
TURBULENT SKIES: LEGAL STRATEGIES ON RESPONDING TO THE DIVERSION OF RYANAIR FLIGHT 4978

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ABSTRACT

The interception and forced landing of Ryanair Flight 4978 in May 2021 underscores the transnational threat that authoritarian regimes, like Alexander Lukashenko’s Belarus, pose to the international community, specifically international civil aviation. The brazen actions of Belarus likely amount to breaches of several international conventions concerning the safety of international civil aviation, presenting segments of the global community with questions of how to most effectively respond in order to hold Belarus accountable for its wrongs. An analysis of the applicable international treaty law, as well as relevant general principles and case law, helps clarify the ways in which members of the international community can most effectively answer Belarus’s transgressions. The nature of the forced landing complicates plausible remedies and renders attempts at judicial appeal to be unpromising. However, coordinated and creative approaches at implementing countermeasures, specifically targeted sanctions, at the institutional and multilateral level may yield greater concessions from Belarus. These strategies could thus more effectively deter future acts of state hijacking in the realm of civil aviation.

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INTRODUCTION

In an increasingly globalized world, states have cultivated a myriad of ways to extend their social, economic, and—most importantly—political practices beyond national borders.¹ While non-authoritarian states undoubtedly indulge in such excesses, authoritarian regimes are much more often scrutinized of late due to their more visible (and well-documented) disruptions of global affairs.² The term “transnational repression,” coined relatively recently, describes the trend of authoritarian states targeting diaspora members with repressive tactics, therefore suppressing dissent extraterritorially, both directly and indirectly.³ The past several years have seen an increased interest in this troubling development, with empirical investigations detailing the repressive transnational strategies authoritarian states adopt in attempting to manipulate and control citizens living abroad.⁴

¹ Dana M. Moss, *Transnational Repression, Diaspora Mobilization, and the Case of The Arab Spring*, 63 SOC. PROBLEMS, 480, 480 (2016).

² See generally Gerasimos Tsourapas, *Global Autocracies: Strategies of Transnational Repression, Legitimation, and Co-Optation in World Politics*, 23 INT’L STUD. R. 616 (2021); Kenza Bouanane, *Igniting the Truth on Transnational Repression*, HUM. RTS. FOUND. (Dec. 17, 2021), <https://hrf.org/igniting-the-truth-on-transnational-repression/> [https://perma.cc/J4SR-5838]; Mike Abramowitz & Nate Schenkkan, *The Long Arm of the Authoritarian State*, WASH. POST (Feb. 3, 2021), <https://www.washingtonpost.com/opinions/2021/02/03/freedom-house-transnational-repression-authoritarian-dissidents/> [https://perma.cc/5DH8-ENWT].

³ Moss, *supra* note 1, at 481.

⁴ See, e.g., Saipira Furstenberg et al., *Spatialising State Practices Through Transnational Repression*, 6 EUR. J. INT’L SEC. 358 (2021). The recently scrutinized presence of hundreds of

In other words, an image of the Berlin Wall no longer comprehensively captures authoritarianism.⁵ The disregard for certain human rights and legal norms that many authoritarian states demonstrate is not simply limited to their own citizens or within their own territory. Instead, authoritarian states now increasingly rely on tools of intervention when exercising a more mobile form of control.⁶

In a February 2021 report, Freedom House outlined the scale and scope of transnational repression around the world.⁷ The extensive project catalogued “608 direct, physical cases of transnational repression since 2014,” including instances of detention, assault, physical intimidation, unlawful deportation, rendition, or suspected assassination.⁸ However, the report emphasized that the list is certainly not exhaustive, with hundreds of potential cases of transnational repression lacking adequate documentation.⁹ Freedom House’s research underscores the need for more consistent consequences, and ultimate accountability, for states engaging in acts of transnational repression in order to deter further transgressions of international norms.¹⁰ Among the most common manifestations of transnational repression that clearly violate international norms are extraterritorial violence, unlawful and arbitrary detentions, and the overall absence of due process.¹¹ Potential measures addressing transnational repression include punishing extraterritorial

Chinese “police stations” operating beyond China’s borders represents another prominent example of transnational repression. 110 OVERSEAS: CHINESE TRANSNATIONAL POLICING GONE WILD, SAFEGUARD DEFENDERS (2022), <https://safeguarddefenders.com/sites/default/files/pdf/110%20Overseas%20%28v5%29.pdf> [https://perma.cc/ZWY3-VSSN]. For a list of countries that have launched investigations into their activities, see Press Release, Safeguard Defenders, 14 Governments Launch Investigations into Chinese 110 Overseas Police Service Stations (Nov. 7, 2022) <https://safeguarddefenders.com/en/blog/14-governments-launch-investigations-chinese-110-overseas-police-service-stations> [https://perma.cc/C2T8-7TSU]. For commentary on the likely illegality of such “police stations” under international law, see Raphael Oidtmann, *Foreign Agents, Diplomatic Skirmishes and the Law on Diplomatic and Consular Relations*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL, (Nov. 2, 2022), <https://verfassungsblog.de/chinese-police-stations/> [https://perma.cc/L3GH-CVA6].

⁵ See Emanuela Dalmasso et al., *Intervention: Extraterritorial Authoritarian Power* 64 POL. GEOGRAPHY 95, 95 (2018).

⁶ See *id.* at 96.

⁷ NATE SCHENKKAN & ISABEL LINZER, OUT OF SIGHT, NOT OUT OF REACH: THE GLOBAL SCALE AND SCOPE OF TRANSNATIONAL REPRESSION, FREEDOM HOUSE (2021), https://freedomhouse.org/sites/default/files/2021-02/Complete_FH_Transnational_RepressionReport2021_rev020221.pdf [https://perma.cc/7XG5-NVZE].

⁸ *Id.* at 1.

⁹ *Id.* at 1–2.

¹⁰ *Id.* at 2.

¹¹ See *id.*

violence and instituting targeted sanctions against offending regimes.¹² Absent more rigorous accountability for perpetrators, transnational repression will continue to constitute a serious threat to human rights and the wider international legal system.¹³

The Belarusian interception of Ryanair Flight 4978 in May of 2021 to arbitrarily detain a journalist associated with domestic political opposition poses serious questions of international accountability. This article addresses the grounding of this flight as a symptom of transnational repression. In doing so, the paper seeks to answer the question of whether perpetrators of state hijacking of civilian airliners will enjoy, or at least reasonably expect, impunity. Consequently, this article will also explore how the hijacking of Ryanair Flight 4978 by Belarusian authorities can—or will—be remedied in any way.

Section I provides the necessary context to understanding the events of May 23, 2021, and the response of the international community. Section II explains how Belarus's actions may have violated certain international conventions, including the 1944 Convention on International Civil Aviation (Chicago Convention), the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention). Section III discusses the legal remedies available to particular states, or the international community as a whole, to respond to these potential violations. In other words, are targeted sanctions an appropriate or effective countermeasure to the grounding of Ryanair Flight 4978? Or are there alternatives or opportunities to reform the sanctions regimes currently in place among the members of the international community best positioned to respond to Belarus's behavior?

I. BACKGROUND

Belarus currently epitomizes the repressive policies authoritarian regimes often wield.¹⁴ Under President Alexander Lukashenko's leadership, civil liberties and human rights in Belarus have been curtailed.¹⁵ The government routinely cracks down on internal dissent, particularly targeting journalists.¹⁶ Since the contentious presidential elections of 2020, the Lukashenko regime has intensified its crackdown on independent journalism and civil society by arresting over 30,500 Belarusian citizens, causing many others to flee the

¹² *See id.*

¹³ *See id.*

¹⁴ *See* FREEDOM ON THE NET 2021: BELARUS, FREEDOM HOUSE, <https://freedomhouse.org/country/belarus/freedom-net/2021> [<https://perma.cc/2YLV-TF3G>].

¹⁵ *See id.*

¹⁶ *Id.*

country.¹⁷ Among those dissidents who fled in the last few years was twenty-six-year-old Roman Protasevich, a co-founder and former editor of a channel on the independent journalism app Telegram.¹⁸ His Telegram channel was a popular means of sharing information and organizing protests for those opposed to Lukashenko's government.¹⁹ Even though Protasevich had been living in exile in Lithuania, the Belarusian authorities nonetheless charged him with inciting public disorder and social hatred in November 2020.²⁰ However, the Lukashenko regime decided to take a dangerous step forward in its pursuit of Protasevich—and, by extension, its stifling of dissent against its government—in May of 2021.

On May 23, 2021, Ryanair Flight 4978 was en route from Athens to Vilnius when Belarusian fighter jets intercepted the aircraft while it was in Belarus's airspace, forcing the plane to land at the Minsk airport.²¹ Roman Protasevich and his girlfriend, Sofia Sapega, a Russian national, were among the 126 passengers on board.²² There was also speculation that three other passengers were "KGB types," according to communications between Ryanair and the British Parliament.²³ Lukashenko personally ordered the MiG-29 fighter jet to intercept and escort the Ryanair flight to Minsk, effectively forcing the plane to make a "U-turn and land."²⁴ The Belarusian authorities claimed that they were acting in response to a bomb threat, with Belarusian air traffic controllers allegedly telling the pilot the bomb could be detonated when it reached Vilnius.²⁵ Belarusian officials further claimed that the bomb threat originated from a terrorist network.²⁶ However, instead of

¹⁷ *Id.*

¹⁸ Neil Vigdor & Ivan Nechepurenko, *Who Is Roman Protasevich, the Captive Journalist in Belarus?*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/05/23/world/europe/roman-protasevich.html> [<https://perma.cc/W2RP-8BJ8>].

¹⁹ *Id.*

²⁰ *Id.*

²¹ Anton Troianovski & Ivan Nechepurenko, *Belarus Forces Down Plane to Seize Dissident; Europe Sees 'State Hijacking,'* N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/23/world/europe/ryanair-belarus.html> [<https://perma.cc/2YNY-B77Z>].

