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AN ASSESSMENT OF THE DESTRUCTION OF ROGUE CIVIL AIRCRAFT UNDER INTERNATIONAL LAW AND CONSTITUTIONAL LAW

The terrorist attacks of September 11th, 2001 have it made abundantly clear that a civil airliner with filled fuel tanks is capable of causing destruction comparable to that brought about by armed military aircraft. The tragedy, which deeply shocked mankind's conscience, has raised the following question: What can a state possibly do to suppress the immediate threat of the execution of a terrorist attack by means of civil aircraft? Can the armed forces be ordered to destroy a hijacked airplane heading towards its genuine or alleged target? Is it permissible to sacrifice innocent passengers on board in order to prevent the terrorist attack and the loss of lives on the ground?[1]

Since September 11th, 2001, military aircraft, reportedly authorised to use, as an ultimate measure, lethal force against rogue airplanes, have routinely been patrolling the airspace of large public events as well as the meetings of highly visible. This fact illustrates the gravity and the timeliness of the dilemma. This study seeks to determine whether current international law allows for the use of force against civil aircraft that are presumably being used for terrorist purposes, and at the same time it also briefly introduces the implications for the Republic of Hungary that stem from this problem. It needs to be emphasised, however, that this assessment is of a purely legal nature; therefore it disregards, as much as possible, the admittedly important considerations of morality.

THE STATUS OF AIRSPACE AND CIVIL AIRCRAFT IN INTERNATIONAL LAW

Airplanes of various legal standing may be used in the execution of a terrorist act. First of all, one has to draw a distinction between state and civil aircraft. State aircraft are always used under the authority or command of a state regardless of the actual purpose of the operation. Thus, aircraft used by the military, customs or police services, as well as those owned or operated by governments, are deemed to be state aircraft, even if they are engaged in commercial air services. According to another increasingly accepted view, however, only aircraft carrying out sovereign tasks or services qualify as state aircraft. According to this interpretation, aircraft used for military, customs and police purposes, those used for the transportation of heads of states or governments or other high-ranking officials on public mission, for scientific and emergency services as well as for any other sovereign purpose are all state aircraft. Such a functional interpretation apparently excludes state-owned airliners engaged in commercial services from this category. [2] An aircraft serving private purposes, *a contrario*, is to be considered a civil aircraft, and this scenario provides the focus of the present analysis. Civil aircraft can be further classified with respect to whether or not they are engaged in international air services and whether they are making a scheduled or a non-scheduled flight. Finally, the state of registration also permits civil aircraft to be differentiated on the basis of nationality. These conditions determine the international legal status as well as the rights and obligations of aircraft, and they also have profound implications for this assessment.

Even though aerial navigation has been subject to domestic legal regulation in a broader sense ever since the successful demonstration of a hot air balloon by the Montgolfier brothers, international law embraced this activity only at the turn of the 20th century as a result of rapid aerial development and the military significance of this development. While international air law was emerging, the previously controversial theory that airspace shares the legal status of the territory beneath it and, as such, the airspace over the territory of a state is under the complete and exclusive sovereignty of that state, was also gaining widespread recognition.[3] This principle is the backbone of customary law and every international treaty governing aerial navigation including the Paris Convention of 1919,[4] the Havana Convention of 1928[5] and the Chicago Convention on International

Civil Aviation of 1944.[6] Since international air law is based upon the assumption that every state has absolute sovereignty over its airspace, foreign aircraft may only fly over or into the territory of a state with an authorisation obtained by special agreement or by prior permission. The Chicago Convention, however, stipulates that aircraft that are not engaged in scheduled international air services have the right to fly into, or to travel non-stop, across state territory as well as to make stops for non-traffic purposes. The convention also prescribes that these "freedoms of the air" may be exercised without the necessity of obtaining prior permission, although the state flown over may require landing. Scheduled international services flying over or into the territory of a contracting state, on the other hand, may be operated in accordance with a special permission or other authorisation of some sort from that state.[7] (The scope of the convention does not extend to state aircraft, yet Article 3, paragraph c) provides that no such plane may enter the airspace of another state without authorisation by special agreement or otherwise.)

With the intention of restraining territorial sovereignty as little as possible, the convention grants a territorial state several possibilities for the limitation of air traffic. Aside from the fact that the state flown over may demand the landing of non-scheduled aircraft, it also "reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions, which are inaccessible or without adequate air navigation facilities, to follow prescribed routes or to obtain special permission for such flights".[8] Certainly, this restriction serves not only the safety of the aircraft and persons on board but also the protection of interests of the territorial state. The options envisaged in Article 9 of the convention reflect analogous considerations, as any contracting state, for reasons of military necessity or public safety, may uniformly restrict or prohibit the aircraft of other states from flying over certain areas of its territory, provided that no distinction is made between the aircraft of the territorial state engaged in international scheduled airline services and similar aircraft of other states. In exceptional circumstances, during a period of emergency or in the interest of public safety, every state has an additional right to temporarily restrict or prohibit air traffic over the whole or any part of its territory with immediate effect.[9]

It also follows from the principle of sovereignty over airspace that *every* aircraft must comply with the domestic rules and regulations of the flight and manoeuvre of aircraft. In case the conduct of a civil aircraft constitutes a breach of such regulations, it violates the sovereignty of the territorial state, and enables that state to take certain measures against it. For instance, the military aircraft of a territorial state may, by strict observance of the relevant standards and procedures,[10] as a *last resort*, intercept, identify, escort to the adequate route or out of the prohibited airspace, or force to land any aircraft that fail to identify themselves, enter the airspace without a necessary permission, deny to follow a prescribed route, head towards a prohibited zone, or violate a prohibition of flight. In absence of an acceptable excuse, such as distress caused by poor weather conditions or a mechanical failure, a state can also institute proceedings on the basis of its own domestic law against the persons that violate the rules of the air.

In the six decades since the end of World War II, numerous incidents have been recorded, in which military aircraft of a state have resorted to the use of weapons, thereby heavily damaging or destroying a civil airplane that was declared, for one reason or another, suspicious. On April 29th, 1952, Soviet fighters opened fire on an Air France airliner flying in the Berlin corridor. The plane was eventually spared from destruction by a successful emergency landing. Three passengers, however, suffered injuries. Two years later a Cathay Pacific scheduled flight of from Bangkok to Hong Kong was attacked in the airspace of the People's Republic of China. As a result, ten out of the eighteen persons on board lost their lives. Almost exactly a year later, on July 27th, 1955, an El Al Israel Airlines scheduled flight from London to Tel Aviv departed from its prescribed route and violated Bulgarian airspace. Bulgarian interceptors shot down the airliner, killing fifty-eight persons. On February 21st, 1973, Israeli fighters shot down a passenger jet. As this event closely resembles the problem examined in this study, a more detailed account of it is necessary. A Libyan Arab Airlines flight *en route* to Cairo was flying over the occupied Sinai Peninsula, when — presumably due to navigational error — it changed course and began flying in the direction of a nearby Israeli base. Since the crew was convinced that they were approaching Cairo airport, the airliner started to descend rapidly as its crew prepared for landing. Israeli interceptors fired warning shots in front of the nose of the aircraft, as a result of which it broke out and collected speed in an attempt to leave Israeli airspace. At that moment the fighters fired lethally upon the aircraft. The resulting crash claimed the lives of 108 passengers. Subsequently it was admitted by Israeli sources that, in view of previous threats, they believed that the airliner was about to commit a terrorist attack. On April 20th, 1978 a Korean Air Line flight from Paris to Seoul was attacked upon an unauthorised entry into Soviet airspace.

Though the plane was not destroyed, two persons on board were killed and several suffered injuries. Another far more serious incident occurred on September 1st, 1983. According to common knowledge, the South Korean airlines flight KAL 007 to Seoul was shot down by Soviet fighters after it had deviated from its course and intruded upon the country's airspace. Certain details of the tragedy, which claimed 269 lives, such as the role of a nearby U.S. military reconnaissance airplane, have thus far remained a mystery.[11] On July 3rd, 1988, an Iran Air flight from Teheran to Dubai was destroyed by surface-to-air missiles launched from the cruiser U.S.S. Vincennes. At the time of the incident that led to 290 fatalities, the warship was sailing on Iranian territorial waters in pursuit of gunboats, and her crew mistakenly identified the incoming civil aircraft as a hostile military jet. Finally, on February 24th, 1996, Cuban interceptors brought down two light airplanes of Hermanos al Rescate, a Florida-based non-profit organisation providing assistance to Cuban refugees. The incident took place over international waters and claimed the lives of all four persons on board the planes.

Each shoot-down caused enormous international outcry. Regardless of the fact that a few states did indeed recognise responsibility for the destruction of civil aircraft, the objecting states described their measures, *inter alia*, with the following words: a conduct that is "entirely inadmissible and contrary to all standards of civilised behaviour", a "barbarous action", "the most brazenly criminal act", a "flagrant violation of the principles enshrined in the Chicago Convention", a "terrorist act", a "flagrant and unjustifiable breach of applicable principles of international law", an incident that puts "into question the principles that govern international relations and the respect for human rights", and a "brutal massacre".[12]

Aside from the vehemently objecting states, several international institutions have dealt with the use of weapons against civil aircraft. It is natural that the International Civil Aviation Organisation scrutinised most of the aforementioned incidents. However, states referred some of the shoot-downs — such as the tragedy of the Libyan Arab Airlines jet or KAL Flight 007 — directly to the United Nations (U.N.) Security Council. Due to the veto power of permanent members, the Council's relevant activity was confined to discussing the situation. Nevertheless, the very fact that such instances actually appeared on the agenda of that body illustrates the gravity attributed to attacks against civil aircraft. The significance of these state actions is similarly highlighted by the proceedings initiated before the International Court of Justice as a result of the Bulgarian incident and the destruction of the Iranian airliner,[13] and by the examination undertaken by the Inter-American Commission on Human Rights on the Cuban fighters' use of force.[14]

Having claimed the lives of hundreds, these incidents also induced profound changes in the system of the Chicago Convention. Two weeks after the Korean plane tragedy of September 1, 1983, the Council of the International Civil Aviation Organisation held a special meeting and, with the intention of preventing similar incidents, opted for the amendment of the convention. The amending protoco[15] was drafted with exemplary swiftness and adopted unanimously by an extraordinary session of the Assembly of the International Civil Aviation Organisation on May 10, 1984. This protocol introduced a new Article 3*bis* to the convention providing that, "*a)* The contracting States recognise that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations. *b)* The contracting States recognise that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with the relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph *a)* of this Article."[16]

Article 3*bis* lays down a general prohibition, according to which any armed action against a civil airplane in flight as well as any other conduct endangering the safety of the aircraft or the persons on board is unlawful. Both the nationality of the aircraft and the type of weapon used against it are, therefore, irrelevant for the determination of a breach of this ban. A violation of the first phrase of the first sentence of Article 3*bis,* paragraph a) may equally occur *vis-à-vis* aircraft carrying domestic or foreign registration, and can be committed not only by military aircraft, but also by surface units. The actual outcome of the resort to force, furthermore, bears no importance to the legal qualification of such measures. Hence a use of weapons that entirely misses its target or merely results in light damage to an aircraft

comes under the same category as that which leads to the complete destruction of its target. Finally, although not stated expressly in Article 3*bis*, it is arguably only the intentional use of weapons, which qualifies as a breach of this provision.[17] Unlike the first phrase of the first sentence of paragraph a), the second phrase of the article can be violated exclusively during an interception, that is to say, in the air. It should be observed that the interception of civil aircraft by military planes remains lawful unless the interceptors engage in a conduct that endangers the intercepted airplane. Such conduct does not presuppose the use of weapons, which could even occur for instance, during a dangerous manoeuvre carried out for the sake of warning a civil aircraft.

Whereas Article 3*bis*, paragraph a) stipulates actions that are forbidden to a state, paragraph b) describes the permissible patterns of behaviour. There is a fundamental difference between these two provisions: the ban contained in paragraph a) embraces any airspace and civil aircraft, while the effect of paragraph b) extends only to the airspace of a given state and to aircraft engaged in unlawful navigation. To put it briefly, every state measure that does not constitute a violation of the relevant rules of international law, particularly Article 3*bis*, paragraph a), is compatible with paragraph b).

Article 3*bis* entered into force, for the states that ratified the protocol, on October 1st, 1998.[18] Nevertheless, its provisions bind not only signatory states, but — through customary law — the rest of the international community as well. Article 3*bis* is a typical example of codification, and as such, it sets down the existing rules of customary law in the form of an international agreement. Thus, international customary law forbids a state from using force against civil aircraft even if it has failed to ratify the relevant amendment to the Chicago Convention. The customary nature of the provisions at issue can be derived, *inter alia*, from statements made in the course of the adoption of the amending protocol, from the employment of the verb "recognise" in both paragraph a) and b) and from an understanding of states' prior behaviour that includes, among other things, their conduct in the wake of incidents outlined above.[19]

Despite the fact that the prohibition laid down in Article 3*bis*, paragraph a) seems to be absolute, the second sentence of this paragraph can be interpreted as establishing an exception to the general rule. The following analysis examines whether the U.N. Charter contains any provisions that, under certain circumstances, permit the destruction of civil aircraft in spite of Article 3*bis* and the concordant customary law.

