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**THE POSSIBILITY OF CRIMINALISATION OF TERRITORIAL
VIOLATIONS BY FOREIGN STATE AIRCRAFT IN ESTONIAN
CRIMINAL LAW**

Master's Thesis

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INTRODUCTION

The penetration of national airspace by a foreign state aircraft is a serious occurrence in the eyes of the offended party. The seriousness is enhanced when done at high speed and low altitude, signifying a higher threat level. In October 2003, two Russian fighter aircraft entered Estonian airspace in the vicinity of Hiiumaa island and continued their flight over two hundred kilometres inside the airspace. The act was thought to be an intel collection and testing flight for the new Kellavere radar post in the eastern part of Estonia. During the flight, the two fighters passed the seat of the Government of Estonia (the Stenbock House) by only 2 kilometres as they overflew Tallinn.¹ The event happened less than six months before Estonia became a member of NATO. Fortunately, as a blatant disregard for the sovereignty of the Estonian air border, this incident was a rare occurrence in its scale. Still, regular intrusion into Estonian airspace by foreign state aircraft has not met its end there.

A State's airspace is defined as a pillar of air, which arises from the State. It is restricted to the State's boundary, including its territorial and inland waters, where it holds exclusive and complete authority. Estonian airspace is defined in the State Borders Act § 3 (3): "airspace above the territory, territorial waters and inland waters of Estonia and above the parts of transboundary water bodies which belong to Estonia."² Therefore the Estonian air border is a continuous and closed imaginary line that matches the Estonian state border and the vertical section. Crossing the air border in this study is defined as crossing the state border excluding sea or land border. The latter can be done with any aircraft: fixed-wing or rotary-wing, human-crewed or unmanned, etc. The definition of aircraft as an apparatus for navigating the airspace used in this thesis is its most commonly understandable form.

State border and the adequate protection and defence of its boundary are primary characteristics of a sovereign State. Without the former, it is impossible to ensure the State's national security, perform customs checks and procedures, intercept illegal crossings of the state border, prevent smuggling of illicit goods, etc. State border is not a mandatory characteristic of a State but can be of high importance for recognising a territorial entity as a

¹Kaas, K. Vene hävituslennukid tungisid Eesti taevasse. Postimees, 05.03.2004. - <https://www.postimees.ee/1401871/vene-havituslennukid-tungisid-estti-taevasse> [06.01.2021].

² Riigipiiri seadus (State Borders Act). Adopted 30.06.1994, e.i.f. 31.07.1994 (RT I, 08.07.2020, 7), § 3 (3).

State.³ The constitution of Estonia states that the Estonian air border shall be defined according to generally recognised international conventions. The primary source of international airspace law is the Convention of International Civil Aviation signed in Chicago on the 7th December 1944 (The Chicago Convention)⁴, on which the Estonian airspace law is based.⁵ Article 3 (a) of the Chicago Convention states that the Convention shall apply only to civil aircraft and shall not apply to state aircraft.

The term "state aircraft" is ambiguous. The Chicago Convention art 3 (b) purports that an "aircraft used in military, customs, and police services shall be deemed to be state aircraft". This is, of course, a concise list of functions that a state aircraft can perform. Estonian Aviation Act § 5 (3)⁶ similarly defines state aircraft as aircraft used in Defence Forces, customs, or police services as state aircraft. Aircraft that do not qualify under those categories are deemed as civil aircraft.⁷ This concept is further expanded in the first chapter of this thesis.

Illegal entry or illegal border crossing is commonly criminalised based on national security reasons, controlling illegal immigration etc. Whether it is a misdemeanour or a criminal offence, it is universally accepted that crossing a national border without authorisation is punishable by state law. Several criminal offences and misdemeanours relating to this matter can be found in the Penal Code of Estonia and other acts like the State Borders Act.

Whereas every aircraft can violate national airspace, this thesis has its scope on state aircraft, whether they are of military origin or aircraft performing another state function. Civil aviation is probably one of the most regulated parts of international law, but most of these conventions or other treaties are not applicable to state aircraft. The scope of this thesis is further narrowed to include only time of peace, excluding aspects arising from international armed conflicts or factors of international humanitarian law.

³ Mälksoo, L. et al. PõhiS § 122. – Ü. Madise (ed). – Eesti Vabariigi põhiseadus. [The Constitution of the Republic of Estonia]. Commented Edition. 4. ed. Tallinn: Juura 2017, commentary no. 4.

⁴ The Convention on International Civil Aviation. Chicago: 7.12.1944, e.i.f. 4.04.1947

⁵ Mälksoo, L. et al. PõhiS § 122. – Ü. Madise (ed). – Eesti Vabariigi põhiseadus. [The Constitution of the Republic of Estonia]. Commented Edition. 4. ed. Tallinn: Juura 2017, commentary no. 5

⁶ Lennundusseadus (Aviation Act). Adopted 17.02.1999, e.i.f. 01.09.1999 (RT I, 10.12.2020, 14). § 5 (3)

⁷ *Ibidem*, § 5 (4)

According to the Estonian State Borders Act § 18 (1), the Defence Forces has the function of protecting and guarding the Estonian airspace. The Defence Forces are a militarily organised governmental authority within the government of the Ministry of Defence.⁸ The main functions of the Defence Forces are military defence of the State and participation in collective self-defence.⁹ These are commonly understandable functions when we think about military organisations as a whole. In times of war or conflict, the Defence Forces are the central authority to protect Estonia from foreign invaders. Safeguarding national airspace is a function that must be conducted whatever the situation may be, including time of peace. Therefore, the Defence Forces must constantly perform this function and have the right competencies.

The main problem regarding airspace violations is that the perpetrators are not currently punished under Estonian law; therefore, it must be determined whether criminalising these incidents would be helpful in this regard.

The primary purpose of this study is to find out on which grounds it is possible to criminalise territorial violations by foreign state aircraft in Estonian criminal law. The thesis shall also determine whether criminalisation would be an effective way to deter these violations and what purpose would it serve.

The primary research questions are as follows. Which aircraft are state aircraft, and how is their entry into Estonian airspace regulated by national and international law? How is the safeguarding of Estonian airspace conducted by the Defence Forces? Which are the most common Estonian airspace violations? How are territorial violations by foreign state aircraft regulated in Finnish criminal law? What challenges would the criminalisation of airspace violations face concerning Estonian criminal law, and how would it affect the possibility of punishing the perpetrators?

The analytical legal method is predominantly used in this study to interpret the current regulative framework concerning state aircraft and airspace violations. The analysis in the thesis is doctrinal; it connects international law principles regarding domains of the sea and

⁸ Kaitseväe korralduse seadus (Estonian Defence Forces Organisation Act). Adopted 19.06.2008, e.i.f. 01.01.2009 (RT I, 26.05.2020, 9), § 2 (1).

⁹ *Ibidem*, § 3 (1).

airspace with Estonian domestic regulations on national defence and criminal law. Furthermore, using the comparative method, the Finnish regulation on the criminalisation of territorial violations is compared to the current Estonian legislature, which interprets the essential part of the purpose and legal practice.

The primary source used in this study is the Chicago Convention and other sources related to its interpretation. Additionally, numerous Estonian legal Acts are used to highlight the procedure behind airspace control and regulations. The primary source for known Estonian airspace violations is derived from publicly available newspapers and press releases. Finnish legal acts for criminal law are used in the third chapter, augmented by a comprehensive article on Finnish practice regarding territorial violations.

Criminalising airspace violations in Estonian law is a novel concept. Still, a Master's Thesis has been written regarding freedom of overflight, defining military aircraft, and transponders' use whilst traversing the EEZs over the Baltic Sea.¹⁰ Furthermore, a master's thesis was published regarding the risk behaviour of Russian Air Force aircraft in the Baltic Sea region.¹¹

To effectively analyse the problem, this thesis is divided into three separate parts. The first chapter focuses on the sovereignty of airspace in international law, defining state aircraft and their obligations for entering Estonian airspace. Furthermore, it dwells on the Estonian Defence Forces competencies for safeguarding the air border and airspace and the role of Baltic Air Policing in that function of the state. The second chapter is a case study of Estonian airspace violations by foreign state aircraft, focusing on the geographical area of Vaindloo island, where almost every air border violation in Estonia occurs. The third chapter analyses how and why territorial violations are regulated in Finnish criminal law and dwell on the possibility of criminalising the aforementioned acts in Estonian law: the modus operandi, desired effects, and challenges.

I want to offer my sincerest thanks and appreciation to my wife Polina for the opportunity and all of the support she gave to me while writing this thesis. Additionally, I am grateful to my

¹⁰ Mae, M. The establishment of a potential treaty obligation for military aircraft to fly with activated transponders over the Baltic Sea. Tallinn: Master's Thesis, University of Tartu 2018.

¹¹ Habakuk, M. Russian Air Force's Risk Behaviour in the Baltic Sea Region. Tallinn: Master's Thesis, Estonian Academy of Security Sciences 2017.

supervisor, Alexander Lott, who introduced me to this particular topic and gave thorough feedback on the primary challenges I faced whilst traversing in the airspace of this thesis.

The key words of this thesis are the sovereignty of national airspace, state aircraft, airspace violations, and criminalisation of territorial violations.

1. COMPETENCIES OF THE ESTONIAN DEFENCE FORCES REGARDING THE SAFEGUARDING OF NATIONAL AIRSPACE

1.1. The principle of a sovereign airspace

1.1.1. Sovereignty against freedom of overflight

The meaning of sovereignty is not universally defined in international law. Still, it is argued that the essential part of it is the State's supreme control over its internal affairs. No other State or international organisation may intervene in matters that fall within the domestic jurisdiction of a State. Of course, this supreme control can be hindered by recognised limitations imposed by international law.¹² It is still argued that the principle of sovereignty is pivotal in modern international law and is most probably "the principle" on which most other institutions and principles of international law rely, directly or indirectly.¹³

The sovereignty principle is one of the pillars of the Chicago Convention. It is stated in Article 1 that "the contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory." The wording of this article points to States' authority over their airspace as absolute. Therefore, it is not a surprise that public international air law stands on two principles. Firstly, it is recognised that States have complete control over the air above their territory and territorial waters that include the right to impose their jurisdiction over such airspace. A State may require any foreign aircraft in its airspace to comply with its regulations on air transport, for example, concerning the aircraft and its crew, navigation, and environment. This right is limited by international treaty obligations the State has assumed in the interest of safe and efficient air transport.¹⁴

¹² Franklin, M. Sovereignty and Functional Airspace Blocks. *Air & Space Law* 2007/32, No.6, p. 426

¹³ Besson, S. Sovereignty. *The Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press 2012, p. 366

¹⁴ Hailbronner, K. Freedom of the Air and the Convention on the Law of the Sea. - *The American Journal of International Law* 1983/77, No.3, p. 490

States have specific attributes in their sovereign airspace according to the Chicago Convention that includes scheduled air services (Article 6), cabotage (Article 7) and pilotless aircraft (Article 8). The right to implement rules on air services is a provision that has had critical importance for international air transport and has been seen as an obstacle to the global liberalisation of air transport services.¹⁵

There are very few judicial cases in the matter of sovereignty and the Chicago Convention. Still, in the case of *R (on the application of Kibris Turk Hava Yollari & CTA Holiday) v. Secretary of State for Transport (Republic of Cyprus, interested party)* [2010], it is argued that a contracting State of the Chicago Convention retains its rights derived from the Convention (regulation of air services into and out of all parts of their territory, including determination of airports where aircraft are permitted to land etc.) over the airspace of its territory even if part of their territory is under the effective control of a third party.¹⁶ The aforementioned case concerned the island of Cyprus and the permissibility of flights between the United Kingdom and the northern part of Cyprus. The Republic of Cyprus does not exercise effective control over the territory after Turkey occupied it in 1974. The State formed in north Cyprus is not recognised as an independent State by the international community. The Republic of Cyprus, in contrast, is a contracting state to the Chicago Convention.¹⁷

Freedom of navigation is a well-established principle of customary international law. Freedom of navigation prevailed because States needed unhindered access to the seas for trading purposes and as a means for maritime powers to secure passage to other areas of political or military influence. Moreover, it derives from the fact that States cannot sustain their control over vast ocean areas. Freedom loosely translates to two areas of the sea. In the territorial sea, the coastal States could exercise exclusive sovereignty, but foreign vessels enjoy navigation rights. In contrast, there is no state sovereignty in the high seas, and all States enjoy complete freedom of navigation.¹⁸ In territorial sea, foreign ships enjoy a right of innocent passage,

¹⁵ Milde, M. *International air law and ICAO*. Vol. 4 of *Essential air and space law*. Utrecht: Eleven International Publishing 2008, p. 43.

¹⁶ Franklin, M. *Sovereignty and the Chicago Convention: English Court of Appeal Rules on the Northern Cyprus Question*. *Air & Space Law* 2011/36, No 2, pp. 109-116.

¹⁷ *Ibidem*, pp. 109-110

¹⁸ Hoffmann, J. A. *Freedom of Navigation*. *The Max Planck Encyclopedia of Public International Law* 2011/7, p. 568.

which is also available to warships provided they comply with the coastal State's laws and regulations concerning passage.¹⁹

Furthermore, the regime of transit passage may be applicable for state vessels and aircraft in international straits defined in the United Nations Convention on the Law of the Sea (UNCLOS) Art. 37. Transit passage regime applies to straits used for international navigation between one part of the high seas or an exclusive economic zone (EEZ) and another part of the high seas or an EEZ.²⁰ State aircraft in transit passage will generally comply with elementary safety measures and will at all times operate with due regard for the safety of navigation. Also, they must monitor the radio frequency assigned by the competent internationally designated air traffic control (ATC) authority or the appropriate international distress radio frequency.²¹ It is argued that strait States do not have the right to adopt air routes in respect of aircraft exercising the right of transit passage and that military aircraft exercising the right of transit passage does not have to comply with the ICAO's Rules of the Air.²²

The Chicago Convention did not establish a multilateral air transport scheme providing for freedoms of overflight and landing. The right to grant traffic rights remains essentially within the domain of each State's sovereign powers. Under customary international law, every flight over foreign territory is subject to the consent of the overflown State. The right of innocent passage as stipulated in the law of the sea has never been extended to foreign aircraft flying over the territorial sea.²³ Furthermore, as state aircraft are excluded from the scope of the Chicago Convention, even if the innocent passage principles would apply to foreign aircraft in the territorial sea, they would be excluded from it. Article 3 (c) of the Chicago Convention explicitly says that no state aircraft of the contracting States shall fly over the territory of any State without authorisation by special agreement or otherwise.

Freedom of overflight is not exercised according to international customary law, and no international convention on freedom of overflight is universally accepted. The International

¹⁹ United Nations Convention on the Law of the Sea. Montego Bay 10.12.1982, e.i.f. 16.11.1994, Art. 19.

²⁰ *Ibidem*, Art. 37

²¹ UNCLOS, Art. 39 (3)

²² Lott, A. *The Estonian Straits: Exceptions to the Strait Regime of Innocent or Transit Passage*. Tartu: University of Tartu Press 2017, pp. 118-119

²³ Hailbronner, *op. cit.*, pp. 491-492.

Air Services Transit Agreement of 1944²⁴ aims to grant the privileges to fly across the contracting State's territory without landing and land for non-traffic purposes. There are several political, military, and security-based reasons why it was never universally accepted. It is stated that the States should re-evaluate the current understanding of exclusively sovereign airspace, which was primarily implemented due to the First World War and recognise the positive opportunities these two freedoms would provide.²⁵

An overflight takes place when an aircraft performs an international flight, meaning it leaves the airspace of the State where it is registered and is, therefore, the State of its nationality.²⁶ After leaving the airspace of its State of nationality, the aircraft can enter and fly through either the national airspace of another State or through international airspace.²⁷

International airspace is strongly connected to the concept of "high seas" in international law of the sea and its freedoms and regulation in UNCLOS Article 87 (especially the freedom of overflight). It can be defined as airspace excluding every other States' airspace. Inside international airspace, the aircraft have freedom of overflight. It includes the airspace over the high seas and the same degree the airspace over EEZs according to UNCLOS Article 58 (1).

In conclusion, derived from the sovereignty principle, the permissibility of overflight by foreign state aircraft in the state's national airspace is usually governed by the State being overflown. These aircraft must comply with the State's regulation; for example, they must have the necessary permits or clearances. The duration of the flight over state airspace does not have a difference in this matter. The process of applying these permits is further analysed in the next subchapters.

²⁴ The International Air Services Transit Agreement. Chicago: 07.12.1944. e.i.f. 30.01.1945.

²⁵ 20. Lee, J. ., Revisiting freedom of overflight in international air law: Minimum multilateralism in international air transport. *Air & Space Law* 2013/38, No. 4-5, pp. 367-369.

²⁶ The Chicago Convention, Art. 17.

²⁷ Demeyere, B. Wouters, J. Overflight. *The Max Planck Encyclopedia of Public International Law*. Oxford: Oxford University Press 2008, para. 1.

1.1.2. Definition of state aircraft in international law and cases of ambiguity

The Chicago Convention distinctly regulates civil aviation, and state aircraft are primarily exempt from its scope. International air law deals only with civil aircraft and purposely excludes its applicability to state aircraft's status and operation.²⁸ For this thesis, it is essential to ascertain a thorough definition of state aircraft and find the legal distinction between state and civil aircraft. Firstly, it is for narrowing the subject matter. Secondly, national regulations are differentiated into these two categories. Thirdly, and most importantly, for the criminalisation of state aircraft unlawful entry into Estonian national airspace, we must know which aircraft are or can be considered state aircraft in the first place. International law does give a clear distinction between state and civil aircraft, but a few examples can be found and studied.