²² *Belarus Plane: What We Know and What We Don't*, BBC NEWS (June 25, 2021), <https://www.bbc.com/news/world-europe-57239521> [<https://perma.cc/YF9T-W6DX>].

²³ *Id.*

²⁴ Troianovski & Nechepurenko, *supra* note 21.

²⁵ BBC NEWS, *supra* note 22.

²⁶ In a briefing with journalists, the aviation head of Belarus's transport and communications ministry said the government received an email from Hamas, the Palestinian terrorist organization based in the Gaza Strip, claiming the group placed a bomb aboard the Ryanair plane. Hamas denied the allegations. *Belarus Claims It Forced Plane to Land Over Hamas Threat; Terror Group Denies It*, TIMES ISR. (May 25, 2021, 5:05 PM), <https://www.timesofisrael.com/belarus-claims-it-forced-ryanair-plane-to-land-because-of->

landing in Vilnius, which was closer, the plane was diverted to Minsk.²⁷ The Belarusian authorities supposedly “gave the pilot ‘no alternative’ but to land in Belarus.”²⁸

While grounded in Minsk, Belarusian police arrested Protasevich and Sapega.²⁹ The Belarusian authorities searched the aircraft and the passengers’ luggage, ostensibly investigating the purported bomb threat, before concluding that there was no bomb aboard.³⁰ After spending about seven hours on the ground in Minsk, Ryanair Flight 4978 was then allowed to continue to its original destination in Lithuania.³¹ Shortly after his arrest, Protasevich appeared in several short videos posted online by pro-Lukashenko outlets, as well as on Belarus state television, where he apparently confessed to trumped-up charges of “public disorder” and “social hatred.”³² However, both his family and human rights groups claim those interviews were conducted under duress and note visible signs of physical abuse on his wrists in the videos.³³

The hijacking was widely condemned.³⁴ In addition to sanctioning seventy-eight individuals linked to the forced landing, the European Union responded by banning Belarusian airlines from flying over, or landing in, its twenty-seven member states.³⁵ In summoning the Belarusian ambassador, the EU External Action Service described the emergency landing as a “coercive act” that jeopardized the safety of those on board.³⁶ Ursula von der Leyen, the President of the European Commission, immediately characterized

hamas-threat/ [https://perma.cc/A7UD-HDTN]. The Swiss email provider soon verified that the email was sent *after* the flight had been diverted to Minsk, furthering undercutting Belarus’s narrative. Mary Ilyushina & Isabelle Khurshudyan, *Purported Bomb Threat Belarus Cited in Plane Interception Was Sent After Flight Diverted, Email Provider Says*, WASH. POST (May 27, 2021, 12:55 PM), https://www.washingtonpost.com/world/europe/belarus-lukashenko-plane-email/2021/05/27/895b59d6-be5d-11eb-922a-c40c9774bc48_story.html [https://perma.cc/GYT5-2VTV].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Vladimir Isachenkov, *EXPLAINER: What Was Behind a Jet’s Diversion to Belarus?*, AP NEWS (May 24, 2021), <https://apnews.com/article/belarus-europe-edcf633281e3e9a55b2d994b96eb029b> [https://perma.cc/D2D7-6J34]; Vigdor & Nechepurenko, *supra* note 18.

³¹ Troianovski & Nechepurenko, *supra* note 21.

³² BBC NEWS, *supra* note 22; Vigdor & Nechepurenko, *supra* note 18.

³³ BBC NEWS, *supra* note 22.

³⁴ *See id.*

³⁵ *Id.*

³⁶ European Union External Action Service Press Release, Belarus: EU Summons Belarus Ambassador (May 24, 2021) https://eeas.europa.eu/headquarters/headquarters-homepage/98916/belarus-eu-summons-belarus-ambassador_en [https://perma.cc/7ZCN-6YUZ].

Belarus's actions as "outrageous and illegal," threatening (then undefined) consequences while describing the incident as a "hijacking."³⁷ The United States Secretary of State, Antony Blinken, similarly condemned the interception and arrest of Protasevich, demanding an international investigation and promising a coordinated response with global partners.³⁸ Lithuania was even more forceful in its reaction, decrying the forced landing as "an unprecedented attack on the international community: A civilian plane and its passengers . . . hijacked by military force."³⁹ Ryanair's CEO, Michael O'Leary, echoed these sentiments when he described the incident as "a case of state-sponsored hijacking."⁴⁰ Furthermore, the International Civil Aviation Organization (ICAO) quickly raised concerns that Belarus may have violated provisions of the 1944 Chicago Convention, which governs international civil aviation.⁴¹ After conducting a monthslong independent investigation, the ICAO later formally confirmed these suspicions at its 41st Assembly in October 2022.⁴²

II. BELARUSIAN VIOLATIONS

This paper addresses Ryanair Flight 4978 within the wider framework of transnational repression. The events of May 23, 2021, warrant an analysis of

³⁷ Ursula von der Leyen (@vonderleyen), TWITTER (May 23, 2021, 4:39 PM), <https://twitter.com/vonderleyen/status/1396566441370001413> [<https://perma.cc/85RA-FY24>].

³⁸ Troianovski & Nechepurenko, *supra* note 21.

³⁹ *Id.*

⁴⁰ Isachenkov, *supra* note 30.

⁴¹ ICAO (@icao), TWITTER (May 23, 2021, 1:18 PM), <https://twitter.com/icao/status/1396515815248257027> [<https://perma.cc/DD8G-MJQ2>].

⁴² The ICAO commissioned a Fact-Finding Investigation Team ("FFIT") in June 2021. The FFIT presented its initial report to the ICAO Council in January 2022. Further investigation thereafter determined that senior Belarusian officials orchestrated the diversion of Ryanair Flight 4978 under the false pretext of a bomb threat. The FFIT final report was then submitted to the ICAO on July 18, 2022, which quickly forwarded it to the Secretary-General and Assembly. The ICAO Assembly endorsed the FFIT report and its conclusions in October 2022 by adopting Resolution 41A-1, which condemned Belarus for its various infractions of international civil aviation law. The ICAO Council President subsequently briefed the U.N. Security Council on these developments on October 31st, 2022. ICAO Assembly Res. A41-1 (Oct. 7, 2022); Meetings Coverage 9175th Meeting (AM), United Nations, Belarus Improperly Diverted Passenger Flight, Endangered Lives, International Civil Aviation Organization Senior Official Tells Security Council (Oct. 31, 2022), <https://press.un.org/en/2022/sc15088.doc.htm> [<https://perma.cc/3ZFA-4AHC>]; News Release, ICAO, Council President Presents Briefing to UN Security Council on the Forced Landing of Ryanair Flight FR4978 by Belarus (Oct. 31, 2022), <https://www.icao.int/Newsroom/Pages/Council-President-presents-briefing-to-UN-Security-Council-on-the-forced-landing-of-Ryanair-Flight-FR4978-by-Belarus.aspx> [<https://perma.cc/NMR3-GKYQ>].

the relevant international conventions governing civil aviation to which Belarus is a state party, as well as the potential legal consequences of its actions. Belarus is party to several major international conventions regarding civil aviation: the 1944 Convention on International Civil Aviation (commonly referred to as the Chicago Convention), the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (known as the Montreal Convention), and the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft (the Hague Hijacking Convention).⁴³

A. The 1971 Montreal Convention

Article 1(1)(e) of the Montreal Convention prohibits any person from intentionally “communicat[ing] information which he knows to be false, thereby endangering the safety of an aircraft in flight.”⁴⁴ Moreover, Article 10 specifies that “Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.”⁴⁵ While commentators have observed that the bomb threat was almost certainly fabricated, which would constitute a clear breach of the convention, Belarus’s reservation⁴⁶ to the treaty’s dispute settlement provision frustrates any attempt at holding it accountable under that framework.⁴⁷ Article 14 allows states to refer disputes to the International Court of Justice (“ICJ”), provided that a state involved in

⁴³ Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention]; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177 [hereinafter Montreal Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Oct. 14, 1971, 860 U.N.T.S. 105 [hereinafter Hague Hijacking Convention].

⁴⁴ Montreal Convention, *supra* note 43, art. 1.

⁴⁵ *Id.* art. 10.

⁴⁶ A reservation to a treaty:

[M]eans a unilateral statement, however phrased or named, made by a State or an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty or by a State when making a notification of succession to a treaty, whereby the State or organization purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization.

U.N. GAOR, 65th Sess., Supplement No. 10 at 36, U.N. Doc. A/65/10 (2010), https://legal.un.org/ilc/documentation/english/reports/a_65_10.pdf [<https://perma.cc/J3AD-JMNV>].

⁴⁷ See Cameron Miles, *Belarus and the Hijacking of Ryanair Flight FR4978: A Preliminary International Law Analysis*, LAWFARE BLOG (May 24, 2021, 3:55 PM), <https://www.lawfareblog.com/belarus-and-hijacking-ryanair-flight-fr4978-preliminary-international-law-analysis> [<https://perma.cc/GCE2-45Y7>].

the dispute has not filed a reservation refusing the ICJ's jurisdiction.⁴⁸ When ratifying the convention in 1973, Belarus declared that it "does not consider itself bound by the provisions" of Article 14 pertaining to the reference of disputes regarding the interpretation or application of the convention to the ICJ.⁴⁹ For that reason, the ICJ would likely dismiss any case arising out of these events brought by a state party to the Montreal Convention due to Belarus's reservation.⁵⁰

B. The 1944 Chicago Convention

Understanding the Chicago Convention's application to the case at hand first requires an overview of the treaty, its relevant provisions, and the organization tasked with its oversight. In applying the Chicago Convention to the facts surrounding Ryanair Flight 4978's diversion, it then becomes necessary to address various questions related to the nature of Belarus's actions, such as whether they constituted a use of force. After properly characterizing and resolving these questions, then one can more effectively anticipate—and counter—the arguments Belarus will likely advance in its justification for grounding the passenger flight.

