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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.

András László Pap

ETHNIC DISCRIMINATION AND THE WAR AGAINST TERRORISM — THE CASE OF HUNGARY

INTRODUCTION

Ethnic data collection and ethnic discrimination (ethnicity-based selection and ethnic profiling), which are in themselves controversial topics, have brought a new set of challenges in the context of anti-terror law enforcement procedures. This essay aims to survey these challenges as they arise in Hungary, a country that so far has not been directly affected by terrorism.

Part I sets the stage by delineating the general practice of ethnic profiling and ethnicity based selection, and by describing how these arise in the context of the fight against terrorism. Besides the perennial problem with ethnic profiling — that it readily turns into a form of ethnic discrimination — this practice faces an independent problem: lack of effectiveness. With the emerging war on terrorism enhancing the appeal of ethnic profiling, it is appropriate to reflect again on both problems.

Part II moves on to discuss the legal framework within Hungary, a country that has a long history of heated political debate surrounding the legal definition of belonging to an ethnic group. Until now, however, ethnic classification has arisen primarily in connection with positive discrimination within minority law and Diaspora law. Hungary's data protection laws classify personal data concerning national and ethnic membership as special data (protected, among others, by the means of criminal law). That is to say, unless the law specifies otherwise, personal data concerning nationality and ethnicity cannot be processed without written consent from the person in question. The irony of this situation is that the law does not protect potential victims of discrimination; in fact, authorities have used these provisions to make an easy case for dismissing charges of ethnic discrimination. Traditionally, within Hungary, law enforcement methods based on ethnic selection have affected the Roma minority rather than the minute Muslim community. Still, as we shall see, the authorities have virtually unlimited discretion when it comes to stops and searches, and, as a result, the possibility for misuse of power remains unhindered.

In sum, the Hungarian framework does not have any special regulations that have come into effect specifically during the war against terrorism. Still, the authorities — including the police, the border guards and the security services, which have an extraordinarily wide range of competencies that mostly parallel one another — have unlimited discretion in initiating action, leaving wide open the possibility of ethnicity-based subject selection.

ANTI-TERROR EFFORTS AND ETHNICITY — GENERAL OBSERVATIONS

After a brief introduction describing how the counter-terrorism measures that are undertaken by law enforcement agents have entered the scene (Section 1), I discuss ethnicity in the context of police action. I begin with two preliminary discussions: the first distinguishes various ways that the police (and, of course, other service members) might take into account ethnic/racial[1] features (Section 2), and the second examines the discretionary power of the police in initiating action and, in particular, their authorisation to stop and search drivers or pedestrians (Section 3). These sections lead into a discussion of the practice of ethnic profiling and ethnicity-based selection (Section 4), which have long been under attack and scrutiny for their role in ethnic discrimination. These misgivings have been pushed to the background as racial profiling was recently deployed in the anti-terror arsenal. It is important to bring ethnic discrimination back into focus, especially in light of the fact that ethnic profiling has not paid off as an effective weapon (Section 5), in anti-terrorism measures or elsewhere.

A New World with New Standards

Just about everywhere in the world, the war against terrorism has had the effect of widening the control functions of the national security and immigration services, as well as of other law enforcement authorities. The expanded measures and procedures thus introduced were often ones that legislators and law

enforcement officials had otherwise only dreamed of attaining. This time around, they could take advantage of changes in the public sentiment due to society's shock over the tragic events and the fear that spread in their wake. For example, there are certain regulations with respect to banking (and clients' data) that the authorities have been longing for, to aid them in their fight against drugs and organised crime, but thus far had not succeeded in achieving due to constitutional misgivings. Under the auspices of anti-terror action, all of a sudden, the same regulations become acceptable. Likewise, recent decades saw the prospects of police patrolling based on discriminatory racial profiling fail miserably (both professionally and politically) within the Anglo-American world. All the same, the Arab population became a natural target of the war against terrorism. Evidently the horrific notions of weapons of mass destruction and recurring terrorist attacks have overwhelmed the previously held principle that it is better to have nine criminals go free than to have a single innocent person punished.

What is new in the world following 9/11? Traditional policing principles or, for that matter, the law of the Geneva Convention (regulating the interrogation of prisoners of war, for example) have become unsuited to the handling of the peculiar warfare undertaken by suicide bombers and terrorist organisations.

The analysis below concerns ethnic discrimination, which probably constitutes the most widely raised and most serious charge that critics raise against anti-terror regulations and procedures.

Ethnicity and Policing

Before we turn to examining the constitutional standards for police ethnic profiling, two preliminary issues have to be addressed. One concerns racial and ethnic classifications by law enforcement authorities, and the other focuses on constitutional standards relating to the reasons and justifications (standards of suspicion or probable cause) based on which law enforcement action may be initiated. I will discuss these in turn.

American case law and jurisprudence provides a good illustration for the legal framework of police ethnic data processing because dozens of circuit and Supreme Court decisions address the issue. It is well to note at the outset a crucial difference between the continental conception and the Anglo-American one: unlike the continental tradition, the U.S. and the U.K. have a generally accepted practice of processing ethnic (racial) data. Thus, in the latter countries, ethno-racial data processing does not constitute a sensitive issue from a data protection perspective. As spelled out by a set of detailed court decisions, the law distinguishes four ways in which police action may rely upon ethnicity or race, applying different constitutional measures for each of them.

The first relatively unproblematic scenario arises when the victim or witness to a crime provides a description of a specific suspect that includes ethno-racial characteristics. In these situations, courts have invariably found it legal to use such information — in search warrants, for example.

A second, somewhat different scenario presents itself when the description provided by the victim or witness contains very little concrete detail about the suspect beyond her race or ethnicity. In such cases, on several occasions, the courts' stance was that race and ethnicity can be operative in negative descriptions only. For example, if the informant identified the perpetrator as black, then that information can serve as basis for the police not to stop whites and Asians, but it would border on discrimination for them to stop blacks without any further reason for doing so beside their skin colour.[2]

The third case is racial profiling, which will be discussed in detail later on. This practice relies on the tenet that ethnicity in itself makes criminal involvement more likely, and this assumption is not based on any specific or general information about a given individual.

Finally, the fourth case, which features prominently in the war against terror, involves preventive measures that rely on official, written directives about certain racial, ethnic, national or citizenship-based considerations. In these cases, the application of ethno-racial profiles are no longer left to the discretion of the police, border guards and airport security personnel. Instead, ethnic profiling becomes an officially formulated prescription.

Suspicion, Probable Cause and Authorisation to Act

Under what conditions might the police (or other law enforcement organs) initiate action? The standards do, of course, change according to how concretely specified the perpetrator is, what the degree of suspicion is, and in what capacity the law enforcement agent is acting. The procedure can have various types of legal bases: random, voluntary encounter; consensual questioning that does not involve coercion, where, in theory, the citizen may disregard the question; stopping and questioning during an investigation; vehicle control; border control, etc. In discussing the variety of legal bases for police action, we may

well also want to pose several questions. Is it justifiable, for example, to institute a roadblock obstructing everyone's way (and not just that of a specific ethnic group)? What kind of suspicion (if any) is necessary for such a measure? Are random checks acceptable?[3]

All over the world, courts have attempted to clarify these issues, but the task has not been an easy one because it is notoriously difficult to classify scenarios in which a member of a minority group is stopped. Is it a case of ethnic profiling-based crime prevention control? Or is it an investigation with a specific suspect, a stop that is mere pretext (where a minor violation is used as a pretext for stopping), or outright racist harassment?

The decisions have not been entirely consistent, which make matters more complicated. In the 1975 Brignoni-Ponce case, for example, the US Supreme Court did not accept the authorities' claim that on a stretch of road in the vicinity of the U.S.–Mexican border, usually teeming with illegal immigrants, someone should be able to be stopped solely on the grounds that she looks Mexican.[4] Stark contrast is provided by the 2001 decision of the Spanish constitutional court, which stated that skin colour and foreign appearance could serve as significant causes for determining whom the police might stop. A year later, based on a similar pretext (the existence of a large number of Mexicans in a specific area), the American Supreme Court also found it acceptable to order a roadblock...

The situation is tricky because proof of unwarranted ethnic motivation would require that the court (or legislator) state that police action can be initiated exclusively on the basis of *individual* behaviour or suspect description. But no-one has ever said this — besides the roadblock incidents already mentioned, the US Supreme Court has also upheld many other types of *general* controls (albeit ones that were free of ethnic classification). Examples are alcohol tests ordered for railroad workers involved in an accident,[5] sobriety tests around nightclubs,[6] and alcohol tests prior to after-hours extra-curricular school events.[7]

Policing, Discrimination, and Ethnic Profiling

American studies on (mostly) highway patrols have shown that blacks, comprising 12.3 percent of the American population, are significantly over-represented among those stopped and checked by the police.[8] In New Jersey, between 1994 and 1999, 53 percent of those stopped by the police were black, 24.1 percent were Hispanic and only 21 percent were white.[9]

This phenomenon sheds light on the fact that direct or indirect discrimination against members of a minority group need not be the result of flagrantly illegal, intentional behaviour; discrimination may instead be due to the questionable application of apparently legal measures.

The institution called ethnic profiling was first developed in the U.S. in order to detect drug couriers, and was later implemented in traffic control, and more recently in counter-terrorism procedures. At the heart of these procedures is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Thus, stops are not induced by suspicious or illegal behaviour, or by a piece of information that would concern the defendant specifically. Instead, a prediction provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing acts of terror, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much on the basis of the (suspicious) behaviour of the individual, but based on an aggregate reasoning. The goal is to make an efficient allocation (based on rational interconnections) of the limited amount of the available police and security resources. After all, the majority of the prison population is Roma (black, etc.), and almost all of the terrorists are Islam fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable.

Originally, the procedure was about an attempt to create a descriptive profile of suspects in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behaviour and circumstances. In the case of drug couriers, such a characterisation might include short stopovers between significant drug sources and distribution locations, cash paid for an airline ticket, and the relationship of ethnicity, sex and age to criminal statistics. The case for ethnic profiling is further strengthened by the fact that the gangs that play key roles in organised crime tend to be almost exclusively ethnically homogenous.

The irony of the situation is that it was right around the time of the World Trade Centre attacks that racial profiling suffered decisive rejection within professional as well as political circles. In the fall of 1999, 81 percent of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58 percent approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight.[10]

In connection with anti-terror measures, there was therefore renewed debate over preventive measures

based on ethno-racial profiling. Some commentators emphasise that ethnic profiling is in principle unacceptable. The result, according to these critics, is the harassment of the innocent minority middle class, which is subjected to a kind of "racial tax" that affects all aspects of people's lives. A further unwanted result is the strengthening of racial/ethnic essentialism, reductionism to black and white (Roma and Hungarian; Arab and non-Arab, etc.).

Another, straightforwardly pragmatic criticism has called attention to the practical ineffectiveness of racial profiling: inherent in the prima facie plausible reasoning based on statistics is a profound (and provable) error. Studies conducted in New Jersey and elsewhere have targeted stops based on racial profiling, involving vehicle checks and body searches. The aim was to discern how effective these measures were in detecting drug possession and illegal possession of weapons. The studies clearly demonstrated that there was no significant, tangible difference between the proportional hit rate within the white population and the non-white population. Not only did the study find that the authorities habitually stopped a disproportionate number of non-white drivers, but it also confirmed that the hit rate testifies to the ineffectiveness of ethnic profiling. Racial profiling relies on the assumption that a high rate of criminality is connected to ethnicity, so the hit rate must be higher among, say, African Americans. For a long time, no-one asked for a proof of this seemingly sensible connection; after all, a sufficient number of criminals were found among the disproportionately high number of minority members stopped. But researchers argue that this does not yield a cost-effective method because the number of false negatives and false positives is bound to be much too high.[11] In other words, the measures have a disproportionate negative impact on the black (Roma, Arab) population that is law-abiding, while also reducing the possibility of finding perpetrators that belong to the majority population.[12] To summarise the results, the previously esteemed effectiveness (which was always assumed, rather than checked and confirmed) turns out to be illusory and does not provide an appropriate policing, prevention and security policy.

A third argument mentions the risks inherent in alienating crucial minority communities in the context of law enforcement (policing and prevention). Ethnic profiling raises additional severe misgivings apart from the problem of false positives and negatives. The community policing model has demonstrated the now well-known danger of alienating crucial populations. This model maintains that local policing is most effectively done with active participation from the community. Law enforcement thus should not be an antagonistic, unjust, oppressive power, but a protector of peaceful, law-abiding people, with the criminals pitted as the enemy. With respect to terrorism, we should not overlook the importance of community cooperation. It is no coincidence that the Bush government identifies truck drivers, cab drivers and parking meter attendants as high-priority potential informants (helpful in identifying bombers or suicide bombers), in addition to the particular importance of members of the Muslim community, that can detect suspicious behaviour.[13] Indeed, most of the American terrorists identified up until recently were caught based on community reports.

Terrorism and Ethnic Profiling[14]

What is behind the changes in the public and professional sentiment towards racial profiling?[15] With the increases in the dangers and risks of terrorism, we are more and more willing to give up some of our rights, especially if there is a life or death situation at hand. Faced with the possibility of an asymmetric crime in which the death of a single terrorist yields the death of thousands, people's sense of justice is not necessarily offended by an effective procedure that is based on discrimination and prejudice. Moreover, profiling does strike us as more reliable when it comes to terrorism: after all, even though not every Arab or Muslim is a terrorist, still (we tend to assume), every terrorist is an Arab or at the very least a Muslim fanatic.

Even though the above reasons seem plausible, they are not necessarily tenable. Several critics of ethnic profiling have pointed out that its ineffectiveness (illustrated through the example of false positives and false negatives) does not improve in the context of anti-terror measures.[16]

It is well to note that racial profiling can indeed be criticised for its lack of effectiveness. Staying with American examples, not only is it unfeasible for the 11,500 FBI agents to adopt the working assumption that the entire Arab-American population — some 3,5 million people — are potential terrorists, but it is also crucial to avoid alienating that very population — especially when it comes to terrorism. (Consider one of the very few terrorist arrests where the suspect was eventually charged: in Lackawana, New York, a report from the local Muslim community tipped off the authorities, leading to the arrest.[17]) Further, false positives raise a special problem with respect to terrorism: it is untenable to assume that only Arabs are involved in terrorist attacks. We need only mention a couple of incidents that happened on American soil:

Richard Reid (the "shoe bomber"), a British citizen from the West Indies; Jose Padilla (the "dirty bomb" terrorist of Chicago's O'Hare Airport), a Hispanic man who converted to Islam while in jail; Zaccarias Moussaoui from Morocco; not to mention white Americans like John Walker Lindh (the American Talib), Timothy McVeigh, and Charles Bishop.[18]

Having briefly highlighted some general questions relating to the ethnically discriminatory elements of "ordinary" and anti-terrorist policing and law enforcement practices, let us now turn our attention to the case of Hungary.

THE HUNGARIAN LEGAL FRAMEWORK

After providing some data on ethnic, racial and immigrant groups within Hungary (Section 1), I first analyse existing definitional problems under the Minorities Act (Section 2) and then assess the standards for the collection of ethnic data (Section 3). In Section 4, I describe the competencies and procedures of the police, the border guards and the security forces. Before my concluding remarks, I discuss existing anti-terrorist legislation (Section 5) and evidence of racial profiling (Section 6) within Hungary.

Data on Ethnic, Racial and Immigrant groups

There are thirteen recognised ethnic and national minorities in Hungary. The number of immigrants and foreigners with non-European phenotypes has also increased in recent years, producing a new victim group for racial profiling. Recent immigration however, is still of relatively small scale, mainly transitory or coming from neighbouring countries.[19] As a result, ethnic profiling in Hungary is an issue that affects first and foremost the Roma, the only recognisably visible minority.

The size of the Roma population is hard to establish due to the legal ambiguity of registering ethno-national data and the Roma's lack of confidence in the state. Census and academic estimates range between 200,000 and 600,000[20] (2-6% of the Hungarian population). Roma experience widespread discrimination in all walks of life. Stereotypes and prejudices against this group are prevalent in the Hungarian public opinion.

Definitional Problems under the Minorities Act

Data collection aside, ethno-national affiliation in itself is a controversial, ardently debated topic in Hungary. It comes up in two dimensions: defining the group itself and defining membership within the group. As it is closely connected to the questions of ethnic profiling and indirect discrimination, it is essential to provide some brief preliminary highlights of the legal background of the most important elements in the debates.

Group Affiliation

In Hungary, national and ethnic minorities are specifically protected under the Act on the Rights of National and Ethnic Minorities.[21] As Article 68 (1) of the Constitution states: national and ethnic minorities living in the Republic of Hungary participate in the sovereign power of the people: they represent a constituent part of the State. The Act does not, however, define the term 'ethnic' or 'national minority'. As a result of political negotiations, for example, Jews are not included among national and ethnic minorities for the purposes of the Act, a fact which, however, does not prevent them from being covered by the Race Equality Directive[22] and general domestic anti-discrimination legislation.[23]

The 1993 Act defines national and ethnic minorities as groups that have been present in the territory of Hungary for over 100 years and "(§ 1.) constitute a numerical minority within the population of the country, whose members hold Hungarian citizenship and differ from the rest of the population in terms of their own tongue, cultures and traditions, and who prove to be aware of the cohesion, national or ethnic, which is to aim at preserving all these and at articulating and safeguarding the interests of their respective historically developed communities."

According to the Act, the following groups comprise these minorities: Bulgarian, Roma (Gypsy), Greek, Croat, Polish, German, Armenian, Roman, Ruthenian, Serb, Slovak, Slovene, and Ukrainian. In order to register a new minority group, a popular initiative signed by 1000 citizens must be submitted to the Speaker of the Parliament.

Without going into an in-depth analysis of the Hungarian statutory model, two controversies — procedural as well as material — need to be pointed out. Both material requirements (100-year presence and 1000 signatures as a special popular initiative) for qualifying as an ethnic or national minority seem problematic. The Act, besides defining the two group constituting requirements, also contains an enumeration of the thirteen minority groups that are recognised by the Act, which means that the Parliament would need to pass a formal amendment to these provisions if a new group were to qualify. The House (being sovereign), however, is not obliged to vote

affirmatively on the question, which is in sharp contradiction with the otherwise clearly defined requirements. The law therefore uses language that initially appears absolute and seems to set forth the collective right of establishing a minority group (that is, a right to be registered and recognised as such), but in fact it remains politically dependent.

Another set of issues arise around the theoretical and practical questions of who is to verify or whether the 100-year requirement has been fulfilled, and when the clock is supposed to start ticking. When will the Chinese minority (a considerable population since the political transition) be entitled to seek recognition? What about the Palestinians, who may claim some 600 hundred years of presence if "Ismaelite" merchants are considered?[24]

Not only does this model make it difficult for new groups to gain recognition, but it also opens the floor to legally permitted misuse. For example, based on the letter of the law, by seeking registration of the Hungarian Francophone community, a thousand friends of French art and cuisine may easily find tax-paid support for their cultural-leisure activities. Commentators also point out that, besides being inherently arbitrary, the measurement of the 100-year presence is not supported by any legal guide lines, therefore anyone commissioning a historical study showing a century-long presence of any given group can beat the system, and get around the legislator's intent.

As a background note, it is important to stress that post-1989 Hungarian minority-politics cannot be understood outside the context of the ethnic Hungarian Diaspora.[25] We can even say that besides classical commitments, one of the primary reasons behind constitutional motivations for providing and recognising minority rights has been Article 6 (3) of the constitution, which declares that "the Republic of Hungary bears a sense of responsibility for the fate of Hungarians living outside its borders and shall promote and foster their relations with Hungary". Commentators claim that the creation of the above described homogenous legislation for national and ethnic minorities may help promote the rights of ethnic Hungarians living in neighbouring countries; it cannot, however, provide an effective institutional framework to deal with the specific and robust Roma-problem. Also, this monolithic minority category is inefficient in serving the needs of all thirteen official minority groups in Hungary, which substantially differ in size and consequent claims and aspirations. Also, critics point out that the European accession and subsequent changes in the constitutional and socio-political climate brings challenges that the anachronistic, pre-accession minded Diaspora-targeting law cannot cope with. For example, the appearance of European and other migrant workers and immigrants will bring challenges that the existing legal framework may be ill equipped to confront. Newly arriving groups will easily outnumber small traditional national minorities (such as the Armenian and Ruthenian), and, at the same time, the current legal framework does not have clear guidelines as to how new groups can seek official recognition.

Individual Affiliation

The other, even more controversial element of the Hungarian framework relates to the lack of satisfying legal guarantees regarding individuals' minority affiliation. Hungarian law allows for the handling of data on racial and ethnic origin only with the consent of the person concerned.[26] This gives rise to what is commonly known as "ethno-business" or "ethno-corruption".

In this model, the exercising of minority rights is not dependent on minimal affiliation requirements. Stephen Deets documents, for example how school officials pressure the parents of "Hungarian" students to declare their children German: "according to Hungarian government statistics, in 1998, almost 45,000 primary school students were enrolled in German-minority programs, which, by the latest census, is about 8,000 more than the number of ethnic Germans who are even in Hungary".[27] Similarly, in court proceedings, non-Roma employees testify to be Roma in order to rebut claims of ethnic discrimination.[28]

Hungary also established a relatively potent form of autonomous minority institution, a minority self-government structure (bodies that co-exist with local municipal administration), and a decision to vote at minority self-government elections is left solely to the political culture and conscience of the majority. Thus, in Hungary, citizens can vote for minority self-government candidates regardless of their ethnic origin. This enables members of the majority to take advantage of the various remedial measures. For example, the wife of the mayor of Jászladány — a village notorious for segregating Roma primary school children from non-Roma — can hold an elected office in the local Roma minority self-government. Likewise, non-Roma parents can claim that they are Roma in order to conceal racial segregation.[29]

Hungarian minority representatives repeatedly claim that the fact that some candidates ran as Roma in one election and then later as German in the following term (which is permitted by both the law and

the ideal of multiple identity-formation) proves the flourishing of local ethno—business.[30] Similarly, both the President of the National Romanian Minority Self-Government[31] in Hungary, and the (Romanian) Secretary for Romanians Living Outside Romania[32] found it worrisome that the 2002 local elections brought an increasing number of candidates for Romanian minority self governments, while the number of those identifying themselves as Romanian in the national census is decreasing.[33] In their view, the answer lies in the fact that "Gypsies" and Hungarian immigrants who moved from Romania are running as Romanians. The critics are right, for example, in that some Roma politicians decided to run under different labels (in most of the reported 17 cases, Slovakian), expressly for the purpose of exposing the problematic aspects of the legal framework. Also, there are several municipalities where (according to the national census) nobody identified herself as a member of any minority group, yet numerous minority candidates were registered.[34] The examples of loopholes in the legal regime sometimes result in complete absurdity. In order to express their admiration of German football, for example, a small village's entire football-team registered as German minority-candidates for the elections.[35]

It should also be noted that the question of ethno-national identity has been in the centre of other socio-political debates, such as the Hungarian status law,[36] a framework legislation that provides for schemes of rights and preferences available for ethnic Hungarians living outside of Hungary's borders. During the drafting of this law,[37] an ardent domestic political debate[38] arose from the various legislative approaches in identifying who would be considered Hungarian (for the purposes of the law.) In fact, the contradiction between the basic liberal tenet of the free choice of identity and the desire to reduce (the legal) options for both politically and financially undesirable misuse was perhaps the most controversial aspect of the law.

In June 2005 the Parliament passed a comprehensive amendment to the Minorities Act. The legislation made a point of setting forth a plan for institutional reorganisation of the minority-protection mechanisms. At the same time, combating the aforementioned ethno-corruption (that is, the utilisation and misuse of remedial measures for private means that are contrary to the legislators' intentions) will introduce a somewhat controversial registration procedure for those who decide to take advantage of the various privileges and additional rights set forth by the minority law. In order to ensure that only members of the given minority can vote and be elected to minority self-government, the law redefines the meaning of Article 68 par. (4) of the Hungarian Constitution which stipulates that national and ethnic minorities have the right to establish minority self-governments. The Act thus departs from the pre-existing dedication to the free choice of identity, and, by eliminating the explicit provision allowing for the recognition of multiple identity, sets forth legal requirements for minority political participation. According to the new legislation, both the right to vote for and to run as candidates at the minority elections would require the registration.[39] President Ferenc Mádl, vetoed the Act and, at the time of the submission of the manuscript, the Constitutional Court's decision was still pending.

Having described the general issues related to ethno-national identity, let us now turn to the question of ethnic data collection.

Standards for the Collection of Ethnic Data and the Murphy-Law of Prejudice

Data protection laws[40] in Hungary prohibit the collecting and processing of sensitive data, among them data on national or ethnic origin, without the concerned person's explicit consent.[41]

Law enforcement practice in this regard appears to be quite illogical. For example, officials claim that even the recording of racial violence victims would run against statutory provisions, even though the Criminal Code[42] acknowledges certain racially motivated crimes, such as "violence against members of national, ethnic or racial minorities and religious groups" or "incitement against community". All such crimes presuppose a belonging to a given (racially or ethno-nationally defined) community.

This issue provides a wide range of examples for what we may call the "Murphy-law of prejudice". This describes the following phenomenon: no matter how sweet the constitutional and statutory language that deals with equal treatment, the free choice of identity and the protection of sensitive data might sound, it is always the discriminatory practice of the majority that will actually provide a practical definition for ethnic affiliation. Thus, when it comes to the mistreatment of members of various ethnic groups, no serious difficulties with regard to definition or recognition arise for the discriminating party. Such conceptual ambiguities will only worsen the protections provided for the victimised group.

Statistics showing racial crimes and violence to be virtually non-existent should not be taken to suggest that such incidents are in fact absent within Hungary. Such statistics in fact demonstrate that law enforce-

ment agents, as well as prosecutors and courts are very reluctant to recognise racial motivation in violent and non-violent crimes committed against Roma victims.[43] Officers and officials habitually claim that it is because of the lack of clear legislative guidelines for the establishment of racial motivation that the majority of such instances will only qualify as nuisance, assault or mischief, however, some politicians and experts argue that criminal legislation in force could easily allow for a less narrow, more minority-friendly interpretation.

Officially, no police registry contains any ethno-national or racial data per se, and in official use, such as press releases for example, even if the victim or a witness would claim that the offender was, say, Roma, the formal suspect description will not use any ethno-national signifiers. Instead, a (presumed) politically correct meta-language would be used, describing the suspect as "Creole", or a person with a dark complexion.

It should be noted that data protection regulations[44] do not prevent the handling and processing of data on the self-declared or perceived ethnic origin of individuals. Although on the national level, the existence of such statistics is mostly denied, ethnic data is collected by many institutions — for administering minority self government elections, affirmative action quotas, minority scholarships, etc. For some procedures set forth by the Minorities Act (seeking minority self-government elections or minority language education, registering first names that are not included in the official Hungarian register, etc.) one needs to make a formal declaration regarding ethno-national affiliation, in order to be eligible for the measures or preferences.