THE RIGHT OF INDIVIDUAL OR COLLECTIVE SELF-DEFENCE

When the drafters of Article 3*bis* included the phrase "the rights and obligations of States set forth in the Charter of the United Nations", they probably had Article 51, which deals with the right of individual or collective self-defence in mind.[20] Article 51 of the Charter reads, "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[21]

The wording of this article raises the following question: Can the conduct of civil aircraft used for the execution of a terrorist attack give rise to a situation of self-defence, and provide the attacked state a legal basis for its destruction? Even though the lawfulness of shooting down an aircraft in self-defence has ostensibly gained ground in literature,[22] the question cannot be answered with a simple "yes" or "no". Since Article 51 of the Charter and the corresponding customary rules recognise the right to self-defence only with regard to an armed attack, one must first of all determine whether or not an action carried out by means of civil aircraft may qualify as such an attack.

When, in the spring of 1945 at the United Nations Conference in San Francisco, the representatives of founding states decided to draft Article 51 and incorporate it into the Charter, they obviously imagined an attack by an army rather than a single civil aircraft. As the Charter does not define the concept of armed attack, however, nothing rules out the possibility of an application of self-defence to this latter scenario, provided that two conditions prevail. First of all, a terrorist act perpetrated by means of civil aircraft must reach a high, yet imprecisely defined, gravity or intensity. Armed attack is the gravest form of the use of force. Not every forceful measure, therefore, qualifies as such nor provides a legal basis for the exercise of the right of self-defence. For example, if the armed forces of a state were to intentionally fire a single mortar shell into the territory of its neighbour, Article 51 would barely become applicable. However, if its artillery systematically bombards a dwelling on the other side of the border, the attacked state can by all means consider this an armed attack. Certain authors believe that even civil aircraft engaged in military reconnaissance may bring the territorial state to a situation of self-defence,[23] although, in the light of the necessary and specific features of armed attack, this view seems untenable. On the other hand, if an aircraft seeks to destroy a crowded stadium or a

nuclear power plant by direct impact, its conduct may reach or even surpass the minimum gravity required for the authorisation of an armed attack. This assertion is supported by the fact that the Security Council has recalled the inherent right of individual or collective self-defence in two resolutions that were adopted following the events of September 11th, 2001.[24] It is also noteworthy that the determination of the existence of an armed attack does not necessitate a Security Council resolution. It is the subjective opinion of the attacked state, which is authoritative in this respect. Thus, in the case of an attack, it can resort to defensive force without authorisation by the Council. Article 51, however, states can validly exercise this right only "until the Security Council has taken measures necessary to maintain international peace and security".

The qualification of the behaviour of civil aircraft used for terrorist purposes as armed attack is rendered extremely difficult by the fact that — just like on September 11th, 2001 — one cannot be absolutely certain as to the actual intentions of the perpetrators until the impact.[25] Whether a state faces an armed attack or a "common" hijack can in practice only be determined after it is too late — when the aircraft closes in on its target and makes its final manoeuvres. Shooting down an airplane at a safe distance from the presumed target of its apparent attack, therefore, inevitably bears the characteristics of *anticipatory self-defence*, which is highly awkward from the point of view of international law.[26] It would not substantially alter the situation either if the hijackers communicated their intentions via radio, since one can never rule out the possibility of deceit. Should a state automatically shoot down suspicious aircraft upon any communication of this kind, it would — paradoxically enough — broaden the freedom of action of terrorists. It is hard to imagine a crew that, having learned of the aims of suicide hijackers, would yield to coercion and fulfil their demands. If a state shoots down any suspiciously behaving plane upon the receipt of an adequate threat, the terrorists could also achieve their goal were they to force the pilots, under the pretence that the hijack was not going to entail the destruction of the aircraft, to alter the flight profile, hamper the transmission of radio and visual signals of hijack, and — leaving the crew uniformed — issue a deceitful terrorist threat to the competent authorities of the territorial state. Last, but not least, difficulties may likewise arise from the location of the target of rogue civil aircraft. Suppose that the target is situated near the border and the vector of approach is such that the airplane does not enter the airspace of the attacked state until the final phase of its journey. How should the relevant states co-operate? Which state should issue a command to open fire, perform the interception and execute the shoot-down? What if these states are in a tense relation?

HOWEVER, IF A TERRORIST GROUP CARRIES OUT THE ATTACK, THE DETERMINATION OF STATE RESPONSIBILITY AS WELL THE EXISTENCE OF ARMED ATTACK REQUIRES THE CLARIFICATION OF FAIRLY COMPLEX LEGAL ISSUES.

The conduct of persons seizing and controlling the civil aircraft must also be attributed to another state in order to satisfy the conditions that define a situation of self-defence. This scenario would apply, for example, were secret service agents or on duty members of the armed forces to seize the aircraft and attempt to accomplish a suicide terrorist mission.[27] However, if a terrorist group carries out the attack, the determination of state responsibility as well the existence of armed attack requires the clarification of fairly complex legal issues.[28] Conducts of private persons or groups, as a general rule, do not entail the responsibility of a state unless they are of a special relation with a particular state, in which case, the act becomes attributable to that state. The action of a terrorist group comprising "private persons" is considered an act of a state if it is in fact "acting on the instructions of, or under the direction or control of, that State in carrying out the conduct".[29] In the case that a state instructs or authorises an action, its responsibility can readily be established. If terrorists merely act under the direction or control of a state, however, one may question the minimum extent of such control that is necessary to attribute a particular act to a given state. Originally the judgement passed by the International Court of Justice in the Nicaragua case required "effective control" for the establishment of state responsibility.[30] However, the International Criminal Tribunal for the former Yugoslavia subsequently concluded that an "overall control" might also be sufficient.[31] Since opinions are divided in this respect, the International Law Commission argued that the required extent of control is a matter of appreciation in each specific case.[32]

The determination of state responsibility consequently presupposes an exhaustive knowledge of the preparatory stages and the resulting execution of any act. It is most unlikely, however, that the relevant pieces of information would already be at the disposal of the attacked state when it grants permission to fire on an aircraft. Hence a state *does not have a chance to confirm beyond reasonable doubt whether or not it has*

suffered an armed attack, which would yield a situation of self-defence under the terms of international law. Let us not forget that, after the attacks of September 11th, 2001, the United States collected intelligence for weeks to prove the relationship of the Al-Qaeda organisation to the Taliban regime of Afghanistan before it notified the Security Council of an initiation of actions in exercise of its right to self-defence[33] and requested from its allies the invocation of *casus foederis* of the North Atlantic Treaty[34] as well as that of the Inter-American Treaty of Reciprocal Assistance.[35] This likewise indicates that the attacked state acts in anticipatory self-defence when it orders the destruction of a rogue aircraft.

Following the terrorist attacks against the United States, views have been expressed in literature according to which "private actions" of non-state-sponsored terrorist organisations may also trigger the invocation of the right to self-defence, as Article 51 of the Charter does not mention that an armed attack can only be committed by states.[36] This position, however, is not supported by current international law. The right to individual or collective self-defence is not an autonomous rule but rather an exception to the prohibition of the use of force, which is a peremptory norm of international law.[37] Article 51, therefore, should not be interpreted in isolation; its true meaning can only be revealed in the context of the general rule. The prohibition of the threat or use of force is set forth in Article 2, paragraph 4, of the Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[38]

This provision is located amongst the principles of the United Nations and obliges its respect from "all Members". The Charter also stipulates that the organisation is not exclusively open to the founding members but to "all other peace-loving *states* which accept the obligations contained in the present Charter and, in the judgment of the Organisation, are able and willing to carry out these obligations".[39] The prohibition envisaged in Article 2, paragraph 4, consequently pertains to states rather than to individuals or groups of private persons. For that reason, the activity of armed bands, groups, irregulars or mercenaries violates the prohibition of the use of force only if they are sent by a state to the territory of another state. Since the notion of the use of force comprises state conduct, and an armed attack is in a part-whole relation with the use of force, one may conclude that the right of self-defence in Article 51 can be exercised exclusively upon attacks attributable to a state. It has to be emphasised that these rules also prevail in customary law with decisions that contain a similar content. Thus armed attacks are always instigated by states — either directly or by *de facto* agents.[40]

Even though it has been verified that actions of terrorists committed by means of an airplane may lead to the invocation of the right of self-defence,[41] it would be unsound to deduce the lawfulness of a shoot-down from this finding. The right to self-defence permits the use of force only in general terms, but it does not give states a green light to freely choose their means and methods of warfare. The fact that a state suffers an armed attack carried out by a civil aircraft *does not automatically render this airplane a legitimate target*, and as such, a lawful object of destruction. Because an armed attack exists only if it is attributable to a state, such an attack necessarily constitutes the initial step of an international armed conflict. The relevant rules of international humanitarian law unavoidably become applicable as a result of the simultaneous outset of this conflict. If a state finds itself in a situation of self-defence due to a terrorist act perpetrated by a civil aircraft, this particular body of law, rather than the right to self-defence, will determine whether or not the airplane can be shot down.[42]

Given the fact that not every act of terrorism involving the use of civil aircraft in a weapon-like manner qualifies as armed attack, international humanitarian law is unable to resolve the legality of the destruction of such airplanes in a comprehensive way. From here on, this paper's assessment must proceed in separate ways. First, we must examine whether the norms of humanitarian law relating to international armed conflicts and applicable from the outset to situations of self-defence allow for the shooting down of an attacking civil aircraft. Secondly, we must take into consideration those scenarios, in which the aforementioned rules of humanitarian law offer no guidelines due to the circumstances of a particular terrorist attack.

RELEVANT NORMS OF INTERNATIONAL HUMANITARIAN LAW RELATING TO INTERNATIONAL ARMED CONFLICTS

International humanitarian law can, according to one definition, be understood as a set of international rules, established by treaty or custom, which are intended to solve humanitarian problems that arise from international or non-international armed conflicts. These rules limit the right of conflicting parties

to freely choose the methods and means of warfare in addition to obliging them to protect the persons and property that are affected by the conflict.[43] Of the two types of armed conflict mentioned in this definition, only one, international armed conflict, bears importance to terrorist attacks that lead to a state's invocation of self-defence. In describing the scope of its application, the common Article 2 of the Geneva Conventions of 1949 unveils the meaning of this concept: "In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[44]

This article contains very few details. Nonetheless, the essence of international armed conflict can easily be grasped by taking into account state practice and legal literature. From the standpoint of humanitarian law, such armed conflict occurs when a state resorts to force against another state. This body of law becomes applicable from the first moment of conflict; it begins restricting the right of belligerents to freely choose their means and methods of warfare and it seeks to protect persons and property that could be affected by the hostility as soon as the first attack occurs. International armed conflict is, therefore, an objective category, the existence of which is independent from the conviction of states and from the existence of a state of war. War is consequently in a part-whole relation with the concept of international armed conflict. Humanitarian law is, furthermore, totally indifferent to the rationale, purpose, intensity, nature, duration and lawfulness of the use of force. The number of casualties, the amount of damage, and the presence or absence of armed resistance by the attacked state is similarly irrelevant.[45]

Applying this understanding of Article 2 of the Geneva Convention to acts of terrorism committed by civil aircraft yields several observations. If the conduct of a civil aircraft results in the invocation of self-defence, this conduct qualifies as armed attack in line with Article 51 of the U.N. Charter. Such an armed attack is necessarily attributable to a state, even if the aircraft is controlled by "private persons" acting under the instructions, direction or control of that state. Since armed attack is the gravest manifestation of the use of force, terrorists acting on behalf of a state actually perform the first act of an international armed conflict, albeit not by traditional weaponry, but by means of civil aircraft. Surprising as it may sound, it appears that in this case the execution of a terrorist act would bring about the applicability of the norms of humanitarian law that relate to international armed conflicts. It is noteworthy that such an attack constitutes a "double" breach of the law, as it violates both humanitarian law and the prohibition of the use of force.[46]. It should be emphasised that if the aircraft used in the attack were registered in a neutral third state, this state would, as a result, not become party to the conflict, because it would have neither initiated nor suffered the attack. It would not become a belligerent even if the airplane carrying its registration were to reach its target or happened to be destroyed by the attacked state. The state of registration may seek redress for the loss of its registered aircraft exclusively by peaceful means.

The law of armed conflict demands that the civilian population as well as individual civilians enjoy general protection against the effects of hostilities. For the purpose of ensuring this protection "the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".[47] Further provisions detail the fact that the civilian population or individual civilians must not be the objects of attack and that acts or threats of violence with the primary purpose of spreading terror among the civilian population are prohibited. In addition, parties to the conflict may not engage in indiscriminate attacks. An attack is deemed to be indiscriminate if, for instance, it employs methods or means of combat that cannot be directed at a specific military objective, or if its effects are not limited to military targets, as required by the rules of humanitarian law, but instead implicate the suffering of additional consequences to civilians or to civilian property. More specifically, any attack "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated", is deemed indiscriminate. Finally, it is also forbidden to use civilians as "human shields" in the course of military operations.[48]

In addition to the protection of civilian population, humanitarian law also seeks to safeguard civilian property in requiring that it neither be the object of attack or of reprisal. Civilian objects are objects that do not qualify as military objectives. This negative definition obviously serves the extension of the scope of protection offered to civilian objects. Therefore, an

object, which by its nature, location, purpose or use does not make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, under the given circumstances, offers no definite military advantage, cannot be considered a legitimate military target and, thus, cannot be attacked.[49] The possibility of re-classifying a civilian object is, however, inherent in a functional description of military objectives. Should a civilian object or facility, due to its nature, location, purpose or use, make an effective contribution to military operations, it can be regarded as a military target and destroyed. Nevertheless, in case of doubt, one must presume in favour of the civilian use of an object.[50]

A THOROUGH ANALYSIS, NEVERTHELESS, REVEALS THAT THIS PROVISION OF HUMANITARIAN LAW BARELY SUBSTANTIATES THE LEGALITY OF A SHOOT-DOWN, AS IT REQUIRES THAT MILITARY COMMANDERS UNDERTAKE CAREFUL DELIBERATION IN THE COURSE OF TARGET SELECTION.