1. Background and Analysis of Article 3bis

Unlike the Montreal Convention, the 1944 Chicago Convention does not contain a reservation from Belarus.⁵¹ Article 84 of the Convention designates the Council of the ICAO as the appropriate body to settle disputes between member states, with its decisions appealable to the ICJ.⁵² The ICAO is the specialized agency within the United Nations charged with overseeing the diplomatic framework set up by the Chicago Convention.⁵³ For this reason, the Chicago Convention offers a more promising international legal procedure to assess Belarus's actions. Under Article 3bis(a), 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 the persons on board and the safety of the aircraft must not be endangered."⁵⁴ The article was adopted as an amendment after a Soviet military aircraft shot down Korean Air Lines

⁴⁸ Montreal Convention, *supra* note 43, art. 14.

⁴⁹ *Id.*

⁵⁰ *See, e.g.,* Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, 2006 I.C.J. 6 (Feb. 3), <https://www.icj-cij.org/public/files/case-related/126/126-20060203-JUD-01-00-EN.pdf> [<https://perma.cc/TH29-LZPC>].

⁵¹ *See* Chicago Convention, *supra* note 43.

⁵² *Id.* art. 84.

⁵³ *About ICAO*, ICAO, <https://www.icao.int/about-icao/Pages/default.aspx> [<https://perma.cc/TWJ2-Q8HQ>].

⁵⁴ Chicago Convention, *supra* note 43, art. 3bis(a).

Flight 007 in 1983, killing all 269 people on board.⁵⁵ Furthermore, Article 3bis(b) stipulates that a state may “resort to any appropriate means consistent with relevant rules of international law” when requiring a civilian aircraft land in its territory.⁵⁶ Importantly, Article 3bis of the Chicago Convention does not grant overflowed states the right to require a foreign civilian aircraft to land due to a bomb threat.⁵⁷ Therefore, Poland (the flag state of the plane involved) or any other member of the Chicago Convention likely has standing to initiate proceedings against Belarus within the ICAO Council or the ICJ.⁵⁸

Even though the Chicago Convention enjoys widespread nominal support, having been ratified by 193 states,⁵⁹ the interpretation of Article 3 remains varied and controversial.⁶⁰ However, applying Article 3bis to the grounding of Ryanair Flight 4978 requires an understanding of the broader law set forth by the Convention. For example, Article 1 reflects the rule in customary international law that every state has “exclusive sovereignty over the airspace above its territory.”⁶¹ Therefore a state’s territory encompasses a three-dimensional character, with national airspace including the airspace directly above its lands and waters.⁶² Meanwhile, Article 25 calls on each state party to provide “assistive measures to aircraft in distress and to allow the authorities of the state of registry to also provide such.”⁶³ Because there is no “right of innocent passage” analogous to maritime law within the pre-existing airspace law, Article 6 of the Convention limits scheduled civilian flights to operate or land in a contracting state only with the “special permission or other authorization of that State.”⁶⁴ Although Articles 5 and 6 establish a large degree of sovereignty over contracting parties’ airspace, the rest of the Convention defines and limits that freedom by imposing various obligations upon member states.⁶⁵ In this way, the overarching object and purpose of the

⁵⁵ PAUL STEPHEN DEMPSEY, PUBLIC INTERNATIONAL AIR LAW 56 (2d ed. 2017).

⁵⁶ Chicago Convention, *supra* note 43, art. 3bis(b).

⁵⁷ Mikko T. Huttunen, *The Right of the Overflowed State to Divert or Intercept Civil Aircraft Under a Bomb Threat: An Analysis with Regard to Ryanair Flight 4978*, 14 J. TRANSP. SEC. 291, 300 (2021).

⁵⁸ See Miles, *supra* note 47.

⁵⁹ CONVENTION ON INTERNATIONAL CIVIL AVIATION SIGNED AT CHICAGO ON 7 DECEMBER 1944, <https://www.icao.int/publications/Documents/chicago.pdf> [https://perma.cc/ZSV5-GL9Y].

⁶⁰ For an analysis of how Article 3 delimits the scope of the Chicago Convention and a discussion of the ways in which interpretations of Article 3 have varied, see Jiri Hornik, *Article 3 of the Chicago Convention*, 27 AIR & SPACE L. 161 (2002).

⁶¹ DEMPSEY, *supra* note 55, at 54–55; Chicago Convention, *supra* note 41, art. 1.

⁶² DEMPSEY, *supra* note 55, at 54.

⁶³ See Huttunen, *supra* note 57, at 300 (paraphrasing language of Article 25).

⁶⁴ DEMPSEY, *supra* note 55, at 55; Chicago Convention, *supra* note 43, art. 6.

⁶⁵ DEMPSEY, *supra* note 55, at 55.

treaty—creating “uniformity in Air Law across national boundaries”—can be properly implemented.⁶⁶

While the Chicago Convention grants quasi-judicial authority to the ICAO to settle disputes, or to refer them to the ICJ, the ICAO has only exercised those functions on seven instances, none of which entailed similar circumstances as Belarus’s grounding of Ryanair Flight 4978.⁶⁷ There is some doubt as to whether the ICAO is prepared to serve as a neutral arbiter, considering its relative lack of experience in conclusively settling disputes and its political structure.⁶⁸ In light of this context, a thorough insight into the interpretation of Article 3*bis*, coupled with any other sources of international law applicable to Belarus’s intervention ought to be addressed before exploring possible adjudication methods.

2. Application of the Chicago Convention to Belarus and Questions on the Use of Force

First, one must appropriately define Belarus’s actions against Ryanair Flight 4978. The apparent involvement of a Belarusian fighter jet in the diversion of the Ryanair flight raises concerns related to the use of force. Regarding the use of force in international law, Article 2(4) of the U.N. Charter declares that “[a]ll Members shall refrain . . . from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.”⁶⁹ Article 2(4) prohibits threats of force in addition to use of force.⁷⁰ A threat of force usually entails “an express or implied promise by a government of a resort to force conditional on non-acceptance of certain demands of that government.”⁷¹ Furthermore, “[i]f the promise is to resort to force in conditions in which no justification for the use of force exists, the threat itself is illegal.”⁷² However, the international legal norms governing the use of force in international relations “do not affect the right of a state to take measures to maintain order within its jurisdiction.”⁷³ In addition, international law has evolved in recent decades in order to more effectively combat terrorism, with U.N. Security Council resolution 1368 and General

⁶⁶ *Id.*

⁶⁷ See Dmitry V. Ivanov & Vladislav G. Donakanian, *The ICAO Council as a Dispute Settlement Body: Theoretical and Practical Issues*, 3 MOSCOW J. INT’L L. 33, 38–39 (2022) (Rus.). See also DEMPSEY, *supra* note 55, at 75.

⁶⁸ See DEMPSEY, *supra* note 55, at 76.

⁶⁹ U.N. Charter art. 2.

⁷⁰ *Id.*

⁷¹ IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 364 (Oxford Univ. Press, 1963).

⁷² *Id.*

⁷³ MALCOM N. SHAW, *INTERNATIONAL LAW* 857 (Cambridge Univ. Press, 8th ed. 2017).

Assembly resolution 1373 calling for states to confront “by all means” the threats posed by terrorism.⁷⁴ The relative zealotry and discretion afforded states in combating terrorism under the current international legal framework no doubt incentivized Belarus’s claims that Ryanair Flight 4978 harbored a bomb planted by some terrorist network.⁷⁵

What complicates analyzing Article 3*bis* here is the fact that most scholarship pertaining to application of the provisions concern situations where states, typically via military craft, shoot down civilian airliners.⁷⁶ Nevertheless, there is sufficient supplementary commentary on state interception of civilian aircraft.⁷⁷ The ICAO’s Manual Concerning the Interception of Civil Aircraft reiterates that “interception of civil aircraft will be undertaken only as a last resort.”⁷⁸ Meanwhile, observers have highlighted some shortfalls of Article 3*bis* and the Chicago Convention as a whole, namely the absence of remedy provisions for violation of Article 3*bis* and the lack of any provision calling for compensation or reparations when a state uses military force against a civilian plane.⁷⁹ State practice, under international law, generally allows state interception of civilian aircraft suspected of posing a threat.⁸⁰ A bomb aboard an aircraft may qualify as a plane’s use for purposes inconsistent with the aims of the Convention.⁸¹ In this case, however, Belarus’s allegations that Ryanair Flight 4978 contained a credible bomb on board are widely believed to be false and disingenuous.⁸²

⁷⁴ S.C. Res. 1368 (Sept. 12, 2001); S.C. Res. 1371 (Sept. 28, 2001).

⁷⁵ See *supra* note 26.

⁷⁶ See generally Brian E. Foont, *Shooting Down Civilian Aircraft: Is There an International Law?*, 72 J. AIR L. & COM. 695 (2007); James A. Beckman, *Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability of Nation-States and the Application of Punitive Damages*, 10 FIU L. REV. 585 (2015).

⁷⁷ See Int’l Civil Aviation Org. [ICAO], *Manual Concerning Interception of Civil Aircraft*, Doc. 9433-AN/926 (2nd ed. 1990), <https://www.wing.com.ua/images/stories/library/ovd/9433.pdf> [<https://perma.cc/8QDT-VHRL>].

⁷⁸ *Id.* at 2-1.

⁷⁹ See Beckman, *supra* note 76, at 612.

⁸⁰ See *id.* at 617 (providing examples from the U.S., Canada, and Germany).

⁸¹ Miles Jackson & Antonios Tzanakopoulos, *Aerial Incident of 23 May 2021: Belarus and the Ryanair Flight 4978*, BLOG OF THE EUR. J. OF INT’L L. (May 24, 2021), <https://www.ejiltalk.org/aerial-incident-of-23-may-2021-belarus-and-the-ryanair-flight-4978/> [<https://perma.cc/LGS6-NTSF>].