In practice, several authorities allegedly keep ethnic data based on the perceived ethnicity of persons,[45] and researchers and human rights NGOs also sometimes rely on such estimates.[46] This leads us to the central question within ethno-national data collection (and similarly, within racial profiling and discrimination): should group identity be based on self-identification, or on perception? As Lilla Farkas claims, "Curiously, when penalising violence against a member of an ethnic group, Hungarian criminal law recognises the difference between self-identification and perceived ethnic origin and attaches the same criminal liability to violence committed on either ground.[47] As Hungarian judges seem to understand now, a plaintiff who does not profess himself in court as belonging to the Roma minority, can at the same time claim that he was discriminated on the ground of his perceived ethnic origin."[48]

A Test for Ethnic Profiling: Law Enforcement Competencies and Authorisations

Part I, Section 3 establishes the standards for initiating police actions — above all in stop and search cases — as a crucial aspect of ethnic profiling practices. The present section makes clear just how much is left to the discretion of Hungarian law enforcement authorities — the police, the border guards and the national security agency.

The Police

According to the Hungarian legal framework, the police have an extremely wide, almost indefinite threshold for high-discretion stops; they have full discretion to perform routine control-checks on motorists and pedestrians. The police may stop anyone at any time and ask any questions deemed necessary.[49] The vacuous language of Article 29 of the Act on Police[50] gives full authorisation for the police to stop and request identification of "anyone, whose identity needs to be established". If the need arises, because the individual is not willing to co-operate or because her identity cannot be sufficiently established, she may be searched,[51] arrested[52] and held for eight hours. The chief of the local police unit may prolong the detention period for an additional four hours if the process has not been successful. Should this (maximum 12 hour) arrest not be sufficient, another type of detention[53] („public order detention") may be ordered, which (including the time spent in arrest) may take as long as twenty-four hours. For these stop and search procedures no suspicion whatsoever is needed, no probable cause standards are set forth and, as demonstrated above, unsuccessful identification itself may lead to up to 24 hours of detention. Apart from arrests or detentions, the police are under no obligation to provide an explanation — the only exception being when the individual herself requests such information.[54] The Constitutional Court ruled on several challenges to these provisions[55] and has been consistently dismissing petitioners' claims — disregarding dissents' arguments pointing to a disproportionate length of the detention and a lack of motivation for speedy police procedures with regard to detainees who are being held without having committed anything illegal.

Another form of stop and search competencies comes up in the context of vehicle control. According to Article 44 of the Police Act, the police may at any time check the legality of vehicle operation and possession. The police may therefore randomly stop and check vehicle ownership documents, certificates for

appropriate carbon-dioxide emission, highway stickers (a Hungarian equivalent for motorway tolls), they may check the first-aid kit (a required accessory for all vehicles), the insurance papers of the vehicle, or the condition of the windshield wipers. Critics[56] have argued that it raises constitutional concerns that a significant part of this type of control is actually of an administrative nature and should not be performed by the police forces. For instance, in the case of a company car, checking for the authorisation of the manager is not a policing matter per se; such procedures rather serve social security, tax, and administrative purposes.

Matters of police competencies also raise the problematic issue of reasonable suspicion and probable cause standards. According to the Act on Criminal Procedure,[57] probable cause is needed for the initiation a criminal procedure; still, an arrest or the above mentioned "public order detention" does not qualify as such. As a result, in addition to failure to provide proper identification, a "simple" suspicion (the probability of criminal offence does not exceed 50 percent) also suffices for these coercive measures.[58] Although the legislator never bothered explaining what these standards are supposed to mean, the Constitutional Court upheld the law,[59] precisely on the ground that these measures do not amount to criminal procedure and the detainee (whose co-operation is crucial in these procedures) does not qualify as a defendant under criminal procedures.

Border Guards as Immigration Officers

Border control agencies are another area of law enforcement worth considering. In enumerating competencies and coercive measures, the Act on Border Control Forces[60] gives almost identical authorisation as that of the police forces. What makes this peculiar is that besides classical border guard competencies, Articles 22 and 61 of the Act give a wide authorisation to both the police and the border control agencies to supervise regulations set forth in the Act on Immigration and Alien Control.[61] Among other things, the latter law obliges aliens to carry at all times and upon request present their immigration and identification documents. Should an alien be unable to provide these, she can be arrested and held for 12 hours.[62] In order to check this and other provisions of alien law, police and border guard officers are authorised to enter private premises.[63]

These provisions thus establish a legal environment, which enables, even requires law enforcement agents to stop and control persons with alien accents, appearance, etc.

Security Forces

Act 125 of 1995 regulates the authorities and competencies of the Security Forces. The competence of the Services in most cases runs parallel with that of the police (see below), thus, secret service agents may utilise all coercive measures and procedures that are provided for police officers.

Anti-terrorist Legislation

As everywhere in the Western world, general issues of terrorism have been on the agenda of Hungarian public, academic and media forums. However, the debate over Islam or Muslim communities has not been a dominant issue in the Hungarian political discourse. Altogether, there have been two unrelated incidents where individuals in Hungary, a Muslim religious leader (2004) and a non-nationalised immigrant doctor (2003), were accused of having terrorist connections. The former was arrested and latter was released and then extradited). These events received a considerable amount of media attention but neither triggered particularly long-lasting nor significant public attention.

Motivated by European Union integration process[64] rather than a fear of terrorism, Hungary adopted in 2001 an anti-money laundering and anti-terrorism package[65] containing a host of new measures and regulations intended to aid in the global effort to combat terrorism, especially in the field of financial sanctions and restrictions towards organisations and persons supporting terrorism. In 2002, the Centre for International Co-operation in Criminal Matters was established, followed in 2003 by the Anti-Terrorism Co-ordination Committee.[66] Hungary is involved in Europol and Interpol networks, and is also party to all terrorism-related UN conventions and EU common positions.

As István Szikinger[67] points out, however, that Hungary does not have a special anti-terrorist legislation in force. This can be explained by the fact that authorisation for police action under ordinary procedures and in "regular" cases is so wide that it covers all preventive, investigative and coercive measures[68] that may be used in anti-terrorist operations. Although Article 261 of the Criminal Code[69] specifically criminalises terrorist acts,[70] applicable investigative and coercive measures, including secret information gathering are no different from those that can be used in relation to other serious offences. Most of these measures were introduced in 1999 when a comprehensive legislation combating organised crime was passed.[71]

A judicial or a prosecutorial warrant must often be obtained for secret information collection, though it depends on the nature of the operation. In cases of emergency or pressing need, the police may use unauthorised interim measures. In connection with any criminal offence that can be punished with more than two years imprisonment, upon obtaining a warrant signed by a prosecutor, the police can have access to tax, telecommunications, bank and health care data.[72] Article 69 of the Police Act provides regulations for all secret operations that require judicial warrants. These measures (including searching private premises, wire tapping, controlling mail and email, etc.) may be applied in connection with a variety of serious offences, including "international crime" or "terrorist or terrorist-like crime". As the Constitutional Court[73] noted (in a decision striking down certain elements, but upholding the vast majority of the law), these labels introduce constitutionally questionable, vague and imprecise language.

IN THIS MANNER, POLICE ARE AUTHORISED TO USE ALL MEASURES, WHICH, IN OTHER JURISDICTIONS, MIGHT FALL UNDER THE COMPETENCE OF THE NATIONAL SECURITY SERVICE OR OTHER SPECIALISED BODIES.

In this manner, police are authorised to use all measures, which, in other jurisdictions, might fall under the competence of the national security service or other specialised bodies. In fact, police and national security forces (the secret service) pretty much share competencies and operational means. Whether it is the police or the secret services that will take action actually depends on where a report has been sent, or which agency takes ex officio notice.

Even though there are no anti-terrorist exceptional measures provided for the secret service, as mentioned above, security service officers enjoy the same rights as police officers,[74] and they may apply the same coercive measures and employ the same procedures. In considering the small size of the Muslim community, as well as the fact that no concrete information relating to terrorist activities has ever been identified in Hungary, and, the lack of specific anti-terrorist measures, no significant shift in ethnic profiling is demonstrated by our data. It is nevertheless interesting to note the curious, web-posted[75] yearbook of the Hungarian National Security Office, which in presenting its anti-terrorist activities, for some reason, feels the urge to explicitly refuse ethnic profiling as an operational principle. It says: "...terrorists are to be recognised not so much [sic!] from their origin or religion but their motivation [...] it would be wrong [...] to concentrate on the colour of the skin of the individual instead of his unusual behaviour. [...] It is difficult to sketch concrete traits of character. These people generally hide their intentions thus their behaviour — to reduce the danger of being caught — may be perhaps too law-abiding. Their behaviour may arouse suspicion if they make you feel or voice explicitly their separation from the social-political-religious circumstances of their country..."

Another peculiar example may be brought from the terrain of financial regulations. A recommendation of the President of the Hungarian Financial Supervisory Authority No. 1/2004[76] on the prevention and impeding of terrorist financing and money laundering[77] provides a vivid example for singling out Arab and Muslim countries by the very formulation of its due diligence and reporting requirements:[78] "The procedures aiming at the detection of money laundering intentions need to be used especially when.... Transactions should primarily be examined in terms of whether they are related to individuals, countries[!] or organisations contained in the specific international lists. ... Raised attention needs to be paid to electronically sent and received amounts, which are unusual for certain reasons, including especially the size of the amount, the beneficiary target country[!], the country[!] of the customer placing the order, currency or the method of sending or receipt. .. If an activity does not fit in the registered and reported activities, if the origin of received funds is unclear, if an amount increases from unusual sources, the target country[!] or addressee raises a suspicion, the financial service provider needs to analyse and evaluate them with special care, and the transaction should be reported to the authority even if the smallest suspicion arises."

Evidence and Indications of Racial Profiling by Police Forces

Given the very small size (roughly 0.057 percent of the population) of the Muslim community in Hungary, a fundamentalist terrorist threat is not considered a factor of significance, as the dominantly naturalised Muslim community lives integrated within Hungarian society.[79] There is no measurable public hostility towards the Muslim community, and, even after September 11, or March 11 Islamophobia appears to be a fully marginal, if at all existent phenomenon or sentiment in Hungary. Academic and NGO interest in discrimination and ethnic profiling has therefore been limited to mistreatment of the Roma.

Since the mid 1990's ill-treatment of the Roma in Hungary has been widely documented by human rights NGOs such as the Legal Defense Bureau for National and Ethnic Minorities (NEKI),[80] the Hungarian Helsinki Committee (HHC),[81] the Romani Civil Rights Foundation (RPA),[82] as well as the Parliamentary Commissioner for National and Ethnic Minorities.[83] 2004 saw a remarkable victory of the Hungarian human rights movement engaged in defence of Roma rights before the European Court of Human Rights. In the Balogh judgement, the Court found a violation of Article 3, determining the treatment on behalf of the police against the Roma victim to be inhuman and degrading. The court found no violation of Article 14, prohibition of discrimination, however.[84]

The Hungarian Helsinki Committee conducted a research project in 2002-2003, assessing discrimination against Roma in the criminal justice system. By scrutinising court files, the research of the HHC focused, among other things, on how perpetrators were initially detected by the authorities. The findings of the survey appear to be fully in line with similar Anglo-American studies geared towards analysing discrimination in the criminal justice procedure against visible minorities.[85] The researchers found that Roma offenders and suspects were significantly more likely to have been identified via police stops and searches, whereas in the case of non-minority defendants, the cause of their capturing were other investigative methods, and most of all being caught in the act.

Circumstantial evidence from other stages of the criminal procedure also indicates the likeliness of ethnic profiling. According to the 2001 EUMAP report[86] "research indicates that Roma are more likely than non-Roma to be reprimanded in pre-trial detention or ill-treated by the police,[87] and tend not to have legal representation during investigation".[88] The European Commission against Racism and Intolerance (ECRI) has expressed concern "at evidence that severe problems in the administration of justice exist as regards discrimination against members of the Roma/Gypsy community..."[89]

Closing remarks

Racial and ethnic discrimination — in particular, ethnicity-based selection and ethnic profiling — whether "general" or counter-terrorism specific, is a multi-dimensional issue; Hungary is no exception to this. Scrutiny of ethnic bias should ideally include all of the following: stops and searches, detaining, arrest, criminal procedure, charging, sentencing, disparity in police brutality, access to counsel, law enforcement public employment, ineffective legal remedies, expulsion and immigrant treatment, the designation of terrorist organisations, etc.

The legal framework calls for constitutional scrutiny and law enforcement calls for empirical analysis. Thus far, discussions on ethnic profiling are still rare and considered novel within Hungary. Beside the obvious relevance of observing constitutional rights in the light of anti-terrorist measures, in Hungary the issue also directs public attention to other, more complex implications of constitutionalising ethno-national identity

It emphasises that the remedial, affirmative context (which the Minorities Act encompasses) is not the only place where ethnicity and national identity come up. And even if the Constitutional Court decides to uphold the present amendments to the Act on Minorities, the Murphy-law of prejudice will remain, because the Minority Law applies only to cultural and political rights.

Although there is no spectacular increase in ethnic profiling within the framework of anti-terrorist measures, findings by the Hungarian Helsinki Committee and other sources indicate that ethnic profiling is present within Hungary — this much can be gleaned from raids, prison population, police violence, and the rate of complaint cases filed against the police that were subsequently dropped. In general, as Farkas points out,[90] with Hungarian law allowing for the handling of data on racial and ethnic origin only with the consent of the person concerned, the effect is a severe impediment on the prospect of litigation against indirect discrimination or institutional racism.[91] As ECRI reported in 1999: "...while acknowledging the fact that the collection and utilisation of data on ethnic origin is restricted in Hungary for valid reasons, ECRI is concerned that the lack of reliable information about the situation of various minority groups living in the country makes evaluation of the extent of possible discrimination against them or the effect of the actions intended to fight such discrimination difficult."[92]

Anti-terrorist measures expand the list of related questions: does (Muslim) religion qualify as an ethno-national characteristic? Does the fact that certain crimes actually involve ethnically, racially, nationally homogenous groups (beside terrorist organisations, there are gangs, mafia, etc.), make such profiles effective policing, and if yes, does such group-specific appearance validate preventive profiling measures? After all, we need not forget that just as much as terrorism operates in the battlefields of psychology („kill ten and keep thousands in a state of fear"), so does the war against terrorism. As long as seeing Arabs (or

Roma) being stopped by authorities creates a feeling of safety in the majority, anti-profiling arguments can hardly have a steady impact. There is thus another war, one of ideas, that must be fought with research papers that demonstrate that ethnic profiling is no effective policy and that discrimination is no recipe for security.

NOTES

1. A note about terminology: besides obvious differences, I will treat racial, ethnic and nationality-based terminology as synonymous.
2. This way, if we know only that the perpetrator is black, then the law enforcement syllogism means the following: the perpetrator is black and the suspect is white; from these it follows that the perpetrator cannot be identical with the suspect; but it does not follow from the pair of claims that the perpetrator is black and so is the suspect (or the pedestrian or driver), that then the suspect is the perpetrator. See Sharon DAVIES, "Reflections on the Criminal Justice System after September 11, 2001." *Ohio State Journal of Criminal Law*, Fall, 2003, p. 66.
3. E.g., in the 1979 Delaware v. Prouse case (440 US 648, (1979) the Supreme Court found random stops and checks to be unconstitutional. (See, e.g., Anthony THOMPSON, "Stopping the Usual Suspects: Race and the Fourth Amendment." *New York University Law Review*, October, 1999, pp. 973–974.) In the 2000 City of Indianapolis v. Edmund case (531 US 32 (2000)), the Court still found it unacceptable to have a road check following a roadblock, with the involvement of drug-searching dogs. But the Court upheld a roadblock in the context of a 2004 investigation concerning a hit-and-run accident, when during the time when the crime was committed, the road was blocked and without using further coercive measures the police politely asked motorists about the case, showing them photographs. [Illinois v. Lidster, (000 U.S. 02-1060 (2004)], see also THOMPSON, *Op. cit.*, p. 920. The question is, of course, whether the Court's position would be similar if the roadblock were put in front of a mosque or a Middle-Eastern grocery store...
4. U.S. v. Brignoni-Ponce, 422 US 873 (1975).
5. Skinner v. Railway Labour Executives Assn, 489 U.S. 602, (1989).
6. Police v. Sitz, 496 U.S. 444 (1990).
7. E.g., Veronia Sch. Dist. 47J v. Acton, 515 US 646 (1995), Bd. of Educ. v. Earls 536 US 822 (2002).
8. http://quickfacts.census.gov/qfd/states/00000.html.
9. See, Michael BUERGER – Amy FARRELL, "The evidence of racial profiling: interpreting documented and unofficial sources." *Police Quarterly*, Vol. 5. No 3, September, 2002, p. 290; David A. HARRIS, "The Stories, the Statistics, and the Law: Why 'Driving While Black' Matters." *Minnesota Law Review*, December, 1999, p. 267.
10. Samuel R GROSS – Debra LIVINGSTON, "Racial Profiling Under Attack." *Columbia Law Review*, June, 2002, p. 1413.
11. See, e.g., Mariano-Florentino CUÉLLAR, "Choosing Anti-Terror Targets by National Origin and Race." *Harvard Latino Law Review*, Spring, 2003; Leonard BAYNES, "Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis." *Virginia Sports and Entertainment Law Journal*, Winter, 2002, pp. 12–13; Deborah RAMIREZ – Jennifer HOOPES – Tara Lai QUINLAN, "Defining Racial Profiling in a Post-September 11 World." *American Criminal Law Review*, Summer, 2003, p. 1213.
12. Consider the fact that the name of Yigal Amir, Yizchak Rabin's assassin would not have cropped up based on any kind of assassin profile; nor would the person who first blew up a commercial aircraft — she was a woman who wanted her husband dead in 1949. Gregory NOJEIM, "Aviation Security Profiling and Passengers' Civil Liberties." *Air and Space Lawyer*, Summer, 1998, p. 5.
13. See, e.g., Steven BRANDL, "Back to the future: The implications of September 11, 2001 on law enforcement practice and policy, *Ohio State Journal of Criminal Law*, Fall, 2003; Mark OSLER, "Capone and Bin Laden: The failure of government at the cusp of war and crime." *Baylor Law Review*, Spring, 2003.
14. It should also be noted that there is another somewhat different, though related issue in the context of the war against terrorism: the questions of financial (and related criminal and immigration law) sanctions. These legal measures are intended to obstruct terrorist organizations. A widely held opinion among analysts is that these sanctions have a disproportionate negative impact on the Arab and Muslim community (because of both due process violations in the designation process and an unusual shift in the standards for criminal liability.) The concern is that among the designated organizations and individuals, the ratio of Arabs and Muslims is disproportionately and unjustifiably high. By contrast, comparable strictness about national security is absent with respect to other extremist groups (Irish, Basque or Jewish). Several analysts are of the opinion that the designation of terrorist organizations is profoundly discriminative because it is not based on a uniformly applied set of standards; instead, an organization is designated as terrorist whenever the current government deems it such (mostly based on secret information and unpublicized principles.) See e.g. Paul ROSENZWEIG, "Civil Lib-

erty and the Response to Terrorism." *Duquesne Law Review*, Summer, 2004; David COLE, "The New McCartyism: Repeating History in the War on Terrorism." *Harvard Civil Rights-Civil Liberties Law Review*, Winter, 2003; Sahar AZIZ, "The laws providing material support to terrorist organizations: Erosion of constitutional rights or a legitimate tool for preventing terrorism?" *Texas Journal on Civil Liberties and Civil Rights*, Winter, 2003; Erich FERRARI, "Deep Freeze: Islamic charities and the financial war on terror." *St. Mary's Law Review on Minority Issues*, Spring, 2005; David COLE – James DEMPSEY, *Terrorism and the constitution: Sacrificing civil liberties in the name of national security*. New York: The New Press, 2002; David COLE, *Enemy Aliens: Double Standards and constitutional freedoms in the war on terrorism*. New York: The New Press, 2003; David COLE, "Secrecy, guilt by association, and the terrorist profile." *Journal of Law and Religion*, 2000–2001; Karen ENGLE, "Constructing good aliens and good citizens: Legitimizing the war on terror(ism)." *University of Colorado Law Review*, Winter, 2004; *Review of the Security Council by Member States* (eds. Erika DE WET – Andre NOLLKAEMPER). http://www.intersentia.be/ english/index.asp.

15. In the U.S., in 2002, 30 percent of those asked supported that foreigners from an unfriendly state who were legally residing in the U.S. could be interned. Moreover, 53 percent approved that the borders to Arab countries be closed. Stephen ELLMANN, "Racial Profiling and Terrorism." *New York Law School Journal of Human Rights*, No. 19. 2003, p. 345.
16. William J. STUNTZ, "Local Policing After the Terror." *Yale Law Review*, June, 2002; Samuel R. GROSS – Debra LIVINGSTON, "Racial Profiling Under Attack." *Columbia Law Review*, June, 2002; Mariano-Florentino CUÉLLAR: "Choosing Anti-Terror Targets by National Origin and Race." *Harvard Latino Law Review*, Spring, 2003; David A. HARRIS, "Using Race as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description Yes; Prediction, No." *Mississipi Law Journal*, Special Edition 2003; Richard BANKS, "Beyond racial Profiling: Race, Policing, and the Drug War." *Stanford Law Review*, December, 2003; Richard BANKS, "Racial profiling and antiterrorism efforts." *Cornell Law Review*, July, 2004; David A. HARRIS, "Racial profiling revisited: 'Just common sense' in the fight against terror?" *Criminal Justice*, Summer, 2002; DAVIES: Op. cit.; RAMIREZ–HOOPES–QUINLAN, Op. cit.; Liam BRABER, "Korematsu's Ghost: A Post-September 11th Analysis of Race and National Security." *Villanova Law Review*, 2002.
17. David A. HARRIS: "New Risks; New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001." *Utah Law Review*, 2004, p. 933.
18. HARRIS, 2004, p. 940; see also, BAYNES, *Op. cit.;* Thomas W. JOO, "Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11." *Columbia Human Rights Law Review*, Fall, 2002.
19. 2003 UNHCR Statistical Yearbook Country Data Sheet — Hungary. http://www.unhcr.ch/cgi-bin/texis/vtx/country?iso=hun.
20. Census data is inaccurate because many Roma are reluctant to identify themselves as such. Some improvement is noticeable: whereas in the 1991 census 142,683 persons declared themselves Roma, in 2001 this number increased to 190,046. Minority organizations put this number somewhere between 400,000 and 500,000. The most reliable number was provided by a survey in 1993/1994 estimating 456,000. See UNDP Avoiding the Dependency Trap. Bratislava 2002.
21. Act No. 77 of 1993.
22. Directive 2000/43 EC, Official Journal of the European Communities 2000, L 180/22.
23. See, e.g., Act CXXV of 2003 on Equal treatment and the Promotion of the Equality of Opportunities (Equal Treatment Act — hereinafter: ETA)
24. Both groups have estimated numbers of 10,000. Meanwhile some doubt that certain recognized minorities (such as the Ruthenian for example) have fulfilled the statutory numerical requirements. (The same doubts were raised on that of the 100-year presence of the Greeks.) The legislator is of course free to recognize any group as a national or ethic minority (even lacking the general conditions), yet the statutory language setting forth the requirements therefore seems absolute and general, and is thus somewhat misleading.
25. Following the Treaty of Trianon in 1920 two-third of Hungary's historic territory (with a corresponding population) had been annexed to the neighbouring state. Since then, but especially after the 1989 political transition, Diaspora politics has been a dominant factor in Hungarian foreign and domestic politics.
26. This of course does not prohibit the anonymous collection of census data. In general, Articles 2(2) and 3(2) of Act No. 63 of 1992 on the protection of personal data and the publicity of public data (Data protection Act).
27. Stephen DEETS, "Reconsidering East European Minority Policy: Liberal Theory and European Norms." East European Politics and Society, 16:1, 2002.
28. For more, see FARKAS Lilla, "The Monkey that does not See." *Roma Rights Quarterly*, 2/2004, http://www.errc.org/cikk.php?cikk=1940 (2003).
29. For a detailed case description see Roma Rights 21–2/003, pp. 107–108. In the summer of 2003 the Roma Press Center's fact finding revealed that at one point non-Romani parents signed a petition in which they too claimed to be Romani.

30. See the minority-ombudsman's annual parliamentary reports or an interview with Antal Heizler, President of the Office for National and Ethnic Minorities, *Népszabadság* (the leading Hungarian daily), 24 July 2002.
31. The President did not predict that more then 7 out of the 17 local self-governments running in the 2002 elections in Budapest (and some 30 out of the 48 registered nationally) would be "authentic Romanian". Out of the 13 local Romanian minority self-governments operating between 1998 and 2002, he estimated that only three have "real Romanian blood" running in their veins. See the summary of an interview with Kreszta TRAJAN, *Népszabadság,* 21 August 2002.
32. See the statement of Doru Vasile IONESCU, *Népszabadság,* 15 August 2002.
33. Only five signatures are needed for the registration of a minority self-government. (For which subsequently everybody, including members of the 'majority', may vote.)
34. See *Népszabadság,* 15 August 2002.
35. Interview with Mr. Heizler, cit.
36. For considerations of the Venice Commission on the issue, see, e.g., http://www.venice.coe.int/ docs/2001/ CDL-INF(2001)019-e.asp.
37. Act 67 of 2001.
38. Two of the three opposition parties in parliament have severely criticized the text, claiming first of all that the government is significantly underestimating the cost of the law. The Socialist party estimated that as many as one million people would be taking advantage of the health care benefit, which alone could cost around 15 billion Forints ($50 million), and the annual price of the proposed legislation would actually add up to around 60 billion Forints. Additional concerns were raised regarding the labour market's capacity to deal with the estimated additional 700,000 legal labourers. Opposition liberals expressed grave misgivings about the overall conception behind the law, claiming that the intricate web of preferences and benefits (most of which would be available in Hungary) does not support staying but in fact encourages immigration.
39. See, e.g., Minelres News, Office for National and Ethnic Minorities, Budapest, Hungary, Selection of news on national and ethnic minorities in Hungary, March 2004, http://lists.delfi.lv/pipermail/minelres/2004-March/date.html.
40. In particular Articles 2(2) and 3(2) of Act No. 63 of 1992 on the Protection of Personal Data and the Access to Public Data.
41. For a detailed discussion of the data protection system in Hungary in relation to ethnic data see Andrea KRIZSAN, "The Case of Hungary." In *Ethnic Monitoring and Data Protection* (ed. Andrea KRIZSAN). Budapest: CEU Press, 2001.
42. Act IV. of 1978. The Criminal Code.
43. Consider for example the case of racially motivated crimes. The Hungarian Criminal Code (Act IV. of 1978) criminalizes four types of behaviour that may fall under the racially motivated category. These are: genocide (Article 155), apartheid (Article 157), violence against members of national, ethnic or racial minorities and religious groups (Article 174/B) and incitement against community (Article 269). Nevertheless, it is safe to say that the while the first two never, the latter two only very rarely occur in official statistics. In 2003, for example, no investigation was initiated in relation of apartheid or genocide, whereas 11 instances of "violence against members of national, ethnic or racial minorities and religious groups" and 14 instances of "incitement against community" were registered. In recent years for example, in the case of "violence against members of national, ethnic or racial minorities and religious groups", the following number of instances had been registered: 1999: 3, 2000: 8, 2001: 12, 2002: 5, 2003: 11. This means that the following number of offenders had been identified and indicted: 1999: 9, 2000: 12, 2001: 9, 2002: 5, and in 2003: 9 identified from which 8 indicted. According to official statistics, in 2003 two people were indicted and two convicted under Article 174/B; in 2004, the numbers were eight and six, respectively. (Source: Unified Police and Prosecution Statistical Database.)
44. It should also be stressed that the Data Protection Act does not explicitly prohibit the processing of anonymous ethnic data of statistical nature, or the anonymous collection for research purposes of data relating to one's perceived ethnic origin. The Data Protection Act defines sensitive data as personal data that relates to racial origin, national and ethnic minority affiliation — not perceived racial origin.
45. See cases encountered by the Minority Ombudsman. For a discussion see KRIZSAN, *Op. cit.,* 168–172.
46. As Lilla Farkas claims, "at present the majority does vindicate the right to say who is a Roma. Despite the lack of official data, when confronted by researchers, heads of prisons provide estimates about the number of Roma inmates. (See FARKAS, *Op. cit.*) The Hungarian Helsinki Committee's research into discrimination against Roma defendants in the criminal justice system was too based on perceived ethnic origin. As researchers explained, they cared little about discrimination based on self identification. Their focus was on discrimination stemming from the perception of policemen, prosecutors and judges of the defendant's ethnicity. See FARKAS Lilla – KÉZDI Gábor – LOSS Sándor – ZÁDORI Zsolt, "A rendőrség etnikai profilalkotásának mai gyakorlata" [The Current Police Practice of Ethnic Profiling]. *Belügyi Szemle,* 2004, p. 33.