A civil aircraft, regardless of its nationality, qualifies as a civilian object, although humanitarian law leaves room to change this status. If it is proven beyond reasonable doubt that a civil aircraft is being used for the execution of an armed attack, due to its altered function and purpose, and because it becomes capable of making an effective contribution to military action, it can thus be re-classified as a military target.[51] Yet a slight suspicion of military use does not substantiate such re-classification, as in case of doubt the airplane must be considered a civilian object. Furthermore a re-classification, by itself, provides insufficient legal basis for the destruction of the aircraft — it is merely a part of the question of the lawfulness of shooting down an aircraft. The elimination of the protection afforded by law to the aircraft that is employed in an attack is far from being enough to legally permit its destruction. Because there are also individuals on board the aircraft, it is their legal status that finally determines whether or not an airplane can be shot down.

The composition of a group of persons on board a rogue civil aircraft can be twofold. If only the perpetrators of the terrorist attack are aboard, the lawfulness of a shoot-down under humanitarian law depends on whether or not they qualify as combatants.[52] If so, the aircraft can lawfully be destroyed as both the object and the individuals controlling it are legitimate targets. However, if the perpetrators of the attack are not to be deemed as combatants, their killing must be judged in the light of a different legal system of legal rules, that of international human rights, which is elaborated upon below.

The gravest moral and legal dilemma arises when, in addition to the terrorists, innocent civilians — passengers or members of the civil crew — are aboard an aircraft on a suicide mission. It is well known that, "the civilian population as such, as well as individual civilians, shall not be the object of attack" even if they happen to be on board an airplane that qualifies as military target. Humanitarian law regards "collateral" civilian casualties acceptable only on one condition: if an attack causes loss of civilian life or injury to civilians that is not excessive in relation to the concrete and direct military advantage anticipated.[53] *Prima facie* it would appear that this rule permits, under certain specific circumstances, the sacrifice of passengers aboard an attacking plane. A thorough analysis, nevertheless, reveals that this provision of humanitarian law barely substantiates the legality of a shoot-down, as it requires that military commanders undertake careful deliberation in the course of target selection. If we imagine a scale, then on one side weighs "the concrete and direct military advantage anticipated", while on the other weighs the potential death and injury caused to civilians and the destruction caused to civilian objects. Thus, an exact military advantage opposes undefined, dubious and incidental consequences to civilians and civilian property. If the latter exceeds the military advantage to be achieved, the attack should be abandoned or aborted. In the case of a civil aircraft used for terrorist purposes *the situation is, in fact, reversed*. Given that the airplane and its passengers are beyond help, there is a certain civilian loss on one side of our imaginary scale, whereas on the other, there is an anticipated, vague and inevitably speculative advantage, which is moreover not necessarily of a "military" nature. In addition, due to a lack of communication or a suspicion of deceit, one may take neither the intentions of perpetrators nor the eventual destruction that might result from the attack for granted. If decision-makers authorise the use of lethal force at a safe distance from the presumed target, they fail to act in spirit and within the framework of the provision of humanitarian law under deliberation. (It is also conceivable that in such a case an armed attack would not yet have occurred.) However, if they opt too late for the destruction of the aircraft, the scattering debris of the aircraft rather than its impact could claim the lives of many on the ground.

Though indirectly, several rules of humanitarian law preclude shooting down an aircraft carrying passengers or civil crew. First, the Martens Clause declares that in absence of more complete regulation "populations and belligerents remain under the pro-

tection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience".[54] Secondly, the position of passengers and crew is greatly reminiscent of people used as "human shields", save that the latter have incomparably better chances of survival. According to the law of international armed conflicts, the fact that one of the parties to a conflict unlawfully attempts to facilitate the achievement of its military goals by the presence or movement of individual civilians does not release the opposing party from its legal obligations regarding the protection of civilians.[55] Thus "human shields" may never be the object of attack. Thirdly, a military commander hardly ever has the opportunity to "do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives" prior to issuing an order to open fire[56] — especially if the aircraft is still flying at a great distance from its presumed target. Furthermore he can neither "take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects".[57] Because conclusions that are drawn from flight profiles or possible threats are overly speculative, the fulfilment of these precautionary obligations should not be based upon them.[58]

Norms of humanitarian law relating to international armed conflicts, *as a general rule, prohibit* shooting down a civil aircraft used in an armed attack. Only one exception to this rule is conceivable: if the airplane has been re-classified as military target, and if no one is on board the plane except for the enemy combatants that are commanding it. The materialisation of such scenario is, however, most improbable. In the absence of the necessary pieces of information, the legal justification of a shoot-down would be extremely difficult and could only assume an *ex post facto* form. In other words, should the state ordering the shoot-down fail to prove beyond reasonable doubt that the plane was serving military purposes, was not carrying passengers or civil crew, and was controlled exclusively by enemy combatants, its destruction would be deemed a breach of law. Making a judgement is much easier if there are also passengers or members of civil crew on board the aircraft because in that case a shoot-down can never be justified by the rules of humanitarian law.[59]

In the following section, we turn our attention to those acts of terrorism committed by means of civil aircraft, which do not yield an international armed conflict, and as a result, the norms of humanitarian law no longer apply to the question of the legality of a shoot-down. The category scrutinised below consists of peacetime actions of any gravity that are not attributable to any state,[60] as well as any terrorist attack attributable to a state that, due to its relatively insignificant gravity, cannot be considered an armed attack.[61]

DISTRESS?

Were a state to destroy a rogue civil aircraft, the conduct of which did not amount to an armed attack or lead to the invocation of self-defence, the arguments raised to justify this measure would probably include the doctrine of distress. Article 24 of the draft articles on state responsibility adopted by the International Law Commission in 2001 describes distress, in line with customary law, as follows, "1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care. 2. Paragraph 1 does not apply if: *a)* The situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or *b)* The act in question is likely to create a comparable or greater peril."[62]

Distress, being one of the circumstances precluding wrongfulness, is an institution of the law of responsibility. In absence of contradictory *lex specialis* circumstances, precluding wrongfulness is generally applicable to any internationally wrongful act whether the international obligation breached arises from a treaty, customary law or any other source. [63] The doctrine of distress focuses specifically on a single value: human life. Its objective and function is to negate the unlawfulness of an act that is voluntary and attributable to a state, when the author, having no alternative, can save his life or the lives of others entrusted to his care only at the expense of breaching an international obligation. Nevertheless, if the danger is of a more general character, that is to say, if the lives endangered are other than that of the author or a person of any nationality under his care, or if other values, say material assets, are being imperilled, no claim of distress can be made. This circumstance precluding wrongfulness may neither be invoked when a violation of law committed in the interest of saving human lives creates a risk that is comparable to or greater than the one sought to be avoided. Consequently, if an act aimed at saving people endangers

as many more lives than the number of persons that are to be rescued, it constitutes a breach of law. The rationale of this rule is that the creation of a similar or greater peril can never be seen as a "reasonable way" as defined in paragraph 1 above, in spite of the understandable motives of the author.[64]

A claim of distress might, for a number of reasons, appear to be an expedient method for a state to destroy a civil aircraft that is being used for the perpetration of a terrorist act. First of all, the aforementioned characteristics of distress resemble, although distantly, the position of a person making a decision on the destruction of an aircraft. The doctrine of distress might also prove to be a tempting argument because its practical use is closely related to international air law. In practice, claims of distress primarily involve aircraft or ships entering, without authorisation, the territory of another state due to bad weather conditions or a mechanical failure.[65]

In spite of appearances, *the doctrine of distress cannot justify* the destruction of rogue civil aircraft. As we have seen, an act in distress is not unlawful provided that the situation of distress was not brought about by the state invoking it, that the act is aimed at the saving of the author's life or the lives of others under his care, and that it does not cause a comparable or greater peril. As a result of its peculiar nature, a terrorist attack committed by means of civil aircraft would almost certainly meet the first two criteria of distress. The terrorist action, although the possibility cannot be completely ruled out, is usually not directed by the attacked state, and the attack directly imperils the lives of a given, yet indefinite group of persons. It is unlikely that the attack would be explicitly directed against the author himself, since this individual is no-one else but the fighter pilot carrying out the shoot-down or, according to a different interpretation, the political or military decision-maker issuing the order to use lethal force. It is, however, obvious that the conduct of terrorists endangers persons entrusted to the author's care and persons with whom he has a "special relationship".[66] Citizens of a state and aliens in its territory are related to the government as well as to the armed forces in exactly such a fashion.

The rationality requirement, according to which a comparable or greater peril should not be created in the interest of saving endangered lives, nevertheless, precludes the adequacy of a hypothetical claim of distress. Since the genuine target and intentions of the perpetrators remains unknown until the last moments before impact, only a vague assessment of the number of persons to be saved is available when the airplane could be shot down. Thus, the basis of comparison, which forms an essential part of the doctrine of distress, is missing from the beginning. In addition, the requirement of rationality precludes the creation of a comparable or greater *peril*. If one sacrifices human lives in order to save members of an imperilled group, one seriously exceeds the minimum amount of legal digression tolerated by the rationality requirement of the doctrine of distress. The killing of others can scarcely be seen as the creation of a slight "peril". Numerical considerations, therefore, play a role in so far as the author simply imperils others in the course of rescuing lives, the idea being that the number of persons thereby endangered is significantly less than of those to be saved. Hence if a measure taken in a rescue attempt claims even a single life, it immediately becomes "unreasonable". As a result, the doctrine of distress is generally inapplicable to the justification of the destruction of a civil aircraft used in a terrorist attack.

Interestingly enough, another norm of the law of responsibility likewise precludes the invocation of distress for such purposes. Article 26 of the International Law Commission's draft articles on state responsibility emphasises, in a chapter concerning the circumstances that preclude wrongfulness, that, "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law".[67]

Peremptory norms of international law, or *ius cogens* norms, form the "hard core" of current international legal order and protect the most fundamental values of the international community. Their existence presupposes the will and consensus of the international community of states as a whole, while any derogation from them, even if based upon a treaty stipulation, qualifies as a breach of law. In addition, a peremptory norm can be changed exclusively by a subsequent rule of a similar nature.[68] Despite the fact that an exhaustive list of *ius cogens* norms has never been established, both the actors in the international domain and representatives of legal doctrine are fully aware of the provisions, which unquestionably belong to the peremptory norms of general international law.

INTERNATIONAL HUMAN RIGHTS ASPECTS

Due to the "human rights revolution" following World War II, certain human rights have attained the rank of peremptory norms of international law. This development obviously cannot be connected to a specific date. It, however, appears that the process

concluded — at least with respect to a few human rights — by the end of the 1960s. For example, the International Law Commission made the following observation while dealing with the codification of Article 53 of the Vienna Convention of 1969, which defines international *ius cogens:* "Other members expressed the view that, if examples [of established *ius cogens*] were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples."[69]

The judgement of February 5, 1970 passed by the International Court of Justice in the Barcelona Traction Case should also be recalled as evidence for the peremptory nature of human rights. This frequently cited *dictum* maintains that, "[An] essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State [...]. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as well as from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination."[70]

The judgement apparently refrains from an explicit recognition of peremptory nature of "the principles and rules concerning the basic rights of the human person", but some authors believe that the Court, in fact, "had in mind only those human rights which qualify as jus cogens, that is to say, peremptory norms of general international law".[71] No matter how we interpret the words of the Court, there is consensus both in state practice and in literature on the fact that certain human rights belong to international *ius cogens*. It needs to be emphasised that not all human rights bear a peremptory character; only a few of the most fundamental rights have attained the rank of such norms.

A precise catalogue of peremptory human rights is not available. This can be explained primarily both by the cautiousness of the international community and its desire to avoid a restrictive interpretation of such a catalogue and by the existence of difference in scholarly opinion concerning the attributes of cogency in the field of human rights. In spite of that fact, Article 53 of the Vienna Convention of 1969 clearly defines the criteria of international *ius cogens*. An analysis or demonstration of the peremptory character of human rights is far from being a simple task for it is closely intertwined with the problem of absolute rights as well as questions of derogation and limitation. Thus, prior to the examination of relevant human rights, these three categories have to be briefly introduced.

