the issues of state responsibility for shooting down a civil aircraft. In the era of widespread terrorism, all countries have to acknowledge the fact that an aircraft, which is usually a means of transport of passengers or goods, can be used as a kind of weapon against humanity and its values.

## **2. State responsibility**

States are subjected to international law, therefore they are responsible for their actions. Legislative, executive, judicial and other bodies carrying out their statutory tasks may act on behalf of the states. This catalog also includes entities, which are not state authorities, but on the basis of relevant authorizations may perform activities which give rise to responsibility [10]. Also the actions of one person or a group of people, acting on the instructions or under the direction or control of a given country, fall within the above scope [52].

At first, there was no legal regulation to address this issue. Gradually the need to codify the responsibility of the state emerged, that is why in 1956 the International Law Commission proposed a narrow approach to this topic - each country is responsible for the damage caused by a foreigner who remains in the territory. This position of the Commission was upheld until 1975, when it was stated that the responsibility of the state should be extended [5,19]. In addition, two concepts appeared in the literature: a conservative and a progressive one. According to the first concept, countries were responsible mainly for property matters [23]. According to the second one, each country is responsible, among others, for genocide or violations of mandatory standards. In 2001, the International Law Commission created the premises, on the basis of which the state would be held responsible for its actions [23]. First condition is that the violation of an international obligation has to arise as a result of an act or omission. Secondly, there must exist a country to which this illegal behavior can be attributed [1,13,26,33]. Nevertheless, both premises must be in a causal link with each other. In this case, one does not ponder whether the treaty or customary law has been violated. The fact that the international obligation is violated is of importance.

Therefore, it is an objective responsibility based on the theory of risk. States are not liable in many cases, such as: consent of the affected state, force majeure, occurrence of a state of emergency, self defense, retaliation or exercise of due diligence [23,26]. However, proving an offence committed by a given country results in the obligation to stop the unlawful conduct, avoid it in the future, remove its effects and compensate for the damage caused. This imperative may be implemented in the form of: restitution (restoring the previous state) and reparation (repairing material damage). In addition to the previously mentioned forms, one can point out satisfaction, which is a compensation for immaterial damage. It manifests itself, among others, in official apologies or regrets of the state for the committed act [28]. In addition, there are peaceful ways to resolve disputes such as negotiation, mediation, conciliation and arbitration. However, the other party must agree to such forms. According to art. 42 of the ILC project, entities, such as another country or a group of countries, are authorized to seek redress for a prohibited act. However, they have to prove that their action has a legitimate legal interest. In case of responsibility of a state for shooting down a civil aircraft, there are a few things which should be considered, including:

- does the state have the right to perform such an act?
- is there an international or national regulation that allows one to shoot down an aircraft with passengers?
- in which cases can the state perform such an act?
- are there any countertypes that would exclude the state liability in the event of shooting down an aircraft.
- what form of responsibility will the state incur for doing so?
- what social, political and legal consequences can occur after shooting down a civil aircraft belonging to another country?

Taking into consideration the above matters, one will be able to analyse the presented issue, which is the responsibility of the state in the case of shooting down a civil aircraft.

### **3. International regulations**

Air space is an area above the earth's surface extending to the outer space. Primarily, its status was not regulated in any international document, which is why theories related to the scope of airspace arose. According to the first one, this area is available to all countries. According to the second one, each country has a separate, sovereign space over its territory. The third theory introduced a division of the airspace into the lower one (belonging to a given country) and the upper one (available to everyone). Due to the armed conflicts between states (World War I) and the protection of neutral countries, there was a need to regulate the issue of airspace [13]. In 1919 (October 13), the Paris Convention, introduced the principle of supremacy over airspace over the territory of a given country [34,38]. In accordance with Art. 1, "The High Contracting Parties recognise that every Power has