47. Article 174/B of Act 4 of 1978 on the criminal code.
48. FARKAS, *Op. cit.*
49. Article 32. of the Police Act.
50. Act 34 of 1994.
51. Article 29.
52. Article 33.
53. Article 38.
54. Articles 29 and 33.
55. Decisions No. 9/2004. and 65/2003.
56. See, e.g., Andras L. PAP, "Street Police Corruption — A Post-communist State of the Art." Kokkalis Program on Southeastern and East-Central Europe, Kennedy School of Government, Harvard University, http://www.ksg.harvard.edu/kokkalis/GSW3/Andras_Laszo.pdf.
57. Act 19 of 1998.
58. Article 33.
59. Decision no. 65/2003.
60. Act 32 of 1997.
61. Act 39 of 2001.
62. Article 61 of the Act on Border Control and Border Guards.
63. Id.
64. It is of particular importance that in June 2001 Hungary was put on its black list of countries non-conforming in money laundering issues by the FATF, OSCE.
65. Act 83 of 2001.
66. Its members are as follows: the National Security Office, the Information Office, the Military Security Office, the Military Information Office, the National Security Special Service, the National Police Headquarters and the Border Guard of the Ministry of the Interior.
67. See his essay in this volume.
68. See e.g. Articles 63, 64, 69 of Police Act.
69. Act 4 of 1978.
70. And the law imposes a duty to report such activities too.
71. Act 75 of 1999. Also see Act 126 of 2000 on the Coordination Centre Against Organised Crime.
72. See Article 63 of Police Act.
73. Decision no. 47/2003.
74. The only difference between the competences of the two agencies is that only the police is authorised to "investigate", thus, whatever this distinction is to mean in practice, national security forces competences stop at "prevention" and "detection" of terrorist activities.
75. www.nbh.hu.
76. http://www.pszaf.hu/english/start.html.
77. Act 15 of 2003 on the prevention and impeding of money laundering states that the objective of the act is to combat the laundering of funds originating from crime, or financing terrorism through the money and capital market system, or making accessible for criminals, through financial service providers. Act 4 of 1978 on the Criminal Code, Section 303 provides for the following definition of money laundering: (1) Any person who uses any item originating from the commitment of a criminal act punishable with imprisonment during his economic activities in order to conceal its origin, or perform any financial or banking transaction in relation to the item shall commit a crime and may be punished with imprisonment up to five years. (2) The punishment is imprisonment up to eight years if the money laundering is committed a) in a businesslike manner, b) involving especially large or even higher amounts, c) by an officer or employee of a financial organisation, investment enterprise, investment fund manager, clearing house, insurance company or an organisation involved in the organisation of gambling, d) by official persons, or e) attorneys at law. (3) Those who make an agreement on committing money laundering shall commit an offence and can be punished with imprisonment up to two years. (4) Those cannot be punished due to money laundering who voluntarily submit a report to the authority, or initiates such a report, providing that the action has not been detected at all, or it has only been detected in part. (5) The item specified in Paragraph (1) also includes documents and dematerialised securities representing a right to assets, which provide the right of disposal over the asset value or entitlement on their own or, in the case of dematerialised securities, for the beneficiary of the securities account. Section 303/A (1) In case of items originating from a punishable action committed by a third party, a) those who use the item while exercising business activities, or b) perform any financial or banking transactions in relation to the item, and are not aware of the origin of the item due to negligence, may be punished with imprisonment up to two years, community work or may be imposed a fine. (2) The punishment for an offence is imprisonment up to three years if the action defined in Paragraph (1) is committed a) involving an especially large, or even higher value, b) by an officer or employee or a financial institution, investment enterprise, investment fund manager, clearing house, insurance company or organisation engaged in the organisation of gambling games, or c) by official persons. Section 303/B (1) Those who do not fulfil the reporting obligation specified in the Act on the prevention and hindering of money laundering shall commit a crime and may be punished with imprisonment up to three years. (2) Those who do not fulfil their reporting obligation specified in Paragraph (1) for negligence shall commit and offence, and may be punished with imprisonment up to two years, community work, or may be imposed a fine. For the legislative background also consider the following: Act 83 of 2001 on combating terrorism, aggravation of regulations on the prevention of money laundering, and ordering certain restrictive mea-

sures, Act 101 of 2000 on the announcement of the Strasbourg convention of November 1990 (on money laundering, and the detection, seizure and confiscation of items originating from crime).

78. Id. See Part 1.4. Blocking the funds financing terrorism.
79. In the 2001 national census 5,777 persons identified themselves as Muslim, which is about 0.057 per cent of the Hungarian population. Taking into account non-citizen migrants and converted Hungarians, media and academic estimates occasionally refer to a larger Muslim population size, sometimes as large as 20,000-50,000. See, e.g., "Mozlimok Magyarországon" [Muslims in Hungary]. *Magyar Narancs*, Vol. 16, No. 19; http://www.mancs.hu/index.php?gcPage=/public/hirek/hir.php&id=10117 (11. April 2005).
80. See www.neki.hu.
81. See www.helsinki@helsinki.hu.
82. See www.romapage.hu.
83. See www.obh.hu.
84. ECHR case Balogh v. Hungary 371, 20. July 2004; http://www.echr.coe.int/Eng/Press/2004/July/ChamberJudgmentBalogh200704.htm#_ftn1.
85. See FARKAS–KÉZDI–LOSS–ZÁDORI, *Op. cit.*
86. EUMAP Monitoring the EU Accession Process: Minority Protection. OSI EU Accession Monitoring Program 2001. p. 241.
87. Hungarian Helsinki Committee and OSI-COLPI, Punished Before Sentence, Budapest, 1997. See also, UN Committee Against Torture, Conclusions and recommendations concerning Hungary 's third periodic report, November 1998: "The Committee is also concerned about the persistent reports that [...] a disproportionate number of detainees and/or prisoners serving their sentences are Roma."
88. A kirendelt vedővel rendelkező fogva tartott személyek védelemhez való jogának érvenyesülése a büntetőeljárás nyomozási szakaszában („Realising the right to defence of detained persons with appointed defense counsels in the investigative phase of the criminal procedure"). Office of the Ombudsmen, 1996.
89. ECRI (2000)5, para. 14.
90. See FARKAS, *Op. cit.*
91. Under Article 19(1) b, of Act No. 125 of 2003 on equal treatment and the promotion of equal opportunities the plaintiff must establish his ethnic origin in order for the burden of proof to be reversed. In any case, under Article 8 protection is based on ethnicity, thus she must clear this issue when bringing a case. In cases of indirect discrimination not only the ethnicity of the plaintiff(s) but also of the comparator(s) must be established. The latter may prove an insurmountable task, given data protection provisions. See FARKAS, Op. cit.
92. Second report on Hungary, Adopted on 18 June 1999 made public on 21 March 2000, Para. 26. http://www.coe.int/T/E/human_rights/Ecri/5-Archives/1-ECRI's_work/5-CBC_Second_reports/Hungary_CBC_2.asp.

„PRESIDENTS SHOULD NOT BE AUTHORISED TO DECLARE AN EMERGENCY ON THEIR OWN AUTHORITY"

INTERVIEW WITH BRUCE ACKERMAN BY GÁBOR HALMAI

My first question regards the Hungarian Constitution. You wrote in your book, The Future of Liberal Revolution (1992) that it is unconditionally necessary to enact an entirely new constitution in order to constitutionally guarantee a liberal rule of law regime. As you know Hungary is one of the countries in this region, which has not done so. You wrote in another piece on transition that this is a time window that will be closed. What do you think about this very special Hungarian approach of so-called permanent constitution-making, which does not entail changing the whole constitution but rather amending it? I would also like to ask for your thoughts on another very paradoxical aspect of the whole history of this region. Hungary and Poland are the two most developed countries in the region, and yet Hungary has not enacted a new constitution and Poland was comparatively slow to do so (1997). Those countries where the obstacles of a new democracy were seemingly more present, on the other hand — e.g. Russia, Bulgaria, Romania — enacted new constitutions very rapidly. What do you think of these phenomena of Eastern-Central-European constitution-making approaches?

Let's begin by comparing Poland and Hungary. In Poland we have a genuine, popular mobilisation and movement led by Walesa, who fails to be equal to the challenges of constitutional creativity. In contrasting Walesa with Mandela, we have a very nice comparison. I have no doubt that it was his petit self-aggrandisement that disrupted the movement toward a constitution, which was, nonetheless, accomplished in the end. Now, Hungary is a very different case. There was not a popular solidarity similar to that which existed in Poland; the great events of 1989 were symbolic. The mass mobilisation was directed to the reburial of Imre Nagy. Remnick wrote a very interesting article that describes the movement of mass changes and popular opinion in more prominent terms than it is normally described. The standard view is that Hungary is simply a case of an elite negotiation. This article casts an interesting light on the deep changes in public opinion, which made this transformation possible. Nonetheless, I certainly do believe that a new constitution in Hungary is both possible and more desirable. The sad fate of the Sólyom-court suggests the desirability of a genuine constitutional solution. It was an admirable, heroic effort at judicial statesmanship. We can argue about particular decisions, but this is of no significance. It was an admirable effort to constitutionalise fundamental liberal democratic values and give them public centrality, which is terribly important in the legitimisation process. It is the court, which substitutes for a new constitution.

May I interrupt you in order to expand upon your comparison between Poland, where a kind of movement was present, and Hungary, where there was no revolution at all? My question is whether achieving a new legitimacy, a new legality in society demands a kind of revolution, which wasn't present in Hungary. The negotiation with the former communist party was a "revolution", according to Timothy Garton Ash. It was a negotiation between the new and the old regime. Would it have been appropriate to have a totally new constitution for that approach of development?

Sure. It would have been. Of course, I understand your point that there is a sociological continuity and legal continuity. That is Andrew Arato's point, too. However, merely because there is a considerable sociological continuity doesn't mean that we should not use the legal symbolic resources to express and qualify a change in values, which expresses a new set of public commitments. I very much believe in the relative autonomy of the political. To some degree it is easier to have a new constitution in states which have a substantial continuity in their elite. This is the case, of course, in Germany. After all, a great percentage of the elite had Nazi past in the 1940s. The fact that the Americans gave them pieces of paper does not eliminate history. And yet the constitution symbolically expressed a set of values, which, given the Wirtschaftswunder, the economic developments afterwards, served as a way of expressing the new German statehood.

My major problem is related to the legitimacy problem in Hungary, which I believe is similar to the German case. Which body would have been the legitimate one to enact a new constitution?

There are two very different models of the relationship between constitutional legitimacy and sociological reality. One model is that constitutional legitimacy reflects and underlines agreement. And that is sometimes true. Sometimes the constitution creates legitimacy... if you are lucky. Let's go to Germany before we go back to Hungary. In 1947, there was this fragile situation. They created an expressed set of ideals, which many people in the society were very sceptical about. But after a decade of good fortune and accidents, which we don't have to repeat now, the basic law that we now call the constitution had become, by 1960, a highly expressive component of German identity. Not because it reflected something of 1948, but because it actually helped to create. So, I would argue that the round table in 1989 in Hungary is the functional equivalent of the Philadelphia Convention of 1787.

People with no legitimacy at all...

No, with a little bit. There is not a complete absence of legitimacy, but rather a problematic legitimacy. The delegates to the American Constitution were not even elected by people and they acted far beyond the authority granted them by the state legislatures. They just declared themselves representatives of *We the People* and expressed something, which then, through a sequence of events became profoundly expressive of national identity. That is the possibility that Hungary missed. Which is not to say that you can't have a legitimate system, that you can't develop it over time, and, in fact, what is going to happen now, is that a great deal of the legitimacy debts will be taken up by the European Union. Let me just give you one comparative example. Let's take the Russian system, a system that is far less legitimate than the Hungarian system is today. Here we have a very technically poor constitution proposed by Boris Yeltsin. He didn't read my book, *The Future of Liberal Revolution*, and yet he followed my advice. This constitution was ratified in a referendum, a referendum that resulted in questions about how accurate it was, who won and who lost. Very obscure. Despite the fact that this referendum reflected very little, it has been crucial. If they had not had that referendum and that constitution, would Yeltsin have been willing to run for re-election for the presidency, rather than moving into a form of absolutism? No, probably not. That is very important. In contrast, what we have in Hungary is the round table in 1989, which does not give birth to a constitution. The constitutional court in this heroic modality tries to symbolize foundational values, and has done so with a great deal of popular support and legitimization as far as public opinion is concerned. Then, at the end of the term what happens? We'll see. The modality of expression being judicial rather than textual means the process of sustaining this central expressive modality is more vulnerable.

In my opinion one of the advantages to the Hungarian approach of continuing this constitution-making process mostly in the constitutional court is that the court can keep the whole development within a legal framework and avoid some of the efforts of the political forces. In the effort to achieve transition and justice, compensation or lustration, etc., the court very rigorously said that no transition could exist without applying the rules of the game and the rule of law.

Through how many time horizons should we judge the process of constitutionalisation? You are talking about short-term phenomena. 5 years, 10 years. There is a trade-off here, but there are also longer-term phenomena. Let me refer to a hypothetic counter-argument. Let's imagine that Fidesz had won the 2002 election 53 to 47, rather than lost. And, let's imagine that the next generation of constitutional court justices had been very poor and not seriously engaged in the process of the construction of liberal democratic values. Let's suppose we are in the year 2015. And the next generation of Hungarians are looking back to monuments of cultural, legal, political identity. What would they have seen? A treatise by László Sólyom. A treatise as opposed to a textual statement like the Grundgesetz. Well, that is a big difference.

It is true. The constitution of Germany is, however, not only the Grundgesetz but also the jurisprudence of the Federal Constitutional Court.

We are talking about several things here.

If we are talking about the U.S., the U.S. constitutionalism nowadays is not the text of 1787. It is also the jurisprudence of the Supreme Court in the last two centuries.

Yes. It is another perspective. But the question is not whether the failure of Hungary or the Hungarian round table, the failure of the first government

to take constitutionalism seriously, delegating it instead to the constitutional court, was the only important factor in the constitutional development of Hungary? Obviously, this is not the question. The question is whether this was a missed opportunity. And I think it was. Let's take another example. Look at Israel. The Israelis could have had a constitution written by the Knesset, the first Knesset. They don't. Of course, parts would have changed or even everything, but it was a missed opportunity. You are absolutely right that there are some countries in which there are pieces of paper, which have a little value. Some exist in the region. I suggest that, even in Russia, one might be sceptical about the constitution and many of its basic provisions. Nonetheless, the act of writing a constitution wasn't altogether in vain. It was significant in important ways. I am not knowledgeable enough about some of the other countries to make an informed judgement.

If you think that was a missed opportunity, do you think that is a handicap for Hungary in the European Union?

Not a serious one. Obviously, we have a legitimacy problem. And the constitution is part of the solution to the legitimacy problem. The fact that we have an alternation of political power is another very important fact. Which is the more important? The second. The fact that there was this heroic effort of constitutional creativity by the constitutional court is an important fact in sustaining the legitimisation process. The fact that the next constitutional court has not developed it as aggressively is another fact. So, we have a complex picture here. But, of course, the transformation into the structure of the European Union is a dramatic loss of sovereignty, making the status of the Hungarian legitimisation system less important compared to the constitution of a new Europe and the success of the EU project. So, our concerns about the mixed picture of legitimacy in Hungary at the end of 15 years would be more fundamental if Hungary would have remained outside the EU for the next 25 years. However, it remains important. But you are now part of this European project and the crucial question for Hungary, and for everybody else, is whether that will succeed or not. Your crystal ball is as good as mine.

On the other hand, of course, the EU itself has a large deficit in legitimacy and democracy. Let's take Dieter Grimm's argument that actually the Union and the source of the Treaty of the Union is not the people, but the different member states. So, how to create democracy and legitimacy and at the very end a constitution knowing the existence of that kind of deficit?

It is fair to question whether there has ever been a government that does not have a legitimacy deficit. A big question. If you think of liberal democratic political philosophy, and you think of Jürgen Habermas' work, John Rawls' work, or my work, and then you look at political reality, there is a huge deficit. John Rawls and I were philosophers not only of democracy but of social justice. Outside Scandinavia, how many states can, in a straightforward sense, be considered to be just or even moderately just? As far as the political process is concerned, taking into account the role of money in it and the extent of popular attention paid to it, it is very weak. Nonetheless, despite this huge legitimacy deficit, there are completely illegitimate systems and then other systems in the grey area. That's how we should think of it. When we look at the so-called successful countries that Dieter Grimm has in mind, I don't know which ones they are. Italy? Is that the one that he has in mind? Let's look at Germany! Germany in 1950, 1960 or 1970? When is it that this country has had a legitimate system? What we have here is the following. We have a set of European values, which we call Enlightenment liberal values. There are many interpretations of them. But the fact remains that if an enlightenment Hungarian encounters an enlightenment Portuguese person, they know what to talk about. Maybe that is just the elite, but it is also more than the elite. If you look at the educational content of the "gimnázium" in Hungary and you compare it to the educational content of the "gimnázium" in Holland, it is not that different. That is one important point. If you look at a 17-year-old in Hungary and you look at 17-year-old in Italy, they dress the same way. They listen to the same music. They eat the same food. They have the same complaints about their parents. That's another fundamental point. They travel around in ways they wouldn't have 50 or a 100 years ago. So both on the social and on the high cultural level there is a convergence. Consensus would be a strong word for that. So, what phenomenon are we talking about? What we are talking about is something important but not decisive. We are talking about the fact that there are no European-wide parties. That if you look at the headlines of Népszabadság and you compare them to those of Le Monde, they are different. They are different in a way that the New York Times, the Washington Post, and the Los Angeles Times are not. So, it is certainly true that the political system of Europe, which is not based on values, high values or cultural

commitment, still has a lot of constructive activity to undertake in the federal system. But because there is also, both in my generation and that of the 40-year-olds, a recollection of the disaster of the 20th century, I am not persuaded that this is beyond the capacities of the political class in Europe. I was in Budapest in 1967 and then again in the 1980s, and while I can see that there is a big difference, one still sees much of the disaster of nationalism all around. Talk to a Spaniard or a German, it is the same thing. People know that the 21st century should not be like the 20th century. It is a negative evolution, but it is still very important. Of course, you can fail. But to say that the political presuppositions for a European federation do not exist is much too strong. The European federation has to be built. It is time to move beyond the Marxist notion that the constitutional order is just part of a superstructure, beyond the notion that the base has to be built first. There is autonomy in political life, there is energy and there are constructive possibilities.

Do you see the American model of federalism as a model for the European approach or should it be totally different?

There are many analogies between the American constitutional system between 1787 and 1860, what I call in my paper the First Republic, and the present situation in Europe. It was important in the U.S. at that time that you as a Virginian were religiously and culturally very different from a New Yorker. The state was at the centre of the political life in the U.S. not the federal union. There were constant efforts and arguments about secession at the court and it ended in civil war. So I think there are striking analogies between the federal experience of the U.S. and that of Europe in the future. We have different models of federalism. The German model is one of administrative federalism with a weak bureaucratic centre. But the law-making confidence of the centre is very substantial. Bürgerliches Gesetzbuch is a national thing. In the U.S., each state is in control of the foundations of private law and many other institutions. I think that is what should be true of Europe. The premature national Europeanization of large areas of local law should be resisted. And I think it will be resisted. These basic patterns, then, will have a certain American look to them, as will the political party system. Just as in America, a lot of European politics will be a politics of greed, local greed for a very long time. The "Let's help the Hungarian farmers" sorts of political action, rather than principle. That will be a demoralising feature of politics. That will be too much regional aggrandisement politics and too little European articulation politics for my taste. That is also true of America, even today.

Absolutely. In your paper you said that the spirit of dualist democracy will die if the present generation of the American citizens fail to discover in their constitution a living language of self-government? Do you think this has already happened after the elections of 2000 or it is going to happen?

One of my models in my book *We the people* is based on Montesquieu's *The Spirit of the Laws*. It does not die with the election. We are talking about a generational phenomenon.

The Electoral College could die. Yet it is a very substantial part of the American approach to democracy, which had been designed as a kind of deliberative body before Jefferson reformed it. It was a very basic, fundamental idea of the American democracy.

There are two different facts here. One is whether the spirit of the American Constitution, the possibility for ordinary people to organize themselves and actually affirmatively and constructively participate in the shaping of public values, will die. As you point out, the Electoral College was killed in 1800. So, it has been dead for a long time. The crucial question, and it is one that the Europeans will have to think about is the notion of "we the people" as capable of action in an affirmatively creative way. I think that the only nation in Europe that has this notion is the French. It is different from the Americans, but very similar in its affirmation of a past of popular sovereignty. It is not an accident that the French, even though for little micro-reasons, had a plebiscite on Maastricht, while the others didn't. If the French didn't go 52 for 48 for Maastricht, we would be in a very different situation today. And, whether or not, after the trauma of the 20th century in Europe, Europeans over the next fifty years will develop greater self-confidence in their politically generative capacities is a fundamental question. In the U.S., the civil rights revolution is a paradigmatic exercise of "we the people" politics. So, we are talking about the 1960s. Whether this kind of confidence and political generativity will prevail in the next generation is a fair question. The outcome will partly depend on whether or not militarization, a new phenomenon in American political life, and increasing economic inequality will undermine this idea of popular liberal constitutionalism. In Europe, of course, it was populism that was demagogic while liberalism

was elitist. However, in America the issue is whether this popular liberal constitutionalism can be maintained. I hope so.

I raised the question concerning the Electoral College because one of your books, Bush v. Gore, has the subtitle, The Question of Legitimacy. Does the 2000 election raise the question of legitimacy?

Let's imagine Al Gore had won. I would certainly have advised him to propose a constitutional amendment on the election of presidents, an amendment that would have a number of basic elements, obviously on the national scale. The Electoral College would be abolished. You would want to reorganize the process of selecting candidates, which is a scandal and a mess at the present time in the U.S. We would have had a reconstruction of the presidential selection process to reflect what the presidency has become over two centuries: the pre-eminent national office. This is what G. W. Bush should have done. Rather than engage in particular domestic programs, he should have taken his election as an indication of the need for a fundamental reform, and he could have earned a great deal of respect from the losers for doing this. Instead, he chose to pretend that the problem didn't exist, and he governed not from the centre but from the right. This is an opportunity missed. Hungary missed an opportunity in 1989, but it probably survived that well. I hope that we will as well, but it is perfectly possible that we will have another electoral crisis in 2008.

Let's get back to the problems of a real dualist system that you discuss in your writings. One of the points that you bring up in your recent work, if I understand correctly, is the lack of democracy, the lack of the involvement of citizens and the lack of deliberative systems that would use the capacity of the citizens. One of your recent texts deals with the deliberation day, another one with voting with dollars and a third that deals with stakeholder society. All of these ideas target this lack of citizen involvement.

Absolutely right. I can see these new books to be books on 21st century constitutional flaws. There is a parallel between Habermas and myself. That is to say he talks about a legitimisation crisis. In many of his works, he talks about the problem of civic-private citizen. To some degree civic-privatism is good. It is a good thing that we are not always included in some great political project. People have their own lives to live. I am for the private sphere. I am not against the private sphere. As soon as you say that you are for the private sphere, civic-privatism is a problem... always. People are often going their own way and they are over-reluctant to share and participate in the common good. So we have to think of techniques, which are liberal and not totalitarian, to seduce them a little bit more into being concerned about the public. And you are absolutely right that all of my recent practical proposals are that kind of thing. Let's say one got a civic inheritance as well as a family inheritance, and as a result, because you are a Hungarian, you get 4,000,000 HUF when you are 21. You might say, "Why did I get it? Maybe I should contribute a little bit to Hungary if a get something serious." Or, if you have to vote and all the campaigning parties are trying to solicit your 10,000 HUF, you might say "I could give it to them and then I'd get a little bit more engaged." This kind of thing. These are the borderlines to create more civic involvement without being oppressive. We certainly have enough oppression. It is a balance. That is why the central concept in my book is private citizenship. A private citizen is someone who asks two questions: What is good for me? What is good for the country? I understand that these are two different questions. I understand that coordinating these two roles rather than being a stoic citizen or a libertarian privatist with no civic concerns requires maintaining a balance between these two aspects of people's personalities. We must achieve this through cleverness, not through hoping and praying.

A kind of effort like that of Habermas in Faktizität und Geltung to use both liberal and republican ideas.

There are several German reviews of my work, one of which described me as "an Anglo-Saxon Habermas", which is not a compliment. But for me it is good enough. There are more similarities between myself and Habermas, than myself and Rawls. The emphasis on dialogue, on coordinating the liberal and the democratic, the problem of civic privatism, the solution of Verfassungspatriotizmus, all of these are, as it were, Anglo-Saxon variations of a common problematic. I haven't really followed through. But there is a similarity. I am also very much against the libertarianism of Nozick and Hayek, who believe far too much that the free market will solve all the problems. This has just not happened.