⁸² See, e.g., Rep. of the ICAO Fact-Finding Investigation, Event Involving Ryanair Flight FR4978 in Belarus Airspace on 23 May 2021, at 4.6.2–5.4 (Jan. 2022) [hereinafter ICAO Report], https://www.politico.eu/wp-content/uploads/2022/01/19/ICAO-Fact-Finding-Investigation-Report_FR497849.pdf [<https://perma.cc/5DWX-7GQT>]. For the finalized version of the report submitted to the ICAO Council and Assembly, see Rep. of the ICAO Fact-Finding Investigation, Event Involving Ryanair Flight FR4978 in Belarus Airspace on

To avoid these sorts of scenarios, some suggest Article 3*bis* be revised so as to incorporate the language of Article 51 of the U.N. Charter related to self-defense and the specific formulation exemplified in the Caroline Case.⁸³ In that way, exercising military force against civilian airliners in self-defense would only be acceptable when the “necessity of that self-defense is instant, overwhelming, [and] leaving no choice of means, and no moment for deliberation.”⁸⁴

3. Countering Potential Belarusian Defenses

Moreover, it is helpful to remember that the Ryanair incident naturally concerns questions related to Belarusian aerial sovereignty.⁸⁵ In this respect, Belarus “can control which aircraft may access [its] airspace and how they must behave therein.”⁸⁶ Therefore, a state like Belarus, by default, may exercise its right to divert or otherwise intercept an aircraft potentially harboring a bomb onboard.⁸⁷ However, Belarus’s ratification of the Chicago Convention means that it has agreed to the various limitations and restrictions on national aerial sovereignty set forth in the treaty governing civil aviation.⁸⁸ Meanwhile, an act of interception by a military aircraft, in this case the Belarusian fighter jet, would fall outside the scope of the Chicago Convention and instead be subject to the national air law of the overflown state.⁸⁹ What is unique about the interception of Ryanair Flight 4978, however, is the fact that it involved an interaction between both state and civil aircraft: A state military aircraft intercepting and escorting a civilian

23 May 2021, (July 2022), <https://www.icao.int/Security/Documents/Ryanair%20FR4978%20FFIT%20report.pdf> [<https://perma.cc/HN7L-LWNT>].

⁸³ See Beckman, *supra* note 76, at 624. The Caroline Case refers to a dispute between the U.S. and the British government concerning a British attack on an American steamer involved in the 1837 rebellion against imperial rule in Canada. The diplomatic exchanges between the two states marked a significant development of the concept of self-defense within international law. The doctrine derived from the case ultimately confirmed the requirement of necessity; that is, an act of self-defense must be “instant, overwhelming, [and] leaving no choice of means, and no moment for deliberation.” This test would also materialize the modern notions of necessity and proportionality in armed conflict. Christopher Greenwood, *The Caroline*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 1, 5, 6, Oxford Public International Law (Apr. 2009). For the diplomatic letter, see DANIEL WEBSTER, *Mr. Webster to Mr. Fox*, in THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER, WHILE SECRETARY OF STATE 123, 132 (1848).

⁸⁴ WEBSTER, *infra* note 83, at 132. See also Beckman, *supra* note 76, at 624.

⁸⁵ See Chicago Convention, *supra* note 43, art. 1 (“[E]very State has complete and exclusive sovereignty over the airspace above its territory.”).

⁸⁶ Huttunen, *supra* note 57, at 294.

⁸⁷ *Id.*

⁸⁸ See *id.*

⁸⁹ See *id.* at 295.

aircraft, resulting in a forced landing.⁹⁰

At first glance, Belarus may have followed all the rules of international law in intercepting and grounding Ryanair Flight 4978. The Belarusian authorities made sure to declare that it possessed some form of information regarding a bomb threat and shared it with the Ryanair crew.⁹¹ An expert in air law also commented that, ignoring the validity of the bomb threat, the emergency landing largely complied with international rules.⁹² Aside from the performance of the diversion, there are serious doubts regarding whether the operation was “conducted with the principle of necessity and proportionality demanded by Appendix 2 of the Chicago Convention,” which reiterates that state interception of an aircraft must be a last resort.⁹³ Here, the Belarusian military fighter jet “took off immediately,” without evidence of any prior alternative deliberations.⁹⁴ When dealing with bomb threats, the “air navigation service provider must assess the credibility of these statements and determine whether they constitute reasonable grounds” for intervention.⁹⁵ However, “reasonable grounds” only exist if the bomb threat is legitimate and not based on falsified information.⁹⁶ In this case, the official ICAO investigation determined that the bomb threat was “deliberately false.”⁹⁷ If there was not suspicion already, this determination could cast even more doubt on the good faith participation of Belarus in any further investigations related to the matter.

Because the legality of the use or threat of force ultimately depends upon whether the incursion in question was unlawful, it would be very difficult for Belarus to argue that grounding the Ryanair flight, via a fighter jet escort, was justified.⁹⁸ The aircraft was traversing Belarusian airspace lawfully, as it

⁹⁰ *Id.*

⁹¹ Sava Jankovic, *Forced Landing of a Passenger Plane: Law and Politics Behind the Ryanair 4978 Flight from Athens to Vilnius: Part I*, OPINIO JURIS (June 21, 2021), <http://opiniojuris.org/2021/06/21/forced-landing-of-a-passenger-plane-law-and-politics-behind-the-ryanair-4978-flight-from-athens-to-vilnius-part-i/> [https://perma.cc/G6ZM-LACG].

⁹² Elizaveta Lamova et. al., *Experts Assessed the Actions of the Authorities When Landing a Ryanair Plane in Minsk*, RBC (May 23, 2021, 9:28 PM), https://www.rbc.ru/politics/23/05/2021/60aa90989a794739151cb0a0?fbclid=IwAR2IT94oReNoVhred0_xaHp4rCjzQ7jPNcMyS0o1YDOjkZVcB4XWJ64YMIo [https://perma.cc/23QX-G2RN] (Rus.).

⁹³ Jankovic, *supra* note 91.

⁹⁴ *Id.*

⁹⁵ Huttunen, *supra* note 57, at 299.

⁹⁶ *Id.*

⁹⁷ ICAO Report, *supra* note 82, at 5.4.

⁹⁸ See Tom Ruys, *The Meaning of “Force” and the Boundaries of Jus Ad Bellum: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT’L L. 159, 172 (2014).

was a regularly scheduled commercial civilian flight with the proper authorization. However, the fact that a single interception is often an isolated incident, the threat or use of force against a civilian aircraft within a state's territory likely falls beyond the scope of the U.N. Charter's Article 2(4) prohibition.⁹⁹ Even against that presumption, though, Belarus's actions remain legally dubious. Because Article 3*bis* of the Chicago Convention does not grant overflown states the right to require a foreign civilian aircraft to land due to a (fabricated) bomb *threat*, there is consequently no corresponding right to intercept the aircraft.¹⁰⁰ Instead, Belarus ought to have complied with the provisions of Article 25 of the Chicago Convention that address distress scenarios.¹⁰¹ Rather than treat the situation as a security threat against itself, Belarus should have assisted Ryanair Flight 4978 and not have issued orders for the aircraft to land.¹⁰² In fact, the rules pertaining to the interception of civil aircraft found within the Chicago Convention ultimately vest the pilot, not air traffic controllers, with the authority to decide where the plane flies, even under a bomb threat, while de-emphasizing the right of overflown states to divert or intercept the aircraft.¹⁰³

Ultimately, the fact that the bomb threat was almost certainly fabricated frustrates analysis of this incident. Had the pilot known the bomb threat to be false, and indeed likely construed as a means to arrest passengers onboard, he or she would probably have not decided to land in Minsk.¹⁰⁴ There already seems to be some indication that Belarus will rely on the pilot's decision to land in deflecting accusations of unlawful interception.¹⁰⁵ But therein lies the problem: Belarus needed some sort of security or safety-based justification for its abuse of international norms in order to execute its transnationally repressive objectives.

C. *The Hague Hijacking Convention*

The 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, like the 1971 Montreal Convention, arose in reaction to terrorist groups targeting civilian airliners and aircraft hijackings that occurred in the

⁹⁹ See *id.* at 209.

¹⁰⁰ See Huttunen, *supra* note 57, at 300.

¹⁰¹ See *id.*

¹⁰² See *id.* at 301.

¹⁰³ *Id.* at 302.

¹⁰⁴ *Id.* at 303.

¹⁰⁵ A Belarusian aviation lawyer and adviser to Belarus's state-owned air services emphasized that the air traffic controllers' instruction to the Ryanair pilot was worded as a recommendation to land, and not an order, leaving him some semblance of discretion on where to land. See Graeme Wood, *The Ryanair Hijacking Pierced the Delusion of Flight*, ATLANTIC (May 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/05/belarus-ryanair-hijacking/619028/> [<https://perma.cc/24S3-EH29>].

late 1960s.¹⁰⁶ The Convention was largely aimed at addressing how to apprehend and punish the perpetrators of such hijackings.¹⁰⁷ It also sought to distinguish the relatively new crime of hijacking from that of piracy.¹⁰⁸ As a result of these efforts, condemnation of hijackings is now widespread and the unlawful seizure of aircrafts has become “an international crime of virtually universal jurisdiction in practice.”¹⁰⁹ Belarus is a state party to the Convention.¹¹⁰

1. Relevant Provisions and Application to Ryanair Flight 4978

Article 1 of the Hague Convention states that:

Any person who on board an aircraft in flight: (a) unlawfully, by threat or force thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act commits [a hijacking-related offence].¹¹¹

Article 9 addresses the obligations states party owe to each other and to those onboard an aircraft when an unlawful seizure has occurred or is about to occur.¹¹² Article 9(2) stipulates that contracting states “in which the aircraft or its passengers or crew are present shall facilitate the continuation of the journey of the passengers and crew as soon as practicable”¹¹³ While there were reports that Belarusian KGB agents were onboard,¹¹⁴ observers noted no indication the agents actually “used intimidation or threats of force in order to seize control of the aircraft.”¹¹⁵ For this reason, a straightforward application of the Hague Convention here would likely struggle to yield a convincing case of “state hijacking.”¹¹⁶ However, it remains unclear whether a state fabricating a false bomb threat is enough to constitute state

¹⁰⁶ SHAW, *supra* note 73, at 506.

