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International Legal Aspects of Aerial Terrorism

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Terrorism is one of those phenomena that many consider as the most challenging to be faced by the mankind in 21st century. Attacks on the most populated cities of the world that spread an immense panic among society, caused extensive damage and above all claimed hundreds of thousands of innocent souls seriously concerned governments of the world, as well as international organisations who engaged their resources to combat this threat.

Nowadays, terrorism touches more and more domains of our lives, but one the most vulnerable is civil aviation. Attacks on aeroplanes and airports across the globe in recent decades pushed international community to adapt new juridical solutions that would protect air passengers from the terrorism and currently, they form a vast and sophisticated system of norms. My PhD thesis, as its title suggests, tends to present, analyse and rate how does international law influence security of passengers in the aerospace from terrorist attacks. The draft itself constitutes a reply to necessity in the global academic debate to prepare a complete and accurate work dedicated to current issues in international fight against terrorism on juridical level. What distinguishes my thesis among similar others papers is a fact that it refers to regulations that recently came into force (like so-called Beijing Convention and Beijing Protocol from 2010), as well as some issues that concern future of terrorism (including cyberattacks and usage of unmanned aircraft systems). As in the sector of civil aviation, there is a strong tendency of continuous dialogue between representatives of a legal doctrine and political institutions (both on national and international level), I am convinced that the thesis shall affect the debate on creation of new laws protecting air passengers from terrorism.

The main research query posed at the beginning of the thesis is "Do juridical solutions undertaken by States of the world, that swore to protect their citizens from internal and external hazards, such as international terrorism are adequate to effectively counter the problem of aerial terrorism?" Or, in other words, has the international community taken appropriate way to protect civil aviation from terrorism? Response to the question is an effect of research, whose results are presented in three chapters plus a concluding part. As for the methodological side, in the draft dominates formal-dogmatic method based on overview of sources stemming from international and European Union law. However, a large part of the thesis is based on empirical method; it concerns analysis of selected cases of terrorist attacks on civil aviation from the recent past. Also, due to a nature of research I applied comparative method to present how different legal systems regulate aviation security measures.

The first chapter is devoted to presenting terrorism as a legal phenomenon. It begins

with brief study on evolution of terrorist movements with a stress on radical Islamic groups. But its core part is sub-chapter in which I construct my own definition of terrorism. An idea of forming one universal definition is important in a way that currently war against terrorism has a global range and to ensure that all States shall conduct uniform policy in that matter, acceptance of common definition is essential. Statements featured in the sub-chapter form a basis for further studies on terrorism in the dissertation. Subsequently, I familiarise readers with types of attacks that can be carried out on civil aviation like hijacking, shot down, bombing, etc. That part is mainly destined to show what traits do the acts against civil aviation need to fulfil in order to be considered as (terrorist) offences. Vital is to note here, that covered are several forms of attacks that might be tools in the hands of terrorists in the future, including usage of biological, nuclear and chemical weapons, or mentioned already cyberattacks. The narration in the chapter continues with analysis of the question of use of force in relation to terrorism – it refers strongly to stance that Security Council took in regards to terrorist attacks after tragic events of September 11th, 2001 via Resolutions no. 1368 and 1373. It totally changed the perception of terrorist attacks that ever since have been treated as strikes authorising recourse to self-defence under Article 51 of the UN Charter. That analysis is followed with presentation of civil aviation context. In other words, I explain how the concept of self-defence in response to terrorism relates to offences against civil aviation. Similar analysis is provided in the next sub-chapter describing the role of state terrorism – acts of terrorism committed by a State against another one or the latter's nationals, or widespread acts of cruelty committed by a State against its own nationals. Again, after a general overview of the problem, exposed is its context in civil aviation. The chapter is closed with some remarks on possible future of terrorism concerning attacks on and with usage of unmanned aircraft vehicles.

Then, the main role of the first chapter is to familiarise readers with general characteristics of terrorism and explain how do its relevant aspects (like use of force, participation of states in terrorist attempts, etc.) relate to civil aviation. Therefore, nature of that chapter is rather theoretical.