So how do you think a day dedicated to deliberation can contribute to this idea of a deliberative society?

We began the work with one of my colleague's, James Fishkin, who is running a deliberative poll in Hungary on the Roma. A deliberative poll is

a random sample of 500 Hungarians. He asks their opinion about the status of the Roma, their rights and the stereotypes of them. Afterwards they deliberate for two days in a structured conversation and then ask the same questions again and again. They observe what happens. It has been organized 25 times in different countries throughout the world, including once in Bulgaria. People's opinions change quite a lot as a result of a day and a half of conversation. The framework of the deliberation day is as follows: there are small groups of 15 people who meet for an hour at a time, and then they meet in a larger session of 500, where there are experts or political party representatives who are asked questions that were initially framed by the small groups. People aren't trying to persuade each other about what is right in the small groups. They are rather trying to ask the questions that they really need answer to in order to have an intelligent opinion. They frame the questions, and then either the experts or the politicians, depending on the issue, respond to the questions. Then they go back and formulate more questions, which are once again answered. It is a dialogue of that kind. Often times the opinions change by 5 to 15%, not always progressively but sometimes. It is a fascinating the extent to which deliberation leads to more liberal judgements. We will see what results the case of the Roma produces. The important thing about these deliberate polls, which create a micro-cosmos of the nation, is that we have established that people actually engage constructively in the process. They listen to each other much more than you might expect. They don't scream at one another. They are more capable of constructive engagement than many cynics and sceptics suppose. It is not unique. We have done this in America and in many parts of the world. In Bulgaria it was very successful. The idea is to have a national holiday two weeks before the election. The holiday would begin with a television debate between the party leaders on a set of issues that are specified in advance, similar to the one that you had in the last election. Two, three or four issues. Then, people throughout the country, in schools and community centres where there are televisions, watch the debate. They engage in a small group deliberation about some questions and then they gather in groups of 500 persons at places where local party leaders go to answer questions. The crucial consequence would be the transformative impact on politics. The way people govern and the way they campaign would be very different if they knew that there was actually a day when people would be invited and they would have to come to think and to talk to one another about positions. It would be a positive change to have one day like this every three to five years. On the one hand, this sounds like a utopian suggestion, but, on the other hand, it is a rather modest proposal.

Which is actually about changing the party financing system. This is currently very relevant to Hungarian politics as well.

The most radical proposal is based upon a stakeholder society. It's been adopted by Tony Blair, who proposed the idea during his run for re-election. I have just finished my contribution to a book of essays that is coming out and that begins with an essay by the head of the Prime Minister's planning office about the program to which he is committed for his five year term. According to this essay, each baby born in Britain will get a bank account upon their birth. It will contain capital assets of 5,000 GBP, to which they will have access at the age of 18. I think, however, that this is too early. It should rather be in the twenties, as a young adult, that they come into possession of the money. That would be a birthright of citizenship. This is a tremendous breakthrough. It isn't 18,000 USD or 7,500 GBP, but it is, nonetheless, the beginning of the notion of an economic birthright that is equivalent to a vote. The basic foundation of the idea is that the wealth of England or Hungary is not merely the product of individual family members, passing it on their own, but it is rather the result of collective effort. It isn't socialism, it's universal private property. It is a concept that is different from the liberal political community, but it is political community at the same time. Each of these ways represents a marginal rather than a revolutionary transformation. Each one is a practical proposal that might be a stupid idea or it might not. It is not a one size fits all solution, and I encourage people to propose other solutions because these are by no means the only middle-sized ways to improve. I encourage people to think both that they are implicated and that they are political community people.

Following September 11th, a new situation developed in the American constitutional system. President Bush declared "the war on terror", and, as a result of this, he won the elections. The resulting consequences include oppressive laws that aim to establish greater security, military tribunals and the deportation of non-U.S. citizens. Even free speech limitations are everyday practice. This is also somehow undermining the traditional values of American constitutionalism.

Of course. The reaction of the administration has been extreme and they, of course, had a lot of short-term popular support, not for these particularly oppressive measures, but because of the victory in Afghanistan, etc. The Jose Padilla case, which will probably be decided by the Supreme Court in June of 2006, presents a unique threat to the survival of the republic. If the president can throw citizens into solitary confinement for years on end, our democracy is in very deep trouble. And it is not good enough to tell Americans that they can regain their freedom if they can convince a military tribunal of their innocence. The mere threat of arbitrary presidential action is sufficient to destroy normal democratic life.

In your essay, The Emergency Constitution, which appeared in the March, 2004 issue of the Yale Law Journal, as well as in your forthcoming book Before the Next Attack: Acting Now to Preserve Our Freedoms in an Age of Terrorism, you yourself also argue that, under the emergency constitution, the thousands of terrorist suspects who may be arrested by the police and FBI for preventive detention — the overwhelming majority of whom will probably turn out to be perfectly innocent — must wait 45 days before they can gain their freedom through the standard mechanism of the criminal law. Is this morally right?

In speaking of an emergency constitution, I don't mean to be taken too literally. Almost nothing I propose will require formal constitutional amendment. The "emergency constitution" can be enacted by Congress as a framework statute governing responses to terrorist attacks. First and foremost, it imposes strict limits on unilateral presidential power. Presidents should not be authorized to declare an emergency on their own authority, with the exception of declarations that last for a week or two while Congress is considering the matter. Emergency powers should then cease unless a majority of both Houses vote to continue them. Even such a vote, however, has a temporal limit and is valid for only two months. The President must then return to Congress for reauthorization, and this time, a supermajority of sixty percent would be required. After two more months, the majority would be set at seventy percent, and then eighty percent for every subsequent two-month extension. Except for the worst terrorist onslaughts, this "supermajoritarian escalator" would terminate the use of emergency powers within a relatively short period.

What is then the crucial difference in approach between President Bush's "war on terror" and your "emergency constitution" approach?

Classical wars come to an end. This won't happen with the war on terror. Here is where the emergency constitution provides a crucial alternative. If left to their own devices, presidents will predictably exploit future terrorist attacks by insisting that we need to sacrifice more and more of our freedom if we ever hope to win this "war". But with an emergency constitution in place, collective anxiety can be channelled into more constructive forms. This is the point of my suggesting an emergency constitution that would serve as a constitutional alternative.

But the most serious and sensitive question has to do with defining the scope of emergency power.

Yes, but, at its core, it involves the short term detention of suspected terrorists to prevent a second-strike. Nobody should be detained for more than 45 days and detainment for periods of less than 45 days should only take place upon reasonable suspicion. Once the 45 days have elapsed, the government must satisfy the higher standards of evidence that apply to ordinary criminal prosecutions. And even during the period of preventive detention, judges should intervene in order to protect against torture and other abuses.

Your reform ideas with regard to the emergency constitution indicate that you have more confidence in the checks and balances built into the political processes than you have in the process of judicial review. Why are you sceptical about the processes of constitutional review of ordinary courts and special constitutional courts? As Laurence Tribe and Patrick Guidridge argue in their reply — also published in the Yale Law Journal — to your initial essay on the emergency constitution, some substantive limits of the restrictions you acknowledge need the interpretation of the courts, as in the mentioned case of torture. What is the role of the courts and especially that of the Supreme Court in your enterprise?

The success of the emergency constitution will depend in part on the Supreme Court. If it decisively rejects extraordinary presidential actions that are undertaken in the name of "the war on terror", it may help force the presidency to accept an emergency regime as its best available alternative. But the Court's first encounters with the subject, which have already been mentioned, leave a great deal open for the future.

And it also depends on the efforts of the current administration, following the death of Chief Justice

Rehnquist and the resignation of Justice O'Connor, to nominate new justices with the majority in the senate.

In 2003 I published an article on this in the Los Angeles Times. I argued, as I did in the *Bush v. Gore* book, that the judges have a responsibility not to retire until 2005. Were the same judges that appointed the president to secure a majority for over thirty years through nominations made by the man to whom they gave the presidency, that would have indicated that the constitutional system is out of equilibrium. This was a unique situation in the history of the U.S. They had responsibility to stay on the court until 2005. Now we have seen that President Bush could win an honest election.

Unfortunately, there are no guarantees.

There are no guarantees. Self-government has no guarantees. But we should not overestimate short-term events. We are in a peculiar moment of vulnerability, to be sure. First, there is the problematic election of the president, and second there is Osama Bin Laden. It is the Osama Bin Laden vote that transforms a problematic president into a war hero, even if he never actually found Osama Bin Laden. So we are at this particularly puzzling moment, and it is easy to overemphasize this. It is possible to tell the story that 20 years from now the U.S. will have deeply transformed its political and constitutional regime for worse. It is perfectly possible. But I am not all that pessimistic. It is easy to be sceptical, but there are many millions of people in the U.S. who would prefer to repudiate the blunders of the past few years and set a better course.

István Szikinger

THE POLICE ACT AND THE NATIONAL SECURITY ACT IN SERVICE OF THE FIGHT AGAINST TERRORISM

UNDERLYING PRINCIPLES AND LEGAL FRAMEWORK

INTRODUCTION

Two positions, which in principle mutually exclude each other, can determine the legal framework of counter-terrorism activities. According to one of them, terrorist phenomena are not to be handled within the scheme of a constitutional democracy, and therefore either an exceptional legal regime or a declaration of is needed.[1] Representatives of the other perspective declare the opposite, that is, that terrorism can and should be fought while preserving all the constitutional democratic values.[2] Actually, the debate goes even further: because they do not view a terrorist as having the legal status of a combatant, adherents to the "war" perspective do not want to observe the provisions of international law on war or those of the international humanitarian law.[3] The difference between these two positions, at least in their extreme forms, is that one carries out counter-terrorism activities within a legal framework while the other does so outside of a legal framework. Those who declare the exceptional nature of the fight against terrorism necessarily reach a point where they deny basic legal values even if they make compromises in order to protect the residues of such values. The manifestation of views on the legalization of torture offers a prime example of the negligence of basic legal values.[4]

I believe that Zoltán Miklósi is right in concluding that the war against terrorism leads to unacceptable consequences with regard to the restriction of freedom and the destruction of the norms the Rule of Law.

Before undertaking an overview of the constitutional foundations and ensuing legislation with regard to the fight against terrorism, it is necessary to touch upon the definition of terrorism itself. In so doing, however, our aim is not that of achieving a comprehensive analysis of distinct conceptual issues, but rather it is to determine whether the phenomenon of terrorism contains particularities that create the necessity to expand the traditional framework of the Rule of Law, or at the least to elaborate new legal institutions or schemes of regulation that are different from those that already exist. The Parliamentary Assembly of the Council of Europe classifies an act of terrorism in the following manner: "Any offence committed by individuals or groups resorting to violence or threatening to use violence against a country, its institutions, its population in general or specific individuals which, being motivated by separatist aspirations, extremist ideological conceptions, fanaticism or irrational and subjective factors, is intended to create a climate of terror among official authorities, certain individuals or groups in society, or the general public."

It should be noted that that the central element of most definitions of terrorism is violence and the political-ideological motives and goals that are related to the manifestation of such violence.

In spite of the existing debate over the definition of a terrorist attack, I do not question the ability of the average citizen to interpret the particular phenomenon of terrorism. From the perspective of our subject, the following question emerges: does the threat of terrorist acts offer evidence for the necessity of the introduction of new and previously unknown arrangements of the activities of the police or the national security services. If no such evidence is to be found, we must ask whether, given the context, the pure gravity of the danger would justify constituting competencies and/or procedural provisions otherwise unfit for the normal constitutional regime.

In short, we must address whether or not it is necessary to re-evaluate the theory of the Rule of Law and its historically developed perspectives and whether or not it is necessary to consider limiting the scope of the Rule of Law in suspending it in cases of possible and real manifestations of terrorism. From the perspective of this study the following question can be posed: based on international and national practice and theory, does the legislation covering the activities of police and national security services pro-

vide an adequate framework for acting against terrorism? Examination of these perspectives, of course, leads to an investigation of the justification of the restriction of any rights in order to curb terrorism. As this paper is part of the material of a joint research project investigating the issue in other contexts, I will go beyond analysing the Act on Police No. XXXIV. of 1994 (hereafter: Police Act) and the Act on National Security Services No. CXXV. of 1995 (hereafter: National Security Act) only to the extent that the existing interrelations necessitate.

It hardly needs to be proven that, in addition to the position of the Hungarian Republic in the community of nations and its relation to the universal and regional norms, the nature of terrorism makes it especially necessary that action be based upon the expectations of international law and guiding documents.

INTERNATIONAL FRAMEWORK AND DETERMINING PRINCIPLES OF THE POLICE AND NATIONAL SECURITY ACTIVITIES AGAINST TERRORISM

The Organization of the United Nations, in accordance with the introduction to the Charter, carries out its activities from the very beginning both for sake of security and the protection of human rights. Certainly addressing security concerns means first of all preventing and addressing international conflicts. However, the in elaborating of the concept of Human Security[5] and the implementation of its essential elements, individuals and communities also began to receive the attention of this world organization. Obviously, this new approach makes even clearer the notion that the fullest possible implementation of human rights is not an obstacle to but rather the goal or result of security policy.[6]

The Secretary General of the UNO issued a report in 2005 that reflects both the concept of Human Security and the content of the report of the High Level Panel appointed in 2003. The 2005 report is directly supported rather by the High Level Panel's report (A/59/2005, March 21, 2005). Even the title of the material expresses the priority of the values that the world organization intends to represent: "In Larger Freedom: Towards Development, Security and Human Rights for All" Paragraph 140 of the report points out important correlations: "It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral standing and the practical effectiveness of our action."

The Council can be proud of significant success both in the field of promoting security with respect to the implementation of human rights. Similarly to the UNO, this regional organization prefers the values of Human Security in the shaping the framework of activities undertaken to counter terrorism.[7] The Council's guidelines on human rights and the fight against terrorism of July 11, 2002 [H(2002) 4], in recalling that it is not only possible but also absolutely necessary, to fight terrorism while respecting human rights and the rule of law, offers an example of such success.

The Charter for European Security, adopted within the framework of OSCE in 1999, manifests a similar spirit. This document declares that the most adequate guarantee for the security of the region is the capacity of the participating states to maintain democracy and the Rule of Law and the respect of human rights. The title of the chapter on the platform addressing the human dimension of cooperative security, in particular, emphasizes that the party-states confirm human rights — including the rights of national minorities — as part of the foundation of the comprehensive, indivisible concept of Security of the OSCE.[8]

Heads of states and governments of the European Council in December of 2003 adopted the strategic guidelines for the European Union under the title "A Secure Europe in a Better World". This document focuses, first of all, on issues of international security, emphasizing the role of economic factors in addition to other factors, and the necessity of maintaining coherence between activities aimed at international security and cooperation in the legal and judicial field. The strategy points out the importance of collaboration with the United States, NATO, the OSCE, and other organizations. Key threats, according to the document, consist of the proliferation of weapons of mass destruction, regional conflicts, state failure and organized crime. The strategy confirms, among other things, the following: "The quality of international society depends on the quality of the governments that are its foundation. The best protection for our security is a world of well-governed democratic states. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order." In my opin-

ion, it was Mr. Javier Solana, the spiritual father of the European Security Strategy, who pronounced in a conference held in Helsinki in 2004 the sentence expressing the essence of the document's capacity to serve as a good compass in acting against terrorism. The sentence was: "...A world more fair is a world more secure."[9]

The determining document and framework in the field of activities for the promotion of freedom, security and justice, is the Hague Programme, which was adopted in 2004. The agenda of the programme seeks to better respond to the expectations of the European citizens and to protect both the external and internal dimensions of security within an integrated perspective and in a coordinated way. Respect for human rights has remained a decisive element of this Union policy. An important message is delivered by the fact that, similar to the OSCE strategy, among its principles the first priority — referred to — is given to the requiring the respect of human rights and citizenship. It is true, however, that the urge to strengthen the foundations of counter-terrorism activities immediately follows.

The process of adopting the Constitutional Treaty for the European Union has been checked by the referendum defeats in France and in the Netherlands. Independent of further developments, however, it remains a fact that the document has, with regard to the topic of this paper, basically confirmed the results already achieved in maintaining the separation of a common foreign and security policy from cooperation in the field of justice and home affairs. The principles, institutions, and the division of competencies related to the party states are not identical in these two areas. At the same time, of course, the basic law of integration places the provisions of these two functional directions into a framework based on uniform principles. Among those principles, paramount importance must be attributed to the norms of the Charter of Fundamental Rights obliging both the organs of the cooperation — according to Article II/111 of the Constitutional Treaty — and the member states — through their participation in the Union — to respect the human rights and the rights of citizens and to promote their implementation.

In summary, one can conclude that international law and their guiding documents take the firm position of preserving the original values of constitutionalism both on universal and regional levels. This does not exclude, of course, restrictions on rights adapted to the particular features of the fight against terrorism. However, a consequence of this perspective is that such restrictions may only be applied in full respect of the formal and substantial requirements accepted in international law, which begins with the observation of the principles of necessity and proportionality. Legislation and practice that violations of the guarantees that protect rights are rejected by both international and competent national courts.[10]

The policies and legislation of the United States have without a doubt proceeded in a direction opposite to the one discussed here. However, partly because of judicial control and partly because of strong internal criticism, a certain return to the traditional values of constitutionalism can be perceived.[11]

SECURITY POLICY AND HUMAN RIGHTS IN HUNGARY SINCE THE CHANGE OF THE POLITICAL SYSTEM

The Resolution of the Parliament No. 11/1993. (III. 12.), which determines the basic principles of the security policy of the Hungarian Republic, declares that the starting point should be the indivisibility of security. A risk that concerns our country must be addressed within the framework of a system of institutions dealing in a complex manner with the economic, political, military, human rights, environmental and other dimensions of security while also cooperating with all of the states that could potentially be affected by that risk. In this respect there is continuity with the Resolution of the Parliament No. 94/1998. (XII. 29.), which currently prescribes the basic principles of security and defence policies. The goals of the security policy include: "— The creation of appropriate circumstances to ensure implementation of the principles laid down in the Constitution, promotion of the fulfilment of the Rule of Law, support for the undisturbed functioning of democratic institutions and the market economy, contribution to ensuring internal stability of the country; — Promotion of full materialization of the human and citizens' rights, the rights of national and ethnic minorities."

The first reference in the National Security Strategy to the above principles was published in the Annex of the Government Decree No. 2144/2002. (V. 6.). This document elaborates upon the desire of the citizens of the Hungarian Republic to live in peace, security, under the Rule of Law, and democracy. The Government Decree No. 2073/2004. (IV. 15.) repealed the National Security Strategy that was adopted two years earlier and, while emphasizing continuity, it was also enriched by the elaboration of a number of new elements from the list of values and interests to be defended and promoted respectively. For example, the new document references the pro-

motion of democratic values outside the Euro-Atlantic area (I/6). With regard to the subject of this paper, it should be pointed out that the task imposed on national security services of gathering information is extended to global, regional and internal sources of danger in order to pursue preventative and intelligence activities. All of these activities also relate, of course, to the counter-terrorism activities initially mentioned as one of the global challenges (II.1.1.). The strategy declares that terrorist activities are directed at disrupting democratic social and political institutions and at undermining the trust of societies in their governments.

Hungary's police cooperation with relevant European institutions and the EU Member States is very well developed. Since 2002, a special organization, the Centre for International Cooperation in Criminal Matters has been assisting with police cooperation at an international level and with the implementation of the Europol cooperation agreement. With regard to the fight against terrorism, Hungary has signed all terrorism-related UN conventions. Hungary also joined the common positions of the EU with regard to the fight against terrorism.

Within a legal approach, the norm included in the Article 8 of the Constitution should be the first to be mentioned. This provision provides for the principles of solving possible conflict between institutions of public power, including contentious issues related to terrorism. Article 8 postulates that the respect for and protection of human rights is the primary duty of the state. Regulations pertaining to fundamental rights and duties are determined by law without restricting their essential content.

The Hungarian Constitutional Court has not addressed directly the relationship between terrorism and the respect for and protection of human rights. However, it has, in a number of decisions, dealt with problems of constitutional order and basic rights as they relate to the legal framework of the activities to be carried out against threats. Some of the rulings declare that some of the terms connected to terrorism (e.g. "of terrorist character") may not serve as bases for the application of serious legal consequences because of a lack of the necessary concreteness and well defined content [47/2003. (X. 27.) AB; 44/2004. (XI. 23.) AB]. On the other hand, the Constitutional Court also emphasizes that protecting the internal order and public security of the country and the police necessitates serving these in an efficient manner [65/2003. (XII. 18.) AB; 9/2004. (III. 30.) AB].

Even according to the opinion of the Constitutional Court, such efficiency is apparently to be supported by legal provisions which otherwise would be unacceptable in the civil sphere. An example of such a provision is the duty to comply with unlawful orders or instructions. The Court ruled in one case that exemptions from the general duty of obedience to law deriving from the essence of the democratic sate and Rule of Law may only be constituted by making possible the issuing and the executing of unlawful orders in the interest of constitutional values [8/2004. (III. 25.) AB]. For example, only the defence of the country is referred by to the decision. On the other hand, another decision of the same Constitutional Court came to the following conclusion: "Protection of public order or public security as constitutionally acknowledged purposes of the state may justify the implementation of law enforcement means and procedures. This necessity is to be determined by the legislation. However, in the course of regulating institutions established for these purposes, positive provisions of the Constitution must be complied with to their full extent. A fundamental expectation of legislation is the observance of the requirements of legal security, clarity and calculability of norms, further keeping in mind the application of the principle of necessity and proportionality related to restricting basic rights, elaborating procedural guarantees, and ensuring the coherence of the norms related to the given institution within the whole system of current legislation."[12]

The duty of the Police is to protect public security. The term "internal order" used in Paragraph (2) of Article 40/A of the Constitution and in Paragraph (1) of Article 1 of the Police Act is a reference to previous state security activities,[13] as, at the time of the comprehensive modification of the Constitution in 1989, the national security services were not separate from police. The fact that there would have been the possibility to make this provision more precise because there were a number of modifications affecting the regulations of the "armed" VIII Chapter of the Constitution is yet another problem. Due to the fact that the police protect public security on the one hand and, on the other hand, they detect and prevent of terrorist acts, one can logically conclude that the Constitution and the Constitutional Court do not recognize the possibility to stray from constitutional requirement, and thus from the primary duty to respect and protect human rights in the area of acting against terrorism. Regardless, it is unthinkable that in the course of performing such activities (detection of terrorist acts) national security services would be entitled to use substantially different means.

It can be concluded that the domestic legal system remains unchanged with regard to the underlying values and basic norms that have existed since the

change of the political regime. The Hungarian system thus, in congruence with international expectations, does not regard the fight against terrorism as an activity in which it is possible to deviate from the constitutional requirements.

ON THE HUNGARIAN POLICE ACT AND NATIONAL SECURITY ACT IN FORCE

Division of competencies

In Hungary, counter-terrorism duties are basically those of the police. The Police organization exercises substantial powers in all three phases (prevention, obstructing and averting, detection and investigation of acts committed). Police may, according to Paragraph (1) of Article 63 of the Police Act in addition to Articles 64 and 69, carry out secret information gathering in order to prevent, detect, and stop terrorist acts and other crimes, and in order to identify and apprehend the offender, to search and determine the whereabouts of a wanted person, to collect evidence and to protect the authorities conducting an investigation and those collaborating with justice. This can be done either with or without a judicial warrant, depending on the character of the intervention.

It should be mentioned that a terrorist act, as it is defined by the Criminal Code, which refers to the activities of all crime prosecuting organs and those performing similar or connected functions, does not only include attacks that are actually committed, nor does the scope of the law cover only the perpetrators of such deeds. Paragraph (4) of Article 261 of the Criminal Code also threatens with punishment those who make preparations for the execution of terrorist acts. A special definition with more serious sanctions relates to any preparatory behaviour contributing to the activities of a terrorist group [Paragraph (5)]. According to Paragraph 6, it is important, from both the perspective prevention and that of detection, that a person who reports an act unknown to the authorities be offered immunity from punishment. The provision that follows [Paragraph (7)] determines the punishment for threatening to commit terrorist acts while Paragraph 8 imposes a duty to report such offences and makes non compliance punishable by the deprivation of liberty.

Criminal procedure legislation has also to be mentioned in this context. The 1973 Code of Criminal Procedure No. I in force until July of 2003 declared, similarly to the present law, the official principles of legality, according to which, once the occurrence of certain legally established conditions is proven, the competent organs had the duty to begin conducting a procedure. However, there is an essential difference between the conditions of the previous legislation and those of the current legislation. Article 12 of the previous piece of legislation made possible commencing the procedure only in case of reasonable suspicion of commission of a criminal offence. On the other hand, Act No. XIX. of 1989, which is in force at present, requires only the establishment of a plain suspicion in order to begin an investigation that is not in reference to particular persons. A reasonable suspicion that is supported by more facts than in the case of plain suspicion is, however, needed, in order to establish a suspect in a case.

As has been previously explained, preparations for a terrorist act or a failure to report knowledge of such preparations can already commence a criminal procedure. In other words, the prevention of terrorism, as it is understood in everyday life, is done to a large extent within criminal procedures and more precisely during the investigation. Hence it is necessary to refer to the role of the Prosecution as this service, according to the Code on Criminal Procedure in force, dominates the investigation by both investigating and ordering investigation.

All these factors make the delineation of the scope of activities of national security services very problematic. One of the few points of orientation is the provision in Paragraph (1) of Article 31 of the National Security Act, according to which national security services do not exercise investigative powers. However, all investigation up to the beginning of a criminal procedure, that is until establishment of suspicion, is also their task. The Office of Intelligence, dealing basically with foreign information gathering, collects information on terrorist organizations outside Hungary, while the National Security Office, which performs constitutional protection functions, detects and averts the terrorist efforts of foreign powers, organisations, or persons corresponding to Paragraph c of Article 5 of the National Security Act. Paragraph i of the same article provides that the National Security Office investigate terrorist acts if the report of the crime has been sent to its office or if their office discovers the perpetration of such an offence. The activities of the military's secret service exist in parallel to those of the National Security Office. The Military Intelligence Office collects data about terrorist organizations that endanger the armed forces (today: the Homeland Defence Force). The Military Security Office, as a military equivalent of the National Security Office, must detect and prevent the terrorist efforts of foreign powers, organisations, or persons in

the area of the Ministry of Defence and the Homeland Defence Force. In addition to this, the Military Security Office also detects terrorist acts within the scope of its activities independent whether they are committed by foreigners or by Hungarian nationals.