¹⁰⁷ *Id.*

¹⁰⁸ See BIN CHENG, *STUDIES IN INTERNATIONAL AIR LAW: SELECTED WORKS OF BIN CHENG* 316–17 (Chia-Jui Cheng ed., Brill 2017).

¹⁰⁹ SHAW, *supra* note 73, at 507.

¹¹⁰ CONVENTION FOR THE SUPPRESSION OF UNLAWFUL SEIZURE OF AIRCRAFT SIGNED AT THE HAGUE ON 16 DECEMBER 1970, https://www.icao.int/secretariat/legal/list%20of%20parties/hague_en.pdf [<https://perma.cc/6DSV-JNH2>].

¹¹¹ Hague Hijacking Convention, *supra* note 43, art. 1.

¹¹² *See id.* art. 9.

¹¹³ *Id.*

¹¹⁴ Andrew Roth & Daniel Boffey, *Belarus KGB Believed to Be on Plane Forced to Land in Minsk, Says Ryanair CEO*, *GUARDIAN* (May 24, 2021, 7:46 AM), <https://www.theguardian.com/world/2021/may/24/belarus-seizure-blogger-ryanair-flight-us-outcry> [<https://perma.cc/CJP5-G9VG>].

¹¹⁵ Jackson & Tzanakopoulos, *supra* note 81.

¹¹⁶ *See id.*

participation in a hijacking for the purposes of the Convention.

How one characterizes the nature of the bomb threat *and* the diversion by Belarusian authorities will ultimately determine the difficulty of applying the Hague Convention to this case. That is because, while the Convention pertains equally to attempts and accomplices, the definition of hijacking “does not include the unlawful assumption of control by means, such as fraud, that do not involve the use of force or threat of any kind.”¹¹⁷ Therefore, the existence of the bomb threat alone is not enough to constitute a violation of the Hague Convention.¹¹⁸ The participation of the Belarusian authorities and presence of a military fighter jet are necessary elements in suggesting Belarus threatened the use of force against Ryanair Flight 4978. Belarus will likely emphasize, in its defense, that the Convention only applies to individuals “on board the aircraft,” though that restriction has been criticized as hard to justify, given past situations proving the relative ease with which hijackings can be accomplished or attempted from the ground.¹¹⁹ Should this defense be overcome, the Lukashenko regime will likely encounter attempts by other states to enforce the Convention’s extradition obligations.

2. Attempts at Enforcement

Article 8 of the Hague Convention concerns the conditions for extradition between contracting states for hijacking offences.¹²⁰ Specifically, Article 8(3) establishes “an obligation to recognize hijacking as an extraditable offence between the contracting States,” where it is not already made conditional on a treaty.¹²¹ However, the contracting state is allowed to set the conditions governing extradition.¹²² Article 8(7) extends the scope of extradition by “treating the offence of hijacking . . . as if it had been committed not only in the place in which it occurred but also in the territories of the State required to establish their jurisdiction,” which includes the state where the aircraft is registered and the state where the aircraft’s lessee has its principal place of business.¹²³ Those states, in this case, would be Poland and Ireland, respectively. In fact, even under the circumstances of a forced landing, passengers remain under the jurisdiction of the aircraft’s flag state.¹²⁴ The

¹¹⁷ CHENG, *supra* note 108, at 317.

¹¹⁸ See Jackson & Tzanakopoulos, *supra* note 81.

¹¹⁹ *Id.* at 318 (providing the May 1971 Qantas bomb hoax as an example).

¹²⁰ Hague Hijacking Convention, *supra* note 43, art. 8.

¹²¹ CHENG, *supra* note 108, at 320 (interpreting the Hague Hijacking Convention).

¹²² *Id.*

¹²³ *Id.* at 320–21.

¹²⁴ See EUGENIA ANDREYUK, THE GERMAN MARSHALL FUND OF THE UNITED STATES, INTERNATIONAL MECHANISMS FOR ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS 19 (2022), <https://www.gmfus.org/news/international-mechanisms-accountability-human-rights-violations-belarus> [<https://perma.cc/ZYH6-FT3T>].

local authorities of where the plane was grounded can only legally arrest passengers for committing “crimes harming flight or passenger security.”¹²⁵ Therefore, Belarus has not only failed its commitment to the Hague Convention by refusing to extradite those responsible for intercepting Ryanair Flight 4978, but it also lacked the jurisdiction to detain Protasevich and Sapega—for almost any crime—in the first place.¹²⁶

In its effort to deny safe havens to those guilty of, or responsible for, the crime of hijacking, the Hague Convention also imposes obligations on contracting states to prosecute offenders, creating an *aut dedere aut punire* (either extradite or punish) system.¹²⁷ Therefore, in the absence of extradition, the contracting state where the alleged offender is located is under a duty to prosecute and enforce its domestic laws against hijacking (which should have merely codified those set forth in the Convention).¹²⁸ Practically, however, this may still prove unfruitful. Most states often refuse to extradite certain categories of individuals,¹²⁹ and it would be highly implausible for Belarus to prosecute its own government officials in any realistic scenario.

After scrutinizing the events surrounding the forced landing of Ryanair Flight 4978 under each of the three relevant treaties governing international civil aviation, it is clear that Belarus committed grave violations under all of them. However, given the particularities of each one, the Chicago Convention ultimately offers the most straightforward path to successfully proving that Belarus violated its international obligations by intercepting the Ryanair plane.

III. AVAILABLE RESPONSES

This section first outlines several ways in which states, acting individually, can—or, in some cases, have—responded to Belarus’s diversion of Ryanair Flight 4978. It then offers several potential avenues for successfully arguing how Belarus is legally accountable for its wrongdoings before suggesting means by which it could remedy the situation, including potential arguments should the case be brought before an international tribunal. The section concludes by elaborating upon the availability and effectiveness of implementing countermeasures against Belarus to punish and bring about a change in the state’s behavior.

¹²⁵ *Id.*

¹²⁶ Hague Hijacking Convention, *supra* note 43, at arts. 8(1), (4); 9(2); 10(1).

¹²⁷ CHENG, *supra* note 108, at 374.

¹²⁸ *Id.* at 376.

¹²⁹ *See id.* at 375.

A. Individual State Action

Notwithstanding the expected Belarusian refusal to extradite those involved, some parties have nonetheless initiated legal action against Belarusian authorities on the basis of the Hague Convention.¹³⁰ In January 2022, United States federal prosecutors charged four Belarusian officials with conspiracy to commit air piracy when grounding Ryanair Flight 4978.¹³¹ The indictment, filed in the Southern District of New York, alleges that the four government officials were “critical participants” in the conspiracy to divert the flight to land at Minsk in order to arrest Protasevich and Sapega.¹³² The federal prosecutors rely, at least in part, on the Hague Convention in making their case, alleging that the defendants and others “knowingly combined, conspired, confederated, and agreed together and with each other to commit an offense, as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft, on an aircraft in flight outside” the United States.¹³³ The charges further allege the defendants not only credibly threatened to hijack the aircraft, but did, in fact, “unlawfully and intentionally seize and exercise control” of the Ryanair flight via force, threat of force, coercion, and intimidation.¹³⁴

The authorities in Lithuania (the aircraft’s destination) have also opened a criminal investigation against Belarus related to the crime of hijacking covered by the Hague Convention.¹³⁵ The Criminal Police Bureau of Lithuania is investigating the interception of Ryanair Flight 4978 as a

¹³⁰ The Public Prosecutor’s Office in Poland initiated its own criminal investigation into the matter almost immediately after the interception. However, its investigation has thus far focused mainly on the crimes of piracy and illegal imprisonment, and it is currently unclear to what degree its charge of piracy relies upon the Hague Convention. *See* ICAO Report, *supra* note 82, at 4.5.

¹³¹ *See* Press Release, U.S. Att’y’s Off., S.D. N.Y., Belarusian Government Officials Charged with Aircraft Piracy for Diverting Ryanair Flight 4978 to Arrest Dissident Journalist in May 2021 (Jan. 20, 2022), <https://www.justice.gov/usao-sdny/pr/belarusian-government-officials-charged-aircraft-piracy-diverting-ryanair-flight-4978> [https://perma.cc/WG8T-N3VD]; *see also* Louis Westendarp, *US Charges Belarus with Air Piracy Over Reporter’s Arrest Last Year*, POLITICO (Jan. 21, 2022, 9:15 AM), <https://www.politico.eu/article/u-s-charges-belarus-with-air-piracy-in-reporters-arrest-last-year/> [https://perma.cc/8TYJ-EZWF].

¹³² Indictment at 2, *United States v. Churo et al.*, (S.D.N.Y. 2022) (No. 1:22-cr-00038), <https://www.justice.gov/opa/press-release/file/1464061/download> [https://perma.cc/9FJZ-2DCS]. The indictment named Leonid Mikalaeovich Churo, Oleg Kazyuchits, Andrey Anatolievich LNU, and FNU LNU as defendants. Churo was the Director General of the “Belarus Air Navigation Enterprise” responsible for air traffic control in the country, while Kazyuchits was the Deputy Director General of the Enterprise. The other two defendants were officers of the Belarusian state security services. *Id.* at 3–4.

¹³³ *Id.* at 20.