complete and exclusive sovereignty over the airspace above its territory..."[6,24,25]. Art. 2 And 3 specify the rules of flight of an aircraft over another country. Another international agreement which regulates the issues related to aviation law is the Convention on International Civil Aviation signed on December 7 1944 in Chicago [27,39]. This document implied the principle of state sovereignty in the airspace over its territory, which was introduced by the previously binding international agreement concluded in Paris. In accordance with Art. 3 letter a) the Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft [18] (used in military, customs and police services). It should be stated that this distinction is significant, because in accordance with Art. 3 item b) and c) "Aircraft used in military, customs and police services shall be deemed to be state aircraft" and "no state aircraft of a Contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof [39]. Thus, if a state's aircraft violates the airspace of a country with which that state is in conflict, without obtaining the authorization, the aircraft will certainly be shot down as part of the exercise of the right for self-defense. In the case of civil aircraft, each country decides on the rules of flights into the airspace within its territory under bilateral or multilateral agreements or an internal act of the state [24]. By implementing the principle of sovereignty, the states have the right to restrict or prohibit the passage of aircraft over the entire territory, its parts or certain zones. In addition, they may require the aircraft to land at an airport within that country (Art. 9). In addition to the above, the states agree not to use civil aviation for any purpose inconsistent with the aims of this Convention (Art. 4), which could constitute the basis for international liability for a breach of the contractual obligation. However, it should be remembered that under the agreements [40], countries grant to foreign aircraft air freedom (transit and commercial), thanks to which the aircraft has the right to: fly; land to perform technical activities; bring and take passengers from and to the country of affiliation of the aircraft and to third countries [1,13]. Because of the occurrence of cases of shooting down the aircraft, a need arose to regulate the prohibition of this act by the states. In 1984, Art. 3 bis was introduced to the Chicago Convention. Pursuant to it, the contracting states recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board must not be endangered. In addition, the contracting states may require the aircraft to land at a designated airport or give other instructions. In order to stop the infringements by foreign aircraft, the contracting parties may take other measures in accordance with the principles of international law [3,35]. Another document, this time regulating the issues related to counteracting violations of security and order on the aircraft, is the 1963 Tokyo Convention [42]. In accordance with Art. 6 the aircraft commander was authorized to impose reasonable measures upon a person who violates order and discipline on board of the aircraft. At the same time, there must be reasonable grounds to believe that a person has committed, or is about to commit an offence

or act which constitutes or does not constitute a crime, which may endanger or endangers the aircraft, persons or property on board. The convention allows the use of restraint against the attacker. In addition, crew members, at the request of the commander or without such authorization, may take action to ensure safety [27,36]. Thanks to the mentioned international document, it is possible to oppose the attackers who are on board of the aircraft. Unfortunately, nowadays the plane is a kind of weapon, which is often used by terrorists. This was the case with the attacks of September 11, 2001, when two civil aircraft were hijacked and then used to destroy the World Trade Center towers [9,16].

#### **4. The right of the state to exercise self-defense under the Charter of the United Nations. Charter vs the possibility of shooting down an aircraft**

The right of the state to exercise self-defense is regulated in Art. 51 of the Charter of the United Nations [41]. Pursuant to this provision, every country, when faced with an armed attack, may take action, which it deems necessary to maintain security [22]. It should be noted that not every use of force will fall within the scope of the concept of armed attack. In addition to the premises which appear in the Charter of the United Nations, i.e. the occurrence of an armed attack on a member of the United Nations; the possibility to exercise the right of self-defense before the use of measures by the UN Security Council to maintain international peace and security and immediate notification of the UN Security Council of the application of measures exercising the self-defense principle. In addition to the above, we can distinguish other conditions which result from the Webster's formula. These premises arose when examining the case of the ship *Caroline*. Self-defense can be exercised when required - a sudden situation, with no other possibility of action. In addition, it must be proportionate. The means that the countries will use must be reasonable and not excessive [1]. Nevertheless, the possibility of exercising the right of self-defense as a premise excluding the responsibility of the state raises doubts. The concept of an armed attack is not precisely defined by the legislator, because the Charter of the United Nations does not give its legal definition [2]. In addition, it is also questionable whether an armed attack and aggression have the same semantic scope. In accordance with Art. 3 of Charter of the United Nations, aggression is, among others, an attack on the territory of another state, war occupation, annexation of part of the territory. In order to exercise the right of self-defense under Art. 51 of the Charter of the United Nations one should be a victim of an armed attack. It is up to a given state to determine whether this is the case. In addition, the country affected must notify such an incident. In the case of the right to self-defense, when a plane is hijacked by terrorists, it is necessary to consider whether the destruction of the aircraft by terrorists will be an act of armed attack. In 2001, after the attacks on the

World Trade Center, George W. Bush proclaimed a war on terror, which was supposed to be the exercise of the right for self-defense. In addition, the former president decided to shoot down one of the planes, which was heading towards Washington, DC, when the cause of the collision of the two planes with the towers had already been known. Thus, in this situation, the act of self-defense was considered necessary and proportionate. In addition to the above, all factors indicated that the United Airlines 93 aircraft in question was intended to serve as a weapon against humanity and the state. Considering the above, each case should be analysed individually, as the facts of the case will never be identical. Then one should consider the effects of shooting down the aircraft - whether they will be smaller than the scale of damage caused by the fact that a given plane with terrorists reaches its destination. However, when there are only innocent passengers on board, there is nothing to justify such an act (shooting down Malaysia Airlines 17 in 2014).