The concept of a public aircraft was defined in the first formal diplomatic conference on air navigation. Aircraft is considered public when employed in a contracting State and placed under the orders of a duly commissioned officer of that State.²⁹ Furthermore, the Paris Convention of 1919³⁰ defined state and private aircraft. According to Article 30 of the Paris Convention, military aircraft and other aircraft exclusively employed in state services, such as posts, customs, and police, are deemed state aircraft. Every other aircraft is considered a private aircraft.³¹

Interestingly the same article purports that state aircraft other than military, customs, and police aircraft shall be treated as private aircraft and shall be subject to all provisions of the Convention.³² Military aircraft are further defined as every aircraft commanded by a person in military service detailed for the purpose.³³ Paris Convention was liberal by today's standards as it allowed freedom on innocence passage over States in time of peace without any distinction as to the nationality of the aircraft.³⁴ This rule did not apply to military aircraft, and

²⁸ Milde, *op. cit.*, p. 60.

²⁹ de Oliveira, R. The Distinction between Civil and State Aircraft: Does the Current Legal Framework Provide Sufficient Clarity of Law with Regard to Civil and State Aircraft in Relation to Aviation Practicalities? - Air & Space Law 2016/41, No. 4/5, p. 331.

³⁰ Convention Relating to the Regulation of Aerial Navigation. Paris 13.10.1919, e.i.f. 1922 (Paris Convention)

³¹ *Ibidem*, Art. 30

³² *Ibidem*, Art. 30.

³³ *Ibidem*, Art. 31.

³⁴ *Ibidem*, Art. 2.

they need a special authorisation for overflight or landing.³⁵ Therefore, from the start of international air law, military aircraft were given a special status restricting their freedom of operation in foreign sovereign airspace.³⁶

The distinction of military aircraft from civil aircraft was a substantial problem for adapting the Versailles Peace treaty when the Allied States tried to confiscate some German aeronautical equipment as "military". At the same time, Germany claimed it to be "civil".³⁷ This resulted in the formulation of "Nine Rules" on 5th May 1922 that was the base of this distinction.³⁸ According to these rules, military aircraft included all aircraft capable of flying without a pilot, every single-seater aircraft of more than 60 horsepower, all aircraft constructed in such manner as to allow the addition of armaments such as machine guns, bomb racks, torpedos, etc., all aircraft which could exceed a speed of about 106 miles an hour while flying at the height of about 6500 feet, or which carried fuel for more than 4 hours' flight at full power, or which could transport total cargo in excess of 1320 pounds (approx. 600 kg) including the pilot, crew, passengers, or freight.³⁹ Even to the standards of that time, these rules were of no use. Germany proved that much of the civil aviation equipment operated by the Allies over Germany met the criteria of military aircraft. The attempt to define military aircraft strictly by technical parameters proved to be futile. The civil or military nature of an aircraft cannot be determined solely based on its technical features.⁴⁰

As stated, the Chicago Convention is addressed to civil aviation and civil aircraft. From Article 3 of the Convention concerning its applicability only to civil aviation, several conclusions can be deducted. The Chicago Convention as such does not apply to state aircraft; hence, even the law-making power of the ICAO Council to adopt Standards and Recommended Practices (SARPs) and the overall mandate of the Organization is reserved to civil aircraft. State aircraft are not permitted to fly over or land in foreign sovereign territory otherwise than with the concerned authority.⁴¹ This does not, however, mean that these standards never apply to military aircraft. There were several instances when the purpose of ICAO regulations was

³⁵ *Ibidem*, Art. 32.

³⁶ Milde, *op. cit.*, p. 62.

³⁷ *Ibidem*, p 62.

³⁸ *Ibidem*, p 63.

³⁹ Fedele, F. Overflight by Military Aircraft in time of Peace. The United States Air Force JAG Law review 1967/9, No. 5, pp. 10-11.

⁴⁰ Milde, *op. cit.* p. 63.

⁴¹ *Ibidem*, pp. 63-64.

specifically to control actions performed by military aircraft. Appendix 2 of Annex 2 to the Convention does regulate the interception of civil aircraft. These rules were enacted following the shooting down of Korean Air flight 007 by USSR interceptor SU-15.⁴²

The presumption given in the Chicago Convention about state aircraft is well-known. Aircraft used in military, customs, and police services shall be deemed state aircraft (Chicago Convention Article 3 (b)). Of course, a State carries out many more functions such as coast guard, search and rescue, medical services, mapping or geological survey services, disaster relief, VIP, and Government transport. Consequently, the examples provided by the Chicago Convention Article 3 (b) cannot be taken as all-comprehensive. Other functions should also be included in the defining aspects of state aircraft.⁴³ The wording of the Chicago Convention suggests the drafters leaned in favour of a functional approach to determining the status of the aircraft as civil and military, regardless of the design, technical characteristics, registration, or ownership. Therefore, the status of an aircraft should be determined by the function it performs at a given time. Thus, it is possible that the same aircraft may be state aircraft in one situation and civil aircraft in another.⁴⁴ It is proposed that the status of each flight should be determined by an approved flight plan accepted by the State to be overflown and specifying the nature of the flight as either civil or military.⁴⁵ Overall, there is no reliable and generally accepted legal definition of a civil aircraft and a state aircraft.⁴⁶

The following elements could be reasonably be considered in determining the military nature of the flight of an aircraft. The nationality and registration of an aircraft may designate the aircraft as military. Still, the fact itself is not conclusive proof that the aircraft is used as military in each situation. The fact that a State or a defence ministry owns the aircraft is relevant. The nature of the flight, flight plan, communications procedures, secrecy classification, and cargo carried, such as military equipment, including weapons, is relevant. Whether the operator of the aircraft is defence ministry, military, customs, or police is appropriate. Area of operation refers to whether the aircraft is flying in a theatre of military operation in an international armed conflict.⁴⁷

⁴² *Ibidem*, p. 67.

⁴³ *Ibidem*, p. 70.

⁴⁴ *Ibidem*, p. 71.

⁴⁵ *Ibidem*, p. 73.

⁴⁶ *Ibidem*, p. 69.

⁴⁷ Bourbonniere, M. Haec, L. Military Aircraft and International Law: Chicago Opus 3. *Journal of Air Law and Commerce* 2001/66, No.3, pp. 903-904.

When looking at the national legislature, the Estonian Aviation Act defines state aircraft as an aircraft used in Defence Forces, customs, or police services.⁴⁸ This definition is in line with the Chicago Convention but grammatically narrower than the presumption given in the latter. The definition itself is closed to only these activities, and it cannot be widened to include aircraft which may perform other functions of a State, e.g., search and rescue, mapping, VIP flight etc. It is unknown whether this definition is purposely narrow or it does not include other categories by an oversight. Nevertheless, this definition limits discretion when dealing with possible airspace violators, as every aircraft must be labelled into the given narrow categories. It discards other functions a State may perform, and therefore it must be further looked into broadening the definition.

When looking at Russian Federation state or military flight in the Baltic region, the route most used is from the Russian mainland to Kaliningrad oblast. Geographically the fastest direct route to-and-from Kaliningrad oblast is through Estonia, Latvia, or Lithuania. However, as state aircraft have to have permission to fly over another State's territory, the most direct route becomes virtually impossible. It is doubtful that the Baltic States would grant clearances or permits (as it is a discretionary decision) to Russian military (of which some may be armed) aircraft for flying over their national territory for geopolitical reasons. From the other perspective, Russian military services would also not be very keen on filing the applications for clearances. They are very detailed, and the answers may include sensitive or other operational information. As all aircraft enjoy the freedom of overflight over the high seas (UNCLOS Art. 87 (1)(b)) and over the EEZ (UNCLOS Art. 58 (1)), the best way for Russian state aircraft to navigate to-and-from Kaliningrad oblast is over the Baltic Sea. Luckily for them, this kind of route is available.

From the geographical point of view, the route must traverse the Gulf of Finland. Regardless of its name, most of the area in question between Estonia and Finland must be legally considered a strait (Viro Strait).⁴⁹ In this strait, Estonia's and Finland's territorial sea are separated by an approximately 6 NM wide EEZ corridor established by a bilateral Agreement

⁴⁸ Estonian Aviation Act, § 5 (3).

⁴⁹ Lott, *op. cit.*, pp. 99-100.

between Estonia and Finland in 1994.⁵⁰ With this Agreement, Estonia and Finland limited their right to extend their territorial sea up to the limit of 12 miles measured from the baseline as it is stipulated in UNCLOS Article 3. The primary aim was to ensure free passage through the Gulf of Finland, and it was explained in the Estonian Parliament as a voluntary political self-limitation.⁵¹

Nevertheless, the extension of the width of the Estonian territorial sea was once again under public discussion in 2005⁵². It was proposed in a draft act to the parliament in 2007.⁵³ It is argued that the extension of the Estonian territorial sea in the Gulf of Finland would, contrary to the common understanding, increase concerns to Estonian national security. It is due to Viro Strait being considered as an international strait under UNCLOS Article 37. In contrast, the regime of transit passage would apply to it if Estonia and Finland would not have decided to establish the beforementioned EEZ.⁵⁴

Furthermore, transit passage applies from coast to coast⁵⁵, except for internal waters within a strait where establishing a straight baseline had the effect of enclosing as internal waters areas that had not previously been considered (UNCLOS Article 35 (a)). In the case of Estonia, the internal waters may be outside of the regime of transit passage if the foreign State recognises Estonia's State continuity. As the Russian Federation does not recognise Estonia's State continuity, it would not be impossible from their perspective that the regime of transit passage would also apply to Estonia's internal waters.⁵⁶ Therefore, if the transit passage regime would apply to the Gulf of Finland (Viro Strait), Russian state aircraft would have more freedom to navigate through the area in close vicinity of Tallinn.⁵⁷ This right may also not be impeded by the strait State as stipulated in UNCLOS Article 38 (1).

⁵⁰ Exchange of Notes Constituting an Agreement on the Procedure to be followed in the Modification of the Limits of the Territorial Waters in the Gulf of Finland. Tallinn/Helsinki 04.05.1994, e.i.f. 31.07.1995

⁵¹ The oral explanations by the Estonian foreign minister in the Minutes of the first reading of the draft Maritime Boundaries Act in the Estonian Parliament. The stenographic record of the VII Riigikogu, 21.01.1993. - <http://stenogrammid.riigikogu.ee> [27.04.2021].

⁵² Aasmäe, H. Gräzin, I. Lindpere, H. Parts, J. Eesti merepiiri tuleb nihutada. Eesti Päevaleht, 28.12.2005. - <https://epl.delfi.ee/artikkel/51026851/hardo-aasmae-igor-grazin-heiki-lindpere-juhan-parts-eesti-merepiiri-tuleb-nihutada> [25.04.2021].

⁵³ Explanatory Note to the 1993 Maritime Boundaries Act of Estonia 3 SE. Tallinn 2007. - <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/61bf6a3e-fe48-9195-b305-944e25f26bf7/Merealapiiride%20seadus/> [03.04.2021], p. 2.

⁵⁴ Lott 2017, *op. cit.*, pp. 112-113.

⁵⁵ *Ibidem*, p. 115.

⁵⁶ *Ibidem*, p. 116.

⁵⁷ *Ibidem*, p. 118.

From the perspective of this thesis, the beforementioned route has exciting ramifications. Mostly, that almost every aircraft using this route to fly from mainland Russia to Kaliningrad oblast does this for a reason to avoid entering into foreign State's national airspace. Therefore, aircraft navigating the course do not have to apply for permits or clearances from national governmental institutions and disclose in detail its purpose, cargo, personnel etc. It can be reasoned that aircraft that use this route may be deemed as state aircraft performing a state function whatever aircraft is used. Civil aircraft, in contrast, can fly according to rules enacted by international aviation bodies and may take a shorter route over the Baltic States; for example, several Russian civil airlines traverse this route daily. An aircraft behaviour, in this case, can be a significant indicator that it may be a state aircraft but relying solely on the fact may prove to be inconclusive.

Defining state aircraft may prove difficult, especially when regarding border-line cases and different national understandings. Nevertheless, the classification of an aircraft has multiple effects on the application of national and international regulations. Estonian Aviation Act has a relevantly narrow definition of state aircraft, and few state functions are included in the description. Whether intentional or accidental, it limits control over Estonian national airspace and may cause further ambiguity and problems even to operational flexibility.

1.1.3. Procedure for granting permits for state aircraft entry into Estonian airspace

The previous subchapter ascertained that no state aircraft could enter another State's airspace without special authorisation under international law. Therefore, any foreign state aircraft that do not have special permission is committing an airspace violation.

In Estonia, the authorisation is given by a permit or a clearance which is a well-established mean. Flight permits are issued under the National Defence Act § 43.⁵⁸ The procedure for procuring a permit is more detailed in a regulation established by the Government of the

⁵⁸ Riigikaitseadus (National Defence Act). Adopted 11.02.2015, e.i.f. 01.01.2016 (RT I, 13.03.2019, 147), § 43.

Republic.⁵⁹ Therefore, Estonia has established foreign state aircraft entering national airspace as a concern of defence and security.

There are two types of flight permits: for single entry or multiple entries.⁶⁰ The applications of the permits are submitted to the Ministry of Defence (MOD) of Estonia.⁶¹ There are some exceptions to this regulation. For example, an aircraft of a Member State of the North Atlantic Treaty Organization (NATO) involved in protecting Estonian airspace or securing its inviolability may enter Estonian airspace, land on, or fly over Estonian territory without the application for the beforementioned clearance.⁶² Included in this category are also foreign state aircraft performing air policing function for Estonia. The approach differentiates foreign States according to their trustworthiness.

Multiple entry clearances are usually annual, and for the Member States of NATO and the European Union, they are granted without applying. In these cases, prior notification for entry into Estonian airspace is not needed, except for aircraft fitted with intelligence, surveillance, target acquisition, reconnaissance, or electronic warfare equipment, even if this equipment is turned off. Aircraft with that kind of equipment must notify the Defence Forces one day before entry to Estonian airspace or landing on or flying over Estonian territory.⁶³ Annual flight clearance does not apply to foreign state aircraft carrying weapons, ammunition, explosives or other dangerous goods, and aircraft that have turned on its intelligence, surveillance, target acquisition when entering Estonian airspace reconnaissance or electronic warfare equipment.⁶⁴ Meaning, these aircraft will have to apply for a single entry permit.

As mentioned in the previous subchapter, the Estonian legislature defines an aircraft as a state aircraft used in Defence Forces, customs, or police services. Civil aircraft that need similar special authorisation is aircraft making a flight related to the state visit of a head of State or a member of the government of a foreign State or a flight associated with another official visit

⁵⁹ *Ibidem*, § 43 (2).

⁶⁰ Välisriigi sõjalaevale territoriaal- või sisevetesse sisenemise loa ning välisriigi riiklikule õhusõidukile õhuruumi sisenemise loa andmise kord (Procedure for the Issue of Permits for Entry of Foreign Military Vessels in Estonian Territorial Waters or Inland Waters and Permits for Entry into Estonian Airspace of Foreign State Military Aircraft, for their Landing on Estonian Territory or for their Flying over the Territory). Adopted 28.01.2016, e.i.f. 05.02.2016 (RT I, 28.06.2017, 59, § 2 (2)).

⁶¹ *Ibidem*, § 3

⁶² *Ibidem*, § 1 (3).

⁶³ *Ibidem*, § 15 (1) (4).

⁶⁴ *Ibidem*, § 15 (6).

that is significant politically or another diplomatic mission (a diplomatic flight).⁶⁵ Contrary to the clearances granted to state aircraft, this permit is issued by the Ministry of Foreign Affairs (MFA).⁶⁶ The regulation also purports that the MFA can only grant permits that the MOD does not process.⁶⁷ It is not uncommon that diplomatic flights are carried out with aircraft which cannot be categorised under civil aircraft. For example, US Air Force operates at least two Boeing VC-25 aircraft, which are military versions of the well-known Boeing 747 cruiser, and are commonly used for VIP transport, especially of the United States President.

Concerning issues with state security, the latter permits are of lesser importance. Still, they are nevertheless coordinated by the MOD and the Estonian Police and Border Guard Board (only when the aircraft is applying for a landing permit).⁶⁸ It clearly defines that all matters relating to state aircraft are under the close supervision of the military leadership. It links perfectly to the concept of the Defence Forces being the primary guardian of the Estonian national airspace.

Application forms for these permits are available on the web sites of MOD and MFA. The application for a flight must be submitted to the MFA in good time, at least five working days before the estimated arrival of the aircraft in Estonian territory. The diplomatic clearance form for state aircraft requires more information from the applying party and therefore is more detailed. The procedure for granting said permits is confidential, and the subject applying the permits is given only the final decision. In this research, the process itself is not essential; only granting the permit or rejection of the application is of interest.

The main issue of this procedure is that it is based on the goodwill of the applying State and is virtuously unpoliceable by national law enforcement agencies. It is challenging to ascertain if a flight needs a permit when declared as a civilian aircraft but is conducting a flight of diplomatic importance. It would require further coordination between different branches of law enforcement and the military. Nevertheless, deciding on differentiating these two separate categories may prove difficult in time-critical situations.

⁶⁵ Estonian Aviation Act, § 5¹.

⁶⁶ Ametlike visiitidega või muu diplomaatilise missiooniga seotud välisriigi õhusõidukile lennuloa andmise kord. (Procedure for the Issue of Permits for Entry of Foreign Aircrafts Connected with Official Visits or Other Diplomatic Missions). Adopted 23.01.2009, e.i.f. 08.02.2009 (RT I, 19.04.2016, 2), § 6 (1).

⁶⁷ Estonian Aviation Act, § 5¹.

⁶⁸ *Ibidem*, § 5 (1) (2).

1.2. The competencies of Estonian Defence Forces to protect, guard, and conduct surveillance of the national airspace

Maintaining security on the national border is not an easy task. This task is more complicated relating to the air border. It is not policeable by physical means due to its dimensions but relies on different sensors usually deployed only by the military. The following two subchapters will analyse how the Estonian Defence Forces perform the task for securing Estonian national airspace and which role is assigned to allied forces.