¹³⁴ *Id.* at 21.

¹³⁵ *See* ICAO Report, *supra* note 82, at 4.4.

potential violation under its criminal code of, among other offences, the crime of hijacking an aircraft for terrorist purposes.¹³⁶ Lithuania's criminal code establishes liability and universal jurisdiction for certain crimes provided for in international treaties, including "acts of terrorism and crimes related to terrorist activity."¹³⁷ The relevant offences laid out in the Hague Convention would thus apply here.¹³⁸ Prominent NGOs appear to support the Lithuanian prosecutors' strategy. Reporters Without Borders ("RSF") filed a formal complaint with the Bureau shortly after the incident, accusing President Lukashenko of instigating "an act of hijacking for terrorist purposes," citing the same provisions of the Lithuanian code mentioned above.¹³⁹ Significantly, RSF's complaint recognizes that the Belarusian conspiracy was aimed solely at arresting Protasevich and intimidating the public—journalists in particular.¹⁴⁰ In this way, there is increasing pressure on the international community to respond to the dangerous consequences of transnational repression emanating from Belarus.

B. Appealing to International Tribunals: Strategies at the ICJ

Aside from the ongoing investigations mentioned above, the Chicago Convention provides another avenue for affected states to take legal action against Belarus for its interception of Ryanair Flight 4978. Article 84 of the Convention designates the Council of the ICAO as the appropriate forum for settling disputes between two or more contracting states relating to the interpretation or application of the treaty.¹⁴¹ Therefore, any other member of the ICAO is free to bring the matter of Belarus's violation of Article 3*bis* to the ICAO Council. However, the Council has only settled seven disputes under Article 84 since its establishment in 1944, casting doubt on the likelihood of successfully resolving this international scandal.¹⁴² For that reason, it is much more likely that unsatisfied parties will appeal the case to an ad hoc arbitral tribunal or the ICJ, which Article 84 also allows.¹⁴³

¹³⁶ *Id.*

¹³⁷ *Id.* (providing translation of Lithuania Criminal Code, ch. 2, art. 7; ch. 15, 100; ch. 35, art. 251).

¹³⁸ That is, unlawfully seizing or exercising control of an aircraft by use, or threat, of force or intimidation. Hague Hijacking Convention, *supra* note 43, art. 1.

¹³⁹ *In Complaint Filed in Lithuania, RSF Accuses Lukashenko of Hijacking with Terrorist Intent*, REPORTERS WITHOUT BORDERS (Sept. 15, 2021), <https://rsf.org/en/news/complaint-filed-lithuania-rsf-accuses-lukashenko-hijacking-terrorist-intent-0> [<https://perma.cc/798E-RKAQ>].

¹⁴⁰ *Id.*

¹⁴¹ Chicago Convention, *supra* note 43, art. 84.

¹⁴² ICAO: FREQUENTLY ASKED QUESTIONS, <https://www.icao.int/about-icao/FAQ/Pages/icao-frequently-asked-questions-faq-3.aspx> [<https://perma.cc/F2MX-ALTY>]; see Ivanov & Donakanian, *supra* note 67, at 38–39.

¹⁴³ Chicago Convention, *supra* note 43, art. 84.

1. *Arctic Sunrise* Parallel

In appealing to the ICJ, the states bringing the action against Belarus (whether that be Poland, Ireland, Lithuania, or a collection of states with a nexus to the incident and party to the Chicago Convention) could point to the *Arctic Sunrise* case before relying on first principles of international law to make their case.

The *Arctic Sunrise* was a Dutch-flagged Greenpeace ship that had entered Russia's exclusive economic zone in order to protest Arctic oil drilling.¹⁴⁴ On September 13, 2013, Russian authorities boarded the ship, detained the persons on board, and seized the vessel.¹⁴⁵ The group aboard the *Arctic Sunrise* included Russian nationals.¹⁴⁶ The Netherlands then brought an action against Russia before the International Tribunal for the Law of the Sea ("ITLOS") seeking an order that Russia release the people involved, upon posting bond, and allow the vessel to leave Russian waters while adjudicating the dispute.¹⁴⁷

The Tribunal found that even "the absence of a party or failure of a party to defend its case does not constitute a bar to the proceedings and does not preclude the Tribunal from prescribing provisional measures," as long as the parties had the chance to present their views and arguments.¹⁴⁸ Quoting the ICJ's stance in the *Military and Paramilitary Activities in and Against Nicaragua* case, the Tribunal noted how a state "which decides not to appear must accept the consequences of its decision . . . and is bound by the eventual judgment," in accordance with the Tribunal's charter.¹⁴⁹ Ultimately, the Tribunal granted the Netherlands's request and ordered Russia to allow the vessel and all persons detained to leave its territory and jurisdiction after posting bond or some other form of security.¹⁵⁰

The outcome of the *Arctic Sunrise* case follows the basic principles set forth in the *Chorzów Factory* case decided by the Permanent Court of International Justice in 1928. The Court, in its landmark *Chorzów Factory* decision, established the general principle concerning reparations for violations of international law that "reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which

¹⁴⁴ *Arctic Sunrise* (No. 22) (Neth. v. Russ.), Case No. 22, Order of Nov. 22, 2013, 22 ITLOS Rep. 230, 231 [hereinafter *Arctic Sunrise*].

¹⁴⁵ *Id.* at 243.

¹⁴⁶ Miles, *supra* note 47.

¹⁴⁷ *Arctic Sunrise*, *supra* note 144, at 250.

¹⁴⁸ *Id.* at 242.

¹⁴⁹ *Id.* at 243 (quoting *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 28 (June 27)).

¹⁵⁰ *Id.* at 252.

would, in all probability, have existed if that act had not been committed.”¹⁵¹ That is why, in the *Arctic Sunrise* case, the Tribunal ordered Russia to release the Greenpeace activists and their vessel, so as to re-establish the situation as it was before the interruption and allow the *Arctic Sunrise* to continue and complete its voyage.¹⁵² Therefore, if a case against Belarus were brought before the ICJ, the court ought to order the Belarusian authorities to release Protasevich and Sapega from house arrest and allow them to depart Belarusian territory for Lithuania—their original destination while aboard Ryanair Flight 4978. However, it is important to note that the ICJ is not necessarily bound by the decisions of the ITLOS.

2. State Responsibility for Internationally Wrongful Acts

Some cases merit a return to first principles in international law. Here, analyzing the grounding of Ryanair Flight 4978 from this angle raises questions regarding Belarusian state responsibility for internationally wrongful acts.¹⁵³ Chapter II of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (“ARSIWA”) addresses how a wrongful act can be attributed to the conduct of a state.¹⁵⁴ Because the Minsk air traffic controller can be considered an entity “[exercising] elements of the governmental authority,” as defined by Article 5, the communication to the Ryanair pilots concerning the fabricated bomb threat could constitute wrongful conduct attributable to Belarus, as providing knowingly false information that could endanger the aircraft is prohibited by Article 1(1)(e) of the Montreal Convention.¹⁵⁵ Moreover, Article 4 of the Chicago Convention stipulates that contracting parties ought “not to use civil aviation for any purpose inconsistent with the aims of [the] Convention,” which would mean that the Belarusian air traffic control’s actions constituted a violation of international law for using civil aviation for improper purposes.¹⁵⁶ In addition, the fact that Lukashenko admitted that the

¹⁵¹ *Factory at Chorzów (Merits) (Ger. v. Pol.)*, Judgment, 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13) [hereinafter *Factory at Chorzów*].

¹⁵² *Arctic Sunrise*, *supra* note 144, at 252; *Factory at Chorzów*, *supra* note 151, at 63–64.

¹⁵³ *See Jankovic*, *supra* note 91.

¹⁵⁴ *See Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int’l L. Comm’n 26, U.N. Doc. A/56/83 [hereinafter ARSIWA].

¹⁵⁵ *Id.* art. 5; Montreal Convention, *supra* note 43, art. 1(1)(e). When told to divert the plane to land at Minsk, instead of Vilnius (which was much closer), the Ryanair pilots requested clarification on where that directive came from—whether from the airline company (Ryanair), the departure airport (Athens), or the arrival airport (Vilnius). According to the record, Belarusian air traffic control responded that it “was our recommendation.” ICAO Report, *supra* note 82, at 2.3.

¹⁵⁶ Chicago Convention, *supra* note 43, art. 4. *See also* Irene E. Howie, *Action and Reaction: The Belarus Gambit to Force Diversion of Ryanair Flight 4978*, ENO CTR. FOR

orders to intercept and divert the plane came directly from himself and his government further supports the proposition that the state of Belarus bears responsibility for its wrongful actions.¹⁵⁷

States responsible for internationally wrongful acts are also under certain obligations related to cessation of such behavior and reparation.¹⁵⁸ Under Article 30 of ARSIWA, the responsible state is obligated to “cease that act, if it is continuing,” and to “offer appropriate assurances and guarantees of non-repetition,” which Belarus has yet to complete.¹⁵⁹ Moreover, Article 31 declares that the “responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act,” including any “material or moral” damage caused by the conduct.¹⁶⁰ Here, the interruption and endangerment of international civil aviation, under false pretenses in order to detain two political dissidents certainly amounts to moral damage, at minimum.

C. Collective Sanctions Regimes

The imposition of sanctions presents an alternative response to Belarus’s transgressions in international civil aviation law. In fact, the United States, Canada, the United Kingdom, and the EU announced a coordinated sanctions approach in response to the forced landing of Ryanair Flight 4978.¹⁶¹ The EU, in particular, acted swiftly in implementing a package of economic sanctions targeting Belarus, while banning its national airline from operating within EU territory, following the incident.¹⁶² This extends to access to EU airports by all types of Belarusian carriers.¹⁶³ The new package of targeted

TRANSP. (June 11, 2021), <https://www.enotrans.org/article/guest-op-ed-action-and-reaction-the-belarus-gambit-to-force-diversion-of-ryanair-flight-4978/> [https://perma.cc/6TN5-WLDL].