Second chapter, the longest of all, is a vast study on regulations undertaken by selected international organisations targeted at repelling aerial terrorism. Organisations featured in the chapter are: International Civil Aviation Organisation (ICAO), United Nations (UN) and

European Union (EU).

Discussion about measures adopted under auspices of ICAO is focused on international Conventions forming so-called Tokyo-Hague-Montreal-Beijing system. That set of treaties is founded on a rule *aut dedere aut iudicare* establishing obligation on Contracting States to either prosecute or extradite an offender, who had committed a terrorist attack against civil aviation. At first, presented are common issues of all those treaties, inclusive of principles of jurisdiction, or applicability on civil aircraft uniquely.

Following sub-chapters are dedicated to analysis of features distinguishing particular Conventions. First in review (and chronology) is Tokyo Convention from 1963 that applies to offences and other acts that are not criminalised under national law, but might endanger safety of aircraft. Emphasised is its crucial weakness, pointed out also by many experts: lack of criminalisation *expressis verbis* of attacks on civil aviation. The Convention instead is focused on different questions, like rights and duties of States involved in attacks, or powers of aircraft commander. Features of the document are critically commented at the end of sub-chapter.

Next, an extensive analysis is conducted on Hague Convention from 1970 and Montreal Convention from 1971 that deal with hijacking airliners and other offences against civil aviation respectively. Although in some ways those treaties do fix flaws left by Tokyo Convention (lack of criminalisation of attacks in principle), they do not provide adequate level of protection, especially due to non-obligation of States to bring offenders before justice. Just like in previous sub-chapter describing features of Tokyo Convention, that one also provides a commentary on most important characteristics of Hague and Montreal Conventions.

Subsequently, described are mechanisms of protection provided by Montreal Protocol from 1988. As the Protocol only slightly enhances what was established by Montreal Convention, supplementing it by criminalisation of offences committed at international airports, the sub-chapter dealing with it is rather brief and focuses mostly on structure of provisions introducing this wider criminalisation. Again, commentary to the treaty is featured at the end.

The most extensive analysis is devoted to a true *novum* in a palette of aviation security documents, namely Beijing Convention and Beijing Protocol from 2010. In the thesis they are presented as an innovative response to terrorists threats that would haunt air transport in 21st century. In a relevant sub-chapter described are offences covered by both instruments, their

mechanisms of jurisdiction and extradition and other relevant issues. In similarity with previous sub-chapters, given is critical commentary on the Convention and Protocol. I negatively rate a fact that both instruments do not fix the “sin” left by Hague and Montreal Conventions concerning lack of obligation to bring an offender before justice, but overall I appreciate them as accurate tools to face challenges of fight against aerial terrorism in present times, mainly due to wider criminalisation of offences and exclusion of terrorist attacks from the list of crimes of political nature, which relates to higher effectiveness of extradition.

The last of documents prepared on ICAO forum is Montreal Protocol from 2014 set to replace Tokyo Convention, which generally is not directly related to fight against terrorism, but rather targeted to ensure air safety in regard to behaviour of unruly passengers. In the sub-chapter on the Protocol, analysed is role of in-flight security officer introduced thereby, as well as provisions enhancing Tokyo Convention.

Next part of the second chapter is an overview of Resolutions oriented at protection of aviation from aerial terrorism adopted by two bodies of the UN: General Assembly and Security Council, presented in two separate sub-chapters. Each one is divided into smaller sections featuring Resolutions carried by the bodies in a particular period. In case of General Assembly, its narration in relation to terrorist movements considerably changed in 2001. Before attacks on World Trade Center, terrorists were treated as suffering of oppressive regimes that do not respect human rights. In other words, terrorist were seen as true victims of global conflicts. But at the turn of centuries and above all after brutal attacks on September 11th, the approach became much different: General Assembly underlined many times that States should take every effort to combat all forms of terrorism, as well as become parties to anti-terrorist treaties, including those of Tokyo-Hague-Montreal-Beijing system. In the sub-chapter traced is the “evolution” of General Assembly's stance towards terrorism with constructive commentary.