The problem is that, based on this explanation, according to the present substantial and procedural provisions, an investigation must be started even in the case of the emergence of a plain suspicion (less than 50% probability) of somebody inviting another person to commit an offence, somebody offering his own participation or somebody undertaking plans to execute such an offence in the future. In such cases there is no longer any basis for national security investigation. The question remains, what kinds of behaviour can be detected beyond these relationships, which are far from the actual execution of a terrorist act? Practically none, as the manifestation of the intention to commit such a crime, which is not punishable with regard to "normal" offences, is hardly imaginable without the presence of a threat as defined in Paragraph (7) of Article 261 of the Criminal Code. Pure thought does not exist in a realm that is accessible to the power of a constitutional democracy.

There is cause for some concern with regard to the hardly conceivable situation, in which there remains a possibility to detect the relationship of the police and secret service tasks prior to an investigation. First of all, we must ask whether it is reasonable at all to designate terrorist investigation as a national security competence within the narrow framework outlined.

In the course of the Parliamentary debates on the National Security Bill the keynote speaker of the ruling government party (the Hungarian Socialist Party), Mr. Lajos Kórozs, reasoned that one of the characteristic features of the fight against terrorism that belongs to the National Security Services' area of competencies is its undercover appearance. Therefore, it is necessary to carry out its detection and prevention through the use of a particular set of means of the services (Session on 24. 10. 1995 of the Parliament).

If this is the case, the provision of the competence police investigation can be questioned. How is it possible to refer this task of paramount importance with regard to the security of the nation and that of individuals to the competence of a police force that is not entitled to use national security means, thus, making the investigation dependent upon on the circumstances of the arrival of a report and which organisation happens to first learn of a terrorist act that is under preparation or that has been committed?

The answer can seem reassuring. As a matter of fact, the particular "set of means of the services" is also accessible to the police. There are no substantial secret means that cannot be applied by the police. At the same time, the organs of the police can start the investigation without delay and they also can use the full scope of the necessary coercive measures. It should also be noted that members of national security services may resort to typical police means and methods except those that pertain to conducting investigations. The law provides, in a rather unusual way, these organizations with the power to arrest, detain, handcuff and even use firearms. What is more, members of national security services, as opposed to police officers, may, for the purpose of prevention, also use these forms of coercion in a manner that eventually leads to the loss of human life.

The Coordination Centre Against Organized Crime (hereafter: Centre) established by the Act No. CXXVI of 2000 is devoted to the harmonisation of the activities of the police with those of the national security services in addition to the coordination of the national security services in relation to each other. According to Paragraph (1), Article 5 of this Act, the cooperating organizations, the police and the national security services, are obliged to immediately forward all of the relevant data that they gather, including that which relates to terrorist acts, to the Centre before taking the decision to start a criminal procedure. Both the sender and the addressee must document forwarding and receiving of data.

In the practice, this means that the fight against terrorism necessitates ensuring that the Centre is informed while detection is simultaneously undertaken. In response to the information that the Centre receives, it examines whether parallel detective work is already happening, and it makes proposals to stop such overlap. As a consequence, it is possible that the analysis and evaluation of data is carried out simultaneously in three or more institutions (the organs conducting detection and the Centre), while, according to the above mentioned provision, an investigation has to be ordered even in case of plain suspicion of preparations.

Based on the decision of the Cabinet for National Security of the Government, another new organ, the Coordinating Committee Against Terrorism, was established in November of 2003 with the task of enhancing the collaboration among national security services and the police.

In my opinion, this kind of division of competence is far from justified. Indeed the overlapping complexity of the coordination is rather dangerous to the efficiency of preventing terrorism. It should be added

that during past decades, there have been no terrorist attacks that could be termed significant, and even the danger of such an offence has yet to be identified.[14] Of course, one cannot, even given these circumstances, justify a failure to prepare for the worst. It can be concluded, though, that one organization would be sufficient in undertaking this task. It would also be preferable to provide this organisation with all of the data in order that it act exclusively in the fields of prevention and detection and in order to bring an end to the currently existing superfluous coordination. A division of competencies between police and national security services, while feasible, is not reasonable in the absence of a general separation of the activities of the police with those of the national security activities. At present such separation exists to such a limited extent that in reality no clear-cut difference separates either the tasks or the methods to be applied.

Undertaking activities to prevent criminal terrorist attacks from being committed or attempted is basically the duty of specially trained units that are maintained by the police. In exceptionally justified cases it is possible to have recourse to the Forces of the Homeland Defence [Paragraph (2) of Article 40/B of the Constitution, Subparagraphs c. and f. of Paragraph (1) of the Article 70 of the Act on National Defence and the Homeland Defence Forces]. As the armed actions against terrorism require special training and preparations, the power to use firearms, which is given to the members of national security services in Subparagraph b of Paragraph (1) of the Article 36 of the National Security Act, may cause concern. In my opinion, it is rather hazardous to encourage the members of national security services, who have not had the slightest training to take such action. In actual fact, members of the national security services could perform that which is expected of them by the law even in absence of this legislation. It should be recalled that the members of the services may carry arms and that the justified (self-) defence clause in Hungarian legislation may be invoked in order to prevent an attack or a danger that directly threatens public interest.

Special powers

Of all the substantial or procedural institutions that can be found in the international practice of regulation, the existence of a large number of them is attributed to, at least in large part, the necessities of the fight against terrorism. These institutions exist, first of all, within the framework of the "war" approach, which puts aside legal guarantees. Legislative provisions emphasizing the principles of necessity and proportionality, however, also institutionalise arrangements in order to ensure that the norms of constitutionality and accepted international rules are not exceeded. The following are specific examples of legal guarantees that are put in check by the "war" approach: indefinite detainment, proscribing certain organisations,[15] expanding powers to use secret means[16] and even the legalization of torture, depending on specific conditions.[17]

First of all, it should be remarked that there is no power or procedural arrangement in the legislation on police and national security services in Hungary that could be used exclusively or predominantly in counter-terrorism activities. This situation reflects the previously mentioned, fact that, while there have been a number of "common" offences that may reasonably be compared to terrorism in their resulting consequences and destruction, no terrorist act of outstanding seriousness has occurred in Hungary. There was a bank robbery resulting in eight deaths and downtown Budapest has also experienced a devastating explosion that killed several people.

These facts, in my opinion, clearly support the conclusion that protection planning has to be approached not with regard to the character of the attack or with regard to its political-ideological determination. Protection planning must rather be approached exclusively with regard to the values that such activities are intended to defend, with special attention paid to the protection of human life, which corresponds to the concept of human security.

As previously mentioned, no provisions expressly adapted to the need of counter-terrorism activities are to be found in the Acts on Police and National Security Services, although the special norms elaborated for fighting organized crime can also be applied to terrorism investigation. For example, one can mention Paragraph (2) of Article 68 of the Police Act which allows information gathering to be undertaken using a simplified process that is different from the general procedure if a delay would cause danger and if the case is related to drug-trafficking, terrorism, unlawful trade in arms, money laundering or organized crime. This kind of arrangement may, of course, be justified. The only question is why the legislature has not provided for these exceptional possibilities of prevention, arrest or detection in case of a "pure" mass murder or the creation of a public danger. The only explanation is that the legislature has not paid due attention to constitutional values and especially to the protection of human life and has instead of focused on other interests.

It should be noted that, according to Paragraph 8 of the Article 137 of the Criminal Code, a criminal organization is a group consisting of at least three persons, organized over a long period of time, acting in coordination with the intentional aim of committing criminal offences that are punishable by five years or more of deprivation of liberty. As a consequence, a terrorist group that is defined as such by a particular provision [Subparagraph b. of Paragraph (9) of Article 261 of the Criminal Code] can, at the same time, be qualified as a criminal organization: Thus, the same means that target organized crime can be used, without further reference, in the course of activities against terrorism. Terrorists who undertake their actions alone or in pairs are an exemption, as they no longer constitute an organisation. However, this is rather rare as detection and prevention necessarily aim at relationships and communication. Thus, the collective preparation for or execution of an offence generally cannot be excluded from this provision.

THE APPROVAL BY THE CONSTITUTIONAL COURT OF THIS PROVISION IS WORRISOME BECAUSE IT LEGITIMATES CAUSE FOR ARREST AND DETENTION THAT LACK THE GUARANTEES OF CRIMINAL PROCEDURE IN ORDER TO SERVE THE GOALS OF CRIME PROSECUTION.

It should also be noted that substantial legal barriers do not obstruct the preventing, detecting and defeating of terrorism as legislators proved to be very generous when shaping competencies of the armed agencies.

In other words, the institutionalisation of specified authorizations for the activities against terrorism were not needed in the Police Act and the National Security Act because these pieces of legislation provide so much power in the entire domain of the protection of public or national security that some of the authorisations appear only as exceptional means to counter terrorism, and in some cases they aren't even permitted under those conditions. For example, we can examine regulations for deprivation of liberty. Article 5 of the European Convention on Human Rights gives an exhaustive list of the conditions, which can serve as bases for the public power to restrict the basic right to personal liberty. The European Court of Human Rights, in implementing the Convention, consequently emphasizes that Subparagraph c of Paragraph 1 of Article 5 may only be invoked as a reason for bringing people to the authorities in the case of a reasonable suspicion but non in the case a plain.[18] On the other hand, Subparagraph b of Paragraph (2) in Article 33 of the Police Act makes it possible for the police to bring people before the authority based only on plain suspicion and to deprive them of their personal liberty for up to 12 hours.

A further problem is the aim of the employment of this kind of arrest and detention. It is obvious that Article 5 of the Convention relates to criminal procedure. However, no criminal procedure against an individual can be initiated in Hungary based on plain suspicion. Indeed, bringing persons before the authority based on plain suspicion serves the efficiency of justice without providing the individuals concerned with their fundamental rights that are guaranteed by the provisions of criminal procedure. Actually, in a number of cases a kind of "calling to account" occurs. "Calling to account" means an interrogation without applying any of the procedural guarantees. This usually occurs when an alibi is verified, but it is also frequent that a person is "called to account" in order to explain the origin of the objects found on him. The specific reason for questioning and the criminal offence being investigated are usually not communicated precisely because the goal, or sometimes the result, of "calling to account" is exploring previously unknown criminal offences. It does not require profound thought to understand that this practice violates the presumption of innocence.[19] Nevertheless, the Supreme Court did not express any criticism when it concluded concerning the evidence taken in a case related to a very serious crime: "In the course of calling to account and data collection defendant I first denied and then acknowledged that he had killed his father, and he also has shown the site where he buried him."[20]

The approval by the Constitutional Court of this provision is worrisome because it legitimates cause for arrest and detention that lack the guarantees of criminal procedure in order to serve the goals of crime prosecution. Among the reasons given for the decision to accept the constitutionality of this procedure, the Constitutional Court even referred to the necessity of establishing the notion of reasonable suspicion for future investigations [65/2003. (XII. 18.) AB].

Article 54 of the 1994 Police Act empowers law enforcement officers to use firearms in a number of situations. A police officer may resort to the use of firearms in the following situations: in order to avert a direct threat to or an attack against a life; in order to avert a direct attack endangering bodily integrity; in order to prevent or to stop the execution of offences that cause public danger such as a terrorist acts or an airplane hijackings; in order to prevent the criminal use of firearms, explosives, or other deadly means; in order to prevent an act aiming at the unlawful seizure of firearms or explosives; in order to avert an armed

attack directed against a facility of outstanding importance for the functioning of the state or for supplying the population with goods; in order to apprehend a perpetrator who intentionally killed someone or to prevent his escape; in order to enforce a police request to put down weapons if the behaviour of the person concerned leads to the suspicion of their using them directly against others; in order to prevent a detainee being freed by violence; in order to avert an attack directed against the police officer's life, bodily integrity or personal freedom.

The Constitutional Court has repealed some of the provisions, which it deemed unconstitutional. The provision that permits the use of deadly force for the apprehension and prevention of escape of a person who has committed an offence against the state or humanity has been repeals, as has been the provision that enables the use of firearms in order to prevent the escape of a detainee or in order to capture him [9/2004. (III. 30.) AB]. However, the goal of apprehending a perpetrator who has intentionally killed someone remains even in the absence of a court decision that would provide a ruling on the guilt of the person targeted. Needless to say, substituting a legal sentence with the knowledge of a shooting police officer is far from respecting the presumption of innocence. It should be pointed out that, in addition to some substantial constitutional concerns, that the provisions largely overlap and a careful analysis can only result in identifying the legal condition to be invoked. This hardly contributes to the efficient and timely police action that is required in terrorist prevention activity.

One can conclude that the police have extraordinary authorizations. While it is true that that the police do not have the possibility to impose indefinite detention, they can nevertheless resort repeatedly to arrests and to detentions that have a maximum time of 8 hours and, in case of prolongation, 12 hours. A lack of regulation with regard to activities that can be undertaken during detention leads to arbitrariness.

The situation with regard to the provisions of the National Security Act is of a similar nature. Paragraph (3) of Article 31 of this piece of legislation gives an itemized list of the rights that may be restricted in the course of performing the duties by the activities of the services. The national security services may accordingly, in compliance with the provisions of the law, restrict the right to personal freedom, to an inviolable of private home, to private secrets and secrets of correspondence, to the protection of personal data and the freedom of information and to the protection of possessions. As the right to assembly and religious freedom are not on the list, the undisturbed practice of these rights is guaranteed by Article 1 of the Law No. II of 1989 and Article 1 of the Law No. IV of 1990 respectively.

Nonetheless, the government has formulated expectations that are incompatible with the guaranteed right to assembly and religious freedom. The home page of the Office of the Prime Minister, for example, lists the obstruction of the gaining of ground by groups and individuals belonging to or sympathising with organizations functioning on the basis of Islamic Fundamentalism as one of the tasks of the National Security Office.[21] It should be known, however, that Fundamentalism is far from being identical with terrorism[22] and the obstruction of gaining ground can hardly be imagined without disturbing of the right to assembly and to the free practice of religion (the former protects informal as well as institutionalised relationships). A portion of the population of Islamic Fundamentalists do not even deal with politics,[23] and thus, the observation of such organizations without further criteria is possible only in violating guarantees to religious freedom. The Yearbook of the National Security Office gives a detailed account of the activities of Muslim communities and organizations in Hungary (not published in the English version of the Yearbook) followed by a statement that these groups, according to the data acquired by the time of publication, have not carried out activities supporting terrorism. Such reference to the previously collected data logically indicates an intention of continue observation. The conclusion itself quite obviously presupposes permanent monitoring of the given groups and individuals by national security services.

National security activities that violate the freedom of religion can, of course, be qualified as an infringement of one of the provisions that can possibly be restricted by national security operations. Thus this practice is not necessarily a failure of regulation. However, two additional norms of the National Security Act must be mentioned here which, when considered in the above discussion, can justify the charges that the legislation is unconstitutional.

One of them, Article 10, stipulates that the Government must control as well as supervise the activities of the services. Within that framework, the Minister in charge is responsible for, among other things, dictating in written form [Subparagraph b. of Paragraph (2) of Article 11.], the tasks of the services for the Directors General in written form and instructing them to satisfy the data needs of the Members of Government. How, then, does the Minister know what kind of danger deserves outstanding attention in

a given period? Indeed, in a constitutional democracy any secret service can at most operate a service that reports, in a very general manner, perceived threats to national security. However, the Commentary on the National Security Act unquestionably declares that in coordinating the network of organizations the predominant role is performed by the Government.[24]

The situation is made even worse by Paragraph (3) of Article 27 of the National Security Act, which requires members of the services to conduct unlawful activities. "If a professional member of the national security agencies is given an instruction to carry out unlawful activities he will be obliged to call the attention of his superior to this fact but he will not be entitled to refuse its execution [except for obviously criminal actions]."

Undertaking unlawful conduct can thus even be the duty of members of the services. Returning to the previous example, while an instruction based on a mistaken confusion between Fundamentalism and terrorism is in itself no criminal offence, the execution of such an instruction has already resulted in the activities of the National Security Office violating the Constitution and the freedom of religion.

CONCLUSIONS

In Paragraph 2 of Chapter I of this study, I quoted the thoughts of the Secretary General of the UNO, according to whom strategies built upon protection of human rights are essential not only in order to confirm our moral standing but also to promote the effectiveness of action. I am strongly convinced that this statement is also supported by the present overview of the Hungarian legislation on police and national security from the perspective of the possibilities of counter-terrorism actions.

At the same time, competencies described together with a high degree of complex of coordination result in violations of basic rights because of the confusion between police and national security powers. In addition, a profound understanding is not necessary to demonstrate that simultaneous analysis and evaluation of data flow by different organs impedes efficient activity despite (and even partly because of) the duplicated coordination.

The legal framework designed for the police force, which is also to be used in the fight against terrorism, does not fit with the values of the Constitution and those of international expectations. Because of this, the real protection of public security that the people need, one that would reflect the constitutional may be endangered (e.g. by giving priority to less important cases related to organized crime rather than data collection with the aim of saving human lives). Such practice also undermines efficiency in purely professional terms.

National security services are in a similar situation. An arbitrary extension of the ability to restrict rights, combined with the Government's power to issue instructions, has yielded the devotion of large amounts of energy to the observation of individuals and communities who do not support terrorism even according to the Yearbook of the National Security Office.

The Constitution enshrines the most important values of public power. In addition to that, it also serves as a compass in the course of the interpretation and the implementation of a very complex system of law. Precisely because of this, the deviation from the logic and provisions of basic law cannot yield professional success. On the contrary, after examining the quantitative or qualitative signs of terrorism in combination with the logic of public power functions, one would not find cause for the institutionalisation of "exceptionalism" (in which case, according to experience, the "exceptional" becomes a general rule).

As a result, the arsenal of the fight against terrorism must be derived from the concept of human security. The respectful protection and promotion of constitutional rights is not an obstacle but a goal of security policy including measures taken to protect against the threat of terrorism.

NOTES

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2. Tonay BUNYAN, *The War on Freedom and Democracy tatewatch.* http://www.statewatch.org/new/2002/sep /analysis13.htm; Conor A. GEARTY, "Terrorism and Human Rights." *European Human Rights Law Review,* 1/2005, pp. 1–6; MIKLÓSI Zoltán, "A terrorizmus elleni 'háború' és az emberi jogok" [The "War" Against Terrorism and Human Rights]. *Fundamentum,* 3/2004, pp. 43–49; Carl TOBIAS, "Punishment and the War on Terrorism." *University of Pennsylvania Journal of Constitutional Law,* May 2004, pp. 1116–1158.
3. HADNAGY, *Op. cit.*, p. 26.

4. Alan M. DERSHOWITZ, *Why Terrorism Works*. New Haven – London: Yale University Press, pp. 131–163.
5. *Commission on Human Security*, 2003, Human Security Now, New York: UN.
6. Gerd OBERLEITNER, "Human Security and Human Rights." *European Training Centre for Human Rights and Democracy, Occasional Papers*, No. 8. 2002.
7. Conor A. GEARTY, "Terrorism and Human Rights." *European Human Rights Law Review*, 1/2005, p. 4.
8. MÉSZÁROS Margit, "Az Európai Biztonsági Charta" [The European Charter on Security]. *Hadtudomány*, Vol. X. No. 3., July,1999, pp. 114–120.
9. http://www.upi-fiia.fi/tilaisuudet/2004/Solana_puhe.htm.
10. See, e.g., Ireland v. United Kingdom, ECHR (1978), Series A, No. 25.; A (FC) and others (FC) v. Secretary of State for the Home Department, X (FC) and another (FC) v. Secretary of State for the Home Department, 2004 December 16, House of Lords, United Kingdom; Colin WARBRICK, "The European Response to Terrorism in an Age of Human Rights." *The European Journal of International Law*, November 2004, pp. 989–1018.
11. See, e.g., Jose Padilla v. George Bush, Donald Rumsfeld, et al. (U.S. Dist. Court, Southern Dist. Of New York – Case No. 02-4445); Bethke ELSHTAIN, *Just War Against Terror*. New York: Basic Books, 2003.
12. 47/2003 (X.27.) AB.
13. *A rendszerváltás forgatókönyve. Kerekasztal-tárgyalások 1989-ben* [Scenario of the Change of Political System – Roundtable Talks in 1989] (eds. KALMÁR Melinda, RÉVÉSZ Béla). Budapest: Új Mandátum, pp. 425–426; BALLA Zoltán, "A belső rend és a közrend fogalma a jogszabályokban" [Concept of Internal Order and Public Order in Legislation]. *Belügyi Szemle*, 2/2000, pp. 99–103.
14. See, *National Security Yearbook 2004*, http://www.nbh.hu/evk2004/04-0041.htm#2.
15. Brice DICKSON, "Law Versus Terrorism. Can Law Win?" *European Human Rights Law Review*, 1/2005, pp. 11–28.
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18. See, e.g. Fox, Campbell and Hartley v. United Kingdom, Series A. No. 182.
19. John PARRY, "Constitutional Interpretation and Coercive Interrogation after Chavez v. Martinez." *University of Pittsburgh School of Law Working Paper Series*, 2/2004.
20. BH 2000. 7.
21. http://www.nemzetbiztonsag.hu/visszatekintes.php.
22. ROSTOVÁNYI Zsolt, *Az iszlám a 21. század küszöbén* [Islam on the Threshold of the 21. Century]. Budapest: Aula Kiadó, 1998.
23. Angel M. RABASA, "Overview." In Angel M. RABASA, Cheryl BENARD, Peter CHALK, Christine C. FAIR, Theodore KARASIK, Rollie LAL, Ian LESSER, David THALER, *The Muslim World After 9/11*. Santa Monica: RAND Corporation, p. 5.
24. Dr. DEZSŐ Lajos, Dr. HAJAS Gábor, *A nemzetbiztonsági tevékenységre vonatkozó jogszabályok – kommentár a gyakorlat számára* [Legislation on National Security Activities — A Commentary for Practice]. Budapest: Budapest, HVG–ORAC, pp. 138–139.

Gábor Halmai

PUBLIC ORDER AND SECURITY VERSUS RULE OF LAW IN TRANSITION COUNTRIES

I propose, to deal with the contradiction that is posed in the title of this paper in the following way: Are there any elements of the contradiction between public order/security and new-born rule of law that are specific to Central and Eastern Europe and what are the dilemmas for the constitutional courts in the region? After attempting to respond to the organizers original question, I would also like to deal with a relevant, but perhaps more substantive problem: on what basis can fundamental rights, and especially the right to life, as an almost absolute right, be restricted in order to protect public order and security?

RIGHTS-RESTRICTIONS IN TRANSITION

The more general problem behind the first question is whether there exists a special, lower standard of freedom allowing for more restriction in transition countries. One theoretical answer to this question was given by Richard A. Posner, chief judge of the US Court Appeals for the Seventh Circuit, and Professor at the University of Chicago Law School at a conference on economic perspectives with regard to basic rights held in Budapest in 1995.[1] Posner warns the East European new democracies to proceed in a very cautious way with liberal rights. It may be counterproductive, he intimates, for post-communist societies in transition to "accord a high priority to securing all the negative liberties. Perhaps those liberties differ greatly in their value to a poor society". More specifically, while "the protection of property rights and of basic political rights is very important", it would be bad strategy to "attach similar importance to the following rights: to protection from police brutality in pre-trial detention, to protection from custodial abuse in public psychiatric hospitals, and to the provision of competent defence attorneys to indigent criminal defendants". János Kis, in his critique, calls this Judge Posner's priority thesis.[2] One of the arguments Judge Posner marshals in support of his priority thesis is his well-known cost-benefit analysis, but he also offers another argument that is based on historical observations. It would not be wise for the new democracies of Eastern Europe to copy the system of rights recognized today in the United States, he says, because these are not "rights semper et ubique, but are rather the culmination of a specific historical process".

The sign of a similar general regularity in the sequencing of legal evolution can be detected in the measures, which the Czech legislature took immediately after the collapse of Communism to criminalize the support or propagation of totalitarian (or exclusive) ideologies. The law was directed against movements that advocated the suppression of citizens' rights and freedoms; Nazism and Communism were named in brackets in the text of the law. This approach was presumably justified in view of the Communist legacy. The Act on the Era of Non-freedom declared that, "in the years from 1948 to 1989, the communist regime violated human rights as well as its own laws".[3] The Czech Constitutional Court found that "under these circumstances, it is justifiable to prevent by means of criminal law the support and propagation of movements that would seek once again to suppress citizens' rights and freedoms".[4] The Czech Constitutional Court upheld the law, which was found to serve pluralism.

Another basic question confronting all transitional governments is whether to undertake the prosecution of the leaders of the ousted regime for the abuses they inflicted upon the nation. When a decision is made to prosecute, the desire to use criminal sanctions may run directly counter to principles of a democratic legal order, such as ex post facto and nulla poena sine lege, barring the prosecution of anyone for an act which was not criminal at the time it was committed. Some of the worst violations of human rights were crimes under the old system, but they obviously were not prosecuted. If the statute of limitations for these crimes has already elapsed by the time of the transition, can the new authorities still hold the perpetrators accountable for their deeds? In both Hungary and the Czech Republic, post-communist legislators argued that since these crimes, particularly those committed to suppress dissent, in 1956 and

1968 respectively, had not been prosecuted for entirely political reasons, it was legitimate to hold that the statute of limitations had not been in effect during the earlier period. Now, freed of political obstacles to justice, the statutory period for these crimes could begin anew, enabling the new authorities to prosecute these decades-old crimes. Legislation was adopted accordingly. In both countries, the matter was put to the newly created constitutional court for review. Each court handed down a decision, which eloquently addressed the need to view the question of legacy and accountability in the context of the new democracy's commitment to the rule of law. On the basis — with plainly similar fact patterns — the Czech constitutional court upheld the re-running of the statute of limitations for the crimes of the old regime as a requirement of justice, while the Hungarian court struck down the measure for violating the principle of the rule of law.

In Hungary the first elected parliament passed a law concerning the prosecution of criminal offences committed between December 21st, 1944 and May 2nd, 1990. The law provided that the statute of limitations start over again as of May 2, 1990 (the date that the first elected parliament took office) for the crimes of treason, voluntary manslaughter, and the infliction of bodily harm resulting in death — but only in those cases where the "state's failure to prosecute said offences was based on political reasons". The President of Hungary, Árpád Göncz, did not sign the bill but instead referred it to the Constitutional Court.