1.2.1. Protection of national airspace

According to the Estonian State Borders Act, protecting national airspace is given to the Defence Forces.⁶⁹ The Defence Forces hold the function of protection and is authorised to guard the airspace.⁷⁰ The Defence Forces carries out the function by its armed services, in this case, the Air Force. Section 18 (2) of the State Border Act also gives the option to include armed forces of a State being party to an agreement containing the principle of collective self-defence entered into with the Republic of Estonia in the performance of this task.⁷¹ This, of course, means the North Atlantic Treaty Organization and the forces most suited to this task are assets of the Baltic Air Policing (BAP) mission.

The protection of national airspace is an integral part of the protection of the national territory. The purpose of protecting national airspace also includes safeguarding the safety and security of flight, the observance of aviation regulations, and the life and property on the ground. The protection is usually carried out by national police forces or by the military and is done by intercepting the suspect aircraft using a state aircraft, e.g. a fighter jet. An aircraft may be suspect when it does not identify itself, appears unexpectedly in the airspace contrary to the recorded flight plans or schedules, flies beyond the established air route or even over a

⁶⁹ State Borders Act, § 18 (1).

⁷⁰ *Ibidem*.

⁷¹ *Ibidem*, § 18 (2).

prohibited or restricted area, by not communicating with the Air Traffic Services (ATS) or by appearing to perform improper operations or manoeuvres.⁷²

The primary means of dealing with a state aircraft that unlawfully enter a States' national airspace are firstly the interception of said aircraft for identification. Secondly, the aircraft can be directed to leave the violated airspace by a determined route. Thirdly, the aircraft can be directed or even forced to land for further investigation or prosecution. The use of weapons against this aircraft committing an airspace violation in peacetime would be reprehensible and contrary to all humanitarian concepts and hardly a proportionate use of force. Nevertheless, the codified international law does not recognise the general prohibition of the use of weapons against state aircraft and, in particular military aircraft.⁷³

In principle, the unlawful intrusion of foreign aircraft into national airspace constitutes an attack on the State. It may result in self-defence measures against the aircraft, whether it is a response by air-to-air assets or surface-based air defence (SBAD) weapon systems. As mentioned before, the use of force against an intruding foreign military aircraft is commonly understood and accepted. It is not the case for civil aircraft.⁷⁴

Article 3 bis (a) of the Chicago Convention purports that contracting States must refrain from resorting to the use of weapons against civil aircraft in flight; moreover, in the case of interception, the lives of passengers onboard and the safety of aircraft must not be endangered. The key is proportionality, especially when dealing with civil aviation. The least deadly measures should be considered foremost. Article 3 bis (b) highlights the option of the forcible landing of the aircraft at some designated airport. With this reservation, the protection of national airspace with deadly weapons even against civil aircraft is not excluded in principle. Still, it is highly disputed whether the downing of an aircraft constitutes a legitimate means in terms of *ultima ratio*.⁷⁵

Interception of civil aircraft is thoroughly regulated and is seen as a last resort action. When intercepting a civil aircraft, the operation should be limited only to determining the aircraft's

⁷² Milde, *op. cit.*, p. 49.

⁷³ *Ibidem*, p. 64.

⁷⁴ Hobe, S. Airspace. The Max Planck Encyclopedia of Public International Law 2012/1, p. 266.

⁷⁵ *Ibidem*, p. 266.

identity. Exceptions to this rule would be the aim of returning the aircraft to its planned track, directing it beyond the boundaries of national airspace, guiding it away from prohibited, restricted or dangerous areas, or instructing it to land at a designated airfield. Practice interception of civil aircraft is not permitted.⁷⁶ Interception of civil aircraft may be used in cases of emergency, unlawful interference, or communication failure.

The use of deadly force against civil aircraft suspected of being used as a weapon (a Renegade aircraft) against the territory, infrastructure or population of a State cannot be ruled out by international law. The use of such force must observe the requirement of proportionality, and the decision-making authority authorising or ordering the use of force should be vested in a constitutionally designed body or person.⁷⁷ The Estonian Defence Forces may be used to counter threat imposed by civil aircraft if there is reason to believe that the flight of the civil aircraft has been unlawfully interfered with. It may be used to cause damage to a person's property.⁷⁸ The procedure is highly regulated, and the use of force is a last resort measure. The extend of the standards is decided by the minister responsible for the area or a minister authorised by the Government of the Republic.⁷⁹ Regulation of the Government of the Republic further states that this responsibility lies foremost on the Defence Minister.⁸⁰ It must be said that these kind of incidents are very fast-paced due to the nature of air transport and therefore decisions and actions undertaken against said targets must be done effectively and with the highest regard to the situation.

To summarise, intrusion into national airspace may give rise to self-defence measures and acting on these incidents are done mainly by the military, in this case, the Estonian Defence Forces, which protects the national airspace of Estonia. The use of deadly force against foreign aircraft is not principally prohibited but must be avoided at all costs, especially against civil aircraft. The distinction between civil and state aircraft becomes even more critical and has an inamountable effect on the choice and weight of the appropriate response. The use of force

⁷⁶ International Civil Aviation Organization. Rules of the Air. Annex 2 to the Convention on International Civil Aviation. Tenth Edition, 2005. - https://www.icao.int/Meetings/anconf12/Document%20Archive/an02_cons%5B1%5D.pdf [25.04.2021], Appendix 2, point 1.1.

⁷⁷ Milde, *op. cit.*, p. 58.

⁷⁸ Estonian Defence Forces Organisation Act, § 47.

⁷⁹ *Ibidem*, § 47 (3).

⁸⁰ Jõu kasutamise tsiviilõhusõiduki tekitatud ohu tõrjumiseks. (The Use of Force to Counter Threats Posed by Civil Aircraft) Adopted 11.12.2008, e.i.f. 01.01.2009 (RT I 2008, 54, 308), § 1.

against an aircraft would result in a death sentence to the pilot and all passengers onboard the aircraft.

1.2.2. Guarding the national airspace

Protection of the airspace is the result of incidents connected to foreign aircraft. Firstly, the competent institutions must detect, identify, and react to these incidents to determine necessary force measures. Regarding airspace, it is impossible to distinguish air surveillance from the function of guarding because no detection means no reasonable way for reacting to the incident. Therefore, air surveillance is the pillar on top of which protection and safeguarding of the airspace sit.

Air surveillance in the modern era can be effectively done only by electromagnetic means, which usually includes different sensors. This is mainly due to the speed and height of the aircraft being operated. Visual means of identification can be implemented in areas where there is more risk of aircraft flying at a low altitude, but the weather is a significant factor.

“Air surveillance is conducted using a wide array of electromagnetic devices. It can be characterised in terms of coverage volume (the volume of airspace in which the system operates to specification), accuracy (a measure of the difference between the estimated and the actual position of an aircraft), integrity (an indication that the aircraft's estimated position is within a stated containment volume of its actual position), update rate (the rate at which aircraft's position is updated to users), reliability (the probability that the system will continue operating to specification within a defined period), and availability (the percentage of the total operating time during which the system is performing to specification).”⁸¹

The most prominent of these measures are air surveillance radars. “Radar is a technology that detects the range and azimuth of an aircraft. It is based upon the difference in time between

⁸¹ International Civil Aviation Organization Asia and Pacific. Guidance Material of Comparison of Surveillance Technologies (GMST). 2007. -https://www.icao.int/APAC/Documents/edocs/cns/gmst_technology.pdf [12.02.2021], pp. 3-4.

the transmission of pulses to the aircraft and the receipt of energy from the aircraft.” Two main radars are the primary surveillance radar (PSR) and the secondary surveillance radar (SSR).⁸²

“The former transmits a high-power signal, some of which is reflected by the aircraft back to the radar. The radar then determines the aircraft's position in the range from the elapsed time between transmission and reception of the reflection. PSR does not provide the aircraft's identity; however, PSR does not require any specific equipment on the aircraft.”⁸³ This is the primary radar type considering military activities because it can detect aircraft that do not want to be seen, e.g. an aircraft that is not using a transponder.

The latter systems “consist of two main elements, a ground-based interrogator/receiver and an aircraft transponder. The aircraft's transponder responds to interrogations from the ground station, enabling the aircraft's range and bearing from the ground station to be determined. In many cases, the two radar types are deployed together.”⁸⁴ As mentioned before, SSR's effectiveness depends on aircraft using a transponder and therefore can have only limited applications for the full spectrum of air surveillance. It further highlights the importance of activated transponders, making air surveillance much more effortless and gives the authority more options to differentiate between aircraft categories. Interestingly, aircraft not using an activated transponder may be more conclusively regarded as military aircraft.

On a Baltic scale, air surveillance has a long history of cooperation between the Defence Forces of each country. The decision for an integrated air surveillance system in the Baltics was already made in 1994-1995 but came into effect a few years later in 1998.⁸⁵ It was well before the Baltic States joined NATO in 2004. After that, Baltic Air Surveillance Network and Control System (BALTNET) operated inside the NATO force structure and contributed to NATO's Integrated Air and Missile Defence System (NATINAMDS). A significant change occurred in 2020 when one jointly staffed Combined Control and Reporting Centre (CRC⁸⁶) in Karmelava, Lithuania, was replaced by three national CRC to enhance the region's air

⁸² *Ibidem*, pp. 5-6.

⁸³ *Ibidem*, p. 6.

⁸⁴ *Ibidem*, pp. 7-8.

⁸⁵ Republic of Estonia Defence Force. BALTNET. - <https://mil.ee/en/defence-forces/international-cooperation/baltnet/> [12.02.2021]. The information on this site is not up to date.

⁸⁶ Eesti Vabariigi valitsuse, Leedu Vabariigi valitsuse ja Läti Vabariigi valitsuse vaheline Balti õhuseirevõrgu ja juhtimissüsteemi paigutuse kokkulepe (Agreement on the Configuration of the Baltic Air Surveillance Network and Control System). Adopted 24.10.2019, e.i.f. 12.04.2021 (RT II, 06.05.2020, 2), Art. 2. Definitions. CRC.

surveillance and control capabilities.⁸⁷ BALTNET aims to secure the sovereignty of the national airspace of the Baltic States by continuously using nationally owned air surveillance assets and air command and control systems, hence contributing to the safeguarding of the integrity of NATO airspace.⁸⁸

The function of guarding the national airspace is done by the Air Force, an armed service of the Defence Forces. One of the structural units of the Air Force is the Air Surveillance Wing (ASW).⁸⁹ By regulation of the Government of the Republic, the ASW has the right to collect and process signals transmitted or travelling outside the publicly available electronic communications networks located in the territory of the Republic of Estonia and pictures and images of the earth or sea and of objects in the use of a foreign State which are located outside of the territory or have entered the territory of the Republic of Estonia to conduct military intelligence.⁹⁰

The primary purpose of the ASW is to safeguard the integrity of Estonian national airspace by contributing to the NATINAMDS with robust early warning and air defence mission command and control in peacetime, crisis, and war.⁹¹ For this task, the ASW uses its tactical units and its assets. In its arsenal, the ASW has four radars: two Ground Master 403 radars in the south-eastern and western part of Estonia, one TPS-77 radar in the north-eastern part of Estonia, and one ASR-8 radar in the northern part of Estonia inside the Ämari airbase.⁹²

One of the tactical units in the ASW is the CRC Tallinn, one of the CRC in BALTNET. CRC Tallinn's main objective is to safeguard the sovereignty of the Estonian airspace by detecting and identifying flying objects inside and in the vicinity of Estonian airspace.⁹³

⁸⁷ NATO Allied Air Command Public Affairs Office. Baltic Air Surveillance Network to Enhance NATO Air Posture. 03.12.2019. - <https://ac.nato.int/archive/2019/page87502614.aspx> [25.04.2021].

⁸⁸ The BALTNET Agreement, Art. 3.

⁸⁹ Kaitseväe põhimäärus. (Statute of the Estonian Defence Forces). Adopted 21.06.2018, e.i.f. 01.07.2018 (RT I, 17.11.2020, 3), § 18 (3).

⁹⁰ *Ibidem*, § 18 (4); Estonian Defence Forces Organization Act, § 37 (1).

⁹¹ Republic of Estonia Defence Forces. Air Surveillance Wing. https://mil.ee/en/air_force/air-surveillance-wing/ [12.02.2021].

⁹² Laats, A. Kaitseväe pilk taevasse. Ajakiri Sõdur, 2016/2. https://issuu.com/sodur/docs/sodur2016_issuu_6b6c279e5ec361 [12.02.2021], pp. 30-33.

⁹³ Õhuseirediviisjoni põhimäärus. (Statute of the Air Surveillance Wing). Adopted 18.06.2014, e.i.f. 18.06.2014 (Amended by the Order of The Commander of the Defence Forces 09.07.2018). § 6 (5); § 9 (2)(2).

To summarise, air surveillance is the pillar for guarding the national airspace. It is conducted mainly by using different radars. For maximum effect, primary and secondary surveillance radars are used together. Information from the primary surveillance radars may be used to help Tallinn ATC. The Defence Forces, which has the function of guarding the national airspace of Estonia, does this task by using the assets of its armed services and structural units. The lowest tactical unit responsible for the function is CRC Tallinn, which is a part of the more comprehensive Baltic air surveillance network.

1.3. Baltic Air Policing as a measure of collective self-defence principle

Air Policing is a concept that first came into existence in the interwar period between 1919 until 1939 when it was developed by the Royal Air Force and conducted in the Middle-East and eastern African coast. Great Britain used airpower in different circumstances, in some cases to replace or substitute land forces; in other cases, ground campaigns had been conducted for decades before the use of airpower had even been considered.⁹⁴ The definition of air policing is to use airpower to support the internal security of the State, not different to a typical police force. Inherent in the meaning is the notion of a mandate granted by a legal authority such as a national sovereign government or an international body with some reasonable jurisdictional claim.⁹⁵

NATO Air Policing is not a defence mission but a peacetime mission carried out under NATINAMDS to ensure the integrity of Allied airspace.⁹⁶ It aims to secure the skies over Europe, maintaining a Force that is in readiness to react to air incidents 24/7/365. The decision to scramble air policing mission aircraft, or Quick Reaction Alert (QRA) Interceptor aircraft, is first done by detecting a significant air incident. It may include an aircraft that is not using its transponder or is not in two-way radio contact with civilian ATC, or has not filed a valid flight plan. When the decision is made to react to the incident, QRA aircraft are launched in minutes. They are directed by a CRC and brought up close to the unidentified aircraft. During the interception, the main aim is to identify the aircraft and establish visual contact with the

⁹⁴ Longoria, M. A. A Historical view of Air Policing Doctrine: Lessons from the British Experience between the Wars, 1919-1939. Master's Thesis, School of Advanced Airpower Studies 1992, pp. 1-2.

⁹⁵ *Ibidem*, p. 3.

⁹⁶ Harper, C. Lawrence, T. Sakkov, S. Air Defence of the Baltic States. International Centre for Defence and Security 2018, p. 13.

pilot-in-command of the intercepted aircraft. The QRA aircraft may escort the intercepted aircraft to a nearby airfield to land or escort it out of NATO airspace.⁹⁷

The Baltic Air Policing mission started in 2004 when the three Baltic States joined NATO. “Estonia, Latvia, and Lithuania do not have the required aircraft assets to contribute to NATO Air Policing over their territories”; Alliance members provide the necessary capabilities. The capability was established at Siauliai Air Base in Lithuania by a detachment of QRA fighter jets. Unlike the overall NATO Air Policing mission, the QRA assets assigned in the Baltics are often launched to identify Russian Federation Air Force aircraft visually. The high Russian Federation Air Force flight activity near the Baltic States is due to the geographical situation of the Russian enclave of Kaliningrad. “Russian air assets regularly fly from mainland Russia to Kaliningrad and vice-versa.” In many cases, the Russian military aircraft approach or pass close to the NATO airspace without using transponders, lacking two-way communication with civilian ATC services in Tallinn, Riga, and Vilnius, filing a valid flight plan.⁹⁸ After Russia annexed the Crimean Peninsula, NATO introduced Enhanced Air Policing, thus augmented the BAP with a second detachment deployed in Ämari Air Base in Estonia.⁹⁹

The highest risk of Russian Federation military flight in the vicinity of NATO airspace is their lack of usage of transponders. Flying without a transponder makes the target aircraft invisible to Secondary Surveillance Radars commonly used in ATC services. Foremost it is a flight safety issue, and several highly reported incidents have occurred that influenced civilian air traffic in the region.¹⁰⁰ It is argued that the possible outcome of not using active transponders may be loss of communication, airspace infringement, failure of separation, etc.¹⁰¹ The risk derived from these consequences may be mitigated to some extent by filing a proper flight plan or establishing two-way radio contact with the appropriate air traffic control agency. Nevertheless, an activated transponder is the most effective way to combat serious risk to flight safety.

⁹⁷ NATO Allied Air Command Public Affairs Office. NATO Air Policing. We Secure the Skies. - <https://ac.nato.int/missions/air-policing> [15.02.2021].

⁹⁸ NATO Allied Air Command Public Affairs Office. Baltic Air Policing. - <https://ac.nato.int/missions/air-policing/baltics> [15.02.2021].

⁹⁹ NATO Allied Air Command Public Affairs Office. Enhanced Air Policing. <https://ac.nato.int/missions/air-policing/enhanced> [15.02.2021].

¹⁰⁰ Milne, R. Scandinavians warn Russia after air near-miss. Financial Times, 15.12.2014. - <https://www.ft.com/content/95751ff2-837e-11e4-8a84-00144feabdc0> [15.02.2021].

¹⁰¹ Mae, *op. cit.*, p. 19.

Due to the high traffic of these kinds of flights, the air policing assets stationed in the Baltics make several hundred interception flights on Russian aircraft in a year; a significant increase occurred between 2018 and 2019.¹⁰² Most of the 400 air policing missions scrambled by NATO air force assets in 2020 were in response to flights by the Russian military.¹⁰³

As mentioned before, in protecting and guarding the Estonian national airspace, the Defence Forces may include foreign military assets like the air policing aircraft. Their involvement is limited to the function of the air policing aircraft, which is a peacetime force aiming for visual identification and, if necessary, escorting the intercepted aircraft out of NATO airspace or to land at a designated airfield. Furthermore, as the air policing aircraft is not an asset of the Estonian Defence Forces, their usage in response to incidents is not decided by Estonian commanders or governmental officials, but by NATO Air Command, especially the Combined Air Operations Centre in Germany.¹⁰⁴ This is intentional due to the high operational and political risk these kinds of missions can have. Nevertheless, it is a limitation when choosing the appropriate response to an air incident like an airspace violation.