„Absolute right" is a complex and, hence, divergently defined concept. According to one opinion, the absence of permissible exceptions, reservations, limitations or derogations provides a sufficient basis for the conclusion that a given human right is absolute.[72] There are also, however, less strict perceptions. On the basis of another view, absolute rights are human rights phrased in absolute terms, that is to say, without any limitations.[73] At the same time, a third approach maintains that a human rights obligation is absolute if it is not expressed as being limited either by the resources available to a state or by reference to the means to be employed in performing it.[74]

Derogation enables states, in cases of public emergency — normally when "the life of the nation" is being threatened, to temporarily depart from their obligation to respect certain human rights to the extent that is strictly required by the demands of the situation. In other words, some human rights are subject to derogation and may be "sacrificed" on a provisional basis in the interest of saving a state. Conversely, there are human rights from which a state cannot derogate, even for this purpose. The prohibition of derogation, therefore, reflects the fact that a specific right protects values that go far beyond the interests of any state, and its temporary waiver are never a tolerable alternative.

Derogation should not be confused with the limitation of human rights. Notwithstanding the possibilities of derogation, a cluster of human rights may be subject to specific restrictions even under "normal circumstances", in a time of peace, provided that it is both necessary and proportional to the pursued goal. The limitation of a right is permissible only if it is prescribed by law and if it has well-defined and legitimate objectives. From the perspective of a variety of human rights instruments, such objectives include the protection of public safety, public order, general welfare, public health or morals, as well as the protection of the rights and freedoms of others.

How are these categories related to the notion of international *ius cogens?* It should be noted from the outset that absolute rights perceived in the most stringent sense, such as the prohibition of torture or inhuman or degrading treatment or punishment, are almost certainly peremptory norms.[75] On the other

hand, this status does not necessarily also apply to rights that are not subject to derogation. Cogency and the prohibition of derogation are closely connected, but their overlap is merely partial. Some human rights are not subject to derogation because they belong to the peremptory norm of international law. Others, however, bear this feature simply because a temporary derogation can never become necessary in an emergency that threatens the very existence of a state.[76] Conversely, it can be stated that the possibility of limitation by law definitely precludes the peremptory nature of a human right; therefore, peremptory human rights are always non-limitable rights. But can an exception to a peremptory human right exist? By analogy with the preclusion of limitation, one would assume that the answer is "no". Such an exception, however, can exist: the peremptory nature of a human right is not precluded if this right recognises a variety of exceptions. One needs only to recall two principles of international law, the prohibition of the use of force and the prohibition of intervention, in order to support this statement. Both principles are unquestionably of a peremptory nature, still both recognise exceptions: the use of force is lawful in self-defence or upon an authorisation by the U.N. Security Council, while enforcement measures taken under Chapter VII do not qualify as intervention in line with Article 2, paragraph 7. To put it another way, peremptory rights and obligations form part of *ius cogens* along with their inherent exceptions, which also apply to peremptory human rights.

The destruction of a civil aircraft used in the execution of a terrorist attack affects, to various extents, several human rights. Among these, the right to life is by far the most important, although, under given circumstances, an important guarantee of criminal procedure, which is regarded as a fundamental right, as well as the prohibition of inhuman treatment, may likewise come into prominence. The respect for these rights should be examined in relation to the following groups of persons: terrorists seizing and controlling the aircraft, passengers on board the aircraft, members of the crew, potential victims on the ground and close relatives of victims. The problem of shooting down a civil aircraft requires a different approach in each case, since — in spite of human rights being universal and equal — not all of the aforementioned rights bear relevance to every group. For that reason a possible infringement of the right to life should be scrutinised with respect to the terrorists, passengers and crewmembers and the potential victims on the ground, while the observance of the procedural guarantee in question and the prohibition of inhuman treatment needs to be studied in relation to the terrorists and to the close relatives of victims, respectively.

The right to life is the most fundamental right within the system of international human rights. Its outstanding significance stems partly from the nature of the protected value and partly from the fact that the absence of respect for this right renders all other human rights meaningless. Every major human rights instrument protects the right to life. It appears, for instance, in Article 3 of the Universal Declaration of Human Rights of 1948, in Article 6 of the International Covenant on Civil and Political Rights of 1966, in Article 2 of the European Convention on Human Rights of 1950, in Article 4 of the American Convention on Human Rights of 1969, in Article 4 of the African Charter on Human and Peoples' Rights of 1981, in Article 5 of the Arab Charter on Human Rights of 1994, and in Article II-62 of the Charter of Fundamental Rights of the European Union. These provisions formulate the right to life differently, yet the essence of protection can be considered identical in each instrument.

The obligation that the right to life confers upon states is twofold. On the one hand, states must refrain from the arbitrary deprivation of life (negative obligation); and on the other hand they are obliged to take measures to protect individuals, whose lives are put at risk by the acts of others (positive obligation).[77] The negative obligation to protect life is relatively easy to describe: save a few strictly construed exceptions, states must not deprive individuals from their lives. However, the instruments enumerated above slightly differ over the breadth of these exceptions. Some do not mention exceptions at all[78] and a few contain only the death penalty.[79] The European Convention on Human Rights, conversely, includes a detailed list of exceptions. This convention originally recognised four exceptions, specifically capital punishment (since abolished by two optional protocols), the defence of persons from unlawful violence, measures taken to realise a lawful arrest or to prevent the escape of a lawfully detained person, and actions lawfully taken for the purpose of quelling a riot or an insurrection.[80] If an act of the state does not fall under any of these exceptions, then it is deemed as "arbitrary" and, as such, a violation of the right to life. The content of the positive obligation to protect life is less self-evident. The rule, according to which states must take measures to protect persons from life-threatening acts of others, does not mean that they have to be able to successfully save everybody anytime, anywhere and from anyone.[81] This would obviously be an impossible burden. Nonetheless, if authorities encounter an infringement of that right, or an imme-

diate risk thereof, they need to take action in the interest of the victim. The positive aspect of the protection of life rather requires that states establish conditions, primarily via the adequate development of their domestic legal systems, wherein an effective investigation of acts violating or endangering the right to life, as well as the taking of official preventive or punitive measures, becomes possible. A failure to carry out these obligations — for example, the denial of an investigation of a fatality caused by the action of security forces — violates the right to life just as much as an arbitrary deprivation of life.

In international human rights instruments, the right to life always appears among the rights that are not subject either to limitation or, save a few exceptions, to derogation.[82] As already mentioned, the prohibition of derogation can be explained in two ways. A right does not allow derogation either because of its peremptory nature or because its temporary suspension can never — not even in order to avert a peril threatening the very existence of a state — prove necessary. Keeping in mind the characteristics and outstanding importance of the right to life, the prohibition of its derogation undoubtedly derives from its peremptory nature. This argument is further underpinned by the fact that several significant international forums have explicitly regarded this right as *ius cogens*. For example, the Human Rights Committee established by the International Covenant on Civil and Political Rights has stated that, "The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, paragraph 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant *(e.g., articles 6 and 7)* ."[83]

In case of the destruction of a rogue civil aircraft, the right to life prevails in both its positive and negative manifestations. Because of the positive aspect, states must protect the right to life of potential victims on the ground, but this obligation also exists with respect to the passengers and crew of the airplane. At the same time, the negative aspect of the right to life obliges states to refrain from the deprivation of lives of passengers and crewmembers aboard as well as from the elimination of terrorists as long as such action does not fall under the relevant exception to the right to life that is invoked when the protection of persons from unlawful violence is at stake. The composition of the group of persons on board the aircraft, therefore, still needs to be observed when examining the lawfulness of a shoot-down.

If terrorists are the only occupants of an attacking civil aircraft, then a state, within the framework of the defence of persons from unlawful violence, may bring it down. (Since the protection of human rights — in this case the protection of the right to life of potential victims on the ground — is an obligation that can be derived from the U.N. Charter, the shoot-down does not violate Article 3*bis* of the Chicago Convention of 1944.) Nonetheless, this measure will not necessarily be lawful. Terrorists may be legally deprived of their right to life only under certain circumstances.[84] First of all, the existence of an illegal conduct carried out by means of civil aircraft and directed against the lives or physical integrity of others, must be proven beyond doubt. This requirement obviously does not pertain when, for example, the perpetrators merely wish to flee to another country by a stolen civil aircraft in order to seek political asylum there. Their destruction would be unlawful even if the flight profile of the aircraft used for their escape were declared by the territorial state to pose a potential terrorist threat. Secondly, the action must be planned with utmost caution and needs to be "absolutely necessary". The burden of proof rests on the state. Since, until the very last moment, one can only make suppositions about the true intentions of terrorists hijacking a civil aircraft, a cautious and thorough planning of a shoot-down is impossible. Exercises as well as general preparations are necessary, yet by themselves insufficient, in fulfilling this requirement. The use of lethal force can be particularly awkward if the territorial state wants to destroy a rogue aircraft at a safe distance from its presumed target. Thirdly, in the wake of such action, the state has to initiate a prompt, substantial and effective investigation exposed to public scrutiny with a view to clarifying the circumstances of the incident.[85] Should that investigation reveal abuses, the individuals concerned have to be held accountable. If all these criteria are met, a shoot-down will qualify as lawful. However, if any of them are missing, an infringement of the right to life can be determined irrespective of the fact that the armed forces of the state did indeed destroy terrorists, as illustrated by the case of McCann and Others versus the United Kingdom.[86]

The other possible scenario is when passengers and members of the crew are also present on board an aircraft used for terrorist purposes. In this case the territorial state finds itself in an absurd situation: due to the positive aspect of the right to life, it should simultaneously protect the lives of persons on the ground and aboard the airplane; in addition, given its negative obligation prohibiting the arbitrary deprivation of life, it must refrain from sacrificing the passengers and the crew. In spite of this latter group being virtually beyond help, the state cannot deliberate and choose from among its obligations. The right to life does not

recognise any exceptions in order to permit the sacrifice of any group of persons and, thanks to the requirement of rationality as well as the peremptory character of this right, the doctrine of distress cannot be invoked either. Since numerical considerations bear no relevance whatsoever regarding the respect for the right to life, we may draw the conclusion that *even the presence of a single innocent individual renders the destruction of an aircraft unlawful, regardless to the number of lives this measure might save*. This result excellently reflects the untenable nature of a utilitarian approach to the limitation of fundamental rights, making it clear that "the end may not justify the means".[87] Were a state still to opt for shooting down the aircraft, this conduct — its possible rationality and positive moral assessment notwithstanding — would constitute a grave violation of the right to life of the sacrificed individuals. It would not alter the legal qualification either, if the passengers and crewmembers on board the aircraft expressly consented to the shoot-down. The recognition of such a declaration, which in essence is a voluntary renouncement of the right to life, would raise dilemmas reminiscent of euthanasia. In addition, if a state brought down an attacking plane over an inhabited area and the falling wreckage caused fatalities on the ground, a violation of the right to life of those victims could similarly be determined.

Given its peremptory and non-derogable nature, any departure from the observance of the right to life is unacceptable even during an international armed conflict. Hence, the right to life, coupled with the relevant guarantees of humanitarian law, further strengthens legal arguments pertaining to the unlawfulness of the destruction of a civil aircraft that is controlled by enemy combatants but that carries civilians as well. Moreover, that right rules out the legality of the sacrifice of civil passengers and crew, not only in international armed conflicts, but also in armed conflicts that are not of an international character, such as civil wars.[88] Remarkably, since the right to life is due to all, the nationality of crewmembers and passengers aboard the aircraft influences the legal qualification of shooting down an aircraft neither during an armed conflict nor in peacetime.)

Depending on the actual circumstances of the case, the destruction of civil aircraft might also be problematic from the standpoint of the right to a criminal procedure — the presumption of innocence. The principle of the presumption of innocence necessitates quite simply that everyone have the right to be presumed innocent until proven guilty according to law.[89] The design of the destruction of rogue civil aircraft is apparently rooted in the presumption of guilt of person or persons controlling it: in case an aircraft behaves in a suspicious manner, it automatically exposes itself to the risk of being destroyed. Suppose a well-informed news channel broadcasts breaking news on a civil airplane, which is flying over the middle of the Atlantic Ocean and has deviated from its prescribed route for an unknown reason and fails to react to the instructions of flight control. If someone, having heard the news, were to call the authorities claiming that the aircraft in question is preparing to commit a terrorist attack, these authorities — although unaware of the exact reason for the unusual behaviour — would probably label the plane as rogue, thereby presuming the guilt of persons controlling it thousands of miles from its anticipated target. The violation of the presumption of innocence would become complete upon the shooting downing of the airplane by a state acting beyond the limits of the only applicable exception to the right to life.

Finally, we should briefly recall a less obvious aspect of human rights issues concerning the destruction of civil aircraft: the legal status of victims' relatives. The international system of human rights protection is not at all indifferent to the anguish endured by the close relatives of a victim of flagrant violations of the most fundamental human rights, including the right to life. Various human rights bodies strive to do everything they can to ameliorate the condition of relatives by declaring the mental suffering induced by infringements of human rights to the next-of-kin of victims to be a human rights violation, by the state.[90] Therefore, in the wake of a terrorist attack carried out by means of civil aircraft, a state can be held accountable not only for a violation of its positive or negative obligations emanating from the right to life, but also for the grief of relatives of innocent individuals having lost their lives on the ground or on board the airplane. States may evade claims of inhuman treatment in only one case. Since the anguish emerging on the side of relatives from a lawful deprivation of life is irrelevant from the point of view of human rights, an appropriate destruction of civil aircraft carrying exclusively terrorists in conformity with the relevant exception to the right to life, and in absence of collateral casualties, does not constitute inhuman treatment against the relatives of perpetrators.