## **5. Domestic regulations**

In the Polish legal order, the Aviation Law Act, the State Border Protection Act of October 12, 1990 and the regulations of the Council of Ministers govern the issues concerning the use of the Polish airspace [43,47]. However, in order to understand the issues appearing in the above regulations, it is necessary to determine the notion of aircraft which can violate the territory of a given country during its flight. In accordance with Art. 2 of the Aviation Law Act, 'aircraft means a machine which can hover in the atmosphere as result of the reactions of the air other than the reactions of the air reflected from the Earth's surface' [43]. A similar definition can be found in the annexes to the Chicago Convention of 1994 [31,39]. It should be noted that these machines can move within the boundaries of each country only on the basis of specific conditions. Pursuant to Art. 122 of the Aviation Law Act 'users of the Polish airspace are obliged to obey commands of institutions providing air traffic services, civil and military air traffic services units, as well as commands of air defense authorities and instructions given by military aircraft". In addition, where there is a reasonable concern that a civil aircraft may be used in a manner contrary to the applicable law, these institutions may order: change of the direction or altitude of the flight; landing at the designated airport; obeying other commands.

A similar regulation can be found in Art. 18b of the State Border Protection Act. In this case, rights vis-a-vis foreign aircraft are exercised by the state authority responsible for the air traffic management. The above-mentioned documents implement the principle of total and exclusive sovereignty of the state in the airspace, present in the Chicago Convention (Art. 3, 3 bis, 4). Art. 122a (no longer applicable) allowed one to shoot down a civilian aircraft when it was required by the state security and when the air defense authority so decided [7]. Such a decision could be issued when the information obtained by the air

traffic services indicated that a civil aircraft was being used for illegal activities. Thus, the legislator wanted to create a regulation that would protect the state borders in the case of a terrorist attack with the use of a hijacked plane. The reason for the introduction of this currently inoperative legal article were the events of September 11, 2001, when 2996 people were killed following an attack organized by Al-Qaeda. At that time, the then current president George W. Bush decided to shoot down one of the planes with which no communication could be established. As it turned out later, the hijacked plane was heading towards Washington. Thanks to a heroic attempt by the passenger to regain control of the aircraft, the machine crashed in a site other than the terrorists had originally planned [37]. Based on the judgment of the Constitutional Tribunal [46], the above mentioned Art. 122a was found to be inconsistent with Art. 2 ('The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice. '), Art. 30 (the right to the respect of dignity), Art. 38 (the right to life) in relation to Art. 31 Section 3 "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights" of the Polish Constitution [44]. According to the stance of the Tribunal, a civil aircraft shootdown is contrary to the Constitution, because it causes the death of persons on board of an aircraft, and an order issued by the Minister of National Defense has the characteristics of intentional killing of persons who are not the attackers. Another argument presented in the judgment is that the performance of such an act does not correspond to the principle of proportionality and necessity, because there is a risk of incorrect determination of the degree of threat caused by aggressors in the aircraft. Even if it is proved that the aircraft will be used as a weapon to destroy other objects and deprive many people of life, it cannot be said that the right to life of people on the ground is more important than the lives of the passengers [14,29]. Considering the above, it should be stated that despite the existence of a constitutional principle of proportionality, the collision between goods, which represent the same value cannot be resolved.. In addition, countertypes resulting from criminal law do not provide for the exclusion of the unlawfulness of the offence committed in the presented case, because the good sacrificed does not represent an obviously greater value than the good saved (Art. 26 of the Criminal Code) [17,45]. The decision of the Polish Constitutional Tribunal was not a novum, because the same position was presented by the German Tribunal, recognizing the provisions regarding an aircraft shootdown as unconstitutional (1 BvR 357/05) [51].

## **6. Cases of aircraft shootdowns**

In the history of civil aviation, there were several cases of shooting down aircraft by a state, on the territory of which a foreign flying object appeared. Any such event causes justified criticism from the public, states, aviation organizations and society. In 1955, the EL AL aircraft - flight 402, flying to Tel Aviv was shot down by Bulgarian fighter planes [48]. As a result, 58 people were killed. At the very beginning of the proceedings, the aim of which was to determine the responsibility for the aircraft crash, the Bulgarian authorities did not admit committing such a shameful act. Finally, the state acknowledged its guilt, issued an official apology, and paid compensation to the families of those who had died [3].