In theory, Baltic Air Policing aircraft may be used in response to a Renegade situation, where the final decision is made by an Estonian governmental official, usually the Minister of Defence. The intervention of a Renegade aircraft mandates that the NATO Air Policing aircraft are under the command authority of the Minister of Defence or any competent agency of the Government of the Republic. Transfer of the command authority may be done only according to a bilateral agreement between Estonia and the State to which the aircraft belongs.¹⁰⁵ Given the ramifications of the situation where a foreign military fighter jet intervenes in the flight path or uses deadly force against a civilian aircraft inside Estonian airspace, it is not likely that these kinds of agreements can ever be formulated without any extraordinary circumstances.

¹⁰² Wright, H. NATO Baltic Air Policing mission made record number of flights in 2019. ERR News, 17.01.2020. - <https://news.err.ee/1025175/nato-baltic-air-policing-mission-made-record-number-of-flights-in-2019> [15.02.2021].

¹⁰³ NATO Allied Air Command Public Affairs Office. NATO Intercepts Hundreds of Russian Military Jets in 2020. 28.12.2020. - https://ac.nato.int/archive/2020/NATO_AP_in_2020 [15.02.2021].

¹⁰⁴ NATO Allied Air Command Public Affairs Office. Combined Air Operations Centre Uedem. - <https://ac.nato.int/about/caoc/uudem> [15.02.2021].

¹⁰⁵ Jõu kasutamise tsiviilõhusõiduki tekitatud ohu tõrjumiseks. (The Use of Force to Counter Threats Posed by Civil Aircraft) Adopted 11.12.2008, e.i.f. 01.01.2009 (RT I 2008, 54, 308).

Therefore, air policing assets' primary purpose is to respond to unidentified aircraft flying in NATO airspace or approaching it. In the European theatre, most of these aircraft are Russian Federation military aircraft. An interception aims to identify and, if necessary, escort the intercepted aircraft out of NATO airspace or escort the aircraft to land in a designated airfield. It remains unclear which actions may be conducted by the interception aircraft in the completion of this task. Air policing aircraft are not under Estonian command authority, limiting their usage in protecting Estonian airspace. Still, due to the combined nature of Baltic Air Policing, it is imperative to conduct these missions with high regard to safety precautions. It is unknown how many tasks are undertaken in reference to Estonian airspace violations and if and how they would differ from the usual function of air policing aircraft.

2. ESTONIAN AIRSPACE VIOLATIONS IN THE VICINITY OF VAINDLOO ISLAND

Airspace violations that have importance in this research are characterised as foreign state aircraft entry into Estonian airspace without a necessary flight permit or clearance. Also included are civilian flights with diplomatic significance (diplomatic flights), which should have had a diplomatic flight clearance issued by the MFA. The period of interest is designed as 2017 up to 2021. Almost all Estonian airspace violations in the period have occurred in the exact geographical location and have very similar circumstances. They all happened in the vicinity of Vaindloo island.

2.1. The curious case of Vaindloo island

Vaindloo island (59° 49' N 26° 21' E) is the northernmost point of Estonia, situated in the Gulf of Finland. Its surface area is approximately 6,7 hectare, and its circumference a mere 2,2 kilometres. The island itself is mostly uninhabited except for a lighthouse and its keeper and a border guard radar facility. With its characteristics and whereabouts, it seems a somewhat insignificant island between Estonia, Finland, and Russia. Nothing can be further from the truth; the tiny island holds geopolitical importance.

Due to its location as the northernmost point of Estonia, it is also the northernmost point of the Estonian baseline. The breadth of the territorial sea is measured according to the UNCLOS Article 3. There are two points of the Estonian baseline on the island (59° 49,35' N 26° 21,85' E and 59° 49,30' N 26° 21,60').¹⁰⁶ The territorial sea in the area extends from the baseline to north and ends with the Exclusive Economic Zone (EEZ).¹⁰⁷ The boundary of the EEZ is still not determined between the Republic of Estonia and the Russian Federation in the vicinity of the island.¹⁰⁸ The breadth of the territorial sea is inherently connected with the extent of the national airspace. Therefore, the Estonian airspace near the island forms a distinctive corner,

¹⁰⁶ Merealapiiride seadus (Maritime Boundaries Act). Adopted 10.03.1993, e.i.f. 01.06.2002 (RT 1993, 14, 217), Annex 1.

¹⁰⁷ *Ibidem*, Annex 1 and 2.

¹⁰⁸ *Ibidem*, Annex 3.

leaving a narrow corridor of EEZ between the Estonian and Finnish territorial sea. This commonly called "Vaindloo corner" is where almost every Estonian airspace violation occurs.

The reason why these violations take place in the area is simple: Estonian authorities do not provide ATC services in the area.¹⁰⁹ Flight information service is offered to give advice and valuable information for the safe and efficient conduct of flights. Flight information region (FIR) is defined as the airspace within which these services are provided.¹¹⁰ The FIR boundaries defined by EUROCONTROL are not equal to the boundary of the Estonian state border.¹¹¹ This leaves the Vaindloo corner area outside of Estonian/Tallinn FIR and aircraft flying through there outside of the effective control of ATC Tallinn. Vaindloo corner area belongs in the FIR of Saint Petersburg of the Russian Federation and under the supervision of Saint Petersburg's ATC. The latter has minimal interest in the sovereignty of the national airspace of Estonia and conducts its duties in line with the purpose of an air traffic control agency.

This situation has the effect where aircraft flying through the area may be inside Estonian airspace and the Russian controlled flight information region. It may be a blatant excuse for Russian state flights' current reluctance for avoiding Estonian airspace. On the other hand, the ramifications of this situation do not change the stance that Estonia has exclusive sovereignty over its airspace and all rules and regulations on permits and clearances apply. The added concern to this matter is that aero-navigational maps like an en-route chart¹¹² do not include state borders, and there is a possibility of human error in these incidents. Nevertheless, without further consultation with the Russian counterpart, the issue remains. Regarding the relevantly straightforward clarification, it may be clouded in politically charged circumstances. The changing of the FIR boundary is not the primary concern, but it must be acknowledged that these problems are valid, and the discussion must be introduced into the public domain.

¹⁰⁹ Püss, F. Lennuamet: sagedased õhupiiri rikkumised on tingitud asjaolust, et Vaindloo saare kohal osutab lennuliiklusteenuseid Venemaa. Eesti Delfi, 21.07.2018. - <https://www.delfi.ee/news/paevauudised/eesti/lennuamet-sagedased-ohupiiri-rikkumised-on-tingitud-asjaolust-et-vaindloo-saare-kohal-osutab-lennuliiklusteenuseid-venemaa?id=83102287> [15.03.2021].

¹¹⁰ International Civil Aviation Organization. Rules of the Air. Annex 2 to the Convention on International Civil Aviation. Tenth Edition, 2005. - https://www.icao.int/Meetings/anconf12/Document%20Archive/an02_cons%5B1%5D.pdf [25.04.2021], pp. 1-4

¹¹¹ Eurocontrol. Flight information region (FIR/UIR) charts 2021. 19.01.2021. - <https://www.eurocontrol.int/publication/flight-information-region-firuir-charts-2021> [16.02.2021].

¹¹² Estonian Air Navigation Services. Estonian Aeronautical Publication (eAIP). - <https://aim.eans.ee/et/eaip> [25.04.2021].

2.2. Case study of Estonian airspace violations

This subchapter includes all publicly known Estonian airspace violations by foreign state aircraft in the given period. Information of these incidents are acquired from open sources, e.g. press releases by the Defence Forces in various media outlets. For some but not all cases, the representatives of the Russian Federation have given out statements about the incidents. All these statements have denied any airspace violation whatsoever.

The main points of interest are whether the aircraft had a valid flight plan, a switched-on transponder device, and did the aircraft establish two-way radio contact with Tallinn ATC. These criteria link perfectly to the concept of air policing mentioned before. A proper flight plan is an excellent tool for determining the flight path of an aircraft, its intentions, and any relevant information regarding the flight.

A switched-on transponder on an aircraft is mainly a feature relating to flight safety as civil ATC services do not commonly use primary surveillance radars and therefore do not have the means to track and identify aircraft that do not use a transponder. Lastly, establishing two-way radio contact with ATC services gives the latter a final and effective means of monitoring an aircraft and knowing its intentions. Also, various important information may be shared through this communication, for example, position, timings, flight path, etc. For some of the cases, further information was given. As for the depth of the airspace violations, no data is provided publicly, but due to the area's characteristics, it cannot be very extensive or comparable to the airspace violation mentioned in the introduction (several hundreds of kilometres).

2.2.1. Estonian national airspace violations in the years 2017-2021

The first reported Estonian airspace violation for 2021 took place on 3rd February¹¹³ when a Russian Air Force aircraft Ilyushin IL-76MD (a medium-range military transport aircraft) entered Estonian airspace in the vicinity of Vaindloo island. The plane was inside the airspace

¹¹³ Wright, H. Russian plane flies in Estonian airspace without permission. ERR News, 04.02.2021. - <https://news.err.ee/1608097324/russian-plane-flies-in-estonian-airspace-without-permission> [15.03.2021].

approximately for one minute, it did not have radio contact with Tallinn ATC at that time, but it had a working transponder. There was no information given about a flight plan.

During the year 2020, there was only one reported Estonian airspace violation. On 10th June,¹¹⁴ a Tupolev TU-204-300 (a medium-range jet airliner) entered Estonian airspace without a permit and remained there under a minute. The aircraft was described as belonging to Russian Federation. At the time of the incident, the plane did not have radio contact with Tallinn ATC and a valid flight plan, but it had a working transponder. The fact that no further information was given about the operator of the aircraft derives the incident of its merit because it does not provide a conclusive answer whether the aircraft could be analysed being a state aircraft or not.

In 2019 there were three Estonian airspace violations. On 25th October,¹¹⁵ a Tupolev TU-154 (a medium-range airliner) belonging to the Ministry of Internal Affairs of the Russian Federation entered Estonian airspace without a permit for under a minute. The aircraft had a transponder but lacked the required flight plan and radio contact with Tallinn ATC at the time of the incident. The most detailed incident occurred on 23rd September¹¹⁶ when a Russian Air Force Sukhoi SU-34 (a supersonic medium-range fighter-bomber/strike aircraft) entered Estonian airspace. During the incident, the aircraft did not have a working transponder, a valid flight plan, or radio contact with Tallinn ATC. The Russian Ministry of Defence gave a statement regarding the aircraft. It was conducting a flight to Kaliningrad overflying international waters with high regard to international rules and did not violate any borders. Furthermore, the aircraft had been in contact with Estonian air traffic controllers, and all the evidence supports this statement.¹¹⁷ The third airspace violation took place on 18th May¹¹⁸ when a Tupolev TU-154 belonging to the Russian Federation Naval Service entered Estonian

¹¹⁴ Wright, H. Russian plane flies in Estonian airspace without permission. ERR News, 10.06.2020. - <https://news.err.ee/1100434/russian-plane-flies-in-estonian-airspace-without-permission> [15.03.2021].

¹¹⁵ Whyte, A. Russian Federation aircraft in Estonian airspace incursion. ERR News, 28.10.2019. - <https://news.err.ee/996669/russian-federation-aircraft-in-estonian-airspace-incursion> [15.03.2021]. The article mistakenly shows a picture of a Tupolev TU-134.

¹¹⁶ Wright, H. Russian ambassador summoned after aircraft breaches Estonian airspace. ERR News, 24.09.2019. - <https://news.err.ee/983785/russian-ambassador-summoned-after-aircraft-breaches-estonian-airspace> [15.03.2021].

¹¹⁷ Anonymous. Venemaa hävitaja SU-34 rikkus Eesti õhupiiri. ERR Uudised, 24.09.2019. - <https://www.err.ee/983774/venemaa-havitaja-su-34-rikkus-est-ohupiiri> [15.03.2021].

¹¹⁸ Whyte, A. Russian airliner in naval service briefly enters Estonian airspace. ERR News, 20.05.2019. - <https://news.err.ee/943506/russian-airliner-in-naval-service-briefly-enters-estonian-airspace> [15.03.2021].

airspace without a permit for less than a minute. During the incident, the aircraft had a functioning transponder and a valid flight plan but was not in radio contact with Tallinn ATC.

The year 2018 was the busiest of the period selected regarding Estonian airspace violations amounting to six cases. Firstly, on 16th July¹¹⁹, two Russian aircraft, an Airbus A319 (a short-to medium-range, narrow-body, commercial passenger twin-engine jet airliner) and an Ilyushin IL-96 (a quad jet long-haul airliner) entered Estonian airspace within an hour of each other. Both aircraft had a working transponder but had not filed a flight plan nor were in radio contact with Tallinn ATC. A news outlet reported that the aircraft belongs to a Russian state fleet and is used to transport top-level Russian leaders. The incident occurred in the time frame of a meeting between Russian President Vladimir Putin and United States President Donald Trump in Helsinki.

Secondly, on 12th July,¹²⁰ an Ilyushin IL-76 belonging to the Russian Armed Forces entered Estonian airspace for less than a minute. Its transponder was switched on, but it had not filed a flight plan or radio contact with Tallinn ATC. Thirdly, on 10th July, an Ilyushin IL-96¹²¹ belonging to Russian Federation entered Estonian airspace. The aircraft had a working transponder but did not have radio contact with Tallinn ATC nor a valid flight plan. All four airspace violations may be deemed to be linked to the beforementioned meeting in Helsinki. Fourthly, on 20th June,¹²² a Tupolev TU-154M belonging to the Russian Ministry of Internal Affairs entered Estonian airspace for a minute. The aircraft had a working transponder but was not in radio contact with Tallinn ATC, nor had filed a flight plan. Lastly, on 12th March,¹²³ an Ilyushin IL-76MD belonging to the Russian Ministry of Defence entered Estonian airspace for approximately one minute. According to other sources, the aircraft was flying from the Caucasus region to Kaliningrad, and its registration number was RA-78850.¹²⁴ The

¹¹⁹ Vahtla, A. Two Russian aircraft violate Estonian airspace near Vaindloo island. ERR News, 17.07.2018. - <https://news.err.ee/847171/two-russian-aircraft-violate-estonian-airspace-near-vaindloo-island> [15.03.2021].

¹²⁰ Vahtla, A. Russian aircraft violates Estonian airspace. ERR News, 13.07.2018. - <https://news.err.ee/846278/russian-aircraft-violates-estonian-airspace> [15.03.2021].

¹²¹ Kuus, I. Venemaa lennuk rikkus Vaindloo saare juures Eesti õhupiiri. ERR Uudised, 10.07.2018. - <https://www.err.ee/845644/venemaa-lennuk-rikkus-vaindloo-saare-juures-est-ohupiiri> [15.03.2021].

¹²² Vahtla, A. Russian aircraft violates Estonian airspace near Vaindloo. ERR News, 21.06.2018. - <https://news.err.ee/841124/russian-aircraft-violates-estonian-airspace-near-vaindloo> [15.03.2021]. The article mistakenly shows a picture of a Tupolev TU-134.

¹²³ Vahtla, A. Russian aircraft violates Estonian airspace. ERR News, 12.03.2018. - <https://news.err.ee/689163/russian-aircraft-violates-estonian-airspace> [15.03.2021].

¹²⁴ Viirand, L. Venemaa Föderatsiooni lennuk rikkus Eesti õhupiiri. ERR Uudised, 12.03.2018. - <https://www.err.ee/689156/venemaa-foderatsiooni-lennuk-rikkus-est-ohupiiri> [15.03.2021].

registration number points to an ex-Aeroflot airliner used by the 223rd Flight Unit of the Russian Air Force based in Chkalovsky Airport near Moscow.¹²⁵

In 2017 there was reported two Estonian airspace violations. Firstly, on 21st November,¹²⁶ an Ilyushin IL76 entered Estonian airspace for less than a minute. The aircraft had a valid flight plan and a working transponder but was not in radio contact with Tallinn ATC during the incident. In the Estonian version of the press release, the aircraft was described as a state aircraft.¹²⁷

Secondly, on 3rd May,¹²⁸ an Ilyushin IL-96-300 callsign RSD008 and registration number RA-96019 belonging to the airline Rossiya - Special Flight Squadron entered Estonian airspace. The aircraft had a working transponder, but the flight plan was not submitted, and it had no radio contact with Tallinn ATC. Later, the Russian Ministry of Foreign Affairs confirmed that the aircraft was used for the transportation of Foreign Minister Sergey Lavrov to Helsinki.¹²⁹ A member of the Estonian parliament described the incident as a foolish sloppiness of the pilot because the particular condition in the area is widely known, and intrusion into Estonian airspace is easily avoidable.¹³⁰

2.2.2. Analysis of the violations

Overall, there were thirteen publicly reported Estonian airspace violations in the given period. Though there are several differences between these incidents, they share a common geographical area and characteristics. Several aspects of them will be highlighted and further analysed in the following subchapter.

¹²⁵ Jetphotos. RA-78850. - <https://www.jetphotos.com/registration/RA-78850> [15.03.2021].

¹²⁶ Cavegn, D. Russian aircraft violates Estonian airspace. ERR News, 22.11.2017. - <https://news.err.ee/644147/russian-aircraft-violates-estonian-airspace> [15.03.2021].

¹²⁷ Nael, M. Venemaa Föderatsiooni lennuk rikkus Eesti õhupiiri. ERR Uudised, 22.11.2017. - <https://www.err.ee/644076/venemaa-foderatsiooni-lennuk-rikkus-eesti-ohupiiri> [15.03.2021].