¹⁵⁷ Troianovski & Nechepurenko, *supra* note 21. Article 8 of ARSIWA states that “The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.” ARSIWA, *supra* note 154, art. 8.

¹⁵⁸ See ARSIWA, *supra* note 154, arts. 30, 31.

¹⁵⁹ *Id.* art. 30.

¹⁶⁰ *Id.* art. 31.

¹⁶¹ Press Release, U.S. Dep’t of State, Joint Statement on Belarus (June 21, 2021), <https://www.state.gov/joint-statement-on-belarus/> [https://perma.cc/4BRG-U8YD].

¹⁶² Michael Birnbaum & Isabelle Khurshudyan, *E.U. Agrees to Impose Sanctions on Belarus, Bars E.U. Airlines from County’s Airspace, After Authorities Forced Down a Ryanair Jet*, WASH. POST (May 24, 2021, 8:08 PM), <https://www.washingtonpost.com/world/2021/05/24/belarus-ryanair-airplane-hijack-journalist/> [https://perma.cc/TXC9-W496].

¹⁶³ Press Release, Council of the EU, EU Bans Belarusian Carriers from Its Airspace and Airports (June 4, 2021), <https://www.consilium.europa.eu/en/press/press->

sanctions includes

the prohibition to directly or indirectly sell, supply, transfer or export to anyone in Belarus equipment, technology or software intended primarily for use in the monitoring . . . the internet and of telephone communications, and dual-use goods and technologies for military use and to specified persons, entities or bodies in Belarus.¹⁶⁴

The measures also restricted trade in “petroleum products, potassium chloride (‘potash’), and goods used for the production or manufacturing of tobacco products,” while limiting access to EU capital markets and prohibiting the furnishment of insurance and re-insurance to the Belarusian government.¹⁶⁵ In all, the Council of the EU added seventy-eight Belarusian individuals and eight entities to its existing sanctions regime aimed at pressuring Lukashenko’s government to “initiate a genuine and inclusive national dialogue with broader society and to avoid further repression.”¹⁶⁶ The U.S. Department of the Treasury, meanwhile, designated sixteen individuals and five entities in its initial sanctions response to the incident.¹⁶⁷

Economic sanctions have become important tools used by members of the international community against rogue states.¹⁶⁸ Under international law, the term “sanctions” typically refers to “coercive measures, taken by one State or in concert by several States, which are intended to convince or compel another State to desist from engaging in acts violating international law.”¹⁶⁹ Sanctions serve a variety of purposes, namely “(i) to coerce or change behavior; (ii) to constrain access to resources needed to engage in certain

releases/2021/06/04/eu-bans-belarusian-carriers-from-its-airspace-and-airports/ [https://perma.cc/T6DC-7QBN].

¹⁶⁴ Press Release, Council of the EU, EU Imposes Sanctions on Belarusian Economy (June 24, 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/06/24/eu-imposes-sanctions-on-belarusian-economy/> [https://perma.cc/G7BF-26C7].

¹⁶⁵ *Id.* For the detailed sanctions implemented by the EU in June 2021, see Council Regulation (EU) No. 2021/1030 of 24 June 2021, Amending Regulation (EC) No. 765/2006 Concerning Restrictive Measures in Respect of Belarus, 2021 O.J. (L 224 I) 1.

¹⁶⁶ Press Release, Council of the EU, Belarus: Fourth Package of EU Sanctions Over Enduring Repression and the Forced Landing of a Ryanair Flight (June 21, 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/06/21/belarus-fourth-package-of-eu-sanctions-over-enduring-repression-and-the-forced-landing-of-a-ryanair-flight/> [https://perma.cc/HKA6-CERG].

¹⁶⁷ Press Release, U.S. Dep’t of the Treasury, Treasury and International Partners Condemn Ongoing Human Rights Abuses and Erosion of Democracy in Belarus (June 21, 2021), <https://home.treasury.gov/news/press-releases/jy0237> [https://perma.cc/YR4M-LJ5H].

¹⁶⁸ See Christopher C. Joyner, *Collective Sanctions as Peaceful Coercion: Lessons from the United Nations Experience*, 16 AUSTL. Y.B. INT’L L. 241, 241 (1995).

¹⁶⁹ *Id.* at 242.

activities; or (iii) to signal and stigmatize” offending states.¹⁷⁰ They are helpful in the “defining and demarcation of international responsibility for those actions that are likely to endanger international peace and security.”¹⁷¹ Therefore, sanctions are effectively “penalties imposed by States as the designated consequence of some other State’s failure to observe international standards or legal obligations.”¹⁷²

The primary legal basis for sanctions rests within Chapter VII of the U.N. Charter. Article 41 states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions and it may call upon the Members of the United Nations to apply such measures. These may include the complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.¹⁷³

Furthermore, sanctions may be imposed not only for violating international law, but also in the event of “any threat to the peace, breach of the peace, or act of aggression” determined by the Security Council.¹⁷⁴ Frequently, however, the Security Council has either been unwilling or unable to take mandatory action when it comes to sanctions, and has instead opted for voluntary measures.¹⁷⁵ That is why, in recent decades, states have more often imposed sanctions at the regional level, via organizations like the EU and African Union.¹⁷⁶ Ultimately, there is essentially “no international body or universally accepted mechanism authorized to govern the legality” of sanctions as a tool of international law.¹⁷⁷ For that reason, the more viable means of punishing Belarus’s transgressions through sanctions-related measures may rest upon a multilateral approach taken by specific

¹⁷⁰ Jana Illieva et al., *Economic Sanctions in International Law*, 9 UNIV. TOURISM & MGMT. SKOPJE J. ECON. 201, 202 (2018) (citing Sue E. Eckert, *The Evolution and Effectiveness of UN Targeted Sanctions*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 52 (Larissa van den Herik ed., 2017)).

¹⁷¹ *Id.* (citing Dumitrița Florea & Natalia Chirtoacă, *Sanctions in the International Public Law*, 13 USV ANNALS ECON. & PUB. ADMIN. 264 (2013)).

¹⁷² Joyner, *supra* note 168, at 242.

¹⁷³ U.N. Charter art. 41

¹⁷⁴ U.N. Charter art. 39. *See generally* Julia Schmidt, *The Legality of Unilateral Extra-Territorial Sanctions Under International Law*, 27 J. CONFLICT & SEC. L. 53, 58–59 (2022); Josef L. Kunz, *Sanctions in International Law*, 54 AM. J. INT’L L. 324 (1960).

¹⁷⁵ Nigel D. White, *Collective Sanctions: An Alternative to Military Coercion?*, 12 INT’L RELS. 75, 75 (1994).

¹⁷⁶ *See* Ilieva, *supra* note 170, at 203 (citing Mirko Sossai, *UN Sanctions and Regional Organizations: An Analytical Framework*, in RESEARCH HANDBOOK ON UN SANCTIONS AND INTERNATIONAL LAW 395 (Larissa van den Herik ed., 2017)).

¹⁷⁷ *Id.* at 210.

intergovernmental organizations or a collection of states.

1. ICAO-Centered Approach

When deciding how to most effectively respond to Belarus's actions with countermeasures, utilizing the ICAO presents the international community and concerned states with several potential approaches. First, the ICAO can assert its authority as the world's governing body for international civil aviation by pressuring the U.N. to impose a comprehensive sanctions regime targeting Belarus. The ICAO has, historically, supported U.N. Security Council actions responding to international civil aviation violations.¹⁷⁸ In fact, Article 87 of the Chicago Convention provides for an automatic sanctions of sorts regarding noncompliant member state airlines, calling for each contracting state to "not allow the operation an airline of a contracting State in the airspace above its territory if" the ICAO Council has determined it to be in breach of the Convention.¹⁷⁹ Article 88, meanwhile, penalizes non-conforming states by authorizing the ICAO Assembly to "suspend the voting power in the Assembly and in the [ICAO] Council of any Contracting State that is found in default under the provision" of the Convention concerning disputes.¹⁸⁰

Therefore, appropriate countermeasures the ICAO could take include: (1) suspending Belarus's voting power in the Assembly; (2) initiating a ban on its national carriers from operating beyond its borders; and (3) calling for a coordinated sanctions program among its member states targeting the actors responsible for the forced landing. The ICAO could use these measures to induce Belarus to release Protasevich and Sapega, allowing them to continue their journey to Lithuania, while disavowing its aggressive actions—including the threat of the use of force—against Ryanair Flight 4978. In that way, Belarus could at least fulfill some reparations for its wrongful actions, as expressed by the precedent set forth in the *Chorzów Factory* and *Arctic Sunrise* cases.¹⁸¹ The ICAO has instituted similar measures in the past, albeit infrequently.¹⁸² However, it would be difficult for Belarus to challenge these potential ICAO actions given the fact that the ICJ recently recognized the competency and authority of the ICAO in regulating civil aviation among its

¹⁷⁸ See, e.g., ICAO Assembly Res. A20-1 (Aug. 20, 1973); ICAO Assembly Res. A21-7 (Oct. 15, 1974); ICAO Assembly Res. A23-5 (Oct. 3, 1980).

¹⁷⁹ Chicago Convention, *supra* note 41, art. 87.

¹⁸⁰ *Id.* art. 88.

¹⁸¹ See *Factory at Chorzów* *supra* note 151, at 47; *Arctic Sunrise*, *supra* note 144, at 252.