Another shootdown of a civil aircraft took place in 1973, when the Libyan Arab Airlines Boeing 727 aircraft violated the space over Israel's territory. As a result of an incorrect recognition of the markings on the fighter planes and a failure to comply with instructions by the pilot of the passenger aircraft, the Israel's government decided to shoot down the plane with 108 people on board. Although the Israel's authorities did not officially accept responsibility for this incident, they decided to pay compensation to the families of the victims for humanitarian reasons [49]. The next incident happened in 1983 when the state authorities decided to shoot down a Korean Air plane - flight 007. As a result of this disaster 269 people were killed. The Soviet authorities had concluded that the passenger plane was on a reconnaissance mission [48]. In 1988, a shootdown of an Iranian Airbus A300 (flight Iran Air 655) with 290 passengers on board by the US cruiser USS Vincennes was reported [48]. Following this incident, the United States Government paid compensation of 300 thousand dollars for each professionally active victim and 150 thousand dollars for each inactive one, but it has never acknowledged its responsibility for shooting down the aircraft. According to the American government, it was a unilateral act of goodwill. After obtaining compensation, the case, which was pending before the International Court of Justice, was closed.

In 2001, the Russian Siberia Airlines 1812 aircraft was shot down on the Ukrainian territory [48]. Following this event, in 2003 the Ukrainian and Israeli governments signed an agreement, under which it was decided to pay ex gratia compensation. Under this agreements, both the families of victims from Israel and from Russia were to receive 200.000 thousand dollars. The Ukrainian side has not officially accepted responsibility for shooting down the aircraft [50]. Another example of such an act widely criticized by the international community was the Malaysia Airlines 17 flight disaster in 2014. In this case, 283 passengers and the entire crew died [48]. Following this plane crash, many families of the victims filed a lawsuit against the airline because of the improper performance of the air transport contract [8]. Furthermore, in this case it was considered whether the responsibility for this act could be attributed to the Russian Federation and its representatives [20]. According to Cezary Mika, it was not possible to prosecute the Russian Minister of National



Defense of Russia (in relation to civil and criminal liability) before the courts of other countries or before the International Criminal Court. However, it was possible to seek compensation from that country. Some families of the victims of the disaster chose this legal action, suing the Russian Federation before the European Court of Human Rights. Considering the above cases of shooting down civil aircraft, it should be pointed out that countries are reluctant to recognize their responsibility. In the previously discussed cases, the relevant authorities claimed that such an act was carried out because of security issues and the need to protect their citizens [21]. However, in order not to provoke public outrage, countries decide to pay *ex gratia* compensation to the families of the victims.

## **7. Conclusions**

Threats to civil aircraft include, among others, armed conflicts in the countries and terrorism. Shooting down an aircraft will always cause controversy and have effects on many levels, including international, social or economic ones. First, the question whether the state has the right to commit an act prohibited under the Chicago Convention should be answered. The present internal regulations of states prohibit the use of force against aircraft (Poland, Germany). Although the previously applicable Art. 122a of the Aviation Law Act allowed it, the Constitutional Tribunal decided that one legal good could not be compared to another one, which had the same value. Art. 26 of the Polish Criminal Code shows countertypes excluding criminal liability in the event of a criminal act, however, this provision cannot be applied in the above-mentioned situation. In addition, the constitutional principle of proportionality or necessity will not be taken into account in the case of violating such rights as the right to life or dignity. In addition to the above, the contentious issue is whether the state can exercise the right of self-defense in the event of an aircraft hijacking. Countries, which have carried out such acts so far, claim that foreign aircraft had violated their territory and, despite the given warnings, did not comply with the orders or could not communicate with them, which indicated deliberate, illegal activities. In addition, the distinction between civil and state aircraft is a key issue, because according to Art. 3 item c of the Chicago Convention, "no state aircraft of a contracting state shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and not in accordance with the terms thereof" [39]. In the absence of an authorization from the state, such an aircraft may be shot down in the light of the principle of self-defense as in the case of the Russian aircraft, which violated the Turkey's airspace. If a given state shoots down an aircraft as a subject of international law, it will be held liable in this respect. In addition, families of the victims will be able to claim compensation. In the event of a plane shootdown, it is not possible for the country to restore the previous state, existing before committing the prohibited act. However, it is necessary to supplement

the provisions of the Chicago Convention, which prohibits the use of force against aircraft, so that each and every country would have detailed provisions stating whether there are any enumerated deviations from this rule, or whether this is an *ius cogens* prohibition, from which there are no exceptions.

## 8. References

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45. Criminal Code of June 6 1997 (Dz.U. /Journal of Laws/ 2016.1136 consolidated text, as amended).
46. Decision of the Constitutional Tribunal of September 30 2008, K 44/07, OTK-A 2008/7/126, (Dz. U. /Journal of Laws/ of 2008 item 177 no. 1095)
47. The State Border Protection Act of October 12 1990 (Dz. U. /Journal of Laws/ 2017.660 consolidated text as amended).

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