¹²⁸ Vahtla, A. Russian plane violates Estonian airspace over Gulf of Finland. ERR News, 05.05.2017. - <https://news.err.ee/594011/russian-plane-violates-estonian-airspace-over-gulf-of-finland> [15.03.2021].

¹²⁹ Cavegn, D. Russia confirms Lavrov's plane was near Estonia. ERR News, 06.05.2017. - <https://news.err.ee/594181/russia-confirms-lavrov-s-plane-was-near-estonia> [15.03.2021].

¹³⁰ Krjukov, A. Lavrovi Soome viinud lennuk rikkus Eesti õhupiiri. ERR Uudised, 05.05.2017. - <https://www.err.ee/594003/lavrovi-soome-viinud-lennuk-rikkus-eesti-ohupiiri> [15.03.2021].

When looking at the similarities, all the aircraft did not have radio contact with Tallinn ATC during the violations. It is understandable due to the nature of the area mentioned before; the aircraft was not inside Tallinn FIR at that time. It is unknown, but these aircraft did likely have proper radio contact with other air traffic control agencies in the region (mostly Saint Petersburg). Furthermore, all these cases concluded in diplomatic means. Usually, the Russian ambassador in Estonia received an official note from the Foreign Ministry. For two known cases, the Russian authorities issued a statement denying the incident, but no public comment was given for the most. Denying the venture is, unfortunately, a predominant way of communication from the Russian side.¹³¹ As it is dealt with via diplomatic process, there is usually no evidence publicly from either side.

From the known cases, it may be deduced that there are two main avenues of airspace violations. The first is the beforementioned flight path to and from Kaliningrad (for example, the SU-34). Most of these flights are conducted without incursion to Estonian airspace; therefore, there must be an approved flight path for Russian military aircraft. It is not plausible that some pilots do not know it.

The second avenue is from mainland Russia to Finland. The cases describe several incidents that happened with aircraft on their way to Helsinki (S. Lavrov's visit). Circumstances of the Vaindloo area can also explain it; the air corridor from mainland Russia to Finland goes through it. For example, any aircraft travelling from Moscow to Helsinki will most probably fly on this path, and for civil aviation, it is not a problem.¹³² State flights still must have permission for this route.

Most of these flights may be deemed as state aircraft. Furthermore, many aircraft are military aircraft due to their type, route, ownership, behaviour etc. The best example being the SU-34 which is a fighter-bomber and has no civilian purpose. The flight in question may be regarded as the most severe incident in the given period. Due to its high speed, fast manoeuvring

¹³¹ Anonymous. Sweden says Russian Military Planes Briefly Violated Airspace. RFE/RL, 24.01.2019. – <https://www.rferl.org/a/sweden-says-russian-military-planes-briefly-violated-airspace/29728754.html#:~:text=The%20Swedish%20military%20says%20a,the%20country's%20Baltic%20Sea%20coast.&text=It%20said%20the%20planes%20entered,reported%20to%20the%20Swedish%20government> [25.04.2021].

¹³² Estonian Aviation Act, § 4 (4). Aircraft which have Estonian nationality, nationality of a member state of the International Civil Aviation Organisation or nationality of a foreign state which has entered into an agreement to this effect with Estonia may be flown in the Tallinn flight information region.

capabilities, and flying without an activated transponder can pose a significant threat to civil aviation in the region.

On the other hand, some flights were conducted by airliners that have default multi-purpose usages. The flight where S. Lavrov's was onboard may be regarded as a diplomatic flight and therefore needed a permit to fly in the area. Still, several flights are not definitively of diplomatic nature. In cases where no further info was provided for its purpose, nature, or passengers, it cannot be sure that the flights may be regarded as state flights or diplomatic flights. Taking into the consideration that Estonian Aviation Act has a narrow definition for state flights. The Special Flight Squadron is one of the best examples. It is a state-owned flight detachment used to provide air transport for several state institutions not considered strictly state flight worthy.¹³³

Furthermore, at least two aircraft committing an airspace violation were described as just belonging to Russian Federation. Every aircraft used or owned by a State cannot be regarded as a state aircraft conclusively; therefore, further investigation is needed for both situations. It points again in the direction of the narrow state aircraft definition in the Estonian Aviation Act. Still, there must have been a valid reason why these flights were regarded as airspace violations. Due to these incidents being resolved by diplomatic means, it is difficult to ascertain which reasoning the decisions were made.

Interestingly, the number of violations is relatively low compared to the volume of Russian military air traffic traversing the area yearly. Therefore, there must be a reason why most of the pilots are able to avoid penetrating Estonian airspace. The aspect falls out of the purpose of this thesis, but for clarity, it should be further investigated.

Conclusively, every Estonian airspace violation is similar, but not all are equal. Vaindloo island region (the corner) may be regarded as a problem area for Estonia and its airspace sovereignty. Not all facts about the cases are publicly known or discussed, especially certain characteristics about the aircraft, e.g. callsigns, specific routing, etc. Therefore, the solution

¹³³ Special Flight Detachment ROSSIYA Magazine. SK PRESS Publishing House. - <https://www.skpress.ru/in-flight/en/rossiya/> [15.03.2021].

does not seem apparent and easily achievable. It would acquire more consultations with the appropriate agencies and a more comprehensive approach to its challenges.

As of 2021, only one violation has occurred, but it most surely will not be the last one. In recent news, there have been talks regarding a meeting between US President J. Biden and Russian President V. Putin, which may take place yet again in Helsinki.¹³⁴ The author of this thesis predicts that the meeting or the preparation for it will result in further incursions into Estonian airspace by Russian state aircraft.

¹³⁴ Krjukov, A. Vene Presidendi abi: Putini ja Bideni kohtumine võib aset leida juunis. ERR Uudised, 25.04.2021. - <https://www.err.ee/1608190630/vene-presidendi-abi-putini-ja-bideni-kohtumine-voib-aset-leida-juunis> [27.04.2021].

3. THE CRIMINALISATION OF AIRSPACE VIOLATIONS BY STATE AIRCRAFT

Territorial violations, which include airspace violations, are criminalised in Finnish penal law. Similarly to Estonia, Finland also has concerns about foreign military flight near its borders and transgressions of their airspace by different State actors. It gives an opportunity to comparatively analyse the challenges and purpose of criminalisation regarding two States with varying approaches to the same problem. To achieve a comprehensive understanding of criminalising these kinds of incidents, the legal framework in the Finnish legislature and the background of the criminalisation is analysed in the following subchapter.

3.1. The criminalisation of territorial violations in Finnish law

The legal basis of Finnish regulation on territorial control¹³⁵ is the Territorial Surveillance Act implemented in 2000 (Act No. 755/2000). Definition of a governmental aircraft¹³⁶ is provided in section 2 of the former Act. It is defined as "a military, frontier guard, police, or customs aircraft or an aircraft used by a State for transport, courier, survey or other corresponding flights."¹³⁷ Furthermore, a military aircraft is defined as "an aircraft bearing national military markings and belonging to national armed forces".¹³⁸

Chapter 2 of the Territorial Surveillance Act regulates the entry into and stay in Finland by military personnel, vehicles, governmental aircraft, and governmental vessels. Thus, restrictions apply in principle both for military aircraft and governmental aircraft.¹³⁹ Section 5 of said Act purports that a foreign State's governmental aircraft "may enter Finnish territory and stay in the country only under the terms of an international treaty binding on Finland or the basis of permission."¹⁴⁰ The former has two exceptions. Firstly, a governmental aircraft "carrying the head of a foreign State making an official visit to Finland may enter and stay in

¹³⁵ Åkermark, S. S. Hyttinen, T. Kleemola-Juntunen, P. Life on the Border: Dealing with Territorial Violations of the Demilitarised and Neutralised Zone of the Åland Islands. *Nordic Journal of International Law* 2019/88, No.2, p. 145.

¹³⁶ Governmental aircraft is by definition a state aircraft and must be regarded as such.

¹³⁷ Aluevalvontalaki (Territorial Surveillance Act). Adopted 18.08.2000, e.i.f. 01.01.2001, Section 2 (7).

¹³⁸ *Ibidem*, Section 2 (8).

¹³⁹ Åkermark *et al*, *op. cit.*, p. 146.

¹⁴⁰ Territorial Surveillance Act, Section 5 (1).

Finnish territory without the beforementioned permission.” The advance notification still must be made to the Defence Staff on the entry and stay of the aircraft in Finland.¹⁴¹ Secondly, at the request of a territorial surveillance authority or another authority, a governmental aircraft “of a foreign State may enter Finnish territory for an urgent rescue mission” or a mission to prevent environmental damage or provide assistance in winter navigation.¹⁴² Before a governmental aircraft enter Finnish territory, a flight plan compliant with Finnish aviation regulation and related to the aircraft must be submitted to the area control centre (ACC).¹⁴³

Further details for supplementing and clarifying the provisions of the Territorial Surveillance Act are written in the Territorial Surveillance Government Decree.¹⁴⁴ Conditions included in the decree relate to the entry and stay of military persons, military vehicles, governmental aircraft, and governmental vessels in Finland. The exploration and survey of the sea bottom, soil exploration, and aerial photography from an aircraft, permits related to restricted areas, operation of territorial surveillance authority in a water area. The activity of a territorial surveillance authority while the object of surveillance is in Finnish airspace, land activities of territorial surveillance authority, warning and an intensified warning, and other miscellaneous provisions.¹⁴⁵ The application for a permit for the entry of government aircraft into Finnish territory must be submitted to the Defence Staff in good time and no later than six working days before the planned entry.¹⁴⁶ A permit application related to a government aircraft shall contain the necessary information for the decision, such as the State applying the permit, the purpose of the visit, the routes to be taken and sites to be visited, the planned times of arrival and departure, the planned ports of entry and departure, the arms carried by the military person, information on the aircraft entering the country, any special equipment carried by it and the crew of the aircraft.¹⁴⁷

The Decree purports that an unidentified aircraft entering Finnish territory shall be considered a military aircraft until identified otherwise, and all unidentified unmanned aircraft shall be considered military aircraft.¹⁴⁸ If a governmental aircraft crosses the Finnish border without

¹⁴¹ *Ibidem*, Section 5 (2).

¹⁴² *Ibidem*, Section 5 (3).

¹⁴³ *Ibidem*, Section 5 (4).

¹⁴⁴ Valtioneuvoston asetus aluevalvonnasta (Government Decree on Territorial Surveillance). Adopted 16.11.2000, e.i.f. 01.01.2001.

¹⁴⁵ Åkermark *et al*, *op. cit.*, p. 146.

¹⁴⁶ Government Decree on Territorial Surveillance, Section 1.

¹⁴⁷ *Ibidem*, Section 2.

¹⁴⁸ *Ibidem*, Section 18.

permission, the territorial surveillance authority must admonish the aircraft and urge it to leave Finnish territory.¹⁴⁹ Initially, this may be done by calling out the aircraft by radio and informing its pilot about illegal crossing to Finnish territory. Later, if the aircraft, even after a warning or an intensified warning, fails to comply with the order to leave, it shall be forced to land or leave Finnish territory, using force if necessary.¹⁵⁰ Military intervention may only be performed by interception aircraft, very similarly to Baltic Air Policing assets. Using force is an option, but it is highly doubtful that it would be done without any previous engagement. If the government aircraft is forced to land, the inspection of it shall be decided by the Ministry of Defence.¹⁵¹

Defending the State is usually understood to be conducted primarily by the military. Still, the Finnish legislator also wanted to indicate the blameworthiness of territorial violations with a civil criminalisation.¹⁵² In Finland, territorial violations have been criminalised in Chapter 17, Section 7c of the Criminal Code,¹⁵³ stating that a soldier of a foreign State or the master of a foreign vessel or state aircraft can be guilty of a territorial violation. From the criminal normative perspective, only a State actor may be guilty of a territorial violation. Conceptually and normatively, territorial violations should be separated from a state border offence, of which anyone may be guilty if they cross the border of Finland without permission.¹⁵⁴ Territorial violations are criminalised as a typical blank penal provision, where the description of the punishable act is separated from the threat of punishment. Hence, a territorial violation is criminalised in the Criminal Code, and the description of the punishable act is defined in Territorial Surveillance Act.¹⁵⁵ The criminalisation was included in the Criminal Code relevantly recently connected with adopting the Territorial Surveillance Act in 2000. In principle, it can be seen as a symbolic criminal law provision. It was considered that parties operating in the name of a foreign State are not obliged to subordinate themselves to the criminal law measures of another State. During peace-time, serious territorial violations are solved with diplomacy. It is especially true in cases of recurrent military territorial violations, such as state-conducted violations of airspace.¹⁵⁶

¹⁴⁹ *Ibidem*, Section 19.

¹⁵⁰ *Ibidem*, Section 19.

¹⁵¹ *Ibidem*, Section 23.

¹⁵² Åkermark *et al*, *op. cit.*, p. 150.

¹⁵³ Rikoslaki (The Criminal Code of Finland). Adopted 19.12.1889, e.i.f. 01.01.1891.

¹⁵⁴ Åkermark *et al*, *op. cit.*, p. 150.

¹⁵⁵ Territorial Surveillance Act, Chapter 2.

¹⁵⁶ Åkermark *et al*, *op. cit.*, p. 151.

Interestingly, in 2017 the statutory definition of territorial violations was reformed. Activities of so-called unidentified soldiers are criminalised if they enter or stay in Finnish territory in violation of the Territorial Surveillance Act. The reform was justified by the Ukraine events, and unidentified soldiers were seen as a new type of threat.¹⁵⁷ A new clause was added in the Territorial Surveillance Act, whereas an unknown military group or its member may not enter the Finnish territory or stay in the country. A similar clause was introduced in the Criminal Code, meaning that the activities of unidentified soldiers that violate the Territorial Surveillance Act are punishable.¹⁵⁸ Comparably to the overall criminalisation, the amendment is understood as symbolic rather than functional.¹⁵⁹

The authority of conducting preliminary investigations of reported violations of territorial integrity is a responsibility of the Border Guard. Still, leadership and coordination under the Territorial Surveillance Act are in the hands of the Ministry of Defence.¹⁶⁰ The Ministry of Defence also has the authority to issue press releases about a suspected territorial violation, and it was decided already in 2005 that all alleged violations would be reported.¹⁶¹

The symbolic nature of the criminalisation is also evident in Section 7c (3) of Chapter 17 of the Criminal Code. According to which in dealing with territorial violations cases, the prosecutor “may waive punishment if the territorial violation has been immediately interrupted or if the offender has for that reason been refused entry or deported.”¹⁶² This clause underlines the legislator’s wish to mitigate practices to address territorial violations with criminal law measures, but the reactions should be politically assessed.¹⁶³ Furthermore, according to Section 10 of Chapter 3 of the Criminal Investigation Act¹⁶⁴, the public prosecutor may also decide, on the request of the head investigator, that no criminal investigation is to be conducted or that the criminal investigation shall be discontinued if he or she should wave prosecution based on a territorial violation. Nevertheless, the added requirement is that there is no critical public or private interest that would require the bringing of charges.

¹⁵⁷ Åkermark *et al*, *op. cit.*, pp. 151-152.

¹⁵⁸ The Criminal Code of Finland, Section 7c of Chapter 17.

¹⁵⁹ *Ibidem*, p. 152.

¹⁶⁰ Territorial Surveillance Act, Section 23 (3).

¹⁶¹ Åkermark *et al*, *op. cit.*, p. 142.

¹⁶² *Ibidem*, p. 152.

¹⁶³ *Ibidem*, p. 152.

¹⁶⁴ Esitutkintalaki (Criminal Investigation Act). Adopted 22.07.2011, e.i.f. 01.01.2014.

Other reasons the criminal investigation may be waived or an already initiated investigation may be discontinued based on process economy.¹⁶⁵ These include cases of offences for which the maximum punishment expected is a fine and which are to be deemed manifestly petty.¹⁶⁶ As a fine or a maximum of one year of imprisonment can be sentenced for a territorial violation, there is a chance that criminal investigation in light of territorial violation cases may be discontinued on the basis that only a fine would be expected for the violation.¹⁶⁷ Criminal investigations may also be terminated on the grounds of rationality.¹⁶⁸ Practically this means that criminal investigation may be discontinued in territorial violation cases if the expense of continuing the investigation would be disproportionate to the nature of the matter under investigation and if there is no vital public or private interest that would require continuation of the investigation.¹⁶⁹

Regarding general principles of criminal responsibility, territorial violations have several challenges. Firstly, territorial violation requires intent; hence a state aircraft pilot that enters Finnish territory only out of negligence or even by mistake cannot be guilty of a criminal offence. It may be almost impossible to prove in practice that a person who violated Finnish airspace did it deliberately, not out of negligence. The person committing the offence can be rarely identified or ensured to be available for a criminal investigation in Finland.¹⁷⁰ Secondly, concerning military personnel, their liability for territorial violations may be challenged by the notion of hierarchical commands. The pilot of a state aircraft (the perpetrator of the offence) may be complying with the hierarchical command of his/her superior. The Finnish criminal law system does not generally acknowledge the unlawful order of a superior as legal justification, but complying with superior order does not generally lead to criminal liability in military organisations. Therefore, it may be problematic in light of central principles of criminal law if, in territorial violations, the criminal liability would only target the performing party.¹⁷¹ Thirdly, a territorial violation may be excused for several types of errors, e.g. person

¹⁶⁵ Åkermark *et al*, *op. cit.*, p. 152-153.

¹⁶⁶ Criminal Investigation Act, Section 9 of Chapter 3.

¹⁶⁷ Åkermark *et al*, *op. cit.*, p. 153.

¹⁶⁸ *Ibidem*, p. 153.

¹⁶⁹ Criminal Investigation Act, Section 10 of Chapter 3.

¹⁷⁰ Åkermark *et al*, *op. cit.*, p. 154.