The Constitutional Court in its unanimous decision, 11/1992. (III. 5.) AB, struck down the parliament's attempt at retroactive justice as unconstitutional for most of the reasons that Göncz's petition identified. The court said that the proposed law violated legal security, a principle that should be guaranteed as fundamental in a constitutional rule-of-law state. In addition, the language of the law was vague (because, among other things, "political reasons" had changed so much over the long time frame covered by the law and the crimes themselves had changed definition during that time as well). The basic principles of criminal law — that there shall be no punishment without a crime and no crime without a law — were clearly violated by retroactively changing the statute of limitations; the only sorts of changes in the law that may apply retroactively, the court said, are those changes that work to the benefit of the defendants. Citing the constitutional provisions that Hungary is a constitutional rule-of-law state and that there can be no punishment without a valid law in effect at the time, the court declared the law to be unconstitutional.[5]

The Constitutional Court of the Czech Republic in its decision of December 21st, 1993 on the Act on the Illegality of the Communist Regime rejecting the challenge filed by a group of deputies in the Czech Parliament upheld a statute suspending limitations periods between 1948 and 1989 for criminal acts not prosecuted for "political reasons incompatible with the basic principles of the legal order of a democratic State".[6] The Czech decision permitting suspension of the limitations period relied, in part, on the decision of the German Federal Constitutional Court from November 12, 1996, in which the Court upheld the convictions of former German Democratic Republic (GDR) officials who had helped hand down the shoot-on-sight policy that resulted in the death of 260 people trying to cross the border between East and West Germany, or East and West Berlin, between 1949 and 1989. It rejected the defence argument that the German constitution's provision that "[a]n act may be punishable only if it constituted a criminal offence under the law before the act was committed", Basic Law article 103, para. 2, prohibited such prosecutions. This article, the Court found, did not apply to a case such as this where a state (the GDR) had used its law to try to authorize clear violations of generally recognized human rights.

In the newly unified Germany, the trial of the border guards for shootings at the Berlin Wall offers another illustration of the question, formulated by the Hungarian constitutional judges, as to whether "the certainty of the law based on formal and objective principles is more important than necessarily partial and subjective justice". The Border Protections Law of the former GDR authorized soldiers to shoot in response to "acts[s] of unlawful border crossing". Such acts were very broadly defined and included border crossings attempted by two people together or those committed with "particular intensity". The custom at the border was to enforce the law strictly: supervisors emphasized that "breach of the border should be prevented at all costs". The German trial courts relied on precedents of the Federal Constitutional Court elevating the principle of material justice over the principle of the certainty of the law in special circumstances.

Thus, the Hungarian court, on the one hand, and the Czech and German courts, on the other, formulated the dilemma in a similar manner, but came down on opposite sides: the Hungarian court interpreted the rule of law to require certainty, whereas the Czech and German courts interpreted it to require substantive justice.[7]

The rights-restrictive attitude of the Czech Constitutional Court was confirmed in the Rekvényi

decision[8] of the European Court of Human Rights (ECt.HR) in the context of the restriction of the right of association and freedom of speech. The origins of this position stem from a minority position of some of the members of the European Commission of Human Rights, which, at that time, was responsible for referring complaints to the ECtHR. In the Castells case,[9] the commissioners considered Spain, in 1979, to be undergoing a period of "transition to democracy". The dissenters, who called Senator Castells "a known political representative of Basque extremism", believed that the criminalization of the speech in question would have served to prevent disorder in 1979, which was a couple of years after the end of the dictatorship.

Contrary to the majority opinion in the Rekvényi and to the dissenters' assumptions in Castells, the Hungarian Constitutional Court explained in its decision 30/1992, which declared the defamation provision of the Criminal Code to be unconstitutional, that although the "unavoidable social tensions of system-change" (i.e. the post-1989 political-economic transition) notably increase the danger of inciting large public audiences to hate certain groups, the particular circumstances of Hungary's recent past does not justify limitation but, rather, more rigorous protection of the freedom of expression: "Political culture and healthy public opinion can be formed only through self-cleansing. [...] Disparagement shall be countered by criticism."

In its decision 13/2000, the Court unanimously rejected the petitions, which asserted that the provision of the Criminal Code — providing for the punishment of those who degrade any of Hungary's national symbols — violates the constitutional right to freedom of expression. The reasoning of this decision seems in contradiction to the ruling of 1992: "[T]he Court has confirmed in several of its rulings that the limitation of certain rights is allowable during the period of transition from a totalitarian state apparatus to a democratic society, until democratic institutions are fully stable, even when such limitation would otherwise be unjustified in the case of a country that has undergone uninterrupted democratic development."

The Hungarian judges this time even argued that this newly found principle had indeed been applied by the Strasbourg-based justices, for example in Rekvényi v. Hungary, where it was used to validate a limitation of the freedom of expression.

This kind of citing of the historical circumstances of the change of system recalls the concept of the German Federal Constitutional Court, which likewise cites historical reasons in reacting to militant threats to democracy by limiting the freedom of expression — namely, Germany's interest in avoiding a repeat of the scenario that followed the collapse of the Weimar Republic. In a 1994 decision concerning a public presentation in which the speaker denied the Holocaust — a decision hauntingly reminiscent of the reasoning of Hungary's justices, Germany's Federal Constitutional Court declared that while the German Constitution protects opinions without regard to their content and their manner of expression, the protection of publicly delivered assertions of fact hits a dead end at the point where such assertions are incapable of contributing to the formation of democratic opinion and will.[10]

RESTRICTIONS OF RIGHT TO LIFE

If we reject a rights-restrictive attitude that is based on historical circumstances, or, alternatively, if we argue that after about 15 years of the beginning of the transition these circumstances are no longer relevant, countries in Central and Eastern Europe face the same question as other "old democracies" do: On what basis can fundamental rights be restricted? The most interesting aspect of the question is, whether, in the case of the allowing the shoot-down of a civil aircraft being used by terrorists as a weapon, the right to life of suspected terrorists or of the innocent passengers can also be subject of restriction.[11] Another relevant question that is not dealt with here has to do with whether or not constitutional democracies can accept any exception for the prohibition of torture — in order to force terrorists to reveal plans that threaten the lives of others for example.[12]

With regard to the basis of the legitimate restriction of rights, one can explore the notion of what Sanford Levinson termed a "right to security" that serves as the predicate for the State's limiting a variety of traditional rights, especially during times of perceived "emergencies". According to Levinson, such "right" would be drawn from some Hobbesian notion that the basic duty of the state is to protect its citizens against the threat of attack or a general economic collapse.[13] Giorgio Agamben mentions another means of justification in his book on State of Exception — referring to Santo Romano — where he defines emergency as a subjective right of the State.[14]

The other question is whether the most important fundamental rights, such as the right to life and the right to human dignity, which are treated in most of the modern constitutions, including those of Central and East European states as absolute rights, can be

limited in order to guarantee public order and security. One of the characteristics of this region is that all of the constitutional courts have dealt with the "hard cases" of the right to life and to human dignity, and in four of these countries (Hungary, Lithuania, Ukraine, and Albania) the death penalty was abolished by the national constitutional courts.

The Hungarian Constitutional Court took the lead with its decision 23/1990, which abolished the death penalty.[15] In this decision, the justices defined human dignity as an absolute concept that constitutes a unity with the right to life. With regard to the absolute nature of these two rights, the justices of the Court undeniably went further than their German masters. In claiming that the justices focused exclusively on human dignity and failed to pay due regard to the need of the society to retaliate, one can raise a communitarian argument against the liberal decision.[16] In addition, protecting the right to life and to human dignity were the reasons that the Lithuanian Constitutional Court abolished the death penalty in 1998, and that their Ukrainian and Albanian colleagues did so in 1999. The Lithuanian decision emphasized the protection of the absolute character of the right to life, as well as the constitutional provisions on prohibition of torture, and cruel treatment and punishment degrading human dignity.[17] The Ukrainian Constitutional Court stated that, "the right to life as inalienable right is an inseparable part of human dignity".[18] The Albanian constitutional judges did not treat the right to life as an absolute right, but declared the use of capital punishment in peacetime as an arbitrary restriction.[19]

The Hungarian Constitutional Court, during its one and half decade long jurisprudence, has come a long way in the interpretation of the right to life and human dignity. As we have seen, this jurisprudence began with the concept of the indivisibility and absolute nature of these two rights in decision on the unconstitutionality of capital punishment. The jurisprudence continued when the state acknowledged that the state's acceptance of the deprivation of life can be justified only when a choice has to be made between human lives in the abortion cases; in other cases the institutional duty of the state to protect life can be limited by the mother's right to self-determination, which forms a part of her human dignity. In a decision concerning euthanasia, the Court admitted that deciding on euthanasia is a manifestation of self-determination. At the same time, however, because of the state's institutional duty to protect life, the justices did not consider it as a constitutional requirement to be guaranteed by the legislature. The Hungarian constitutional judges' latest decision on the policemen's use of firearms delivered in spring 2004 represented a regrettable setback, as the Court found constitutionally permissible the state consent on the deprivation of life in cases where there is no choice between lives.[20]

The use of firearms is defined by the act as a shot fired intentionally at a person, and in these cases the policeman is authorized to kill a person consciously. The petitioners considered certain cases of the use of firearms contrary to the right to life and asked the justices to declare such usage unconstitutional and null. One of these cases entails someone failing to comply with a policeman's order to lay down a weapon or another dangerous instrument carried by him, and his behaviour seems indicative of using the weapon directly against humans. The other group consists of those uses of firearms, where the policeman intends to catch the perpetrators of certain serious crimes against state, humanity and life, or to prevent their violent rescue, or escape.[21] One part of the challenged regulation permits the policeman the use of firearms also in cases where it does not serve the prevention of direct danger to life. However, according to the jurisprudence of the Constitutional Court, the state can constitutionally permit taking human life only in cases where the law tolerates the choice between human lives, and accordingly does not punish killing a person. Such a situation occurs for example in self-defence, where one wards off an attack against his life by killing an aggressor.

The justices did not consider unconstitutional those cases of using firearms where it is permissible to fire intentionally a shot in order to catch or to prevent the escape of a person who intentionally killed another human. Thus, in these situations the justices made an exception under their rule, namely the earlier commission of a crime does not itself mean a direct threat to lives, and that is why it is not reasonable to endanger the life of the perpetrator.

It is easy to admit that, no matter how obstinate a criminal might be, shooting him does not protect the lives of others. The justices — realizing this contradiction — stated that they have to take a stand on the issue of whether it is constitutionally permissible to endanger a life when it is not aimed at preventing the threatening of other lives. Because, as the majority decision underlines, the mere fact that someone murdered a person before, does not logically lead to the conclusion that he intends to kill or endanger the life of others. Moreover, the justices also sensed that the problem lies in being unsure as to whether the person against whom the policeman used his firearm committed the murder in question.

According to the majority reasoning, the legal situation of the person threatened by the policeman is special if that person killed someone before (according to the logic of the policeman in any case). From the right to life — says the Court's argumentation — follows the requirement that a decision be made on the legal responsibility of the person taking the life of another: This requires the presence of the alleged perpetrator, which can be assured by arresting him. Hence the foundation of the reasoning: "he who violates the right to life by taking another person's life (let us add again: supposedly — G.H.) ... takes the risk ... of putting his own life into danger." This line of reasoning, however, fails to provide an answer to the following question: on which grounds can an earlier act result in putting the perpetrator's life at risk. It seems as though the vulnerability of the perpetrator's life would serve as a sanction or punishment of the murder that he is supposed to have previously committed. But in this case the limitation of the right to life — even if it does not necessarily mean taking the life, but only endangering it — must meet the same constitutional standard that was used by the Constitutional Court when it found capital punishment unconstitutional. Namely, risking the life of a supposed murderer is, in itself, a limitation of the essence of his right to life. The reasoning, according to which the use of firearms in a specific situation is lawful only if the policeman knows beyond doubt that the person whom he is shooting at killed before, does not eliminate constitutional violation. Making the prosecutor, the judge and the executioner in a justizmord case does not make the death penalty constitutional.

Basically the majority decision employed similar reasoning to reinforce the provision of the act, according to which, the taking of life should be avoided "as far as possible" during the application of coercive measures. Only Justice András Holló's dissent, which was endorsed by Justice István Kukorelli, expressed reservations. Justice Holló's dissent detailed a concern that both permitting the pursuit of those who have previously committed murder and accepting the death of a person as a possible result of using coercive instruments, create a statutory possibility for the arbitrary deprivation of life that is contrary to the Constitution. It seems that in taking this decision, the majority of justices revised the concept of their predecessors on the indivisibility and absolute nature of the right to life and human dignity. This is a bad message to deliver in a world, which is inundated by claims of vendetta between state terror and private terror.[22]

NOTES

1. See, Richard A. POSNER, "The Cost of Enforcing Legal Rights." *East European Constitutional Review*, Vol. 4, No 3, (Summer 1995), pp. 71–83.
2. See Janos KIS, *From Costs and Benefits to Fairness: A Response to Richard Posner*. Ibidem, pp. 84–87.
3. Act No. 480/1991 Sb.
4. E.g. ÚS 5/92.
5. The English language translation of the decision has been published in László SÓLYOM – Georg BRUNNER, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court*, Ann Arbor: The University of Michigan Press, 2000, pp. 214–228. (Hereafter, this book will be abreviated as SÓLYOM/BRUNNER.)
6. English translation is in *The Dilemmas of Transitional Justice: How Emerging Democracies Reckon with Former Regimes. Vol. III. Laws, Rulings, and Reports* (ed. Neil J. KRITZ). Washington, DC.: US Institute of Peace Press, pp. 620–627.
7. The dilemma of successor justice faced by these courts forms part of a rich dialogue on the nature of law; H.L.A. Hart and Lon Fuller's debate on transitional justice wrestles with the relationship between law and morality, between positivism and natural law. Defending positivism see H.L.A. HART, "Positivism and the Separation of Law and Morals." *Harvard Law Review* 71, 1958, p. 593. Fuller rejected Hart's abstract formulation of the problem, and instead focused on post-war Germany. Arguing that Hart's opposition to selective tampering elevates rule-of-law considerations over those of substantive criminal justice, Fuller justified tampering to preserve the morality of law. See, Lon L. FULLER, "Positivism and Fidelity to Law: A Reply to Professor Hart." *Harvard Law Review* 71, 1958, p. 630. About the debate see Ruti G. TEITEL, *Transitional Justice*. Oxford: Oxford University Press, 2000, pp. 12–14.
8. Rekvényi v. Hungary, May 20, 1999. Application No. 25390/94.
9. Castells v. Spain, April 23, 1992. Application No. 11798/85.
10. On these grounds, the Constitution does not protect assertions of fact known by the one making the assertion to be false or which can be proven false. Germany's Federal Constitutional Court considers the so-called "Auschwitz lie" to be an assertion of this sort, which, in the judgement of the Court, has been proven false. *Beschluss des Ersten Senats vom* 13.4. 1994. *Europäische Grundrechte Zeitschrift*, 17–18/1994, pp. 448–452.
11. The latter problematic is discussed in Gábor SULYOK: "An Assessment of the Destruction of Rogue Civil Aircraft under International Law and Constitutional Law." Published in this issue.

12. In the legal literature see Alan M. DERSHOWITZ, *Why Terrorism Works — Understanding the Threat, Responding to the Challenge.* New Haven – London: Yale University Press, 2002; Winfried BRUGGER, "May Government Ever Use Torture? Two Responses From German Law." *American Journal of Comparative Law* 48 (2000). In Germany see the case of Wolfgang Daschner decided by the Frankfurter Landgericht in 20 December, 2004.
13. See Sanford LEVINSON, *Constitutional Norms in a State of Permanent Emergency*. Paper delivered on 28 March, 2005 as the Sibley Lecture at the University of Georgia Law School, p. 1. The Hungarian translation was published in *Fundamentum*, 3/2005.
14. See Giorgio AGAMBEN, *Ausnahmezustand*. Frankfurt am Main: Suhrkamp, 2004, p. 40.
15. See English translation of the decision in SÓLYOM/BRUNNER, pp. 118–138.
16. At the same time, if we examine the opinions of the justices voting with the majority for the abolishing of death penalty, we can observe that several of them dealt with the consequences of the different criminal theories on death penalty. These arguments were left out of the extremely short and concise majority decision and were put into the concurring opinions, because the justices followed different approaches. Justice András Szabó, for example, represented the retributive criminal theory, while Justice János Zlinszky stressed the importance of prevention that cannot be proved in case of death penalty on the basis of scientific achievements.
17. Case No. 2/98. Judgment of 9 December 1998.
18. Case No. 11-rp/99. Judgment of 29 December 1999. The Court declared the death penalty as unconstitutional, after which the Ukrainian Parliament annulled it.
19. Case No. 65. Judgment of 10 December 1999.
20. 9/2004. (III. 30.) AB.
21. In a recent case a policeman shot down, an injured desperately a member of Ukrainian gang of thieves trying to escape at the streets of Budapest. *Népszabadság*, 7 September, 2005.
22. We all remember Jean Charles de Menezes, the 27-year-old Brazilian man, living and working as an electrician, who as an innocent victim was shot dead on July 23, 2005 by the London police in their hunt for the failed suicide bombers targeting the capital two days earlier. See Man shot in terror hunt was innocent young Brazilian. *Observer*, Sunday July 24, 2005.

Ádám Földes

TOUGH LIBERTIES: PERPLEXED ABOUT TERRORISM

FOREWORD

Very little is known about Hungary's war on terrorism though it seems that terrorism has become the most commonly cited reason of a governmental body's explanation of any of its restrictive policies. Since 9/11 the Hungarian government has issued several decisions with regard the fight against terrorism,[1] which consist of inter alia legislative tasks (such as drafting acts on judicial co-operation), establishing anti-terrorist co-ordinating bodies in police and intelligence fields, implementing EU regulations, linking and exchanging databases and providing financial means for the counter-terrorism activities. The list of the Hungarian measures is impressively long. The greatly consists of reiterations of EU measures but is also supplemented by some Hungarian ideas. The Hungarian way of handling the terrorism issue doesn't differ much from the EU's attitude not only terms of the similar legal basis, but also in terms of their attempts to obscure the aims and means of the new regulations.

The civil liberties group Statewatch has made an analysis of the 57 proposals on the table at the EU Summit on 25–26 March 2004 in Brussels (which followed the tragedy in Madrid) that "shows that 27 of the proposals have little or nothing to do with tackling terrorism — they deal with crime in general and surveillance".[2] Although the Hungarian case still lacks a similar analysis and there are only a few issues which are scrupulously examined by human rights authors, it is quite easy to find cases which correspond with this tendency. In this paper two cases are to be presented I would like to note in advance that these cases are much more lessons in communication than lessons in human rights in Hungary, although the two spheres are deeply connected. The first case, in illustrating the technique of disregard, details how the government has neglected all of the actors in society whose role it is to maintain control in a democratic system. The second case is trivial one on the rhetoric of a dubious enterprise of the Ministry of Interior.

THE BIOMETRIC PASSPORT CASE IN HUNGARY

By the last months of 2004, the biometric passport issue has become the most discussed human rights topic in the EU. The U.S. has proclaimed that each state which wants to further participate in its visa-waiver programme shall make their passports more secure, which means they shall comply with the standards of the ICAO.[3] According to these standards, every passport shall include at least one piece of biometric identification (a special biometric photo) and shall optionally include another one (fingerprint, iris image). The European Council has committed itself in favour of two identifiers (photo and fingerprint), although only one would have satisfied the U.S. requirements.[4] According to the Council's decision with regard to the introduction of the new system, any European citizen who applies for a new passport will have to provide not only his facial image but his fingerprints as well as a compulsory security feature, whose data will be stored on an RFID[5] chip readable at a few meters distance.

There was no public debate on the proposal and the data protection guarantees of the identifiers were also missing. The proposal introducing the new passports has come out in the form of a draft council regulation, and the European Parliament had only the authorisation for a consultation procedure, which meant very little opportunity to inhibit the acceptance of the regulation.

At the end of November 2004 the Privacy International, Statewatch and the European Digital Rights asked the Hungarian Civil Liberties Union (HCLU) among others to join the open letter written to the members of the European Parliament on biometric passports.[6] The petition has also reached Attila Péterfalvi (the Parliamentary Commissioner for Data Protection) and László Majtényi (the former Parliamentary Commissioner for Data Protection) and some other human rights NGOs as well. Apart from seven European data protection commissioners, the open letter was signed by both the commissioner in office and the former commissioner, forty-five human rights organisations (three of which are Hungarian), and many European citizens concerned

about privacy. The HCLU sought all the Hungarian members of the European Parliament (EP) with a letter of the same content, but unfortunately the EP has passed the draft.[7]

Along with the open letters, we have started an intensive media campaign in order to foster a public debate on biometric passports when not in the European Parliament then at least in Hungary. We are undertaking these activities because we feel that the position of the government should be clarified, as it is the ministers of the EU member states that will decide on the proposal in the end. The print and the electronic media were discussing the issue for days. On behalf of the Hungarian state — not counting the Parliamentary Commissioner — an employee of unknown assignment from the Central Bureau of the Ministry of Interior has answered the questions of the journalists (explaining only technical details), and Etele Baráth, the Minister for European Affairs has once made a statement to the reporter of a commercial channel just before leaving for Brussels on the way to the ministerial meeting. He explained, "I know that it affects the right to privacy, but nonetheless we have to raise the question, whether security or this right is more important for the country and for the society".[8] The government has more or less concluded the debate, or rather it did not want to get deeper involved in it.

While it was never made public, it is known that the Minister of Justice, the Minister of Interior, the Minister of Foreign Affairs and the Minister for European Affairs have gathered in order to finalise the position of Hungarian government before sending the Hungarian delegation to the European meeting. Although they did not invite the Parliamentary Commissioner for Data Protection to this meeting, it must have been evident to them that the draft council regulation on biometric passports is contrary to the Hungarian Constitution. Hungary would have had the possibility to vote against the proposal giving the chance of further discussion into the ambiguous details. However, the Hungarian government has voted without any debate for the regulation which was considered by the Hungarian DP Commissioner as the fingerprints have been used for identifying the criminals until the 21st century and "it would not be desirable if all citizens of the union were to go on quasi criminal records". The regulation has entered into force the 18th January 2005.[9]

After the commencement of the regulation, the system required that the handling and producing of the special biometric photos should be established within 18 months and the fingerprints within 36 months. As some questions in the passport issue are still undecided, it is unsure if the personal data will be stored in an RFID chip or in a database from which the data of the passport owner shall be downloaded on a case by case basis.[10]

THE HUNGARIAN CIVIL LIBERTIES UNION

The Hungarian Civil Liberties Union (HCLU) is a law reform and legal defence organisation. When the founders were looking for a model to follow in 1994, they finally chose the American Civil Liberties Union (ACLU) because its organisatioanal structure, principles and values it seemed to be the most appropriate. Only five years after the change of the regime, the founders created their NGO in Hungary based on the American model.

HCLU works independently from political parties, churches, the government, the state or any of its institutions, and it does not use resources from the above organisations. HCLU's activities are financed by large private foundations — domestic and international, and increasingly from Hungarian individuals. Fundraising is a great challenge for HCLU as well as for the other NGOs in the country and in the Eastern European region the tradition and practice of individual donating is lacking. Fundraising also requires the formation of a strong base of individuals who are identified with HCLU's values and goals.

HCLU's aim is to promote the fundamental rights and principles that are laid down by the Constitution of the Republic of Hungary and by international conventions. Generally it has the goal of building and strengthening the civil society.

HCLU has chosen to focus its work on the following areas: drug policy and drug use, Patients' Rights, Data Protection and the Freedom of Information, and the defence of Political Liberties (such as Freedom of Expression, Freedom of Assembly, opinion etc.). Professional experts are working full time with the help of well known advisors in each of these areas of concentration.

Their work mainly consists of promptly reflecting upon the questions coming from the society that are related to the expert's field that in addition to providing recommendations and guidelines to Hungarian authorities and institutions. Associates represent HCLU's point of view in the media and in public appearances, write studies and make surveys on the recent issues. Besides these activities, HCLU organises and participates in

Because the biometric passport is an issue of major concern, it is worth to recalling some of the problematic details without the intention of being exhaustive. Both the system based on chips and the database system have their perils. The RFID chips have the risk of being read by unauthorised persons or manipulated without even giving the owner the chance of being aware of the data flow. The real danger of the database is "function creep": once a huge amount of biometric data is collected, it will be used for purposes which have not much to do with the original aims of the regulation.[11] There is a strong temptation to use a database, which contains the personal data of hundreds of millions of people, for the purposes of dozens of different activities of the state in addition to border control purposes. No doubt every new purpose will have serious grounds. Even if the passport and the database are invulnerable and the data controllers never abuse the personal data, there is still an inevitable problem. Whoever is willing to sacrifice his life in a suicide attempt won't have any scruples about giving up his identity and applying for a passport with false data. The biometric data will surely comply with the biometric features of the owner; only the identity will be of someone else. Thus, the biometric passport will give an unfounded feeling of security for the people and mislead the authorities for whom relying on the correspondence of the biometric identifiers will be more comfortable than examining the passengers. The biometric passport is a very grave restriction of our informational self-determination, and, in return for this restraint, it won't give more security. The constraints on our right to privacy do not stand the constitutional test of necessity and proportionality.

It is clear that this issue raises several important questions, regardless of the fact that the government which represents the Republic of Hungary in the European Council has not considered this topic important enough to take up in a public debate. The ground of this attitude is obscure, but the government has supported a measure with unforeseeable consequences so as to reduce the risks of terrorism without asking for anyone's opinion. The voters expect the government to do everything for their security but it is highly unlikely that they would like to obtain a new risk in addition to an already existing one.

THE CCTV FEVER

The United Kingdom is a very important instance in crime prevention and in prosecuting crimes in Hungary. Both on a theoretical level and in practical sense, the British model is considered as worth following. A fine example of this imitation is the use of the video surveillance. In Budapest there are twenty three districts, and in the two thirds of them CCTV

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conferences, workshops and trainings, coordinates partnerships, cooperates with and provides information to other organisations.

HCLU is up-to-date on the activities of several important institutions and organisations such as the European Union, the Council of Europe, the WHO, the UN and the World Medical Association. HCLU follows up on the recommendations and guidelines, issued by these organisations, which regard HCLU's areas of concern. HCLU sometimes makes these documents accessible in Hungarian language.

HCLU's objective is to achieve a Hungarian legal system that is in accordance with the most recent international legal norms, which necessitates that laws and other legal instruments be adjusted.

HCLU consistently monitors the formulation of new pieces of Hungarian legislation that fall within its competence, from the initial conception of a draft law all the way to its enactment. Before working out a statement, HCLU seeks counsel from eminent experts on the topic at issue — typically jurists, lawyers and physicians.

By the time parliamentary discussion of the issue opens, HCLU gives politicians, journalists and experts their prepared statements. In the annex attached to the Statements, HCLU provides the Members of Parliament who are most directly involved in the legislative discussion with a commentary on the bill and recommendations for alternative wording of several of the bill's articles.

HCLU's Programs

Drug Policy Program

In the beginning HCLU only dealt with individuals having drug use-related legal problems. Since 1998, HCLU has been cooperating with harm reduction service providers and outpatient drug treatment clinics. HCLU also provides legal assistance to arrested methadone doctors, street outreach workers and needle exchange program operators.

Within the Drug Policy Program, HCLU recently initiated the Media Monitoring project which aims to monitor the drug related information released in Hungarian media (regardless the type of the medium). The goals

systems are operated by the police which means about five hundred cameras. In the major cities of the country, numerous CCTV systems were installed in the last decade. The first system watching public area was introduced around 1993–94. Although the video surveillance is widely used in Hungary, no survey has ever been made in order to ascertain its effects either before installing a system or after its start.[12] There is no one in Hungary who is able to judge if the CCTV could reduce the crime in public area anywhere in the country or not. The costs of the installation of the surveillance systems in the capital cost approximately 6 million euros, and the annual cost of operating them is about 1.5 million euros.