HUNGARIAN IMPLICATIONS OF THE PROBLEM OF SHOOT-DOWN

Among the military tasks enumerated by the Act on National Defence and Hungarian Defence Forces, the defence of independence, territorial integrity, air-

space, people and property of the country against external attacks in addition to co-operation in the struggle against international terrorism and the contribution to the suppression of grave acts of violence committed by force of arms or in an armed manner under Section 40/B, paragraph 2, of the Constitution bear relevance to our particular topic.[91] Having considered the peculiarities of aerial warfare and the shortness of time available for defensive countermeasures, however, the legislator reckoned that the accomplishment of these tasks by the air force required special rules of engagement. Thus a recent amendment to the act states the following: "Section 131 (1) The responsibilities of high readiness allied and national air defence forces participating in the defence of airspace of the Republic of Hungary extend to aircraft violating (unlawfully using) the airspace, lacking identification, flying with unknown intent or performing hostile activities as well as breaching any rule of the air, or being in a state of distress. [...] Section 132 (1) Aircraft flying in national airspace may be fired upon with warning or destructive intent with weapons of the high readiness national and allied air defence forces that are participating in the defence of the airspace of the Republic of Hungary, if a) On-board weapons are used, or b) There is a grave act of violence that otherwise (by other weapons or means) endangers lives and property or causes a disaster, or c) It may be definitively concluded that there is an attempt to perform an act under paragraphs *a)* or *b),* and the aircraft intentionally fails to obey the instructions of high readiness air defence forces. (2) In a case envisaged by paragraph 1, sub-paragraph c), the notice as well as the warning fire may be omitted if, under the circumstances of the case, there is insufficient time thereto, and a delay would result in injury to lives or property."[92]

The cited sections of the Act on National Defence clearly indicate an effort to establish the possibility of the destruction of civil aircraft that are used for the execution of a terrorist attack, although the legislator remarkably refrained from framing it in explicit form. As no adjectives qualifying or specifying legal status stand before the word "aircraft", this expression embraces all conceivable aircraft, including state and civil airplanes bearing national or foreign registration. The use of high readiness forces, therefore, depends exclusively on the conduct of a given plane. Any airplane might be subject to measures taken by national air defence forces or that of the North Atlantic Treaty Organisation if it violates Hungarian airspace, fails to identify itself, flies with unknown intent, carries out hostile activities, breaches a rule of the air, or otherwise gets into trouble. Nonetheless, Section 131, paragraph 1, does not go into details with regard to the specific means (e.g., interception, identification, escort out of a prohibited zone, forced landing) that can be employed by such forces in the course of carrying out their responsibilities.

The act mentions only the most extreme of measures: Section 132 lays down the rules of engagement for the air force, including the conditions of warning fire and the use of lethal force.[93] Naturally the content of this section does not encompass each and every scenario contained in Section 131, paragraph 1; it only pertains to aircraft performing hostile activities. Manifestations of such activities are detailed in three sub-paragraphs of Section 132, paragraph 1. Even though sub-paragraph c) refers to cases respectively governed by paragraphs a) and b), it seems that altogether four rather than three forms of behaviour may be deemed as hostile activities under this section: the use of on-board weapons, the perpetration of grave acts of violence endangering lives and property by means other than on-board weapons, the causing of a disaster by means other than on-board weapons, and an attempt to carry out any of the foregoing acts. As such, sub-paragraph b) contains not one, but two conducts: the first presupposes the execution of an act, whereas the second requires a particular, albeit somewhat vaguely worded, result assuming the form of a disaster.

At first glance, the behaviour of an aircraft seeking to destroy its target by direct impact might as well fall within the context of two sub-paragraphs of Section 132, paragraph 1. If the terrorists achieve their objectives, their action qualifies either as a grave act of violence endangering lives and property committed by means other than on-board weapons or as a creation of a disaster in accordance with sub-paragraph b). In these cases, however, the air defence forces can no longer repel the attack. Hence the destruction of civil aircraft attempting to commit such an attack is rather based on sub-paragraph c) that, as opposed to sub-paragraphs a) and b), relates to conduct not yet completed at the time of the military countermeasure. Sub-paragraph c), nevertheless, does not grant a *carte blanche* for shooting down every suspicious airplane. The unidentified nature of an aircraft or the unknown intent of persons controlling it yields insufficient ground for the use of weapons. It is permitted only when "it may be definitively concluded" that the plane has hostile intentions. Unfortunately, the regulation fails to shed light on the factors, from which this conclusion can be drawn. The legislator probably had an unusual flight profile, a lack of communication or obedience to instructions, or an incoming concrete terrorist threat in mind. However, it has

been pointed out on a number of occasions in the course of analysing international law that the existence of one or more signs of this kind does not constitute decisive proof of an intention to commit a terrorist attack. The possibility of error or deceit can never be totally ruled out. Section 132, paragraph 2, which sanctions shooting down an aircraft without any warning if "under the circumstances of the case, there is insufficient time thereto, and a delay would result in injury to lives or property", appears especially awkward from this point of view.

In addition to such practical reservations, the following question should also be raised: How can the rules of engagement contained in the Act on National Defence be reconciled with the Constitution? In absence of a state of martial law, a state of emergency or a decision of the Parliament under Section 19, paragraph 3, sub-paragraph j) of the Basic Law,[94] the constitutional basis of the use of air force lies in Section 19/E, paragraph 1: "In the event of an unexpected invasion by external armed groups into the territory of Hungary, the Government shall take immediate action, in accordance with the defence plan approved by the President of the Republic, with forces commensurate to the gravity of the attack and prepared for such role, until a decision on the declaration of a state of emergency or a state of martial law, with a view to repel the attack as well as to protect the territorial integrity of the country with national and allied high readiness air defence and air forces, to ensure constitutional order and the security of lives and property, to protect public order and safety."[95]

Any "peacetime" use of air force is, as a general rule, permissible exclusively in conformity with this provision. However, even a simple grammatical interpretation of the text reveals that Section 19/E, paragraph 1, does not cover every conceivable instance of military action against civil aircraft used for terrorist purposes. Under this section, the air force can only be used in the event of an attack launched from abroad by an external armed group. The expression "unexpected invasion [...] into the territory of Hungary" makes it clear that an attack under Section 19/E, paragraph 1, is initiated from beyond Hungarian borders. The adjective "external" used to characterise the armed group, however, leaves room for two divergent interpretations. Restrictively construed, it means "foreign". It can also, however, be interpreted with regard to its physical, geographical meaning. In this latter sense the phrase "external armed group" comprises — regardless of the nationality of its members — every state or non-state organisation, which performs its activities from a base beyond the borders of the country. In the light of a contextual interpretation of the Constitution, this seems to be the correct meaning. If we construed the concept of "external armed group" narrowly, it would create a gap in the constitutional provisions concerning extraordinary situations. We would come to an absurd conclusion, according to which the state would not be able to take immediate action against armed groups of Hungarian nationals attacking from abroad without first declaring a state of emergency. Still Section 19/E, paragraph 1, does not authorise the use of air force to repel terrorist attacks launched by domestic or foreign armed groups from within the country. Another issue also needs to be clarified. Can it be considered an invasion, *stricto sensu*, if members of an armed group simply enter the Hungarian airspace as passengers and only then seize the aircraft?

The first phrase of Section 19/E, paragraph 1, by itself, might allow for the interpretation that the repulsion of an invasion by an external armed group and the protection of territorial integrity by the air force actually constitute two distinct obligations, and thus, the latter does not necessitate that an attack be launched from abroad. It stems from the application of a conjunction — namely, "*illetőleg*" in Hungarian — that frequently causes problems in the interpretation of legal texts. The wording of the rest of the section, particularly the phrase "with forces commensurate to the gravity of the attack and prepared for such a role", nevertheless, indicates that the use of the air force stands coherently within the provision as a potential method of defence against an invasion.

The use of armed forces is also permissible in a state of emergency. Section 40/B, paragraph 2, of the Constitution states that, "The armed forces may be employed in the event of armed actions aimed at the overthrow of constitutional order or the acquisition of absolute power, or in case of grave acts of violence committed by force of arms or in an armed manner endangering lives and property on a large scale, during a state of emergency declared in accordance with the provisions of the Constitution, if the use of police forces proves insufficient."[96]

Since "grave acts of violence committed by force of arms endangering lives and property on a large scale" obviously include terrorist acts that involve the impact of an aircraft, this provision of the Basic Law also renders the use of air force possible for anti-terrorist purposes. Furthermore, unlike Section 19/E, paragraph 1, this rule does not determine the direction of the attack; therefore, it may provide a basis for the destruction of any aircraft seeking to commit an act of terrorism. The only problem is that there would hardly ever be a chance to declare a state of emergency prior to the impact given the size of the

Republic of Hungary and the shortage of time available for taking countermeasures.[97] Thus a prompt action is imaginable only during an already existing state of emergency. In the absence of such action, only Article 19/E, paragraph 1 could be applicable.

The same applies to the third possible scenario for the use of armed force: the state of martial law. Should it become certain in the phase of approach that the conduct of persons controlling an aircraft attempting to carry out a terrorist attack is attributable to a state (which is fairly unlikely), a state of martial law may, in principle, be declared due to the imminent danger of an armed attack by a foreign power. In practice, however, it would be nearly impossible to do so prior to impact. As such, a timely response by the air force is conceivable only if a state of martial law has already been declared in the country in the wake of a state of war or an imminent danger of armed attack by another state.[98]

Hence the air force is to be employed in different manners and breadths according to whether a state of "peace", emergency or martial law prevails. The scope of the threats, against which air defence forces may resort to the use of weapons in concordance with Section 132 of the Act on National Defence, differ accordingly. Contrary to a state of emergency or martial law, under normal circumstances — when a terrorist attack committed by means of civil aircraft is most likely to occur — the air force is authorised to fire exclusively at airplanes committing an external attack in the sense of Section 19/E, paragraph 1, of the Constitution. Although Section 19, paragraph 3, sub-paragraph j) empowers the Parliament to rule on a different use of armed forces both abroad and within the country, the likelihood of such a ruling in practice is negligible due to the reasons mentioned above with regard to the state of emergency as well as martial law.

Could Section 5 of the Constitution possibly broaden this restrictive interpretation? It states that, "The State of the Republic of Hungary defends the freedom and sovereignty of the people, the independence and territorial integrity of the country, and its borders as established in international treaties."[99]

Section 5 lays down an "unavoidable obligation" that requires the state to prepare for and take measures to eliminate both internal and external threats.[100] Nonetheless, the provision does not authorise any use of armed forces. It merely sets forth a general rule that is spelled out by other sections of the Basic Law, including the ones examined above. The fulfilment by armed forces of the defensive obligation originating from Section 5, therefore, demands the observance of the entire Constitution.[101]

Additional provisions of the Constitution limit even further the possibility of the destruction of rogue civil aircraft by air defence forces. Similarly to international law, domestic law is not indifferent to the composition of the group of persons staying on board the airplane marked for destruction. In other words, the human rights aspects of shooting down an aircraft play a significant role even from the perspective of constitutional law. The Republic of Hungary is party to the most important universal and regional human rights treaties, which — along with the relevant customary law — now form an integral part of the Hungarian legal system by virtue of Section 7, paragraph 1, of the Constitution and the promulgating enactments.[102] The international protection of the rights of individuals is, however, purely complementary and subsidiary as compared to the national protection of fundamental rights. Thus, international mechanisms are triggered only when the state bearing primary responsibility for the protection of human rights is unable or unwilling to fulfil its obligations. In compliance with these obligations, the Hungarian Constitution attaches outstanding importance to the protection of fundamental rights: "Section 8 (1) The Republic of Hungary recognises the inviolable and inalienable fundamental rights of man. The respect for and protection of these rights is a primary obligation of the State. (2) In the Republic of Hungary, regulations concerning fundamental rights and duties are determined by law; however, it may not limit the essential content of any fundamental right."[103]

A list of fundamental rights granted by the Constitution is to be found in Chapter XII, which naturally contains all three rights mentioned with respect to international human rights. It is sufficient for our purposes, however, to scrutinise only one of these rights — the right to life. According to Section 54, paragraph 1, of the Constitution, "In the Republic of Hungary, everyone has the inherent right to life and human dignity, of which no one shall be arbitrarily deprived".[104]

Understandably the right to life, as a fundamental right guaranteed by the Constitution, resembles its international counterpart. Human life is the most precious value in our domestic legal order as well. Its protection presents a twofold obligation for the Hungarian state: on the one hand, it must refrain from any arbitrary deprivation of life; on the other hand, it has to establish conditions necessary for the enjoyment of the right to life "by way of law-making and organisational measures".[105] In conformity with international law, the Constitution also precludes any limitation of this right, and, thus it can be suspended neither in a state of emergency nor in a state of martial law.[106]

However, the Hungarian constitutional order bears a unique feature in comparison to the international protection of human rights. The right to life that is developed in the Hungarian Constitution is inseparably intertwined with the right to human dignity. The Constitutional Court has declared that, "Human life and human dignity constitute an inseparable unity and a value superior to everything else. The right to life and human dignity likewise constitutes a unified, inseparable and non-limitable fundamental right, which forms the basis of and a prerequisite for several other fundamental rights."[107]

The importance of such perception of human life and human dignity cannot be overemphasised. Human dignity shields the untouchable core of individual autonomy and self-determination and sets absolute limits for any external interference either by the state or by other individuals. This conception of human dignity as well as its link with the right to life secures the equal value of human lives, eliminates a value-based distinction thereof, and, finally, it rules out the possibility of sacrificing individuals in the name of public interest.[108]

Still the Basic Law tolerates the deprivation of life on an exceptional basis, as Section 54, paragraph 1 merely precludes the "arbitrary" taking of life. Unlike the aforementioned sources of international law, the catalogue of human rights in the Constitution does not contain an exhaustive enumeration of exceptions — these should be sought in other acts of Parliament. While it may appear that the Hungarian legal system recognises more instances of non-arbitrary deprivation of life than international law, this is not the case. The quantitative differences originate from the comprehensiveness of domestic norms and the more general nature of international regulation. Each exception mentioned in Hungarian enactments, in fact, more or less fits into a category that is accepted by international law.