¹⁸² Examples include suspending the membership of Francoist Spain and adopting U.N. efforts sanctioning Iraq after its invasion of Kuwait. See Myongil Kang, *Refining Aviation Sanctions from an Air Law Perspective*, 40 AIR & SPACE L. 397, 403–04 (2015).

member states.¹⁸³

2. Regional and Alliance-Based Approaches

The EU and NATO allies like the United States, Canada, and the United Kingdom were notably swift in their decisions to sanction Belarus for its aggression. These states also acted promptly and decisively by instituting aviation-related sanctions. The EU Aviation Safety Agency (“EASA”) issued a directive on June 2, 2021, mandating member states cease aviation operations in Belarusian airspace.¹⁸⁴ The EASA considered Belarus’s treatment of Ryanair Flight 4978 to be “an abuse of air navigation procedures,” which created an unsafe environment for “civilian flights by the international community.”¹⁸⁵ The United Kingdom similarly directed airlines to avoid Belarusian airspace and banned Belavia, the Belarusian state carrier, from operating in the country.¹⁸⁶ These actions raise the prospect that Belarus may have to endure certain sanctions related to civil aviation, such as an air embargo or blockade. The objective of most aviation sanctions is to “freeze the air transport industry of a target country” by closing all international air routes to and from the state or prosecuting “airline companies owned or operated by a target country.”¹⁸⁷

International civil aviation is not insulated from political questions.¹⁸⁸ For example, an attempted air blockade of South Africa by a coalition of states, including some of its African neighbors, formed part of the international effort to sanction the regime for its oppressive policies of Apartheid.¹⁸⁹ In fact, the ICAO at one point urged airlines and governments to sever their air transportation connections to South Africa.¹⁹⁰ Moreover, air law in general has come to accommodate international sanctions regimes over time, evolving from air bans to more complex tools impacting wider civil

¹⁸³ See *Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (Bahr., Egypt, Saudi Arabia and U.A.E. v. Qatar)*, Judgment, 2020 I.C.J. 81, ¶ 92 (July 2020) (“The competence of ICAO unquestionably extends to questions of overflight of the territory of contracting States”) (regarding an aerial blockade of Qatar organized by several of its neighbors beginning in 2017).

¹⁸⁴ EASA, Safety Directive No. 2021-02, *Operations in FIR Minsk* (June 2, 2021).

¹⁸⁵ *Id.*

¹⁸⁶ Mary O’Connor, *UK Airlines Told to Avoid Belarusian Airspace After Journalist Arrest*, BBC NEWS (May 24, 2021), <https://www.bbc.com/news/uk-57232988> [<https://perma.cc/PP3A-ZMUC>].

¹⁸⁷ Kang, *supra* note 182, at 406.

¹⁸⁸ See G. H. Pirie, *Aviation, Apartheid and Sanctions: Air Transport to and from South Africa, 1945-1989*, 22 GEOJOURNAL 231, 231 (1990); see also RUWANTISSA ABEYRATNE, LEGAL PRIORITIES IN AIR TRANSPORT 16 (2019).

¹⁸⁹ See Pirie *supra* note 188, at 231.

¹⁹⁰ *Id.* at 236.

aviation.¹⁹¹ State practice and the ICAO itself have essentially endorsed the use of civil aviation as a policy tool when security concerns have rendered it necessary.¹⁹² Meanwhile, research suggests that the effectiveness of sanctions in pressuring governments to change their behavior or policies is strongly correlated with the impact they have on the target state's economy.¹⁹³ For example, even the successful threat of economic sanctions is often “statistically related to the target's expected cost of economic sanctions.”¹⁹⁴ In addition, multilateral sanctions regimes are often more effective than unilateral sanctions, with scholars further noting “a higher effectiveness of economic sanctions introduced through international organizations.”¹⁹⁵ Recent reports from databases tracking the efficacy of sanctions have also suggested a higher rate of success of sanctions vis-à-vis their stated policy goals than commonly expected.¹⁹⁶

For these reasons, sanctions coordinated by regional groups, such as the European Union or NATO, perhaps coupled with countermeasures implemented by relevant international organizations, like the ICAO, are attractive methods in holding Belarus accountable. A multilateral approach addresses “the need for coordination and supervision” when effectively carrying out a sanction regime against a state.¹⁹⁷ Indeed, the EU's Global Human Rights Sanctions Regime (“EU HRSR”), adopted in December 2020, has already been recognized as an example of transnational legal cooperation aimed at countering transnational security threats.¹⁹⁸ The horizontal and supranational elements of the EU HRSR also allows the collective body of the EU to assume full political responsibility for the sanctioning process, rather than individual member states, so as to help dispel any accusations of

¹⁹¹ See Kang, *supra* note 182, at 398–99.

¹⁹² See, e.g., *id.* at 404 (“The Bonn Declaration, adopted by the G7 in 1978, affirmed the use of aviation sanctions on any State that refused to prosecute or extradite hijackers.”).

¹⁹³ See Dawid Walentek et al., *Success of Economic Sanctions Threats: Coercion, Information and Commitment*, 47 INT'L INTERACTIONS 417, 422 (2021).

¹⁹⁴ *Id.* at 420.

¹⁹⁵ *Id.* at 423.

¹⁹⁶ Data from researchers at the Global Sanctions Database, a project of Drexel University's School of Economics, indicated that roughly half of the stated goals of sanctions cases between 1950 and 2019 “were at least partly achieved,” while about thirty-five percent “were completely achieved.” See Ella Koeze, *Boycotts, Not Bombs: Sanctions Are a Go-To Tactic, with Uneven Results*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/interactive/2022/03/11/world/economic-sanctions-history.html> [<https://perma.cc/4CPE-FSQM>]. For the most recent report referenced, see Aleksandra Kirilakha et. al., *The Global Sanctions Database: An Update That Includes the Years of the Trump Presidency* (Drexel Univ. Sch. Econ., Working Paper 2021-10, 2021), https://ideas.repec.org/p/ris/drxlwp/2021_010.html [<https://perma.cc/K8QM-9QXN>].

¹⁹⁷ Walentek, *supra* note 193, at 423.

¹⁹⁸ See Christina Eckes, *EU Global Human Rights Sanctions Regime: Is the Genie out of the Bottle?*, 30 J. CONTEMP. EUR. STUD. 255, 256 (2021).

potential national bias in targeting states.¹⁹⁹

Therefore, the states that have already placed sanctions on Belarusian officials, entities, and industries involved in the regime's interception of Ryanair Flight 4978 (as well as its repressive policies more generally) ought to push for the ICAO to take more stringent action. This should include suspension of Belarus's voting rights in the ICAO Council and Assembly, coupled with a formal air embargo. The closure of Belarusian airspace and withdrawal of transport and commercial rights for Belarusian airlines could pressure the Lukashenko regime to disavow its illegal interception of Ryanair Flight 4978 and release Protasevich and Sapega. Or such sanctions could at least persuade the government to cooperate with the ongoing ICAO investigation into the incident and potentially enter a dispute settlement mechanism with the other states involved. However, some argue that this form of "coercive diplomacy" may run afoul of the spirit of the Chicago Convention by jeopardizing the safety and growth of international civil aviation and disrupting friendly cooperation among states.²⁰⁰ Nonetheless, Belarus's own actions—which essentially entailed a forceful interference of an aircraft with the intent to jeopardize the safety of its passengers²⁰¹ (by arbitrarily arresting and detaining two of them upon landing)—constitute a grievous derogation of the Chicago Convention and its ensuing obligations *erga omnes*.²⁰² Thus, the ICAO would be justified in instituting comprehensive measures such as an air embargo on Belarusian airspace and against its airlines until the state offers to rectify the incident in any meaningful way.

CONCLUSION

The hijacking of Ryanair Flight 4978 and subsequent arbitrary arrest of two passengers present a frustrating moment for the international legal community. For many, the actions of Belarus represent clear violations of international norms and conventions and are indicative of the ways in which transnational repression by authoritarian states can threaten their neighbors and the wider world. Indeed, this episode also embodies the shift in conception among scholars that international law's effectiveness will increasingly hinge upon its ability to mold the domestic policies—especially the more repressive ones—of states.²⁰³ In other words, the international legal system will likely need to re-examine, and perhaps strengthen, its influence

¹⁹⁹ *Id.* at 259.

²⁰⁰ See Marcelo L. Garcia & Roncevert G. Almond, *Coercive Diplomacy in the Skies*, 32 AIR & SPACE L., no. 1, 2019, at 1, 7.

²⁰¹ See ABEYRATNE, *supra* note 188, at 133.

²⁰² See *id.* at 134 ("obligation[s] toward the international community").

²⁰³ See Anne-Marie Slaughter & William Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 327–29 (2006).

on the internal policies and structures of states *before* the harmful effects of repressive regimes become transnational in character. Whether Belarus can or will be punished for its violations of international treaty and customary law will likely have major implications on the prospects of exiled political dissidents around the world, let alone confidence in cross-border transportation and civil aviation.

Due to the bizarre circumstances surrounding the incident (such as the fabricated bomb threat, allegations of KGB agents onboard, and overall bold behavior of the Lukashenko regime), there are few analogous cases in international law. However, Belarus's violations of applicable international treaties, notably the Chicago Convention, in intercepting and grounding Ryanair Flight 4978 are rather straightforward. For this reason, there may be a path, albeit long and arduous, to holding Belarus accountable via the ICAO's dispute settlement mechanism or the ICJ.

Meanwhile, segments of the international community, such as the EU and its allies, can implement various countermeasures in order to simultaneously punish those associated with the incident and pressure the regime to remedy its wrongdoing. The chief aim of such sanctions ought to be the immediate release of Roman Protasevich and Sofia Sapega from detention in Belarus, and the granting of their freedom to continue their journey to Lithuania that was suspended on May 23, 2021. Because the young couple are still in Belarusian custody, the status of their freedom and lives may depend upon the legal consequences of Belarus's violations and any international action taken in response. That is why a measured, coordinated, and multilateral response in instituting sanctions or aviation embargoes on Belarus may be most effective: it would not only signal to other states engaged in transnational repression that there will be severe economic and diplomatic consequences to such conduct, but it will also pressure the Lukashenko regime to concede its transgressions and offer appropriate reparations.