While the reasons for the CCTV boom are various, the following is the most likely scenario. The fear of criminality is relatively high among the Hungarian population. The image of criminality differs much from the official criminal statistics. About 14% of the population thinks that Hungary is among the first three countries in terms of the frequency of crime, and about 50% believe that the country is among the first ten countries in Europe on this list. In reality, however, Hungary is one of the safest countries according to the crime rates per 10000 inhabitants. When asked to estimate the number of crimes committed in the year of 2002, 60% of those surveyed guessed a number below 100 000, whereas in the reality this value is around 500 000.[13] Due to the effects of the media, the frequency of violent crimes is overestimated. If people imagine criminality as a mass of violent crimes, no wonder they are afraid of it even when the statistics don't back up their fears.[14] The local governments and the mayors are resolute on tackling the local "crime problem" and they are looking for solutions. A wide-spread solution is the CCTV which can be easily presented as the silver bullet against crime on the streets, and it is also easy to find local companies which install the system. The population receives what they need: a fancy crime prevention system that fights imaginary crime. The crime issue seems to be resolved for a while, and there is not much discussion about the financial and privacy consequences of the project.

This is the peaceful local level, but there is also a central level of crime prevention. The Ministry of Interior has a very different role in the fight against crime and the war on terrorism as they work on national level. They also need spectacular projects to demonstrate the quality of their work. In Hungary, the CCTV is a perfect subject in this field too, not in the least owing to its success on a local level. After the July 2005 London bombings, the Ministry of Interior reported that the CCTV systems of the

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of the project are filtering out and correcting false information in order to avoid misunderstanding and the spread of ignorance among the public as well as providing credible data and sources on certain drug related issues.

The Patients' Rights and HIV/AIDS Program

The Patients' Rights Program focuses on such serious issues as the right to health care, the right to freedom of choice, informed consent, right to refuse treatment, access to medical records, substituted decision making, right to participate in decision making related to health care and the right to self-determination in cases such as abortion and euthanasia.

Data Protection and Freedom of Information Program

HCLU is governed by the principle that the citizens have a right to control the use of their personal data and that they should have access to documents of public interest. The Program deals with questions like right to the privacy of personal data (including protection of medical data, disclosure of medical data, protection of personal data in the media), access to public interest information and protection of basic information rights on the Internet.

Legal Advocacy — HCLU's Legal Aid System

HCLU provides legal aid and, in special cases, legal representation free of charge. This practice involves the provision of personal consulting hours once a week by two lawyers who can also be reached by telephone, mail or online during office hours every weekday. Those who are in need can only reach HCLU if their problem or case relates to the fields with which the organisation deals. In exceptional cases, HCLU represents a client in order to promote a certain issue in public.

The statistical figures of HCLU's ten years of existence also serve to illustrate its activity. HCLU has served over 4000 clients, dealt with 200 criminal cases and 40 civil suits, issued 200 official statements, commented on 100 rules, made 20 proposals to the Constitutional Court and released approximately 100,000 copies of 150 different publications. The experience of HCLU clearly shows that strategic litigation can be a tool in public interest advocacy even within the continental legal system.

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buildings in potential danger should be revised with special concern given to their use for defence purposes.[15] As another newspaper reported, the "Ministry of Interior is planning to connect the CCTV cameras into a unified system in step with the experience of the terrorist attacks. According to the information of the Magyar Hírlap [a daily newspaper] the ministry would speed up the installation of the systems and the connection of the existing systems."[16]

As seen in these reports, the government has used the London terror attacks either to promote the CCTV, the necessity of which has been questioned lately by human rights groups and journalists, or else they could not find any other measure which could be well communicated as a sign of their firmness. Both conclusions are very sad. In the *first case* the government has chosen the strategy of confusion. The ministry has cynically utilised the population's fear of crimes and terrorism and their belief that the CCTV protects them from crime. The logic is as follows: "if something protects from crime, then it will also protect against terrorism and even if the cameras are infringing upon privacy and might be unconstitutional in 'common' crime prevention, it may be used against the bigger danger of terrorism. Consequently, Hungary needs more cameras, and it doesn't matter if we install them against criminals or terrorists, it must be useful against both. We install them and if there is no terror attack, or if the cameras won't prevent them, at least they will be useful against minor crimes."

The probability of committing a "common" crime on the street is quite high in considering the annual 500 000 crimes. The probability of a terrorist attack on a street under surveillance is quite low — even if we don't take the current Hungarian tendencies in terrorism risk as a basis for our prediction.[17] If the use of CCTV in prevention of crimes with high probability is questionable on constitutional grounds, then it will be even more difficult to constitutionally justify their existence in the prevention of terrorist attacks. The ministry has not taken such arguments in consideration. They were also not taking into consideration the fact that, even if the cameras were effective in reducing "common" crimes, they provide no protection against terrorism, due to its specific nature. A suicide-bomber doesn't care about being recognised by the cameras and thus held accountable. He who sacrifices his life won't be scared of any punishment. Hundreds of thousands of cameras were not able to prevent the tragedy in London.

The *second* conclusion is also very dismaying. The government is not cynical. They truly believe, in spite of the lack of proof of the effectiveness of the video surveillance and the extensive literature on unsuitability of CCTV systems, that these techniques are useful against terrorists. As they don't have a better idea for the prevention of terrorism, they communicate the installation of bigger and better CCTV systems.

CONCLUSION

If either of these offers a sound conclusion, it can be said that the government is not very well prepared for the new era. Parallel with the uncritical adoption of all EU ideas and measures, the Hungarian government has failed to show that they have a single original idea in preventing terrorism applicable to the Hungarian legal and political environment. The issues discussed here are only examples of governmental embarrassment. Alone they are not sufficient to show the consequences of the lack of reason in tackling terrorism, but they shed light on the profound problems of this area. Apparently, the only answer for the risk of terrorism is the mass surveillance amalgamated with the well-known routine of the communist era in refusal of any communication, public debates, sharing information and doing research. It is rather uncertain whether the state of affairs in the Hungarian government is really so bad and the country has not developed in this sense over the last fifteen years, but unfortunately until now no evidence in refutation of this conclusion has come into existence.

NOTES

1. 2286/2001. (X. 11.) Gov. decision; 2112/2004. (V. 7.) Gov. decision; 2151/2005. (VII. 27.) Gov. decision.
2. Statewatch "Scoreboard" on post-Madrid counter-terrorism plans.
3. International Civil Aviation Organization — www.icao.org.
4. Presumably the European Council has taken its decision under the influence of the G8 group, See Tony BUNYAN: *Countering Civil Rights*. Nottingham, Spokesman Books, 2005. at 11.
5. RFID radio freq.
6. http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-85336&als[theme]=BTS%20Biometric%20Passports.
7. The MEPs has supported the draft with 471 yes votes, against 118 nay, 6 abstention. The Hungarian MEPs voted according the following:
   YES: *EPP-ED:* Barsiné Pataky, Becsey, Glattfelder,

Gyürk, Járóka, Olajos, Őry, Pálfi, Schmitt, Schöpflin, Surján, Szájer; *PSE:* Dobolyi, Hegyi, Herczog
NAY: *ALDE:* Szent-Iványi
ABSTENTION: —
NOT VOTED: *EPP-ED:* Gál; *PSE:* Fazekas, Gurmai, Harangozó, Kósáné Kovács, Lévai, Tabajdi; *ALDE:* Mohácsi

8. See Data protection worries about the fingerprint passports [Adatvédelmi aggályok az ujjlenyomatos útlevél miatt], Mtv, 11th December 2004 http://www.hirado.hu/cikk.php?id=12114; We will have passports with fingerprint [Ujjlenyomatos lesz az útlevelünk], TV2.hu - 13th December 2004 http://www.tv2.hu/Archivum_cikk.php?cikk=100000097551&archiv=1&next=0.
9. Tanács 2252/2004/EK rendelete (2004. december 13.) a tagállamok által kiállított útlevelek és úti okmányok biztonsági jellemzőire és biometrikus elemeire vonatkozó előírásokról, lásd http://europa.eu.int/eur-lex/lex/LexUriServ/site/hu/oj/2004/l_385/l_38520041229hu00010006.pdf.
10. According to the British government's paper Liberty and Security — Striking the Right Balance this question seems to be undecided , although the regulation consists the first solution.
11. Statewatch analysis — From the Schengen Information System to SIS II and the Visa Information (VIS): the proposals explained. See www.statewatch.org.
12. The HCLU has started a survey which aims collecting data on CCTV systems operated by the police. We have asked all the police chiefs of the districts of Budapest, the leaders of the police offices in the chief towns of the counties and the responsible officials of the Ministry of Interior if they could provide a study on the effectiveness of the video surveillance systems Their reply was consistent: they do not have any research in this field.
13. Hungary has about 10 million inhabitants.
14. Kó József: *The fear of criminality* [A bűnözéstől való félelem]. In: *Áldozatok és vélemények*, Budapest, Országos Kriminológiai Intézet, 2004. 68—70.
15. Preparing for the terror [Felkészülünk a terrorra], index.hu, 14. July 2005. http://index.hu/politika/ belfold/0714lmperth.
16. The Ministry of Interior would observe the country through cameras [Bekamerázná az országot a Belügyminisztérium], index.hu, 22. August, 2005, http://index.hu/politika/belfold/cctv7805.
17. The government and the terrorism experts share the opinion that Hungary is a low risk country inter alia due to its low media presence in the world.

Gábor Halmai

VIOLENT RADICALISATION IN HUNGARY

Following the Framework Decision on Combating Terrorism (2002)[1] the European Commission has adopted Communications addressing the areas of Preparedness, Prevention and Response relating to counter terrorism.[2] These have dealt with Critical Infrastructure Protection in the fight against Terrorism[3] and the Preparedness and Consequence Management in the fight against Terrorism.[4] This document intends to add to the work on the *prevention* of terrorism, and it complements the Commission's Communication on the financing of terrorist activities[5] and, more recently, on explosives and firearms (subject to adoption). The aim is to look at potential reasons and factors that contribute to leading people to commit terrorist acts. The Communication addressed to the Network of Independent Experts seeks to raise issues in order to work in the following directions: to help understand how terrorist recruitment might take place; to suggest preventive measures that in trying to find out more about the factors that might contribute terrorist recruitment; and to look at what is meant by "violent radicalisation".

The European Commission provisionally defines "violent radicalisation" as being "the phenomenon of people embracing opinions, views and ideas which could lead to acts of terrorism or other acts of violence against others within society". Therefore it might apply to a wide range of movements, organisations and struggles, based on political, religious, national and ethnic motivations. The term might also cover some activities that exist as a combination of these factors, or it might sometimes merely describe a reaction based on feelings of frustration, disadvantage or injustice. Radicalisation is rapidly becoming an important subject of exploration due to its link to combating terrorism and to understanding the origins of terrorism at the ground level and due o its contribution to the overall debate on the root causes of terrorism.

However, it is important to maintain the crucial balance between different fundamental rights in this area, particularly the security objectives (the right to security and life), on the one hand, and the right to freedom of expression and privacy (including personal data protection), on the other. This is a vital area where the EU can use its legislative and policy processes to lead the way.

Therefore, the Commission asked the members of the Network to answer a questionnaire concerning the situation of violent radicalisation in their own country.

HOW ONE CAN DEFINE "VIOLENT RADICALISATION"? ARE THERE ANY "DEFINITIONS" AVAILABLE WITHIN NATIONAL LAW?

According to Article 269 of the Criminal Code, Act No. IV of 1978 which defines an offence called Incitement Against Community, "A person who incites the general public to hatred for a) the Hungarian nation, b) any national, ethnic, racial group or certain groups of the population, shall be punishable for a felony offence with an imprisonment of up to three years."

The freedom of expression jurisprudence of the Hungarian Constitutional Court (hereinafter referred to as: "HCC") concerning the limitations on hate speech is extensive, and the HCC has dealt with the matter several times. Elements of both American jurisprudence as well as those of the European model can be traced. The latter system is more restrictive to free speech and gives more weight to the concept of militant democracy.

The Hungarian Constitutional Court first encountered this problem in examining the constitutionality of the provision in the Hungarian Criminal Code concerning public incitement. Article 269 of the Criminal Code had regulated the facts by defining two easily distinguishable forms of incitement whose only common element was their being committed in public. While the facts of the more serious (criminal) offence under paragraph (1) included incitement of hatred against "the Hungarian nation, any other nationality, people, religion, race or certain groups among the general population", paragraph (2) provided for the prosecution of those who use an offensive or a disparaging expression against "the Hungarian nation, any other nationality, people, religion, or race", or those who commit similar acts. As is apparent, the facts of the two paragraphs differed not only in respect to the protected legal subjects [i.e. indi-

vidual groups within the general population do not figured in paragraph (2)], but also in the behaviour inherent to the act committed. While the incitement of hatred has the potential to disturb the public peace because it embodies the danger of violence or of making violent threats, this cannot be said of the Criminal Code's definition of defamation, a milder form of the incitement of hatred.

In its decision 30/1992. AB of the 29th of March 1992, the HCC found the facts of the crime of inciting hatred, as spelled out in Article 269 (1) of the Criminal Code, to be constitutional and annulled the form of defamation laid down in paragraph (2) of the same article. Its reasoning was based on the notion that the freedom of expression has a distinguished role among other fundamental rights guaranteed by the Constitution, that it is in fact a sort of a "mother right" of the so-called rights of "communication". According to the HCC justices, the right to the freedom of expression protects opinion without regard to its content in terms of value and truth, for it is only in maintaining this condition that we can hope to live up to the ideological neutrality of the Constitution. In confirming the constitutionality of the elements of the crime of incitement, the justices apparently reasoned on grounds similar to U.S. Supreme Court Chief Justice Oliver Wendell Holmes's famous test of "clear and present danger" in Schenck versus U.S. At the same time, it must be said that the "danger" attached by the Hungarian Constitutional Court justices as a condition of constitutionality is more distant and contingent than the sort their erstwhile American peers had in mind. Presumably this is why the Constitutional Court elaborated on its decision by explaining that the "unavoidable social tensions of system-change" (i.e. the post-1989 political-economic transition) significantly increase the danger of the incitement of hatred against certain groups in front of large public audiences.

The main reason for declaring defamation unconstitutional was, however, that in this case, the Hungarian Parliament had in fact made its qualification on the basis of the value content of the opinion expressed. In other words, the violation of public peace was attached to defamation only on the basis of presumption and statistical probability. Moreover, the HCC pointed out that not even the public peace is independent of the degree of freedom of expression that prevails in society. Indeed, in countries where people can encounter numerous different opinions, public opinion becomes more tolerant, whereas, in closed societies, particular instances in which people express opinions that are out of the norm have far more potential to disturb public peace. Further, the needless and disproportionate limitation of the freedom of expression has a detrimental effect on an open society. At the same time, they added that the need to protect the "dignity of communities" might constitute a valid constitutional limitation on the freedom of expression. Thus, the Court decision does not rule out the possibility that Hungary's lawmakers might establish such protection under criminal law even beyond the scope of the incitement of hatred.

THE NETWORK

The European Commission set up the E.U. Network of Independent Experts on Fundamental Rights upon the request of the European Parliament. It monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union.

In the spring of 1996 the statutory regulation of incitement once again came to centre stage in Hungary, after the Penal Division of Budapest City Court acquitted the infamous neo-fascist party leader Albert Szabó and his associates of charges of public incitement and of the public display of symbols of autocratic rule, another crime that had meanwhile been added to the Criminal Code. The reasoning of the decision was more or less in line with that of the Constitutional Court's 1992 decision: "Public incitement is realised only when someone incites passions to a degree capable of summoning hatred and of leading to the disturbance of the public peace." Until the time when such danger prevails, "the free expression of opinion also embraces thoughts and views that are offensive, shocking, or that cause distress".

The acquittal generated a public furore of a magnitude that has not been seen in Hungary in a long time. The Hungarian Parliament amended the legal provision against public incitement, supplementing the crime of the incitement of hatred with the addition of "another action capable of inciting hatred". Even without explicitly spelling out the aim of this new provision, it was well suited to ensuring that, for example, even those who deny the Holocaust out of sheer ignorance are liable to prosecution. Indeed, this revision of the provisions of public incitement created questions as to whether or not it met the criteria set down in the Constitutional Court's 1992 decision.

Decision 12/1999. AB of May 21st 1999 of the HCC was based on a petition filed before the Court

directly after Parliament had amended the incitement law. In applying the criterion of "defamation" and in complementing it with the argument that "indefinite utterances" violate legal security, this decision annulled the newly introduced legal text, thus reviving the situation of 1992.[6]

In December 2003, the Government again initiated the modification of the hate-speech provision of the Criminal Code for three reasons. First, the modification of the hate speech provision was partly a reaction to the acquittal of priest Loránt Hegedűs, the Vice President of the Hungarian Truth and Justice Party (MIÉP) and member of Parliament, who published an article in ÉBRESZTŐ, 16th District of Budapest organization party's journal, under the title "Christian Hungarian State". Appearing on the front page of the journal, which was delivered to letterboxes throughout the district, the article included statements such as, "SHUT THEM OUT! IF YOU DON'T DO IT TO THEM, THEY'LL DO IT TO YOU! This we know from a thousand years of torture, from the remaining legacy 'on high' of our country that has been stolen and looted thousands of times, and not in the least by the stone-throwing sons of Ramallah."

Second, according to the Government's reasoning, the application of Article 269 of the Criminal Court by the ordinary courts[7] was so divergent that it raised legal certainty concerns.[8] Third, the Government also referred to the constitutional duty of Hungary to harmonize its domestic laws with its international obligations.[9] It was the Government's view that Parliament had not yet fulfilled its obligation in the area of hate speech.

On the 8th of December 2003, the Hungarian Parliament voted with a slight majority (184:180) for the modification of the Criminal Code. According to the Bill, hate speech criminalisation would have become stricter. Any incitement of hatred against any nation, national, ethnic, racial or religious minority, or calling for violent acts before the general public would have been a felony offence punishable by imprisonment of up to three years. Violating other people's human dignity by disparaging or humiliating them because of their national, ethnic, racial or religious origin would have been a misdemeanour punishable by imprisonment of up to two years.

The adopted bill prescribed publicity for the incitement of hatred. The word "nation" was a new element. Before the amendment, one could commit this crime against the Hungarian nation, while, according to the new bill, the crime could have been committed with regard to any nation. The lawmaker argued that in order to avoid the trap of being restrictive on content-based consideration, it is not the speech itself but the degree of fierceness created by it that should be the decisive factor in punishment.

Because the President of the Republic considered the already adopted but not yet signed Act on amending the hate speech provisions of the Criminal Code to be unconstitutional, he submitted it to the Constitution Court for ex ante constitutional review on the 22nd of December 2003.

The Constitutional Court ruled that the adopted but not yet enacted amendment to the Criminal Code was unconstitutional.[10] The HCC applied its 1992 precedent in deciding the constitutionality of the amendment. The Court emphasised again that it would not accept content-based restriction of communication. According to the Constitutional Court, communication can only be punished if it directly and foreseeable threatens individual (constitutional) rights. Since the amendment would have punished certain communications whose effects on their audiences would fall below this threshold, the amendment would restrict free speech unnecessarily, disproportionately and, thus, unconstitutionally.

Because of this jurisprudence, it is very likely that the Hungarian constitutional judges would also oppose the planned EU Framework Decision on combating racism and xenophobia. It is for this reason that the Hungarian Government planned a constitutional amendment. After the failure of the

INDOK

The Hungarian Information and Documentation Center was founded with the contribution of the Dutch Ministry of Foreign Affairs and the Dutch Helsinki Foundation. INDOK primarily focuses on creating an extensive database of documents on human rights, organizing conferences, professional trainings and public debates, publishing books, all of which aim to train and inform professionals and individuals on human rights issues and to strengthen the general attitudes that help shape both national and international human rights standards. Four times a year INDOK publishes Fundamentum. INDOK gives advice in cases concerning human rights, but it does not represent clients. It provides legal assistance in filing petitions to the Hungarian Constitutional Court, to the Parliamentary Commmissioners, or to the European Court of Human Rights.
Gabor Halmai, Director of INDOK is a member of the Network of Independent Experts on Fundamental Rights.

Framework decision, however, the constitutional amendment is no longer an important issue.

WHAT IS THE DIFFERENCE (AND LINK) BETWEEN EXTREME POSITIONS/OPINIONS AND VIOLENT BEHAVIOUR? AT WHAT POINT IS THERE A GENERAL LIMIT TO FREEDOM OF EXPRESSION?

After the changes in 1989, there have been attempts to attach a new role to Article 156 of Act IV of 1978, the Hungarian Criminal Code. In the Skinhead trials, prosecutors bring charges against skinheads on the basis of this provision. Article 156 reads as follows: "The person causing serious bodily or mental harm to members of a national, ethnical, racial or religious group commits a felony that shall be punishable with two to eight years of imprisonment."

The hate crime charge was, however, reduced to the lesser charge of aggravated battery, or the attempt thereof, which is committed, partly as principal co-perpetrators and partly as accessories, for a base reason.[11] In practice, this meant that only a few perpetrators were sent to prison, and even those sent to prison served short sentences. In order to tackle this problem, a new provision has been inserted into the Criminal Code through a modification that entered into force on the 15th of June 1996. The same Act also invalidated Article 156.

According to the new Article 174/B paragraph (1) on violence against a member of a national, ethnic, racial or religious group, "The person who assaults somebody else because he belongs or is believed to belong to a national, ethnic, racial or religious group, or coerces him with violence or menace into doing or not doing or into enduring something, commits a felony that shall be punishable with imprisonment of up to five years."

The punishment is, however, two to eight years imprisonment under the following conditions: if the crime has been committed by force of arms or in an armed manner; if it has caused considerable harm in interest or torment to the injured party, or if it was committed in a groups or a criminal conspiracy.

Despite the numerous crimes of racial animus committed, this article was not invoked until May 1997. On the night of the 11th of May 1997, a victim went home accompanied by his friends, when they met a group of app. 9-10 people. They were singing Nazi songs, and shouting anti-Semitic slogans. When the victim and his friends passed by the other larger group the victim said: "What is your problem with Jews? I am a Jew myself." The victim, who was not a practising Jew but intended to express that he found the anti-Semitic songs reprehensible, was beaten up and his nose was broken.

The most recent case is that of József Patai, a fifteen-year-old Roma youth, who was stabbed in the stomach by one of a group of six persons shortly after he boarded a bus in Budapest with his friends on the 8th of May 2005. The members of the group of six persons, including the suspect, were dressed in military uniforms, helmets and boots, and some of them were reportedly equipped with shields, while others were armed with wooden swords. The suspect carried a metal sword. He singled out József Patai, asked him "What are you staring at?" and then stabbed him. When one of the victim's friends shouted for help, the bus driver opened the doors of the bus, which was just about to leave, and the passengers, along with the suspect and his fellows, exited the bus. József Patai suffered serious injuries. Leaders of the Hungarian parliamentary parties and human rights NGOs reacted by expressing concerns about the growing number of actions of extremist groups. The Prime Minister said in Parliament that, "It is not possible to ignore in this case that this crime was motivated by racism." The police, however, rejected the argument that the crime had been perpetrated out of racial animus. The suspect was caught shortly after the crime had been committed. As newspapers reported, the suspect considers himself to be Roma. According to Article 1 paragraph (1) of the Act LXXVII of 1993 on the Rights of National and Ethnic Minorities those considering themselves members of any national or ethnic minority are to be regarded as members of that community. The police investigation of the case has not yet been finished.

Rights to Association and Assembly

According to Act II of 1989 on the Right of Association, the right to association must not infringe the separation of powers and the principles according to which political parties may not exercise public power directly, and on the basis of which no single party may exercise exclusive control of a government body. The objective of any society must be in line with the Hungarian Constitution, and armed associations must not be established. The right to association and the exercise of the right to assembly based on Act III of 1989 on the Right of Assembly must not enable the realisation of crimes, appeals to commit a crime, and they must not lead to the infringement of other persons' rights and freedoms.

The Capital City Public Prosecutor Office has brought an action against the Blood and Honour Cultural Association [Vér és Becsület Kulturális Egyesület] that aims at its dissolution. The reasons behind the action, according the Prosecutor's Office, are that, contrary to what was contained in the basic rules of the association, its members were committed to neo-fascist views, the association has not functioned in reality since last January and it did not have the required minimum of 10 members. In December 2004, the court of first instance dissolved the association because, during the programs organised by the association, statements that are offensive to other persons' dignity were expressed. In October 2005 the court of second instance upheld this decision.

HOW IS THE ISSUE OF VIOLENT RADICALISATION ADDRESSED AT NATIONAL LEVEL? IS THERE ANY SYSTEMATIC AND STRUCTURED APPROACH TO THIS PROBLEM?

National Laws and International Agreements That Hungary has Signed

2112/2004. (V. 7.) Government Decree lists the tasks in the fight against terrorism. The National Action Plan Against Terrorism is based on the declaration of the European Council on combating terrorism of 25 March 2004.

2073/2004. (IV. 15.) Government Decree lays down the national security strategy of Hungary.

Act CXXX of 2003 deals with Co-operation with the Member States of the European Union in Criminal Matters.

A modification to Article 261 of Act IV of 1978 of the Criminal Code, through Act II of 2003 criminalizes terrorism and all forms of financing terrorism. This includes providing funds or collecting funds for terrorist actions or facilitating or supporting such actions by any means. The penalty for such crimes is imprisonment of five to fifteen years. The punishment for acts of terrorism is imprisonment of ten years to fifteen years or for life, depending on the nature of the crime.

On the 30th of November 2001, the Republic of Hungary signed the International Convention on the Suppression of the Financing of Terrorism of December 9th, 1999. It became part of the Hungarian legal system through Act LIX of 2002.

On the 13th of November 2001 the Hungarian Parliament ratified the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on December 15th, 1997 through Act XXV of 2002.

The Hungarian Parliament adopted Act LXXXII. of 2001 on Combating Terrorism, Tightening the Provisions on Impeding Money Laundering and on the Ordering of Restricting Measures.

Prior to 2000, Hungary has ratified the following international instruments relating to terrorism:

The protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which is supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on February 24th, 1988 through Act XXXVII of 2004.

The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, signed in Rome on March 10th, 1988 and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, signed in Rome on March 10th, 1988 through Act LXVIII of 2003.

The Convention on the Marking of Plastic Explosives for the Purpose of Detection, signed in Montreal on March 1st, 1991 through Act LXVI of 2003.

The European Convention on the Suppression of Terrorism, concluded in Strasbourg on January 27th, 1977 through Act XCIII of 1997.

The International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on December 17th, 1979 through Law decree No. 24 of 1987.