¹⁷¹ *Ibidem*, pp. 154-155.

accused of a territorial violation may evade criminal liability due to mistake as to the lawfulness of the act.¹⁷²

Territorial violation as include in the Finnish Criminal Code is deemed as an extraordinary statutory definition. Firstly, territorial violation criminalisation has been valid for almost 20 years. Still, there are no known cases where anybody has been sentenced for a territorial violation, even though they regularly occur. Only preliminary investigations are conducted, but these investigations cannot be regarded as useless. The symbolic nature of the offence is based because the possible issuing of a punishment does not have a general preventive effect and that the penal scale of a territorial violation is relatively light.¹⁷³ Even though it may be considered symbolic, the criminalisation of territorial violations has several positive sides. Criminalisation gives the Finnish authorities the tools to actively pursue border control and to monitor the needs and shortfalls of its territorial surveillance, and at the same time, keeps the avenue open for diplomatic means.¹⁷⁴

3.2. Existing Estonian regulation relating to airspace violations

The Estonian Penal Code uses a finalistic three-way structure of an offence.¹⁷⁵ The basis of punishment in the Estonian Penal Code purports that a person shall be punished for an act if it comprises the necessary elements of an offence. It is unlawful, and the person is guilty of the commission of the offence.¹⁷⁶ Furthermore, the penal law of Estonia applies to acts committed within the territory of Estonia.¹⁷⁷ Offences are categorized into two groups: criminal offences and misdemeanours.¹⁷⁸ The difference between the two categories is regulated by the extent of the punishment, which mirrors the severity of the offence. The Penal Code is the only Act in which the necessary elements of a criminal offence are included.¹⁷⁹

¹⁷² Criminal Code of Finland, Section 2 of Chapter 4.

¹⁷³ Åkermark *et al*, *op. cit.*, pp. 173-175.

¹⁷⁴ *Ibidem*, p. 178.

¹⁷⁵ Sootak, J. Pikamäe, P (koost.). Karistusseadustik. Kommenteeritud väljaanne. Tallinn: Juura, 2015, p. 2.

¹⁷⁶ Karistusseadustik (Penal Code). Adopted 06.06.2001, e.i.f. 01.09.2002 (RT I, 03.03.2021, 3), § 2 (2).

¹⁷⁷ *Ibidem*, § 6 (1).

¹⁷⁸ *Ibidem*, § 3 (2).

¹⁷⁹ Sootak, *op. cit.*, p. 6.

For safeguarding the state border, the Estonian legislature includes several offences. The criminal offences can be found in the Penal Code, and other misdemeanours are included in other Acts, in this case, the State Border Act, Chapter 2¹.

The fundamental offences regarding this thesis are found in the State Border Act. The first offence relates to the violation of the border regime that is punishable by a fine of up to 200 fine units.¹⁸⁰ The second offence of interest is the illegal crossing of the state border or temporary control line of the Republic of Estonia, which is punishable by a fine of up to 200 units or detention.¹⁸¹ Both of these offences are misdemeanours, therefore less important offences in the eyes of the law. The second offence can be perpetrated by crossing the land border only; consequently, it cannot apply to aircraft. The first offence looks more closely at the border regime that is further depicted in a Regulation of the Government of the Republic.¹⁸² It shall specify the procedure for aircraft to enter the Estonian airspace and move in and exit the airspace.¹⁸³ Point 9 of the Regulation further dwells on the process by which the agency monitors aircraft in the national airspace (the ATC services) and on which grounds the Police and Border Guard Board (the police) is notified by a violation of the border regime by an aircraft. It includes situations where an aircraft violates the procedure for crossing the state border.¹⁸⁴ The crossing of the state border has not deemed a violation of the border regime if the aircraft crosses the border due to technical failure of the aircraft, an emergency, a natural disaster or another urgent situation.¹⁸⁵ The necessary elements of this offence can be fulfilled by a state aircraft to whom it is obligatory to have a permit or a clearance for entry into Estonian national airspace that does not possess it.

Criminal offences regarding the illegal crossing of the Estonian state border are in the Penal Code. Coincidentally there are also two offences named that have any interest in the topic at hand. The first is situated in the Penal Code Chapter 15, which regard crimes against the State itself. Inside Division 3 of Chapter 15 is the offence of malicious entry into the Republic of Estonia.¹⁸⁶ The purpose of the criminalisation of this act is to protect the legal right of Estonian

¹⁸⁰ State Borders Act, § 17¹ (1).

¹⁸¹ State Borders Act, § 17² (1).

¹⁸² Piirirežiimi eeskirja kinnitamine (Approval of Rules for the Boarder Regime). Adopted 17.09.1997, e.i.f. 25.09.1997 (RT I, 26.02.2021, 16).

¹⁸³ State Borders Act, § 8 (1) 4).

¹⁸⁴ Approval of Rules for the Boarder Regime, point 9.

¹⁸⁵ State Borders Act, § 12 (4).

¹⁸⁶ Penal Code, § 237⁴.

internal and external security.¹⁸⁷ The maliciousness part of the offence is described in its elements: when the illegal crossing of the state border is committed to conceal another criminal offence against the State in the Republic of Estonia.¹⁸⁸ The perpetrator must be an alien; therefore, the necessary elements of the offence can only be fulfilled by a foreign citizen. It cannot be ruled out that malicious entry into the Republic of Estonia can include aircraft use. Still, due to the offence's necessary elements, it is also modelled more for crossing a physical border area. Therefore, state aircraft entering the national airspace unlawfully cannot fulfil it by definition without committing other necessary elements depicted in the offence.

A more interesting offence can be found in Penal Code Division 1 of Chapter 16 under offences against public peace and public security. It is the illegal crossing of the state border or temporary line of the Republic of Estonia.¹⁸⁹ It punishes unlawful crossing of the state border or temporary line if the act does not contain the necessary elements of an offence provided in § 237⁴ of the Penal Code. One of the necessary elements of the offence is that the illegal crossing occurs using transportation in a location not intended for crossing.¹⁹⁰ Principally the wording of the offence includes entry into the national airspace, and an aircraft is by design a mean of transportation. What makes this offence problematic for aircraft is the aspect of the location of the intended crossing. Aircraft do not enter national airspace through physical locations, but they fly through navigational corridors and points provided by aeronautical publications. Moreover, the flight path of an aircraft can be changed by air traffic controllers following operational need and regards for safety. State aircraft may also have no predetermined flight path, and these are more dependent on operational impact.

Territorial violations by state aircraft (airspace violations) are not currently criminalised in Estonia. The offences found in the State Borders Act and the Penal Code do not specifically target aircraft. The most applicable offence provided in the State Borders Act is a misdemeanour and therefore not a criminal offence.

¹⁸⁷ Sootak, *op. cit.*, p. 641.

¹⁸⁸ Penal Code, § 237⁴ (1) 1).

¹⁸⁹ *Ibidem*, § 258.

¹⁹⁰ *Ibidem*, § 258 (1) 3).

3.3. The possibility to criminalise airspace violations in Estonian criminal law

Criminalisation is the process of creating a crime (a criminal offence) and making conduct previously lawful illegal, frequently for the protection of society. However, the goal might also be one such as economic regulation.¹⁹¹ Criminalising airspace violations is not currently under consideration in Estonia, and there are no public investigations into these incidents. They are regarded as a diplomatic matter and solved behind closed doors. It results in no public awareness of these incidents, and it downplays their significance.

When looking at the reasoning behind the Finnish regulation and the aspect of criminalising these kinds of incursion, it is regarded as symbolic, not functional. Nevertheless, criminalisation is not considered to be unnecessary. The following two subchapters will look more closely at the provisions and general principles in Estonian criminal law that may prove challenging to criminalise airspace violations.

3.3.1. Challenges for criminalisation related to criminal proceedings

Several points of interest can hinder the criminalisation of territorial violations by state aircraft regarding the criminal procedure. Challenges arise connected with the investigative bodies, the legality principle, the gathering of the evidence, and the termination of criminal proceedings for various reasons.

The Defence Forces is the competent governmental authority for protecting and guarding the Estonian national airspace. As the function lies in the hands of the Defence Forces, it would be logical that it would also investigate the offence in its competence. Therefore, it is imperative to ascertain which investigative body would conduct the investigation. An investigative body is defined in the Code of Criminal Procedure¹ § 31. It is a public institution that performs an investigative authority directly or through an institution administrated by them or through a local office.¹⁹² In this closed list are the Police and Border Guard Board, the Internal Security Service, the Tax and Customs Board, the Competition Board, the Military

¹⁹¹ Wright, R. A. Miller, J. M. Encyclopedia of Criminology. New York: Routledge 2005, p. 329.

¹⁹² Kriminaalmenetluse seadustik (Code of Criminal Procedure). Adopted 12.02.2003, e.i.f. 01.07.2004 (RT I, 29.12.2020, 10), § 31 (1).

Police, the Environmental Board, the Department of Prisons of the Ministry of Justice, and the prisons. An investigative body shall perform the procedural acts independently unless the permission of a court or the permission or order of the Prosecutor's Office is necessary for the performance of the act.¹⁹³

During the pre-court proceedings, an investigative body and the Prosecutor's Office shall ascertain the fact vindicating or accusing the suspect or accused.¹⁹⁴ Investigative bodies conduct these proceedings to the limit of their investigative jurisdiction. Most of the criminal offences lie in the investigative jurisdiction of the Police and Border Guard Board and the Internal Security Police.¹⁹⁵ Criminal offences under the investigative jurisdiction of other investigative bodies must be named explicitly in the Code of Criminal Procedure.¹⁹⁶

Military Police is the only investigative body in the Defence Forces. It has the right to conduct pre-court proceedings in criminal offences related to service in the Defence Forces and war crimes.¹⁹⁷ Criminal offences related to service in the Defence Forces are a separate part of the Penal Code and are provided in Chapter 24. These include, for example, desertion (§ 439), failure to obey orders (§ 433), and violation of requirements for navigation of vessels (§ 443). The commission of these offences by a person is punishable only if the person is serving in the Defence Forces.¹⁹⁸ War crimes are provided in Chapter 8 Division 4 of the Penal Code and include, for example, such offences as attacks against civilians (§ 97), use of human shields (§102²), and marauding (§ 109).

These criminal offences are limited to a specific area of criminal law that is closely related to military actions or service in the Defence Forces. Therefore, it does not investigate other criminal offences and does not have the capacity or competence to conduct investigations into them. In the case of conducting investigations related to territorial violations, the investigative jurisdiction of the Military Police would have to be extended and the required competencies acquired. Territorial violation by state aircraft would not be a common offence occurring daily,

¹⁹³ *Ibidem*, § 32 (1).

¹⁹⁴ *Ibidem*, § 211 (2).

¹⁹⁵ *Ibidem*, § 212 (1).

¹⁹⁶ *Ibidem*, § 212 (1,2).

¹⁹⁷ *Ibidem*, § 212 (2) 3).

¹⁹⁸ Penal Code, § 431 (1).

but their frequency can be measured in an annual timeline. Hence, the capacity of investigations would be low, and they could be conducted in a specialized manner.

The extension of the competence of the Military Police to investigate territorial violations would contrast with the current regulation, where the Police and Border Guard Board is responsible for the organisation of matters in the area of the border guard.¹⁹⁹ Police traditionally have more capacity and experience for conducting investigations. Most of the criminal offences are investigated by the police, and it is one of their primary functions.²⁰⁰ Territorial violations are not limited to aircraft but should include personnel and vessels. It would create a possibility for parallel investigation, and the lines of competence would become unclear. Consequently, it would be a political decision which investigative body would have the investigative jurisdiction to conduct the criminal proceedings for territorial violations.

Estonia has mandatory criminal proceedings. The investigative bodies and the Prosecutor's Office are required to conduct criminal proceedings upon the appearance of facts referring to a criminal offence unless the circumstances preclude criminal proceedings or unless grounds to terminate criminal proceedings exist.²⁰¹ The existing legality principles purport that criminal proceedings must be started and conducted when it is apparent that facts referring to an offence exist. The commencement of criminal proceedings is independent of the opinion of other governmental agencies and, for example, the victim.²⁰² Exemptions to this rule are depicted in Section 199 of the Code of Criminal Proceedings.²⁰³ These exemptions include, for example, when no grounds for criminal proceedings are present, the limitation period for the criminal offence has expired, an amnesty precludes imposition of a punishment, and the suspect or accused is dead. Unlike the Finnish regulation for territorial violations where "the prosecutor may waive prosecution, or the court may waive punishment if the territorial violation has been immediately interrupted or if the offender has for that reason been refused entry or deported," no such ground exists in Estonian regulation. In the case of Estonian national airspace violations, where penetration of the airspace is minimal in depth and duration, these circumstances would not exempt from the commencement of criminal proceedings. Every

¹⁹⁹ Politsei ja piirivalve seadus (Police and Border Guard Act). Adopted 06.05.2009, e.i.f. 01.01.2010 (RT I, 10.12.2020, 23), § 3 (1) 6).

²⁰⁰ *Ibidem*, § 3 (1) 7).

²⁰¹ Code of Criminal Procedure, § 6.

²⁰² Kergandberg, E. Pikamäe, P. Kriminaalmenetluse seadustik. Kommenteeritud väljaanne. Juura – Tallinn 2012, p. 52.

²⁰³ Code of Criminal Procedure, § 199 (1).

airspace violation must be investigated and appropriately concluded. In the current situation, whereas these violations by state aircraft are handled through diplomatic means, leaving a wide range for discretion would be a step in the other direction. Consideration must be made whether it would be a positive or negative development.

The detection of a territorial violation by a state aircraft is in the competence of the Defence Forces; thus, the report of a criminal offence must also be submitted to an investigative body by the Defence Forces. It must be pointed out that the Defence Forces is not mandated to submit this report as it is not an investigative body itself. Therefore, an internal regulation system must be drafted to require the necessary units to submit the information.

Whilst conducting criminal proceedings, the facts relating to the subject of proof are the time, place and manner of commission of the criminal offence. Other facts relating to the criminal offence. The necessary elements of the criminal offence. The guilt of the person who committed the criminal offence. The information describing the person who committed the criminal offence and other circumstances affecting the person's liability.²⁰⁴ The subject of proof is the set of characteristics and connections of a criminal offence under investigation that must be identified for the possibility of a guilty verdict.²⁰⁵ Evidence includes the statements of the suspect, the accused, the victim, the testimony of a witness, an expert's report, the statements given by an expert upon provision of explanations concerning the expert's report. Also, physical evidence reports on investigative activities, minutes of court sessions, reports, or video recordings on surveillance activities, and other documents, photographs, films or other data recordings.²⁰⁶ Other evidence may also be used to prove the facts relating to criminal proceedings, except if the evidence has been obtained by a criminal offence or violation of a fundamental right.²⁰⁷

Facts relating to the time, place, and manner of commission of a territorial violation by a state aircraft are not overly troublesome, as air surveillance is conducted and the data recorded daily. The problem with this data as evidence is the fact that information collected from the

²⁰⁴ *Ibidem*, § 62.

²⁰⁵ Kergandberg, *op. cit.*, p. 213.

²⁰⁶ Code of Criminal Procedure, § 63 (1).

²⁰⁷ *Ibidem*, § 63 (2).

radar information and surveillance systems of the Defence Forces is a state secret.²⁰⁸ The comprehensive radar information collected and processed by an air surveillance system is classified as confidential for five years.²⁰⁹ It, of course, does not prohibit investigations by itself. Still, it complicates matters when conducting criminal proceedings, especially when the classified information is the primary evidence against a foreign citizen as state aircraft pilots usually are.

When a criminal offence is committed, there must be a perpetrator who can be identified as the suspect in pre-court proceedings. The perpetrator of an airspace violation is commonly the pilot having factual control of the aircraft. Identifying the suspect is the most challenging part of criminal proceedings when looking at airspace violations by state aircraft. There is also the issue of obtaining information on the suspect's whereabouts, but that can be done by relevant means if necessary.

First, the suspect must be identified. It is not a simple task when regarding aircraft that overfly the State territory. Especially when the aircraft did not file any application for entry into Estonian airspace, in theory, this information can be obtained by a formal request from the State to whom the aircraft belongs. The State usually has an overview of their personnel and their activities regarding their state aircraft. The difficulty lies in the fact that States typically do not want to provide this information, even more, when dealing with military personnel, regardless of how good relationships are between the States. The same problem is pointed out in the article by Finnish researchers. The American embassy refused to disclose information concerning a crew of a state aircraft that allegedly violated the demilitarized zone of the Åland Islands regarding US Defence Ministry policies.²¹⁰ It may be a severe obstacle for conducting criminal proceedings.

Furthermore, Section 200¹ of the Code of Criminal Procedure gives the possibility of termination of criminal proceedings based on the impossibility to identify the person who

²⁰⁸ Riigisaladuse ja salastatud välisteabe seadus (State Secrets and Classified Information of Foreign State Act). Adopted 25.01.2007, e.i.f. 01.01.2008 (RT I, 06.05.2020, 36), § 7 5¹).

²⁰⁹ Riigisaladuse ja salastatud välisteabe kaitse kord (Procedure for the Protection of State Secrets and Classified Information of Foreign State). Adopted 20.12.2007, e.i.f. 01.01.2008 (RT I, 06.03.2019, 15). § 5 (5) 13).

²¹⁰ Åkermark *et al*, *op. cit.*, p. 161.

committed the criminal offence. This termination can be found on the order of the investigative body with the permission of the Prosecutor's Office or by order of the Prosecutor's Office.²¹¹

This modus of termination has the precondition that it is impossible to collect additional evidence, or the collection thereof is not reasonable.²¹² It must be assessed on every case separately. Firstly, have the investigative bodies conducted the necessary and most used procedural acts related to the specific criminal offence. Secondly, is it possible to perform further procedural actions relating to the facts of a particular case? Finally, is it reasonable to conduct further procedural acts regarding their chance of success and resources spent?²¹³ Essentially it is a discretionary decision, but it must be substantiated in a written order and must usually include the reasons for the decision.²¹⁴ In cases of airspace violations, this would be the most used basis of termination of criminal proceedings.