As for the Security Council, the body also overcame an evolution in stance towards aerial terrorism. At the beginning of its functioning, the organ was even reluctant to call attacks “terrorist” and rather left UN Member States with regulating combat against terrorism. But after Lockerbie bombing in 1988, Security Council actively supported global fight with terror to such extend that it even considered terrorism as a threat to sovereignty. Nevertheless, a total breakthrough was reached on September 11th, when the body re-interpreted the concept of self-defence, authorising States to refer to it in response to terrorist attack (which was

mentioned already). The dissertation describes the impact of Security Council Resolutions on development of juridical measures protecting air passengers from terrorism and commenting its influence on current legal order in that matter.

Finally, in the second chapter featured are solutions concerning protection of civil aviation from terrorism present in the EU legislation. A key element in the framework constitutes Regulation no 300/2008 that focuses on prevention of attacks by introducing a ban on carriage of dangerous goods. The Regulation treats on the issues that now seem obvious in terms of security of air transport (like screening hand luggage before boarding), but equally introduces some vague terms and standards that might be too difficult to be followed by less developed Member States of the EU. Nevertheless, due too good records of safety of air travel within Europe, the act seems to fulfil its role.

The next instrument to be analysed is Regulation no 272/2009 establishing norms on methods of screening persons and luggage brought into airside of the airports and boards of aircraft. The Regulation answers the question to what extent airport security services may interfere into individual's rights in order to achieve good level of safety.

Subsequent section is focused on another part of EU anti-terrorist framework, namely controversial Directive (EU) 2016/681 ("PNR Directive") destined to prevent, detect and investigate terrorist offences and serious crimes with the usage of passenger name record (PNR) encrypted in air tickets. The dissertation analyses the mechanism of transferring PNR data from sales providers to government authorities for the purpose of detection suspicious persons travelling by air, as well as its potential conflict with right to privacy.

The last section in the sub-chapter on EU law discusses the provisions of Directive 2017/541 that currently serves as a basic tool in fight against terrorism on the territories of EU Member States. The document somehow mirrors the structure of Tokyo-Hague-Montreal-Beijing system treaties, through criminalisation of wide spectrum of offences and regulating in detail regime of jurisdiction. However, due to a fact that the Directive forms a part of *acquis communautaire* binding upon Member States, it in consequence provides much better protection, as its implementation is not depending on a will of States themselves.

The last chapter is a practical case study of four selected terrorist attacks that happened in the recent past. Study is based on theoretical considerations featured in first two chapters and constitutes a "visualisation" of functioning of anti-terrorist legislation in practice.

Following cases are examined: blowing up of Metrojet flight no. 9268, shot down of Malaysia Airlines flight no. 17, attacks at Brussels Airport in March 2016 and hijacking of Air France flight no. 8969. Analysis of each case is opened with detailed description of known facts on the flight and investigation on its cause, as well as explanation of a terrorist context. However, as each of the cases features a different form of attack, also different legal provisions are taken into account in studies; as the tragedy of Metrojet 9268 was a clear example of aircraft destruction often regarded as a planned attack directed at a State, into consideration are taken provisions of Montreal Convention, Beijing Convention, as well as questions of self-defence in response to terrorist attempt. In turn, in analysis of Malaysia Airlines 17 case discussed are issues of attribution of attack into a state actor, as well as Montreal and Beijing Convention's provisions that refer to aircraft shot downs. As for the facts of Brussels Airport bombing, study is conducted mostly from the perspective of European Union legislation on attacks at international airports. Last but not least, a complex case of Air France 8969 is described in the light of nearly all Tokyo-Hague-Montreal-Beijing system treaties, as it constituted both an attempt to hijack an aircraft and to use it as a weapon.

In a concluding part of the dissertation, given is answer to primary research question. And that answer has rather optimistic tone. Indeed international community has taken reasonable and accurate steps, at least on juridical level, to protect us, airline passengers, from terrorist attacks. Especially I need to praise actions conducted by international organisations in recent years, particularly after attacks of September 11th. Legal framework of aviation security law is much better structured and more relevant to current terrorist capabilities than it was several decades ago. Nevertheless, still an obstacle on the way to form universally accepted norms on protection from terrorism are particular interest of States. Only a common approach and consequential improvement of legal measures by the whole international community shall make civil aviation free from terrorist threat.

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