While examining the domestic lawfulness of the destruction of civil aircraft used for terrorist purposes, two exceptions require closer scrutiny, both of which are provided for by the Criminal Code. Section 29 on legitimate defence reads, "(1) No one shall be punishable, whose conduct is necessary for the prevention of an unlawful attack directed against his own person, property, or that of others, or the public interest, or of an imminent threat thereof."[109] In addition, Section 30 incorporates the doctrine of extreme necessity, "(1) No one shall be punishable, who rescues his own person or property, or that of others, from an imminent and otherwise not preventable peril, or acts so in defence of the public interest, provided that the creation of peril is not imputable to him, and his conduct causes a lesser injury than that he sought to prevent."[110]

Both doctrines may prove to be tempting arguments to those who try to justify a shoot-down. (Needless to say, they should be confused neither with self-defence nor with distress under international law.) Legitimate defence could *prima facie* substantiate the destruction of aircraft occupied exclusively by terrorists, while extreme necessity would seem to legitimise the use of lethal force against passenger airplanes, if it definitely saves more lives on the ground.[111] *A state, however, cannot invoke legitimate defence or extreme necessity*. These doctrines have a role in interpersonal relations, in the domain of individual criminal responsibility. They pertain to situations, wherein the state is in not in position to render assistance to individuals. Conversely, the state is "present" in the event of the destruction of rogue aircraft, since the person granting permission to fire acts on behalf of the state and within the framework of public authority. Hence, the shoot-down as an act of the state cannot be justified by either doctrine, not to mention the fact that neither ensures the subjective right to kill.[112]

Bearing all that in mind, one can finally formulate a legal judgement on the constitutionality of the destruction of civil aircraft used for the execution of a terrorist attack. Similar to international law, here the conclusion is also determined by the legal status of persons on board. First we examine the scenario, in which only terrorists occupy the airplane. In absence of a state of emergency, a state of martial law or a relevant decision of the Parliament under Section 19, paragraph 3, sub-paragraph j), the air force may resort to the use of weapons *solely with a view to destroy aircraft carrying out an external attack in the sense of Section 19/E, paragraph 1, of the Constitution*. The deprivation of lives of terrorists is justified by international human rights norms (i.e., the defence of persons from unlawful violence) transformed into domestic law by virtue of Section 7, paragraph 1, of the Basic Law as well as by the positive obligation of the Hungarian state to protect the lives of potential victims on the ground under Section 8, paragraph 1, and Section 54, paragraph 1. If the conduct of terrorists coming under the effect of Section 19/E, paragraph 1, simultaneously qualifies as armed attack by another state, the elimination might also eventually be legitimised by their combatant status. In such cases a state of martial law can also be declared, which would expand the scope of the use of air defence forces.

In absence of a state of emergency, a state of martial law or an adequate decision by the Parliament, the repulsion of terrorist attacks launched from with-

in the country lacks constitutional basis. It should be emphasised that a constitutional authorisation for the domestic use of armed forces in "peacetime" rather than a legal basis for the killing of terrorists is absent. It is also noteworthy that the terrorists cannot be lawfully eliminated either, if it becomes absolutely certain that their action merely seeks to damage property. In the Hungarian system of the protection of fundamental rights, a human being's right to life — being an absolute value — can only be put into question when other human lives are being threatened. Consequently, acts of violence that endanger property in the sense of Section 132, paragraph 1, of the Act on National Defence, if not threatening to the lives of others, do not substantiate the killing of perpetrators. Finally, in accordance with the requirements of international law, following the shoot-down, the Hungarian state must initiate a prompt, substantial and effective investigation that is exposed to public scrutiny in order to reveal the circumstances of the incident.

If there are not only terrorists, but also passengers or crewmembers on board a rogue aircraft, the air force *must refrain from the use of lethal force*. The Hungarian state is not entitled to dispose the lives of innocent individuals aboard, whose sacrifice would gravely violate their right to life and human dignity. The legality of shooting down an aircraft carrying passengers or members of the crew is likewise precluded by the existing international obligations of the Republic of Hungary as well as by the related obligations arising from Section 7, paragraph 1, of the Constitution: "Section 7, paragraph 1, of the Constitution also means that the Republic of Hungary shall participate in the community of nations by virtue of provisions of the Constitution; this participation is, therefore, a constitutional order for domestic law. It follows that the Constitution and the domestic law must be interpreted in a way that the generally recognised principles of international law truly prevail. [...] It is isolation from international law that would be contrary to Section 7, paragraph 1, of the Constitution. [...] No municipal law can prevail against an explicit and peremptory norm of international law bearing contradictory content."[113]

CONCLUSIONS

The problem of destroying a civil aircraft that is used for terrorist purposes is undoubtedly one of the gravest legal dilemmas of our time. In spite of the fact that the lawfulness or unlawfulness of a shoot-down is determinable on the basis of existing legal rules and categories, it would be overstating the situation to say that either international law or domestic constitutional law is perfectly capable of handling every aspect of the problem. The lack of "preparedness" becomes evident especially when there are also passengers on board an airplane that is being used by terrorists. It would be, nevertheless, unjust to blame the law itself, as it is not meant to make choices between innocent lives.

The point of departure of any analysis of the shooting down of an aircraft under international law is necessarily Article 3*bis* of the Chicago Convention of 1944. As this provision bans the destruction of civil aircraft in general terms, it, therefore, needs to be verified that international law permits rather than prohibits the bringing down of rogue civil airplanes. In fact Article 3*bis* contains an exception by reference to the rights and obligations of states set forth in the U.N. Charter, but — as we have seen — it does not allow by itself the destruction of civil aircraft used for the execution of a terrorist attack. Moreover, it only plays a secondary role in all regarding qualification. The lawfulness or unlawfulness of shooting down an aircraft depends on the composition and legal status of the group of persons on board rather than the status of the particular aircraft as an object.

The terrorist attacks of September 11th, 2001 have proven that, under certain circumstances, even a civil aircraft can cause destruction comparable to the results of an armed attack. Consequently, such terrorist acts may prompt the attacked state to invoke the right to individual or collective self-defence, provided that the action reaches the minimum gravity of an armed attack, and can be attributed to another state. However, the right of individual or collective self-defence, *per se*, may not serve as a basis for shooting down the aircraft. This right merely permits the use of force in general, but it does not allow states to freely choose the means and methods of warfare. If an act of terrorism simultaneously qualifies as armed attack and constitutes an initial step of an international armed conflict, then the legality of a shoot-down should be examined in the light of the automatically applicable rules of international humanitarian law. In the case that only terrorists occupy the aircraft, two conclusions are imaginable. If these individuals are to be deemed as combatants, the plane can lawfully be brought down. If they are not combatants, international human rights law rather than humanitarian law will determine the legality of their elimination. On the other hand, if there are also passengers or civil crewmembers on board, the norms of humanitarian law preclude the destruction of the aircraft. (The outcome is essentially identical with

regard to rules governing armed conflicts that are not of an international character.)

International human rights law determines the qualification of a shoot-down under international law in the remaining scenarios, that is to say, when the conduct of the airplane does not lead to the invocation of self-defence. Three human rights bear particular relevance in this respect: the right to life, the presumption of innocence and the prohibition of inhuman treatment. An analysis of the right to life reveals that a rogue airplane can lawfully be shot down only if it is occupied exclusively by terrorists. The legal ground for shooting down an aircraft is provided by an exception to the right to life, namely the defence of persons from unlawful violence. Conversely, the attacked state finds itself in an absurd legal situation, if there are also passengers or crewmembers on board: on the one hand, it is obliged to protect the lives of persons both on the ground and aboard the airplane; on the other hand, it must refrain from sacrificing the passengers or the crew. Due to the fact that the doctrine of distress is inapplicable for a number of reasons, the state cannot pick and choose from its obligations. As a result, the destruction of aircraft carrying passengers or members of the crew is never lawful, regardless of the ratio of lives to be saved and sacrificed. (The right to life is a non-derogable right, the observance of which can be suspended during neither an international nor a non-international armed conflict. Hence this right further strengthens the rules of humanitarian law precluding the sacrifice of passengers or crew.)

Given that the true intentions of terrorists become absolutely certain only moments prior to the airplane's impact, the shooting down of any suspicious airplane — especially if it occurs at a great distance from the presumed target — can also prove awkward from the perspective of the presumption of innocence. Furthermore, a state can be held responsible not only for the non-performance of its obligations stemming from the right to life, but also for the anguish caused to the next-of-kin of victims on the ground or aboard the aircraft. The system of international human rights protection considers such mental pain to be inhuman treatment. This infringement, however, does not pertain, when a state lawfully destroys a plane carrying exclusively terrorists.

As might be expected, the results of the examination of Hungarian constitutional law are in conformity with the findings of the analysis of international law. Despite the fact that the rules of engagement set forth in Section 132 of the Act on National Defence apparently strive to enable the destruction of any civil aircraft used for the execution of a terrorist attack, the provisions of the Constitution on the use of armed forces and on fundamental rights significantly limit the possibility to resort to lethal force. Neither legitimate defence nor extreme necessity, as provided for in Sections 29 and 30 of the Criminal Code can be invoked by the state, and as such, neither one can broaden its freedom of action.

The question of shooting down an aircraft that is occupied exclusively by terrorists and contains no passengers or crewmembers unveils an interesting anomaly. In "peacetime" the air force may only open fire on airplanes carrying out an external attack in the sense of Section 19/E, paragraph 1, of the Constitution. In absence of a state of emergency, a state of martial law or a decision of the Parliament under Section 19, paragraph 3, sub-paragraph j) of the Basic Law, the repulsion by armed forces of terrorist attacks launched from within the country lacks constitutional basis. It needs to be emphasised once again that it is a constitutional authorisation for the domestic use of armed forces in "peacetime" that is missing rather than a legal basis for the killing of terrorists. This problem ceases to exist in the wake of a declaration of a state of emergency, a state of martial law or a relevant decision by the Parliament, but in practice, the arrival at such a declaration or parliamentary decision is most unlikely to occur before the impact of the attacking aircraft. It should be also be added that, due to the supreme value of human life, even a plane carrying exclusively terrorists cannot be lawfully destroyed if it is proven beyond reasonable doubt that the perpetrators only seek to cause property damage.

In the case, however, that there are also passengers or crewmembers aboard a rogue aircraft, the air force must refrain from using lethal force. The Republic of Hungary is not entitled to dispose the lives of innocent persons on board. If it nevertheless were to opt for the destruction an aircraft, it would gravely violate both the right to life and human dignity of the sacrificed individuals and the state's existing international obligations.

NOTES

1. The present study can and does not seek to define the concepts of "terrorism", "terrorist act" or "terrorist". It may nevertheless be stated that an intentional attack committed by way of direct impact of civil aircraft anywhere, anytime and against any group of persons can reasonably be considered a terrorist act. It is equally evident that such an act constitutes a blatant violation of law perpetrated either by a state or by individuals.