The legality principle is, to a certain extent, countered by the opportunity principle. This principle allows termination of criminal proceedings for various reasons depicted in several Code of Criminal Procedure sections.²¹⁵ The main reasoning behind the principle is procedural economics. A State has limited resources for conducting criminal proceedings and should concentrate more on serious offences. Furthermore, terminating criminal proceedings on the ground of opportunity decreases the workload of the court system and speeds up other more essential proceedings.²¹⁶

This principle is most regularly used to terminate criminal proceedings in case of lack of public interest in proceedings and negligible guilt.²¹⁷ Several mandatory aspects must be fulfilled before termination is possible. The object of the criminal proceedings must be a criminal offence in the second degree; furthermore, the guilt of the offender must be negligible. The offender must have had remedied the damage caused by the criminal offence or at least have had commenced doing it. The offender must have had paid the expenses relating to criminal proceedings or have assumed the obligation to pay such costs. There is no public interest in

²¹¹ Code of Criminal Procedure, § 200¹.

²¹² *Ibidem*.

²¹³ Kergandberg, *op. cit.*, pp. 474-475.

²¹⁴ Code of Criminal Procedure, § 145.

²¹⁵ *Ibidem*, from § 201 (2) to § 205².

²¹⁶ Kergandberg, *op. cit.*, p. 479.

²¹⁷ Code of Criminal Procedure, § 202.

the continuation of the proceedings.²¹⁸ The negligible quilt may be of interest concerning airspace violations which is further analysed in the following subchapter. Still, overall, the most often used section for opportunity could not be used to terminate criminal proceedings for airspace violations foremost due to the public interest aspect that must be fulfilled. Tough public interest has a relevantly broad definition in Estonian criminal law; it may be ascertained that national security matters always have public interest. Therefore, like in the Finnish legislature, there should be a different way to terminate such criminal proceedings.

Another opportunity for terminating criminal proceedings relevant to airspace violations can be found in section 204 of the Code of Criminal Procedure. The section stipulates that the Prosecutor's Office may terminate criminal proceedings by an order if the criminal offence was committed by a foreign citizen on board a foreign ship or aircraft located in the territory of the Republic of Estonia.²¹⁹ It regulates situations where there is a competition between Estonia's and another State's criminal procedural competence. The other States may have more interest or opportunity to conduct an adequate investigation.²²⁰ If a criminal offence is committed on board a foreign aircraft, it probably will not be reasonable to conduct the investigation in Estonia. The main reason being that aircraft are usually inside Estonian territory for a short period. The legality principle would still apply, and this reasoning may only apply to the termination of criminal proceedings.²²¹

In most cases, the offender for an airspace violation is the aircraft's pilot, and therefore this means for termination can surely apply. Contrastingly, from the wording of the section, it may be deduced that it is not meant for such offences and relates to more common offences committed on board an aircraft or a vessel, e.g. assault, theft etc. Additionally, it is hard to imagine that a foreign State would have any interest to prosecute or even formally investigate Estonian airspace violations committed by their citizens, let alone by military personnel.

Challenges that the criminalisation of territorial violations would have for Estonian criminal procedure are highly comparable to the Finnish regulation. The result may also be somewhat disappointing, as punishing or even identifying the perpetrator of this kind of offence may be

²¹⁸ *Ibidem*, § 202 (1).

²¹⁹ *Ibidem*, § 204 (1) 2).

²²⁰ Kergandberg, *op. cit.*, p. 494.

²²¹ *Ibidem*, p. 495.

impossible. Before criminalising these offences, it must be considered which investigative body would conduct the criminal proceedings. Protecting and guarding the airspace is a function performed by the Defence Forces, but it has a relevantly low capacity for conducting such investigations as a military organisation. Additionally, radar data collected of these violations is a state secret, which does complicate the investigation, but relevant measures may be employed. The beforementioned challenges are not related to the commencement of the criminal proceedings, and the legality principle does have some positive aspects worth discussing. Commencing and conducting investigations into airspace violations allows acknowledging the importance of these violations and further analyse the applicable national and international regulation. The criminal proceedings conducted in cases of airspace violations may be terminated for several reasons. Firstly, it may be terminated due to the impossibility of identifying the perpetrator. Secondly, the opportunity principle may be applicable if it is ascertained that there is no relevant public interest in the offence. It may be possible for minor incursions into Estonian airspace. Overall, the challenges relating to criminal procedure for the criminalisation of territorial or airspace violations are not impossible to overcome. Still, several issues remain and must be taken into consideration in the process of criminalisation. Territorial violation would be an extraordinary criminal offence in terms of criminal proceedings.

3.3.2. Challenges for criminalisation related to the General Provision of the Penal Code

Regarding general provision found in the Penal Code, some must be considered troublesome for the criminalisation of territorial violations by foreign state aircraft. Foremost the issue of criminal responsibility is discussed in the following subchapter. Additionally, it takes a closer look at hierarchical commands that are strongly connected with the military and whether it would be reasonable to punish only the actor in these incidents.

Necessary elements of offence include objective elements and subjective elements. Objective elements necessary to constitute an offence are acts or omissions described by law. In cases where it is required, consequences in a causal relation to them must be regarded.²²² Subjective elements of an offence are intent or negligence.²²³ As airspace violations are not currently

²²² Penal Code, § 12 (2).

²²³ *Ibidem*, § 12 (3).

criminalised, the necessary objective elements of an offence do not exist and have little importance as a hypothetical issue. In the author's view, the objective elements would strongly resemble the Finnish regulation. Nevertheless, the more prevailing are the subjective elements necessary to constitute an offence.

For most criminal offences, intent is required as a subjective element of the offence; as usual, only intentional acts are punishable as criminal offences. Negligent actions are punishable only when it is clearly stated in the Penal Code.²²⁴ Furthermore, the Penal Code provides an additional exemption from intentional acts, a person who at the time of the commission of an act is unaware that the circumstance which constitutes a necessary element of an offence is not deemed to have committed the act intentionally.²²⁵ This person shall be punished for a crime committed through negligence if the Penal Code provides such an offence.²²⁶ In territorial violations, intent should be mandatory as a subjective element of an offence, and at least indirect intent must be present.²²⁷ A problem arises from differentiating between negligence and intent. For airspace violations, it would be difficult to find out whether the offence was committed intentionally because most known violations are relevantly brief both in time and depth. Taking into further consideration the unique circumstances that are present in the Vaindloo area. Perpetrator's intentions may be complicated to ascertain where the person committing the offence cannot be identified.

Only unlawful acts are punished under the Penal Code. Unlawfulness is presumed and must be precluded by the Penal Code, another Act, international convention, or international treaty.²²⁸ Unlawfulness may be precluded on account of an error made by the perpetrator.²²⁹ There are several reasons and situations where a foreign state aircraft pilot may be in error regarding the unlawfulness of his/her actions. Firstly, the flight path for the aircraft is usually given by a relevant air traffic control agency or at least may be changed by it if necessary. Whilst flying the given route, the pilot may be unaware of its unlawfulness due to erroneous or unclear instructions. Secondly, it would be unreasonable to expect the pilot to know the exact content of the statutory definition of a territorial violation.²³⁰

²²⁴ Penal Code, § 15 (1).

²²⁵ *Ibidem*, § 17 (1).

²²⁶ *Ibidem*.

²²⁷ *Ibidem*, § 16 (4).

²²⁸ *Ibidem*, § 27.

²²⁹ *Ibidem*, § 31 (1).

²³⁰ Åkermark *et al*, *op. cit.*, p. 155.

Relating to military personnel, in Estonian penal law, unlawfulness may be precluded by a hierarchical command or order.²³¹ In Estonian legislation, an order is a communication, written, oral, or by signal, which conveys instructions of a commander.²³² Furthermore, the recipient of an order is required to comply with the received orders without argument²³³ and refusal or failure to obey orders are criminal offences in some circumstances.²³⁴ The regulation on orders includes two types of unlawful orders. Firstly, an order is void if the order requires the commission of an offence. A void order shall not be issued and complied with.²³⁵ Secondly, an order which conflicts with the law is a prohibited order. Contrary to the void order, prohibited orders must be adhered to.²³⁶

Liability for consequences of compliance with the order is generally with the issuer of an order.²³⁷ For void orders that require the commission of an offence, both the issuer of the order and the person who complies with the order are liable for the consequences of compliance with the void order.²³⁸ The commander who issues a void or a prohibited order shall face disciplinary proceedings or even criminal charges.²³⁹ According to Penal Code § 446, abuse of authority is punishable by up to five years' imprisonment. Offence in terms of a void order must be considered as the definition given in Penal Code § 3 and therefore includes both criminal offences and misdemeanours. In conclusion, the hierarchical command that orders the pilot to commit a territorial violation is in principle void in Estonia. According to Estonian regulation, both the pilot and the issuer of the order may be liable for compliance with the order if the act itself is unlawful.

Conclusively, the perpetrator's criminal liability of an airspace violation may be arguable due to primary challenges to the intentionality of the offence and errors in the unlawfulness of the act. Nevertheless, these aspects are concerned only with punishing the perpetrator, which may not be the only purpose of the novel legislature. Regardless, the challenges that face

²³¹ Sootak, *op. cit.*, p. 128.

²³² Estonian Defence Forces Organization Act, § 29 (1).

²³³ *Ibidem*, § 29 (7).

²³⁴ Estonian Penal Code, § 432. Refusal to obey orders; § 433. Failure to obey orders.

²³⁵ Estonian Defence Forces Organization Act, § 33

²³⁶ *Ibidem*, § 34

²³⁷ *Ibidem*, § 35 (1)

²³⁸ *Ibidem*, § 35 (2)

²³⁹ *Ibidem*, § 35 (4)

criminalisation of airspace violations related to the Penal Code's general provisions must not be discarded and overlooked. They are an obstacle to criminalisation but do not hinder its possibility. The latter is more strongly connected with the purpose of criminalisation. Regarding airspace violations, the possibility to punish the perpetrator must not be seen as the primary objective, rather the overall security of the State.

CONCLUSION

The primary purpose of this study was to find out on which grounds it would be possible to criminalise territorial violations by foreign state aircraft in the Estonian criminal law and whether criminalisation would be an effective way to deter these kinds of violations, and what purpose would it serve. Currently, violations of Estonian airspace are dealt with via diplomatic means and investigations are performed behind closed doors. According to public sources, Estonian airspace violations occur yearly, and almost all of them happen in the vicinity of Vaindloo island. According to the Estonian Defence Forces, the violations have been committed solely by the Russian Federation state aircraft. Even though the number of serious violations has been decreasing in recent years, their overall volume remains the same.

Civil aviation is regulated by the Chicago Convention, which explicitly excludes state aircraft from its scope. Nevertheless, several conclusions may be derived from it. One of the pillars of the Chicago Convention is the sovereignty principle. The contracting States recognize that every State has complete and exclusive sovereignty over the airspace over their territory. The Chicago Convention does not establish freedom of overflight, and under customary international law, every flight over foreign territory is subject to the consent of the State overflown. For state aircraft, this rule is especially prevailing as no state aircraft of the contracting State may fly over the territory of any State without authorization by special agreement or otherwise. For international straits defined in UNCLOS Art. 37, the regime of transit passage is applicable to state aircraft. Furthermore, state aircraft exercising the right of transit passage does not have to comply with ICAO's Rules of the Air. The State governs the entry rules into the national airspace, and international law provides only limited possibilities for freedom of overflight.

To enter Estonian airspace, state aircraft must apply for a permit from the Ministry of Defence. The application process is confidential, and the applying party is given only the result of the application. For the European Union and NATO members, yearly permits are provided automatically, which gives the right to enter Estonian airspace without prior notification, except for aircraft fitted with intelligence, surveillance, target acquisition, reconnaissance, or

electronic warfare equipment. Additionally, a permit is needed for flight with diplomatic importance, which also applies to civil aircraft. The procedure for granting permits is based on the goodwill of the applying party, and it may be almost impossible to police by national law enforcement agencies.

Defining state aircraft in international law is not an easy task as no universally accepted definition exists. The first attempt to define state aircraft was made in the Paris Convention of 1919, whereas state aircraft are military aircraft and other aircraft exclusively employed in State service. This definition was challenged by the adaption of the Versailles Peace Treaty when the Allies tried to confiscate German aeronautical equipment, which they deemed military aircraft. At the same time, Germany regarded them as civil aircraft. It was attempted to define military aircraft by technical parameters, but that proved to be futile. The Chicago Convention Art. 3 (b) wording on the matter leans in favour of a functional approach of defining state aircraft, as it deems aircraft used in military, customs, and police services as state aircraft. It cannot be regarded as an all-comprehensive list of functions state aircraft may perform.

Furthermore, aircraft may be of dual-use, and the determination of whether an aircraft is a state aircraft remains on a case-by-case basis. The definition of state aircraft found in the Estonian Aviation Act is narrower than the assumption in the Chicago Convention; it remains unclear whether it is intentional or a mistake. Its current state does not effectively differentiate between civil or state aircraft, limiting the possibility to conduct effective control over Estonian national airspace.

From the perspective of the thesis, it was found that Russian state aircraft traversing primarily to-and-from Kaliningrad oblast conduct their flight over the high seas or the EEZ of Estonia. Russian military aircraft are not keen on applying for permits from the Estonian MOD, and it is doubtful that the Estonian authorities would grant permits to these kinds of flights. It may be reasoned that Russian aircraft using this route are state aircraft performing a state function whatever aircraft is being used. Overall, defining state aircraft is governed by domestic law, and discretion must be applied for determination.

The Defence Forces carries out its function to protect and guard the Estonian national airspace by its armed service, the Air Force and its relevant units. Furthermore, the performance of this function may be augmented by armed forces of a State being party to an agreement containing the principle of collective self-defence entered into with the Republic of Estonia. The armed forces in mind of this notion are the Baltic Air Policing assets deployed in Estonia or Lithuania. Their primary duty is to intercept the suspected aircraft for identification and, when necessary, to order the aircraft to land in the designated airfield. The Defence Forces may use deadly force against aircraft violating Estonian national airspace, but it is highly debatable whether it would be proportional in time of peace. Civil aircraft's interception is deemed the last resort measure and must be conducted with extensive care to flight safety. Nevertheless, the use of deadly force cannot be ruled out in cases of Renegade aircraft, but using force against these kinds of platforms must be further regulated by bilateral agreements. It may be ascertained that during peace-time, the Defence Forces competence for protecting national airspace is limited.

Guarding the national airspace is conducted by the Air Surveillance Wing, especially by CRC Tallinn, as part of BALTNET and the relevant NATO command structure. Their first objective is to safeguard the sovereignty of Estonian national airspace. It is done by identifying and analysing all relevant incidents. Air surveillance is the first line of defence when regarding airspace violations. Only military radars can detect airspace violations and aircraft not using an operational transponder.

Between the years 2017 and 2021, there have been 13 reported violations of Estonian airspace in the vicinity of Vaindloo. The main reason the violations occur in the vicinity of Vaindloo island is that the air route through the area is not controlled by the air traffic control authority of Estonia but the Russian centre in Saint Petersburg. The FIR boundaries are not equal to the Estonian state border, and the issue needs further attention. The aircraft violating Estonian airspace are usually flying from mainland Russia to Kaliningrad oblast or Finland. Some reported airspace violations were committed by aircraft that may not fall in the category of state aircraft as defined in the Estonian Aviation Act.

In Finnish law, territorial violations are criminalised by the Finnish Criminal Code Section 7c of Chapter 17, stating that a soldier of a foreign State or a master of a foreign vessel or state aircraft can be guilty of a territorial violation. Only State actors may be guilty of this offence. The Finnish Territorial Surveillance Act has a broad definition of governmental aircraft and the procedure for dealing with these kinds of incidents. The Act also depicts the procedure for governmental aircraft entry into Finnish territory, and criminal liability is connected with disregarding the rules set by the Territorial Surveillance Act. The criminalisation of territorial violations has to be regarded as symbolic regulations rather than functional, as prosecuting the violations may prove to be nearly impossible, which is highlighted in practice. Firstly, identifying the perpetrator is difficult as foreign States do not disclose this information to Finnish authorities. Secondly, it would be unreasonable to conduct extensive investigations into incidents where the possible punishment is relevantly light. Thirdly, the person accused of a territorial violation may evade criminal responsibility due to an error regarding the act's unlawfulness.

Furthermore, the liability may be challenged by lack of intent by the perpetrator or when the offender was acting under a hierarchical command. Regardless of the regulation being almost exclusively of symbolic nature, it has been found that there are benefits of the criminalisation and the investigations being conducted. It enables the Finnish authorities to pursue border control measures actively and monitor its territorial surveillance needs and shortfalls.

It was discovered that several challenges face criminalisation that is derived from Estonian criminal law. The main difficulties are connected with criminal proceedings and general principles of penal law. Challenges in the criminal procedure relate to investigative bodies, the legality principle, the gathering of the evidence, and the termination of criminal proceedings. The result of criminalisation in the point of view of criminal proceedings may be disappointing. Criminal proceedings must be commenced and conducted under the legality principle, but these investigations may be terminated due to the difficulties of identifying the offender or lack of public interest.

Furthermore, safeguarding the national airspace is a function performed by the Defence Forces, but it has limited capabilities for conducting criminal proceedings. Therefore, the investigations must be conducted by the police service with extensive coordination with the Air Force. There is no obstacle to criminalising airspace violations in Estonian law, but these challenges must be addressed and mitigated.

The deterring effect of criminalisation is not overly visible in the short timeframe. The Russian Federation has almost exclusively denied these violations and would not be a helpful counterpart for solving the situation. Similarly to the Finnish experience, the actual effect would be found in highlighting the incidents and keeping the lines of communication open via diplomatic means. Furthermore, it would be an opportunity to discuss the matter as a whole and the domestic regulation connected with it.

In conclusion, even though there are several challenges to the criminalisation of airspace violations in Estonian law, these challenges may be mitigated. It is assessed that the criminalisation is possible and purposeful. It must be regarded that punishing the perpetrators should not be the primary objective. Still, the overall increase of public interest and highlighting the issue would increase Estonian national security in time.

VÕÕRRIIKIDE RIIKLIKE ÕHUSÕIDUKITE POOLT SOORITATUD TERRITORIAALSETE RIKKUMISTE KRIMINALISEERIMISE VÕIMALUS EESTI KARISTUSÕIGUSES. Resümees

Õhupiiri rikkumised on tõsine rahvusvaheline intsident, eriti vaadates olukorrale läbi kahjustada saanud riigi silmade. Eesti õhupiiri on rikutud aastate jooksul mitmekümneid kordi. Kõige tõsisemaks võib pidada sündmust, mis leidis aset 2003. aasta oktoobris, mil kaks Venemaa Föderatsiooni hävituslennukit sisenesid Eesti õhuruumi ilma loata ja lendasid marsruudil pikkusega üle 200 kilomeetri Hiiumaast kuni Eesti idaosani. Lennu motiiviks on peetud luure- või kaitsesüsteemide testimise alast tegevust, marsruudile jäi uus sõjaväe radar Kellaveres. Sündmus toimus vähem kui kuus kuud enne Eesti liitumist NATO-ga. Pärast seda sündmust pole sellise skaalaga õhupiiri rikkumisi toimunud, kuid neid võib sellegipoolest pidada regulaarseteks.

Eesti õhupiir on paika pandud lähtuvalt rahvusvahelise õiguse normidest. Põhiliseks lennundust reguleerivaks rahvusvaheliseks konventsiooniks on Rahvusvahelise tsiviillennunduse konventsioon (Chicago konventsioon). Selle põhiprobleemiks on fakt, et selle regulatsioon kehtib enamjaolt ainult tsiviilõhusõidukitele.

Tsiviilõhusõidukite eristamine riiklikest õhusõidukitest pole lihtne ülesanne. Chicago konventsioonist tulenevalt peetakse riiklikeks õhusõidukiteks selliseid õhusõidukeid, mida kasutatakse sõjaväe-, tolli- ja politseiteenistuses. Sarnaselt on õhusõidukite kategoriseerimine paigas Eesti lennundusseaduses, kuigi sealset regulatsiooni võib pidada kitsamaks.

Ebaseaduslik maismaapiiri ületamine on tavaliselt siseriiklikus õiguses kriminaliseeritud või vähemalt karistatav väärteo koosseisudega. Mitmed selletaolised koosseisud on leitavad nii karistusseadustikus kui ka asjakohastest muudes seadustes, nt riigipiiri seadus. Kuigi kõik õhusõidukid võivad õhupiiri rikkuda, keskendus käesolev magistr töö riiklikele lennukitele. Tsiviillennundus on üks kõige enam reguleeritud rahvusvahelise õiguse harusid, kuid vaid väike osa sellest kehtib samaväärselt riiklikele õhusõidukitele. Kitsendamaks töö perspektiivi veelgi, keskendutakse selles ainult rahuaegsetele protseduurile, jättes kõrvale humanitaarõiguslikud ja sõjaõiguslikud põhimõtted.

Tulenevalt riigipiiri seadusest, on õhuruumi valvamise ja kaitsmise funktsioon antud Kaitseväe pädevusse. Kaitseväe põhifunktsioonideks on tulenevalt kaitseväe korralduse seadusest riigi sõjaline kaitse ning selleks valmistumine. See lähtub tavapärasest arusaamast, milliseid funktsioone sõjaväelised asutused erinevates riikides täidavad. Õhuruumi valvamine ja kaitsmine on seevastu ülesanne, mida tuleb teostada olenemata olukorrast ja ajast.

Õhupiiri rikkumised pole hetkel Eesti õiguses kriminaliseeritud. Selles tulenevalt oli magistritöö põhiprobleemiks asjaolu, et taolise rikkumise toimepanijad ei karistata. Taolised intsidendid lahendatakse kasutades diplomaatilisi kanaleid ja saladuse kattevarjus. Selles tulenevalt oli töö eesmärgiks välja selgitada, millistel alustel on võimalik taolised rikkumised Eesti õiguses kriminaliseerida ning millist eesmärki see endas kannaks.

Eesmärgi saavutamiseks tuli vastata mitmetele uurimisküsimustele. Millised õhusõidukid on riiklikud õhusõidukid ja kuidas on nende sisenemine Eesti õhuruumi reguleeritud siseriiklikus ja rahvusvahelises õiguses? Kuidas Kaitsevägi täidab talle usaldatud funktsiooni valvata ja kaitsta Eesti õhuruumi? Millised on kõige tüüpilisemad Eesti õhuruumi rikkumised? Kuidas on territoriaalsed rikkumised reguleeritud Soome karistusõiguses? Milliseid väljakutsed kaasnevad õhuruumi rikkumiste kriminaliseerimisele Eesti karistusõiguses ning kuidas see mõjutaks võimalust rikkumiste toimepanijaid karistada?

Töös on läbivalt kasutatud analüütilist uurimismeetodit, analüüsides õigusraamistikku, mis reguleerib riiklikke õhusõidukeid ja õhupiiri rikkumisi. Analüüs on enda sisult doktriiniline, sidudes endas rahvusvahelise õiguse norme, mis reguleerivad lennundust ja mereõigust, ning siseriiklikku riigikaitse ja kriminaalõigust. Võrdlevat meetodit on kasutatud analüüsima, kuidas on võimalik rakendada Soome karistusõiguses olevat regulatsiooni Eesti õigusesse, millised on selle eesmärgid ja võimalikud kitsaskohad.

Magistritöö põhilisteks allikateks on vastavasisuline rahvusvahelise õiguse allikad, eelkõige Chicago konventsioon, ning teadusartiklid ja muud publikatsioonid, mis seda tõlgendavad. Õhupiiri rikkumiste statistika on toodud avalikele allikatele tuginedes, kasutades selleks erinevaid ajalehe artikleid ja pressiteateid. Töö kolmandas peatükis on kasutatud allikatena Soome vastavasisulist siseriiklikku regulatsiooni ning probleemi erinevaid tahku hõlmavat teadusartiklit.

Töö on jagatud kolmeks peatükiks. Esimene peatükk analüüsib suveräänse õhuruumi põhimõtet rahvusvahelises õiguses, riiklike õhusõidukite erinevaid definitsioone ning vaatab lähemalt protseduuri, mille läbi on lubatud neil Eesti õhuruumi siseneda. Lisaks sellele analüüsitakse Kaitseväge pädevusi Eesti õhuruumi valvamisel ja kaitsmisel ning annab selge ülevaate, kuidas selle funktsiooni täitmisele rakendatakse liitlasriikide vahendeid Balti õhuturbe missiooni vaatenurgast. Teine peatükk keskendub Eesti õhupiiri rikkumistele ja nende võimalikele põhjustele, mis toimuvad eranditult samas geograafilises alas – Vaindloo saare lähistel. Kolmas peatükk analüüsib, kuidas ja miks on territoriaalsed rikkumised, sh õhupiiri rikkumised, kriminaliseeritud Soome siseriiklikus õiguses, ning selgitab välja, kas ja kuidas on võimalik taolised rikkumised kriminaliseerida ka Eesti õiguses.

Riigid naudivad enda õhuruumis täielikku suveräänsust, mille kohaselt ei ole lubatud riiklikel õhusõidukitel võõrriigi õhuruumi siseneda ilma vastava loata. Chicago konventsiooni kohaselt puudub rahvusvahelises õiguses ülelennuvabadus. Taoline õigus on rakendatav ainult avamerel või teatavate piirangutega riikide majandusvööndis. Üheks erandiks on sellele takistamatu läbisõiduõigus, mida on võimalik teostada rahvusvaheliseks meresõiduks kasutatavates väinades. Üldjuhul on seega üle riigi territooriumi lendamiseks vaja vastava riigi luba, mis eriti kehtib riiklikele õhusõidukitele.

Riiklike õhusõidukite eristamine tsiviilkasutuses olevatest õhusõidukitest on valmistanud mitmeid probleeme alates lennunduse alguspäevadest. Kõige tuntum definitsioon on toodud Chicago konventsioonis, kuid seda võib pidada pigem näitlikuks. Riiklike õhusõidukite prevaleerivaks tunnuseks on kujunenud funktsionaalne lähenemine, mis võib sellegipoolest olla petlik, sest samu õhusõidukeid on võimalik kasutada mitmete riiklikust tähtsust omavate funktsioonide täitmiseks. Venemaa Föderatsiooni õhusõidukite puhul saab üheks peamiseks tunnuseks pidada nende käitumismalli lendudel Kaliningradi oblastisse ja tagasi. Nende lendude marsruut väldib põhimõtteliselt sisenemist Balti riikide õhuruumi, millest võib järeldada, et need õhusõidukid vajaksid ülelennuluba, kui need sooviksid võõrriigi õhuruumi siseneda. Sellegipoolest ei saa sellist marsruudivalikut pidada üheselt riikliku õhusõiduki tunnuseks, vaid tuleb seda fakti vaadata kogumis muude faktoritega.

Riikliku õhusõiduki Eesti õhuruumi sisenemiseks loa saamiseks tuleb see taotleda Kaitseministeeriumilt. Antud protsess pole avalik ning taotleja saab ainult vastuse enda taotlusele. Euroopa Liidu ja NATO liikmesriikidele väljastatakse automaatselt aastased ülelennuload, mille alla kuuluvad enamikud nende riiklikud õhusõidukid. Eraldi luba on vaja taotleda juhtudel, mil riiklikul õhusõidukil on peal erivahendid, nt luuramiseks kasutatavad seadmed. Samuti on luba vaja taotleda diplomaatilist tähtsust omavatele lendudele, mida võidakse teostada kasutades nii riiklike või tsiviilõhusõidukeid.

Kaitsevägi täidab enda ülesannet valvata ja kaitsta Eesti õhuruumi kasutades selleks enda struktuuriüksuseid, põhiliselt õhuväe koosseisu kuuluvat õhuseiredivisjoni, mille üheks põhieesmärgiks ongi Eesti õhuruumi puutumatus tagamine. Õhuruumi kaitsmisel ei saa välistada õigust kasutada rikkuja vastu surmavat jõudu, kuid rahuaegses keskkonnas võib seda pidada ebaproportsionaalseks. Jõu kasutamine tsiviilõhusõidukite vastu on veelgi suurem tabu, kuid protseduurid tsiviilõhusõiduki vastu jõu kasutamiseks on paika pandud just nõ Renegaat-õhusõiduki juhtumitel. Renegaat-õhusõidukiks peetakse tsiviilõhusõidukit, mida võidakse kasutada relvana, mille kontseptsioon sai alguse pärast New Yorgi kaksiktornide rünnakut. Õhuruumi valvamise üheks põhialuseks on pädev õhuseire, mille kaudu on tuvastatakse õhupiiri rikkuja kasutades Kaitseväe koosseisu kuuluvaid erinevaid õhuseire radareid. Õhuruumi üle seiret teostab õhuseiredivisjoni allüksus õhuoperatsioonide juhtimiskeskus, mis kuulub NATO laiemasse õhukaitse raamistikku. Lisaks Eesti sõjaväeliste struktuuriüksustele kasutatakse õhuruumi valvamiseks ja kaitsmiseks NATO Balti õhurube hävitajaid, mille põhieesmärgiks on huvipakkuvad õhusõiduki visuaalne tuvastamine ning vajadusel Eesti õhuruumist nõ väljasurumine. Sellegipoolest tuleb arvestada, et tegemist pole Kaitseväe juhtimisstruktuuris olevate vahenditega ja nende kasutamine ning selle ulatus pannakse paika vastavalt NATO-sisestele protseduuride.

Kõik viimase nelja aasta jooksul toimunud teadaolevad Eesti õhupiiri rikkumised on toimunud Vaindloo saare lähistel, mille põhipõhjuseks on asjaolu, et osa õhuruumist, mis on sealse territoriaalmere kohal ei kuulu Eesti lennujuhtimisealasse, vaid sealset liiklust juhivad Venemaa lennujuhid. Olukorrast väljumine tundub olema keeruline, kuigi vastavat õhuruumi korraldust on võimalik muuta, kuid see eeldab rahvusvahelist koostööd ja otsest kokkulepet nii Venemaa Föderatsiooniga kui ka muude osapooltega. Piirkonnas on aastatel 2017 kuni 2021 toimunud kolmteist Eesti õhupiiri rikkumist, kõik rikkumised on olnud lühiajalised, kuid see ei vähenda nende tõsiseltvõetavust ning riske Eesti julgeolekule.

Soome õiguses on territoriaalsed rikkumised, sh õhupiiri rikkumised, kriminaliseeritud juba üle kahekümne aasta. Taolist rikkumist saavad toime panna ainult riiklikud õhusõidukid. Sellist kriminaliseerimist on peetud pigem sümbolseks, kuna aastate jooksul pole ühtegi õhupiiri rikkujate karistatud. Koosseisus peituvad mitmed väljakutsed kriminaalõigusele laiemalt. Territoriaalsete rikkumiste puhul on Soome prokuratuurile jäetud võrdlemisi vabad käed kriminaalmenetluse alustama jätmiseks või selle lõpetamiseks. Lisaks võidakse kriminaalmenetlus lõpetada kantuna menetlusökonomikast, enamikel juhtudel pole võimalik rikkujat tuvastada, kuna isegi riigid, kellega Soomel on sõbralikud välissuhted, ei väljasta õhusõiduki pilootide identiteete. Rikkumine eeldab toimepanija poolt tahtluse olemasolu, mida võib olla keeruline tõendada, eriti kui on võimatu tuvastada toimepanija isikusamasust. Üleüldiselt peetakse antud koosseisu ekstraordinaarseks, rikkumised toimuvad regulaarselt, kuid kriminaalkorras karistada pole kedagi suudetud. Karistuste kartus ei heiduta antud rikkumiste toimumist, kuid annab sellegipoolest võimaluse probleemile laiemat kõlapinda pakkuda ning jätab lahti võimaluse lahendada arusaamatusi diplomaatiliste kanalite kaudu.

Eesti õiguses pole õhupiiri rikkumised kriminaliseeritud, kuigi mitmed süüteod on seotud vähemalt mingi määrani ka õhupiiri ebaseadusliku ületamisega. Sellegipoolest ei ole üheselt rakendatavat koosseisu, mille alusel oleks võimalik rikkumiste toimepanijad vastutusele võtta. Ebaseadusliku piiriületamise kehtivad koosseisud on suunatud eelkõige maismaapiiri ületamise takistamise vastu, ning riigipiiri seaduses olevad koosseisud on väärted.

Võrdluses Soome õiguskorra ja sealt välja tulnud väljakutsetega õhupiiri rikkumiste kriminaliseerimisel, tuleb nentida, et Eesti kriminaalõiguses on sarnased murekohad. Kriminaalmenetluse läbiviimisel uuriti väljakutseid, mis seonduvad uurimisasutuste pädevusega, legaliteedi põhimõttega, tõendite kogumisega ning kriminaalmenetluse lõpetamisega erinevatel põhjustel. Sedastati, et kuigi õhuruumi valvamine ning kaitsmine on funktsioon, mida täidab Kaitsevägi, puudub sel pädevus taolisi kriminaalmenetlusi läbi viia, sest sõjaväepolitsei pädevuses on ainult konkreetsete õigusrikkumiste menetlemine. Tõendite kogumisel tuleb arvestada asjaoluga, et Kaitseväge poolt töödeldakse selliste rikkumiste avastamisel riigisaladust sisaldavaid andmeid. Kõige suuremaks probleemiks võib sellegipoolest kujuneda toimepanija tuvastamine, mille puhul on raske näha võimalust, et toimepanija päritolu riik taolist teavet Eesti uurimisasutustele väljastaks. Samuti võib pidada

väga tõenäoliseks, et kui rikkumiste puhul kriminaalmenetlust alustatakse, siis see lõpetatakse otstarbekuse kaalutlusel. Kõigest sellest järeldub, et kuigi toimepanijate karistamise tõenäosus on madal, ei saa tähelepanuta jätta kriminaalmenetluse alustamise võimalust, mille läbi saab juhtida probleemile suuremat tähelepanu. Karistusõiguslikult taandub väljakutse tahtluse ning õigusvastasuse küsimusele. Tahtluse kindlaks tegemine on sarnaselt Soome kogemusele märkimisväärselt keeruline, sest toimepanija isikut on peaaegu võimatu tuvastada. Õigusvastasust võib välistada toimepanija eksimus õigusvastasuste välistavas asjaolus ning sõjaväelises struktuuris käsu täitmine.

Õhupiiri rikkumiste kriminaliseerimine ei lahenda üheselt olemasolevat probleemi. Arvestada tuleb kehtiva õiguskorrast tulenevat väljakutsetega ning asjaoluga, et Venemaa Föderatsioon on järjepidevalt taolisi rikkumisi eitanud. Kriminaliseerimine võrdluses Soome kogemusega aitab eelkõige kaasa taoliste intsidentide suurema tähelepanu alla toomisele ning nendest järelduste tegemisele.

ABBREVIATIONS

ACC – Area control centre

ASW – Air Surveillance Wing

ATC – Air traffic control

ATS – Air Traffic Services

BALTNET – Baltic Air Surveillance Network and Control System

BAP – Baltic Air Policing

Chicago Convention – Convention of International Civil Aviation

CRC – Control and Reporting Centre

EEZ – Exclusive economic zone

FIR – Flight information region

ICAO – International Civil Aviation Organisation

MFA – Ministry of Foreign Affairs

MOD – Ministry of Defence

NATINAMDS – NATO's Integrated Air and Missile Defence System

NATO – North Atlantic Treaty Organisation

NM – Nautical mile

Paris Convention – Convention to the Regulation of Aerial Navigation

PSR – Primary surveillance radar

QRA – Quick Reaction Alert

SARPs – Standards and Recommended Practices

SBAD – Surface-based air defence

SSR – Secondary surveillance radar

UNCLOS – United Nations Convention on the Law of the Sea

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