2. See, Kay HAILBRONNER, "State Aircraft." In *Encyclopaedia of Public International Law. Vol. 11. Law of the Sea, Air and Space* (ed. Rudolf BERNHARDT). New York–London: North-Holland Publishing Co. – Collier Macmillan Publishers, 1982, p. 317.
3. Vertically, airspace extends all the way to space that, bearing *res communis omnius usus* status, cannot be submitted to state sovereignty. The altitude of borderline between airspace and space is uncertain; however, state practice deems activities performed at an altitude of approximately 100 kilometers as activities in space. It is noteworthy that airspace over the high seas can neither be object of territorial sovereignty as it also qualifies as *res communis omnius usus*. Nevertheless, certain coastal states have drawn the borders of their air defence identification zones in a way that it reaches far into the airspace above the high seas.
4. Convention relating to the Regulation of Aerial Navigation, Paris, 13 October 1919, Article 1.
5. Convention on Commercial Aviation, Havana, 20 February 1928, Article 1.
6. Chicago Convention of 1944, Article 1: "The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory." The convention and its amending protocols were promulgated in Hungary by Law Decree No. 25 of 1971. The concept of state territory is specified by Article 2, which reads: "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."
7. See, Chicago Convention of 1944, Articles 5 and 6.
8. *Ibid.*, Article 5.
9. See, *ibid.*, Article 9, paragraphs a) and b).
10. The exact technical details of the procedure of interception (e.g., direction and distance of approach, visual identification, applicable manoeuvres and signals, the establishment of contact on an emergency frequency) are contained in Annex 2 of the Chicago Convention, which — lacking legally binding force — serves rather as a set of guidelines. See, Annex 2 to the Convention on International Civil Aviation: Rules of the Air, Appendix 1, Section 2: Signals for Use in the Event of Interception; Appendix 2: Interception of Civil Aircraft; and Attachment A: Interception of Civil Aircraft. Certain authors maintain that these recommendations of the International Civil Aviation Organization reflect customary law as a result of their incorporation into domestic legal rules and the concordant practice of states. See, Joseph H. H. WEILER, "Korean Air Lines Incident (1983)." In *Encyclopaedia of Public International Law*, p. 168.
11. For more on some of these incidents, see *Aircraft Downed During the Cold War and Thereafter* (http://www.silent-warriors.com/shootdown_list.html); Farooq HASSAN, "The Shooting Down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers." *International and Comparative Law Quarterly*, Vol. 33. Pt. 3. (July 1984), pp. 717–718; Amir A. MAJID, "Treaty Amendment Inspired by Korean Plane Tragedy: Custom Clarified or Confused?" *German Yearbook of International Law*, Vol. 29. (1986), pp. 197–215.
12. Cf., MAJID, *Op. cit.*, 198. ff.
13. The International Court of Justice could decide on the merits in neither of these cases. See, Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria), Judgement of 26 May 1959, I.C.J. Reports 1959, 127; Case concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Order of 22 February 1996, I.C.J. Reports 1996, 9. (In addition to Israel, the United Kingdom and the United States also instituted proceedings against Bulgaria — with a similar outcome.)
14. See, Armando Alejandre Jr., Carlos Costa, Mario de la Pena and Pablo Morales v. Republic of Cuba, Case 11.589, Report No. 86/99, 29 September 1999, OEA Ser.L/V/II.106, doc. 3, rev.
15. Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3*bis*), Montreal, 10 May 1984.
16. Chicago Convention of 1944, Article 3*bis*, paragraphs a) and b).
17. Regrettably an "accidental" destruction of civil aircraft by armed forces of a state has already occurred. On October 4, 2001 a Sibir Airlines flight from Tel Aviv to Novosibirsk was hit above the Black Sea by a defective Ukrainian air defence missile fired during a military exercise, killing seventy-eight persons on board.
18. The Republic of Hungary deposited the instruments of ratification on May 24, 1990.
19. Cf., MAJID, *Op. cit.*, pp. 218–219.
20. Cf., Horace B. ROBERTSON, Jr., "The Status of Civil Aircraft in Armed Conflict." *Israel Yearbook on Human Rights*, Vol. 27. (1997), p. 117.
21. Charter of the United Nations, Article 51. The Charter was promulgated in Hungary by Act No. I of 1956.
22. See, HASSAN, *Op. cit.*, pp. 721–722; MAJID, *Op. cit.*, p. 205, 224; WEILER, *Op. cit.*, pp. 168–169.
23. See, MAJID, *Op. cit.*, p. 205, 224.
24. See, S.C. Res 1368, 4370th mtg., 12 September 2001, U.N. Doc. S/RES/1368 (2001), preamble; S.C. Res. 1373, 4385th mtg., 28 September 2001, U.N. Doc. S/RES/1373 (2001), preamble.
25. The actual target of a fourth airliner having crashed in Pennsylvania on September 11, 2001 is still subject to debates.
26. Cf., Hans KELSEN, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*. London: The

London Institute of World Affairs, 1950, pp. 797–798; Ian BROWNLIE, *International Law and the Use of Force by States*. Oxford: Clarendon Press, 1963, pp. 275–278; Christine GRAY: *International Law and the Use of Force*. Oxford: Oxford University Press, 2000, pp. 111–112; and partly Yoram DINSTEIN: *War, Aggression and Self-Defence*. Cambridge: Cambridge University Press, 2001 (third edition), pp. 167–169.

27. Cf., NAGY Károly, *Az állam felelőssége a nemzetközi jog megsértése miatt* [The Responsibility of States for Breaches of International Law]. Budapest: Akadémiai Kiadó, 1991, pp. 70–75.
28. On the connection between terrorism and state responsibility, see KOVÁCS Péter: "Beaucoup de questions et peu de réponses autour de l'imputabilité d'un acte terroriste à un Etat." In *Terrorism and International Law. European Integration Studies* (ed. KOVÁCS Péter). Vol. 1. No. 1. (2002), pp. 20–24.
29. Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, 2001, Article 8.
30. See, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986, I.C.J. Reports 1986, para. 115, at 64-65.
31. See, Prosecutor v. Dusko Tadic, Judgement, Appeals Chamber, Case No. IT-94-1, 15 July 1999, para. 145.
32. See, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session, November 2001, 107.
33. Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 7 October 2001, U.N. Doc. S/2001/946. For an opposing view maintaining that operations of the United States in Afghanistan were not necessarily measures of self-defence, see, Jonathan I. CHARNEY: "The Use of Force Against Terrorism and International Law." *American Journal of International Law*, Vol. 95. No. 4. (2001), pp. 835–839. In Hungarian literature, see the discussion of KARDOS Gábor, NAGY Boldizsár and VALKI László, *Fundamentum*, 2001/4, 41–45; NAGY Boldizsár: "Önvédelem, háború, jog" [Self-Defence, War, Law]. *Élet és Irodalom*, Vol. XLV. No. 39. (28 September 2001), p. 3; VALKI László: "The 11 September Terrorist Attacks and the Rules of International Law." In *Terrorism and International Law*, pp. 29–37.
34. See, Statement by the North Atlantic Council, 12 September 2001, NATO Press Release (2001) 124; Statement by NATO Secretary-General, 2 October 2001. The North Atlantic Treaty was promulgated in Hungary by Act No. I of 1999.
35. See, Twenty-fourth Meeting of Consultation of Ministers of Foreign Affairs acting as Organ of Consultation in Application of the Inter-American Treaty of Reciprocal Assistance, RC.24/RES.1/01, 1st plen. sess., 21 September 2001, OEA/Ser.F/II.24. Cf. also, "Terrorist Attacks on World Trade Center and Pentagon." In "Contemporary Practice of the United States Relating to International Law" (ed. Sean D. MURPHY). *American Journal of International Law*, Vol. 96. No. 1. (2002), p. 245. For the text of the treaty, see, Inter-American Treaty on Reciprocal Assistance, Rio de Janeiro, 2 September 1947.
36. See, Jochen A. FROWEIN, "Der Terrorismus als Herausforderung für das Völkerrecht." *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*, Vol. 62. No. 4. (2002), p. 887.
37. According to Article 53 of the Vienna Convention of 1969 a peremptory norm of general international law is one which is "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". The Vienna Convention on the Law of Treaties was promulgated in Hungary by Law Decree No. 12 of 1987.
38. Charter of the United Nations, Article 2, paragraph 4.
39. *Ibid.*, Article 4, paragraph 1. (Emphasis added.)
40. Cf., G.A. Res. 2625, 1883rd plen. mtg., 24 October 1970, U.N. Doc. A/RES/2625 (XXV), Annex; G.A. Res. 3314, 2319th plen. mtg., 14 December 1974, U.N. Doc. A/RES/3314 (XXIX), Annex, Article 3; Conference for Security and Co-operation in Europe, Summit of Heads of State or Government, Final Act, Helsinki, 1 August 1975, 1(a) Declaration on Principles Guiding Relations Between Participating States, II.; Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement of 27 June 1986, I.C.J. Reports 1986, para. 188, at 99, and para. 195, at 103-104.
41. In similar vein, see, Thomas M. FRANCK, "Terrorism and the Right of Self-Defense." *American Journal of International Law*, Vol. 95. No. 4. (2001), pp. 839–843; Michael BYERS, "Terrorism, the Use of Force and International Law." *International and Comparative Law Quarterly*, Vol. 51. Pt. 2. (April 2002), pp. 411–412; Michael BOTHE, "Terrorism and the Legality of Pre-Emptive Force." *European Journal of International Law*, Vol. 14. No. 2. (2003), p. 230. It should be mentioned here that according to an assessment pre-dating September 11, 2001, the anti-terrorist use of force assumed a punitive or preventive rather than a defensive form in state practice. Thus, even though states habitually invoke the right of self-defence, their actions are to be seen as

armed reprisals prohibited by international law. See, GRAY, *Op. cit.*, pp. 115–119.

42. It must be admitted, though, that a timely determination of applicable law is nearly impossible in practice. On the one hand, the real intention and target of perpetrators as well as the gravity of attack remain unknown until the last moments before the impact. On the other hand, the attacked state does not know with certainty at this point whether or not the attack is attributable to another state, which also renders the determination of the existence of armed attack cumbersome. Consequently, it seems very likely that the attacked state will be equally unaware of the fact that it has plunged into an armed conflict with another state and the rules of international humanitarian law will only become applicable once the attack enters its final phase. The train of thought below, therefore, primarily facilitates an *ex post facto* legal evaluation of a shoot-down as, *owing to the lack of time and necessary pieces of information, such an assessment cannot be accomplished beforehand.*
43. See, Hans-Peter GASSER, "Das humanitäre Völkerrecht." In *Menschlichkeit für alle: Die Weltbewegung des Roten Kreuzes und des Roten Halbmonds* (ed. Hans HAUG). Bern–Stuttgart–Wien: Verlag Paul Haupt, 1995 (dritte, unveränderte Auflage), p. 532. According to a different view, humanitarian law, forming part of the law of armed conflicts, is identical with the so-called "law of Geneva", and as such, deals exclusively with the protection of victims of conflicts.
44. The four Geneva Conventions of 1949 were promulgated in Hungary by Law Decree No. 32 of 1954. Article 1, paragraph 4, of the First Protocol of 1977 additional to the Geneva Conventions provides that the notion of international armed conflict embraces armed conflicts fought by peoples against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination, as well. Additional Protocol I of 1977 was promulgated in Hungary by Law Decree No. 20 of 1989.
45. Cf., GASSER, *Op. cit.*, pp. 538–539. See also, *The Geneva Conventions of 12 August 1949: Commentary. Vol. I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ed. Jean S. PICTET). Geneva: International Committee of the Red Cross, 1995 (first reprint), pp. 32–33.
46. Obviously an act of terrorism constitutes the opening of an armed conflict only if such conflict does not already exist between the attacked state and the one directing or controlling terrorists. The norms of international humanitarian law are naturally applicable even to cases where a terrorist act is committed in the course of an existing conflict.
47. Additional Protocol I of 1977, Article 48.
48. See, *ibid.*, Article 51, paragraphs 1 and 2, paragraph 4, paragraph 5, sub-paragraph b), and paragraph 7.
49. See, *ibid.*, Article 52, paragraphs 1 and 2.
50. See, *ibid.*, Article 52, paragraph 3.
51. Simultaneously the protection afforded to civil aircraft by the Chicago Convention of 1944 ceases. Cf., ROBERTSON, *Op. cit.*, p. 117, 121.
52. See, Additional Protocol I of 1977, Articles 43 and 44. It has to be emphasised that mercenaries cannot be classified as combatants. See, *ibid.*, Article 47.
53. Cf., Additional Protocol I of 1977, Article 51, paragraph 5, sub-paragraph b). For a critical analysis of this rule pointing out, *inter alia,* the absence of an appropriate basis of comparison and difficulties related to calculation, see, HERCZEGH Géza, *A humanitárius nemzetközi jog fejlődése és mai problémái* [The Development and Current Problems of International Humanitarian Law]. Budapest: Közgazdasági és Jogi Könyvkiadó, 1981, pp. 216–219.
54. Hague Convention No. II of 1899 respecting the Laws and Customs of War on Land, preamble; Hague Convention No. IV of 1907 respecting the Laws and Customs of War on Land, preamble. The conventions were promulgated in Hungary by Act No. XLIII of 1913.
55. See, Additional Protocol I of 1977, Article 51, paragraphs 7 and 8.
56. *Ibid.*, Article 57, paragraph 2, sub-paragraph a), section (i).
57. *Ibid.*, Article 57, paragraph 2, sub-paragraph a), section (ii).
58. See also, Fourth Geneva Convention of 1949, Article 27; Additional Protocol I of 1977, Article 75.
59. Naturally, divergent views have also appeared in literature. For instance, Horace B. Robertson, having considered the Hague Rules of 1923 as well as military regulations of a few states, drew the conclusion that, in spite of their increased protection, even passenger airplanes can become legitimate military objectives under exceptional circumstances. See, ROBERTSON, *Op. cit.*, pp. 129–130. Since Robertson's analysis ignores certain legal rules protecting individuals, his conclusion fails to stand close scrutiny. For the provisions of the ultimately abandoned Hague Rules on shoot-down, see, The Hague Rules of Air Warfare, The Hague, December 1922—February 1923, Articles XXX, XXXIII, XXXIV, XXXV, L.
60. Though based on different and less detailed rules, the legal qualification of the destruction of civil aircraft employed for the perpetration of an attack by non-state actors during a non-international armed conflict rather than in peacetime is essentially identical with the conclusion reached regarding international armed conflicts. See, common Article 3 of the Geneva Conventions of 1949, paragraph 1, sub-paragraph a); Additional Protocol II of 1977, Article 4, paragraph 2, sub-paragraphs a), b)

and h), Article 13, paragraphs 1 and 2. These provisions prohibit attacks directed against the civilian population, the killing of persons taking no active part in hostilities, collective punishments as well as threats to commit any of the foregoing acts. Additional Protocol II of 1977 was promulgated in Hungary by Law Decree No. 20 of 1989.

61. In case a terrorist act attributable to a state does not reach the minimum gravity of armed attack, it does not come under the rubric of the use of force, regardless to the fact that armed attack is in a part-whole relation with that concept. Because it cannot be qualified as use of force, such an act does not constitute the opening of an international armed conflict and nor does it bring about the applicability of the relevant norms of humanitarian law. There is only one scenario, wherein these provisions are nevertheless applicable to a state-sponsored terrorist attack of minor gravity: if this attack is committed within the framework of hostilities during a previously started and still ongoing international armed conflict.
62. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 24.
63. The existence or application of circumstances precluding wrongfulness does not annul or terminate a breached international obligation. In other words, none of the circumstances precluding wrongfulness can grant *general* release from an international obligation; they rather provide an extraordinary justification for non-performance under strictly defined conditions. See, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 169.
64. The inadmissibility of comparable danger also illustrates the equal value of human lives as well as the irrelevance of office or other position held by persons to be rescued.
65. See, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 189–190. See also, NAGY Károly: "Szükséghelyzet és végszükség a nemzetközi jogban" [Necessity and Distress in International Law]. *Jogtudományi Közlöny*, Vol. L. No. 11. (November 1995), p. 491.
66. See, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 193.
67. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 26. This is one of the reasons why the examination of another circumstance precluding wrongfulness — that is, necessity as contained by Article 25 of the Draft Articles — can be omitted.
68. Cf. *supra*, note 37.
69. Ralf G. WETZEL (comp.) – Dietrich RAUSCHNING (ed. and pref.): *The Vienna Convention on the Law of Treaties: Travaux Preparatoires* [Die Wiener Vertragsrechtskonvention: Materialien zur Entstehung der einzelnen Vorschriften]. Frankfurt am Main: Alfred Metzner Verlag, 1978, pp. 377–378. Article 40 of the Draft Articles on state responsibility adopted by the International Law Commission in 2001 governs breaches of peremptory norms of general international law. The commentary to this article states: "The obligations referred to in article 40 arise from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values." Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 283.
70. Case concerning the Barcelona Traction, Light and Power Company, Limited, (Belgium v. Spain), Second Phase, Judgement of 5 February 1970, I.C.J. Reports 1970, para. 33-34, at 32.
71. Yoram DINSTEIN, "The Erga Omnes Applicability of Human Rights." *Archiv des Völkerrechts*, Band 30. Heft 1. (1992), p. 17.
72. See, Michael K. ADDO – Nicholas GRIEF, "Does Article 3 of the European Convention on Human Rights Enshrine Absolute Rights?" *European Journal of International Law*, Vol. 9. No. 3. (1998), p. 513.
73. See, MAVI Viktor, "Limitations and Derogations from Human Rights in International Human Rights Instruments." *Acta Juridica Hungarica*, Vol. 38. No. 3–4. (1997), p. 110.
74. See, Paul SIEGHART, *The International Law of Human Rights*. Oxford: Clarendon Press, 1983, p. 57. On absolute rights, see also, HALMAI Gábor – TÓTH Gábor Attila, "Az emberi jogok korlátozása" [Limitation of Human Rights]. In *Emberi jogok* [Human Rights] (eds. HALMAI Gábor – TÓTH Gábor Attila). Budapest: Osiris Kiadó, 2003, pp. 108–112.
75. Cf., ADDO–GRIEF, *Op. cit.*, 516.
76. Cf., Human Rights Committee, General Comment No. 29. (Art. 4, States of Emergency), 24 July 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11.
77. Cf., Inter-Am. Ct. H. R., Villagran Morales et al. Case (The "Street Children Case"), Judgement of 19 November 1999, para. 139, 144. In the practice of the European Court of Justice, see, GRÁD András, *A strasbourgi emberi jogi bíráskodás kézikönyve* [A Manual of Human Rights Jurisdiction in Strasbourg]. Budapest: Strasbourg Bt., 2005, pp. 86–107.
78. See, Universal Declaration of Human Rights, Article 3; African Charter on Human and Peoples' Rights, Article 4.
79. See, International Covenant on Civil and Political Rights, Article 6, paragraphs 2 and 4-6; American Convention on Human Rights, Article 4, paragraphs 2-6; Arab Charter on Human Rights, Articles 10-12. Optional protocols to the first two instruments seek to outlaw death penalty.

80. See, European Convention on Human Rights, Article 2, paragraph 2. Optional protocols No. 6 and 13 set forth the abolition of death penalty. Due to Article II-112, paragraph 3, on the rules of interpretation, the content of the provision on the right to life incorporated in the Charter of Fundamental Rights of the European Union is identical to that of the Convention, even though it does not list any exceptions.
81. Cf., Eur. Ct. H. R., Osman v. The United Kingdom, Judgement of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, No. 95, 3159, para. 116.
82. By virtue of Article 4, paragraphs b) and c), the right to life does not belong to the group of non-derogable rights. The solemn wording of the Declaration on Human Rights in Islam, nonetheless, indicates that human life possesses outstanding value even in Islam. See, The Cairo Declaration on Human Rights in Islam, Cairo, 5 August 1990, Article 2. The African Charter on Human and Peoples' Rights does not contain a general clause on derogation, yet the fundamental nature of the right to life can be verified in the light of Articles 60 and 61.
83. Human Rights Committee, General Comment No. 29. (Art. 4, States of Emergency), 24 July 2001, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), para. 11. (Emphasis added.) Article 6 of the Covenant, as already known, regulates the right to life. See also, Inter-Am. Ct. H. R., Villagran Morales et al. Case (The "Street Children Case"), Judgement of 19 November 1999, para. 139.
84. Cf., Eur. Ct. H. R., McCann and Others v. The United Kingdom, Judgement of 27 September 1995, Series A, No. 324, 46, 49, para. 148-150, 161.
85. Cf., Kaya v. Turkey, Judgement of 19 February 1998, Reports of Judgments and Decisions 1998-I, No. 65, 324, para. 86; Eur. Ct. H. R., Kelly and Others v. The United Kingdom, Judgement of 4 August 2001, No. 30054/96, para. 94-98; McShane v. The United Kingdom, Judgement of 28 August 2002, No. 43290/98, para. 94-98.
86. See, Eur. Ct. H. R., McCann and Others v. The United Kingdom, Judgement of 27 September 1995, Series A, No. 324, 62, para. 213-214.
87. See, HALMAI–TÓTH, *Op. cit.*, pp. 109–110. (Translation mine.)
88. See, *supra*, note 60.
89. See, Universal Declaration of Human Rights, Article 11, paragraph 1; International Covenant on Civil and Political Rights, Article 14, paragraph 2; European Convention on Human Rights, Article 6, paragraph 2; American Convention on Human Rights, Article 8, paragraph 2; African Charter on Human and Peoples' Rights, Article 7, paragraph 1, sub-paragraph b); Arab Charter on Human Rights, Article 7; Charter of Fundamental Rights of the European Union, Article II-108.
90. For example, see, Human Rights Committee, Quinteros v. Uruguay, Communication No. 107/1981, 21 July 1983, U.N. Doc. CCPR/C/19/D/107/1981, para. 14; Eur. Ct. H. R., Kurt v. Turkey, Judgement of 25 May 1998, Reports of Judgments and Decisions 1998-III, No. 74, 1187-1188, para. 130-134; Inter-Am. Ct. H. R., Bámaca Velásquez v. Guatemala, Judgement of 25 November 2000, para. 159-166. Inhuman treatment is a segment of the broader category of prohibition of torture or inhuman or degrading treatment or punishment. See, Universal Declaration of Human Rights, Article 5; International Covenant on Civil and Political Rights, Article 7; European Convention on Human Rights, Article 3; American Convention on Human Rights, Article 5, paragraphs 1 and 2; African Charter on Human and Peoples' Rights, Article 5; Arab Charter on Human Rights, Article 13; Charter of Fundamental Rights of the European Union, Article II-64.
91. See, Act No. CV of 2004 on National Defence and Hungarian Defence Forces, Section 70, paragraph 1, sub-paragraphs a), c) and f).
92. *Ibid.*, Section 131, paragraph 1; Section 132, paragraphs 1 and 2. (Translation mine.)
93. Permission to fire is granted to national air defence forces by the general on duty of the Headquarters of Air Force of the Hungarian Defence Forces. An order to open fire addressed to national or foreign forces operating under allied command needs to be confirmed by the same general. In case of an attack directed against him, the pilot of the intercepting military aircraft may open fire at will, but must report its actions immediately. See, *ibid.*, Section 132, paragraphs 3, 4 and 5. See also, Government Resolution No. 2342/2004. (XII. 26.) on the Employment of High Readiness Air Defence Aircraft Operating under NATO Command.
94. The preliminary state of defence governed by Section 19, paragraph 3, sub-paragraph n) and Section 35, paragraph 1, sub-paragraph m) and paragraph 3, of the Constitution as well as by Section 201 of the Act on National Defence bears no particular relevance for the present topic. A preliminary state of defence is declared for a definite period by the Parliament in the event of a threat of external armed attack or in performance of an obligation towards the allies. Extraordinary measures taken in a preliminary state of defence, however, merely serve to facilitate the preparation for an impending external attack, but do not involve the use of force.
95. Constitution of the Republic of Hungary, Section 19/E, paragraph 1. (Translation of the Constitution based upon a text by KJK-Kerszöv, with added modifications by the author. Note: the Hungarian equivalent of the phrase "state of martial law" *(rendkívüli állapot)* is occasionally translated as "state of national crisis", as well.)
96. *Ibid.*, Section 40/B, paragraph 2.

97. See, *ibid.*, Section 19, paragraph 3, sub-paragraph i): The Parliament shall "declare a state of emergency in the event of armed actions aimed at the overthrow of constitutional order or the acquisition of absolute power, or in case of grave acts of violence committed by force of arms or in an armed manner endangering lives and property on a large scale, or a natural or industrial disaster (together hereinafter: case of emergency)".
98. See, *ibid.*, Section 19, paragraph 3, sub-paragraph h): The Parliament shall "declare a state of martial law and establish a National Defense Council in the event of war or an imminent threat of armed attack by a foreign power (threat of war)". See also, *ibid.*, Section 19/A, paragraph 1: "In case the Parliament is being hindered in the making of these decisions, the President of the Republic shall have the right to declare a state of war, a state of martial law and establish a National Defense Council, or to declare a state of emergency."
99. *Ibid.*, Section 5.
100. 50/2001. (XI. 29.) AB, IV.2.3.
101. The Constitutional Court maintains that "in the fulfilment of its tasks under Section 5 of the Constitution, the state's freedom of action is being delimited by Section 40/A, paragraph 1, and Section 70/H, paragraphs 1 and 2". See, *ibid.*
102. Constitution of the Republic of Hungary, Section 7, paragraph 1: "The legal system of the Republic of Hungary accepts the generally recognised principles of international law, and secures the harmony between obligations assumed under international law and domestic law."
103. *Ibid.*, Section 8, paragraphs 1 and 2.
104. *Ibid.*, Section 54, paragraph 1. For an exhaustive treatise on the right to life and human dignity, see TÓTH Gábor Attila, "Az emberi méltósághoz való jog és az élethez való jog" [The Right to Human Dignity and the Right to Life]. In HALMAI–TÓTH, *Op. cit.*, pp. 255–361.
105. See, 64/1991. (XII. 17.) AB, C.3.
106. See, Constitution of the Republic of Hungary, Section 8, paragraph 4.
107. 23/1990. (X. 31.) AB, V.2.
108. Cf., *ibid.*, Separate Opinion of Judge László Sólyom, 3. See also, 64/1991. (XII. 17.) AB, D.2.
109. Act No. IV of 1978 on the Criminal Code, Section 29, paragraph 1.
110. *Ibid.*, Section 30, paragraph 1. For details on legitimate defence and extreme necessity, see, *A Büntető Törvénykönyv magyarázata* [Commentaries to the Criminal Code] (eds. GYÖRGYI Kálmán – WIENER A. Imre). Budapest: Közgazdasági és Jogi Könyvkiadó, 1996, pp. 71–76.
111. On the applicability of extreme necessity, see Arndt SINN, "Tötung Unschuldiger auf Grund §14 III Luftsicherheitsgesetz — rechtmä_ig?" *Neue Zeitschrift für Strafrecht,* Jg. 24. Heft 11 (15. Oktober 2004), p. 593.
112. Cf., 64/1991. (XII. 17.) AB, Separate Opinion of Judge Tamás Lábady, 10.
113. 53/1993. (X. 13.) AB, III, V.2.