The Convention on the Physical Protection of Nuclear Material, signed in Vienna on March 3rd, 1980 though Law decree 8 of 1987.

The Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on September 14th, 1973 through Law decree 22 of 1977.

The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed in Montreal on September 23rd, 1971 through Law decree 17 of 1973.

The Convention for the Unlawful Seizure of Aircraft, signed at The Hague on December 16th, 1970 through Law decree No. 24 of 1972.

The Convention on Offences and Certain Other Acts Committed on Board Aircraft, signed in Tokyo on September 14th, 1963 through Law decree No. 24 of 1971.

Hungary has also concluded numerous bilateral international agreements on co-operation in the fight against crime and more specifically against organised crime, terrorism, illegal trafficking in drugs, and money laundering during the last decade.

Media

Act I of 1996 on Radio and Television Broadcasting mentions the prohibition of hate speech as one of the primary principles. According to Article 3 paragraph (2), "The broadcaster shall respect the constitutional order of the Republic of Hungary, its activity may not violate human rights and may not be suitable for inciting hatred against individuals, sexes, peoples, nations, national, ethnic, linguistic and other minorities, and church or religious groups." Paragraph (3) of the same article expressly refers to minorities: "Broadcasting may not aim, openly or in a concealed manner, at insulting or excluding any minority or majority, or at presenting and discriminating against them on the basis of racial considerations."

Article 5 of the Act declares that, if the programming contains images or sound effects that could violate religious convictions or beliefs or if it contains images and sound effects are capable of disturbing public order in a violent manner or otherwise, the attention of the public has to be drawn to that fact prior to broadcasting. Article 23 paragraph (1) makes the burden on public broadcasters is higher. The public broadcasters are obliged to respect the dignity and basic interests of the nation, as well as those of the national, ethnic, linguistic and other minorities, and they may not offend the dignity of other nations.

The above provisions of the on Radio and Television Broadcasting are to be enforced by the National Radio and Television Commission [Országos Rádió és Televízió Testület]. The sanctions that can be applied are listed in Article 112 paragraph (1). The National Radio and Television Board may call upon the broadcaster to terminate the injurious conduct; establish the violation of the law in a written warning, and it may call upon the broadcaster to terminate the violation of the law and to abstain from the violation of the law in future; the Board may suspend the exercise of the broadcasting rights for a set period of time and for a maximum period of thirty days; the Board may enforce the penalty defined in the contract; it can impose a fine in the case of a public service broadcaster or upon the initiative of the Complaint Committee; or terminate the contract with immediate effect.

IS IT DEALT WITH BY NATIONAL CRIMINAL LAWS? HOW ARE THE MEMBER STATES FACING THIS PROBLEM? WHAT KINDS OF MEASURES ARE IN PLACE IN ORDER TO TACKLE THIS?

Typical measures are not of a criminal nature. See the media, freedom of assembly and freedom of association aspects *supra*. There are however certain cases where criminal law has been invoked in order to tackle the problem of radicalisation. As for Hungarian criminal measures, please see the answers to question 1 concerning the definition of violent radicalisation. A recent related case will be discussed *infra*.

The Hungarian police arrested three persons, a Hungarian citizen of Palestinian origin and two Syrian men, who are suspected to have planned to bomb Hungary's new Holocaust museum during a visit by Israeli President Moshe Katsav.

An Israeli analyst suggested the plot might have been motivated by Israel's assassination of Sheik Ahmed Yassin on the 22nd of March 2004, who was the founder of the Islamic militant group Hamas. Although a motive has been attributed to Hamas, which vowed revenge against Israeli leaders, the Hungarian police said they found no link to them. The police also denied a link between Katsav's visit and the planned attack.

For months, authorities monitored phone calls by one suspect, a Palestinian dentist who became a naturalised Hungarian citizen and who has also been a spiritual leader of an Islamic community in Budapest. The suspect had been asking acquaintances to get explosives. During one phone call, he allegedly asked someone to use explosives to blow up a Jewish museum. The only permanent Jewish museum in the capital is the Holocaust Memorial Centre, which was scheduled to be inaugurated on the 15th of April 2004 by the Israeli President.

The two Syrians were charged with preparing for a crime against property. The investigations have been stopped due to the lack of evidence against the suspects.

IS THERE ANY RESEARCH ON VIOLENT RADICALISATION AT NATIONAL LEVEL? DOES IT FOCUS ON ANY PARTICULAR GROUP?

There is no research, which explicitly targets violent radicalisation, but there are several research projects and other monitoring activities on other related topics.

Research projects focusing on minorities and aliens

In 1998 István Murányi, within the framework of the Institute of Political Sciences of the Hungarian Academy of Sciences, conducted a research project that focused on the attitude of Hungarians towards aliens[12] and, more specifically, examined the role of socio-cultural and territorial factors in influencing the prejudices of the young people between age 10 and 17. The research project sought to answer three questions. First, are the young people of this age biased and if yes how much? Second, how much are the prejudices different in the various groups as a result of socio-cultural and territorial factors? Finally, how much are preconceptions influenced by these factors? The project included questions regarding different social and minority groups, like Roma, aliens (also foreigners and refugees), drug addicts, alcoholics, homosexuals and Jews. Murányi found that prejudices had a significant link to religious belief and age. With regard to the prejudices against ethnic minorities, factors such as perceptions of minorities, interaction with the minority communities and acquired experiences should be also taken into account. He found that there was no linear relationship between the number of Roma living in a certain area and the prejudices of the local young people.

In 1999 Endre Sik, within the framework of the social research centre TÁRKI, examined the situation of foreigners in Hungary and the attitude towards them in the local authorities. Sik found that the quality of life in the local societies largely depends on the people's tolerance towards "outsiders" and on the ability to handle inter-group conflicts. In the period under scrutiny, the proportion of foreigners did not increase. The local authorities thought that the advantages and disadvantages of social inclusion of foreigners were balanced. However, the willingness to segregate Roma was very high: half of the officers believed that the local population would not have allowed Gypsies to settle down in their neighborhood.

The Minority Research Centre of the Minoritás Foundation [Minoritás Alapítvány Kisebbségkutató Intézete] organized a conference in June 2003 on the relationship between hate and politics.[13] The collection of essays written from the presentations deal with the following topics: the Austrian and German experiences of handling racism; the rhetoric of the weekly Hungarian Forum [Magyar Fórum], one of the major Hungarian sources of hate speech that targets Jews and Roma; the relationship between hate speech and other social phenomena; hate speech in American popular culture; xenophobia and Western European radical right wing groups; and the French experiences with minorities.

The International Migration and Refugee Research Centre operating within the framework of Minority Research Institute of the Hungarian Academy of Sciences published the findings of several researches on the migration of Roma people.[14] András Kováts examined the Hungarian society's attitude towards questions concerning the migration of Roma, e.g. the increasing number of Roma applying for refugee status in Western European countries. The majority in every age-group considered that they were not persecuted in Hungary. Gábor Miklósi described the story of a woman who worked as a nurse before migrating to Canada.

After 2000 and 2001 a report documenting anti-Semitic discourse was published by B'nai B'rith Budapest Lodge in 2004. The volume contains essays, which draw attention to the wide spread use of anti-Semitic discourse both in written and oral form in the Hungarian press. The goal of the editors was to point out the characteristics of the events of 2002 and 2003. They found first that the number of openly anti-Semitic manifestations decreased after the 2002 parliamentary election, and secondly, that such manifestations were pushed back to certain well-definable fora of public life.[15]

In September 2003, research was made public on the changes of the prejudices towards Roma and Jews in the previous ten years. The Hungarian Gallup Institute in Budapest carried out the public poll and the analysis.[16] The research — due to financial constraints — covers only the openly confessed prejudices. The findings show that open anti-Semitic feelings dropped from 14-15% to 6-7% between 1993 and 2003, as this attitude was widely rejected by the Hungarian population. While the prejudices towards Roma also decreased, the positive change was not as significant as in the case of Jews. In the period between 1993–1995, 40-42% of Hungarians answered that they openly dislike Roma people. In 1999, this number reached 50%, while in 2001-2003 it was only 36-38%. Despite the fact that the decrease in the number of those who openly dislike Roma was statistically significant, it was much less than in case of Jews.

In 2004, the European Monitoring Centre on Racism and Xenophobia (EUMC) published the empirical findings of the SIREN research project on right wing populism.[17] The research involved Hungary as well. The aim of the SIREN project was to analyse subjective perceptions of, and individual reactions to, recent socio-economic changes and, in particular, changes in working life. The research also

aimed to establish how experiences in working life influence political orientations and to what extent the threat of social decline and precarious living conditions contribute to the rise of right-wing populism in many European countries. Regarding the relation between changes in work and political orientation, no simple relation emerged from the survey data: no clear correlation could be found between negative changes and attraction to right-wing populism.[18]

Research on terrorism

In 2005, the Strategic Defence Research Centre of Zrínyi Miklós National Defence University [Zrínyi Miklós Nemzetvédelmi Egyetem, Stratégiai Védelmi Kutatóközpont] prepared a study on the Hungarian society's relationship to terrorism.[19] The research shows that Hungarians consider security threats as real dangers, as is the case in other Western European countries. The public poll shows, however, that terrorism — even though it appears in the media more often — is not one of the three major security threats. People evaluate security threats in three different dimensions: public safety, environmental safety and economic safety. Terrorism is a more serious threat for the country than the return of dictatorship or a regional conflict. It is definitely on people's mind, but the meaning and content of terrorism is not clear to those questioned. With regard to people's beliefs about the causes of terrorism, historical and political reasons, globalisation and the increasing role of the U.S. in foreign policy dominate. Hungarians believe that a successful fight against terrorist organisations rests on the secret services, while they do not think that military intervention is necessary and appropriate.

The University of Szeged in cooperation with the Minority Research Institute of the Hungarian Academy of Sciences, and the Hungarian Human Rights Information and Documentation Centre (INDOK) in the Sixth Framework Programme (The Changing Landscape of European Liberty and Security — "Challenge") carries out a research with the title "New approaches to security and the role of Europe". The main topics of the research are the following: the theoretical issues of terrorism and the limitation on fundamental rights in the light of the U.S. jurisprudence; the available state measures against civil airplanes used for terrorist purposes — constitutional and international law aspects; the legislation on police and security services in the light of terrorism; the changes in the alien policing and refugee procedures as a result of terrorist threats; the difficulties in analysing ethnic identities; and the changes to the concept of torture that are caused by terrorism. The findings of the research were discussed at a conference in the autumn of 2005.

Monitoring Activity Focusing on Radical Organizations

The Hungarian National Security Office [Nemzetbiztonsági Hivatal] constantly monitors the actions of radical organizations and groups.[20] Although, the radical, national socialist and "Hungarianist" groups have been present since the transition, none of them constitute a real threat to the Hungarian constitutional system and order. None of them has enough public support at the moment to pass the 5%-hurdle in the parliamentary elections. According to the Office, all of these groups and organizations are aware of the fact that all of their goals — the creation of a Hungarianist labour state as proposed by Szálasi, or the revision of the peace treaty of Trianon — are of a utopian nature. Their only aim, then, is to appear before the public and to recruit members. Their propaganda mainly involves public appearances, such as demonstrations, and maintaining Internet sites and publications.

The Hungarian Future Group [Magyar Jövő Csoport] appeared in Hungarian public life in autumn 2004. The national security service and the police followed the activities of the Group, especially those of its leader, who was taken into custody in October before a planned group demonstration could take place. Later she was also expelled from her university. The successful fight against these radical groups — according to analysis of the National Security Office — is large due to the outcry of the public, the media and the civil society.

In Hungary the activity of radical religious groups or persons is not significant. Apart from the arrest of a dentist of Arabic origin for allegedly organizing attacks against Israeli targets in Budapest, no incident was reported.

In 2003, the Government ordered the establishment of the Anti-Terror Coordination Committee, whose task is to coordinate the actions of the different military and police organizations. According to the above-mentioned analysis of the National Security Office, there is no direct terrorist threat in Hungary.

IS THERE A LINK BETWEEN VIOLENT RADICALISATION AND MIGRATION PROBLEMS IN THE EU IN THE MEMBER STATE?

In Hungary no such link is identifiable.

HOW ARE MINORITY ISSUES LINKED WITH VIOLENT RADICALISATION?

The Hungarian radical groups and organisations have two primary target-groups: Roma and Jews. As the research detailed under question 5 shows, these two minorities are mostly affected by racist and violent atrocities. Anti-Semitism is mainly linked to the radical right wing party and the surrounding groups: anti-Semitic speech and direct calls for violence are both present. The websites of two radical right-wing parties: MIÉP[21] and JOBBIK[22] permanently contain anti-Semitic statements and articles inciting the hatred of Roma.

A young man maintaining an anti-Roma website got significant media attention. Although, his blog openly calls for violence against Roma, no procedure has been initiated against him.[23] The skinhead group, Healthy Scalp [Egészséges Fejbőr] performed one of their songs, whose lyrics include, "White Christmas, I so much hate filthy Gipsies, white Christmas", at several public events. Only a local minority self-government officer commenced a criminal procedure against them in April 2004. A game whose aim is to destroy the Roma minority in each of Hungary's counties was released in February and then again in May. In both cases a criminal investigation was started. The creator and distributor of the game has not been made public, but it was most likely an individual action that cannot be linked to any of the abovementioned radical groups.

NOTES

1. 2002/475/JHA (OJ L 164/3 of 22 June 2002).
2. Communication from the Commission to the Council and the European Parliament: *Prevention, preparedness and response to terrorist attacks*. COM (2004) 698 final.
3. Communication from the Commission to the Council and the European Parliament on *Critical Infrastructure Protection and the fight against terrorism*. COM (2004) 702 final.
4. Communication from the Commission to the Council and the European Parliament on *Preparedness and Consequence Management in the fight against Terrorism*. COM (2004) 701 final.
5. Communication to the Council and the European Parliament on the *Prevention of and the Fight against Terrorist Financing*. (2004) 700 final.
6. More detailed see Gábor HALMAI, "Changing Patterns and Measures: The Freedom of Expression in the Jurisprudence of the Hungarian Constitutional Court." In *Constitution Found?* (ed. Gábor HALMAI). BookWorld Publications, 2001.
7. I mean "ordinary courts" as opposed to the Constitutional Court. Some experts contend that ordinary courts do not take into consideration the Constitutional Court 1992 ruling [30/1992. (V. 26.) AB] in the course of interpretation and application of Section 269 of the Criminal Code.
8. See the reasoning of Bill No. T/5179 [a T/5179. számú törvényjavaslat indokolása].
9. The reasoning of the Bill explicitly referred to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the ECRI.
10. 18/2004. (V. 25.) AB.
11. Decision of the Supreme Court. BH 1994. 299.
12. See *Idegenek Magyarországon* [Aliens in Hungary] (eds. SIK Endre – TÓTH Judit). Budapest: MTA Politikatudományi Intézet, 1998.
13. The essays were published: *Gyűlölet és politika* [Hate and Policy] (eds. CSEPELI György – ÖRKÉNY Antal). Budapest: Minoritás Alapítvány Kisebbségkutató Intézet, 2002.
14. *Roma migráció* [Roma migration] (ed. KOVÁTS András). Budapest: MTA Kisebbségkutató Intézet – Nemzetközi Migrációs és Menekültügyi Kutatóközpont, 2002.
15. János DÉSI – András GERŐ – Tibor SZESZLÉR – László VARGA, *Anti-Semitic Discourse in Hungary in 2002–2003: Report and Documentation*. Budapest: B'nai B'rith Budapest Lodge, 2004.
16. The full text of the research is available in Hungarian at www.gallup.hu/Gallup/releas/eloitelet030919.htm.
17. Roads to Right Wing Populism and back. The text available at www.siren.at.
18. For the relation of socio-economic change and radicalism see: Yves DE WEERDT – Hans DE WITTE – Patrizia CATELLANI – Patrizia MILESI, *Turning Right? Socio-Economic Change and the Receptiveness of European Workers to the Extreme Right*. www.siren.at.
19. GYIMESI Gyula – MOLNÁR Ferenc, "A magyar társadalom viszonya a terrorizmushoz" [The Relationship of the Hungarian Society to Terrorism]. *Elemzések*, ZMNE Stratégiai Védelmi Kutató Központ, 2/2005, http://zacs.freeweb.hu/zmnesvkk.htm.
20. All the documents are available in Hungarian: www.nbh.hu.
21. www.miep.hu.
22. www.jobbik.net.
23. http://blog.tomcatpolo.hu.

Ferenc Kőszeg

FROM THE COLD WAR TO THE WAR ON TERRORISM: DID SEPTEMBER 11 HAVE AN IMPACT ON HUNGARIAN LAW ENFORCEMENT?

During the Cold War the Hungarian State Security Service (like other Communist secret services) offered strong support to terrorists planning attacks against the West. Between 1979 and 1985, the group led by the infamous Carlos visited Hungary on a number of occasions: they maintained an apartment, where they stored and probably received weapons, and it was in Budapest that they met the representatives of ETA, IRA and the Italian Red Brigades. Officials of the Hungarian Ministry of Interior booked rooms for them in the Thermal Hotel on Margit Island, where Ulrike Meinhof, founder of the German Rote Armee Fraktion (RAF) also spent some time. Presumably it was also in Budapest that they plotted the 21 February 1981 attack against the Munich headquarters of the Radio Free Europe, where 8 persons were wounded. Naturally, this happened with the approval of the leadership of the Hungarian Socialist Workers' Party, which exercised total control over the Hungarian State.

Minister of Interior Balázs revealed this information to the Parliament and the public on 26 June 1990. He announced that he had requested the Chief Public Prosecutor to launch an investigation into the responsibility of the previous regime's highest ranking officials of interior and security affairs, such as András Benkei, Károly Németh, András Gyenes, Mihály Korom and Sándor Rácz. Eventually a criminal proceeding was launched against the hiding Carlos, whereas the above persons were only heard as witnesses, along with Lajos Karasz, István Horváth, Szilveszter Harangozó and János Berecz,[1] who all refused to testify, claiming that they were not able to do so unless they were exempted from the obligation to withhold state secrets. The person entitled to provide exemption was András Gálszécsy, the Minister without Portfolio in Charge of Civil National Security Services. The Minister requested that the National Security Cabinet be called into session. The high-ranking body (involving the Prime Minister, the Minister of Foreign Affairs, the Minister of Interior and the Minister of Defence) decided that the "witnesses" would not be exempted from their obligation of confidentiality, because this would increase the terror threat against Hungary. Carlos bombed a train in France, because of the arrest of his girlfriend. Although Carlos would probably not have blown up even a firecracker for Lajos Karasz, the investigation came to a halt due to a lack of witnesses. One year after the announcement of the Minister of Interior (on 7 July 1991), the Chief Public Prosecutor declared a suspension of the investigation since Carlos was in hiding.

And then Carlos was miraculously found. The possibility of recommencing the suspended procedure was, however, never raised officially. Béla Katona, the socialist successor to András Gálszécsy, knew without any investigation that the Hungarian State Security Service had committed no abetment; the purpose of their activity had for six years been to force Carlos and his group out of the country. They refrained from more concrete measures because those could have turned Hungary into a target of terrorist attacks. In the course of the French Investigation, the Hungarian Chief Public Prosecutor's Office rejected the French magistrate's request and refused to hand over to the French authorities the records of the prosecutorial hearings and the 13 Carlos-files that had been forwarded by the Office for National Security to the Chief Public Prosecutor's Office in the summer of 1990. Dr. János Fábián, Deputy of the Chief Public Prosecutor, claimed that these could not be handed over since they contained state secrets. In my opinion the records were not released because they also may make it clear that those indispensable professionals who surveyed and covered Carlos's activities in Hungary ten years ago are still working for the national security services, the police or the alien policing authorities.

The purpose of this long introduction is to illustrate that the activities of Hungarian law enforcement bodies have always been characterized by nice sounding announcements, highly publicized but practically useless measures and the innermost fear that one day

an active terrorist might really turn up somewhere in Hungary. The latter did happen once: a bomb-attack was committed on the airport motorway against Jewish people emigrating from Russia to Israel via Hungary. The remote-controlled bomb exploded sooner than planned, under the police car leading the convoy and police officers were wounded instead of the Jewish migrants. By the time the police got over their surprise, the terrorists had left the country; they were identified by foreign secret services later.

Before the first Gulf War, after, in a closed session, the Hungarian Parliament gave permission to NATO aircrafts to use the air space of Hungary, the press reported on potential terrorist attacks. Several articles were published on "sleeping" terrorists, who for long years live like law-abiding citizens, and then suddenly, as if waking from hibernation, start performing the terrorist missions with which they were charged. On the 5th of January 1991, the Hungarian Television reported that Arab terrorists were preparing to bomb Hungarian hospitals, and two days later the daily paper Magyar Hírlap claimed that 43 terrorists had, in two waves, arrived in Hungary. András Gálszécsy, Minister Without Portfolio in Charge of National Security Services, regarded these reports as "almost entirely unfounded" and premature, and, in an interview, he told the journal Beszélő that "due to the limited number of staff and technological background, the secret services are not capable of observing the moves of such people" (Beszélő, 12 January 1991). However, the Police thought it wiser to act: on the 5th of January 1991, police officers invaded the bridges. Only Ottilia Solt[2] was of the opinion that this precaution was not so much due to the terrorist threat as to the fear that, in reaction to price increases announced on 7 November 7th, something similar to the taxi blockade of October 1990[3] might take place.

Although the blockade was not repeated and the hospitals were not bombed either, when the Operation Desert Storm started in the Gulf, the police raided Váci Street bars, stopped every foreigner with a darker complexion and officers armed with machine guns appeared at the railway stations. The Library of the Parliament closed one hour earlier than usual, so that the guards could search the reading rooms. The strictest measures were imposed on airplane passengers. Prior to departure, pencil batteries operating electronic gadgets were confiscated, arriving passengers could only leave the airport through the side entrance, and relatives were compelled to wait *outside* the main entrance in minus 10 degrees. Only members of the anti-terrorist troops were allowed to stay in the heated arrival hall, where, in their bullet-proof vests, they waited for hibernating terrorists to appear.

The use of such extraordinary measures did not, however, require that a state of emergency be declared. The Police acted on the basis of its usual practice and Service Regulations. In fact, the Service Regulations were only made publicly available as a Decree of the Minister of Interior on 10 January 1990. Service regulations were previously issued by the Minister as an order to the Police, and therefore citizens were not able to access its provisions. Although the transformation of the order into a publicly accessible decree was a significant step of the process of democratization, the authorizations included in the former orders appeared unchanged in the Decree. This method is characteristic of legislative techniques used in relation to law enforcement agencies. The authorizations that were regarded as "self-evident" in the undemocratic system made their way into the laws of parliamentary democracy: what was a secret order before was now adopted as a part of the Corpus Juris by a two-third majority of the Parliament.

A good illustration of this is provided by the rules on stop and search measures. On 24 September 1983, Gábor Demszky's[4] car was stopped under the pretext of a traffic control, and not only the trunk of the car, but also Demszky's bag was searched. Furthermore, the policemen read the private letters found in the bag. Demszky filed a complaint with the Chief Public Prosecutor's Office on the grounds that the Police were not authorized by any publicly available statute to act in this manner. Soon afterwards, the Council of Ministers issued a Decree claiming that in the course of an identity check, the police officer may search the car, luggage and clothing of and pose questions to the person subjected to the measure. This ad hoc piece of legislation (called "lex Demszky") survived the democratic transition, and made its way in a practically unchanged form in the new democratic Police Act.[5]

When, following the terrorist attack of 11 September 2001, the President of the United States declared the war on terrorism, the law enforcement agencies had to be vested with special rights in relation to the controlling of citizens and foreigners. In the United States these authorizations were included in the Patriot Act. However, even before 9/11, the Hungarian law enforcement bodies possessed all those authorizations that might be necessary in a special situation. Hence, we can conclude that the terrorist attack in New York brought about no changes in the Hungarian system.

Which are the most obvious of such authorizations?

1) Regular identity checks, stops and searches. Anyone can be stopped at any time. It is possible to

demand information on where the given person has been, and to search his/her clothes and vehicle.

2) Wide possibility to use secret surveillance methods, gathering of information without external control.

3) Controlling financial transactions.

4) Permanent controlling of aliens, using administrative instruments to force out unwanted foreigners without regard to their family ties with the country.

Identity checks, stop and search practices

Under Hungarian law, "the police officer may stop and control anyone whose identity he/she should establish".[6] The law fails to specify when and under what circumstances a situation may evolve as a result of which a police officer *should* establish someone's identity, and such circumstances are not examined in police complaint procedures either. While complaints are investigated by superior police organs, such investigations are only conducted with regards to the way in which the identity check was performed and never into the actual reasons for the measure. An identity check that was carried out lawfully from a formal point of view will be regarded as lawful even if it did not have a well-founded reason. If this were not so it would not be possible to regularly control discos and bars and check the identity of their guests even if no criminal offence was committed in the given place.

„In the course of an identity check, the police officer may search the vehicle and clothing of the person whose identity is being checked."[7] In terms of the law, this is possible if necessary for the establishing of one's identity, the prevention of a probable threat, or the suspicion of a criminal offence or a petty offence. In reality, the prevention of a probable threat and the suspicion of a criminal or petty offence provide such a wide basis for the searching of one's clothes and vehicle that there are hardly any cases when a police officer cannot explain the lawfulness of such a measure. The authorization to search clothing includes the right to search the luggage (handbag, backpack) of the person subjected to the measure, as it is considered by the law to form part of the given person's clothing.[8]

In the course of spot checks that take place within 50-70 kilometres of the border (especially in the East and South of Hungary), the Police and the Border Guards usually work together. In such cases they usually ask the driver to open the trunk, and he/she is asked where he/she comes from, what he/she is carrying, and often the luggage is searched. In the perimeters of bars and discos frequented by younger people, the guests are often stopped upon leaving. They are asked to empty their pockets. The Police are usually searching for disco drugs on such occasions.

The Hungarian NGO Civil Liberties Union criticized this practice in an open letter addressed to the Minister of Interior. At the end of the investigation ordered by the Minister, the Police held a press conference, where the National Commander's Deputy in Charge of Public Security informed the public that in the previous year, i.e. 2003, there had been 1.5 million identity checks, but only 0.1 percent of the persons checked had filed complaints, and only about 300 of these complaints had proved to be well-founded. Only one thing was not explained: why is it necessary to have 1.5 million identity checks per year in a country with a population of 10 million.

In the course of identity checks — especially those performed among pedestrians as well as at bars and discos, the Police's main targets are young people, foreigners (especially non-whites) and the Roma. As the authorities are forbidden by law to gather ethnic statistics, this statement is only supported by indirect evidence. In analyzing the files of criminal proceedings closed with a final and binding judgment in 2003, the Hungarian Helsinki Committee tried to find out whether there was evidence of ethnic discrimination in the Hungarian criminal justice system. The files of 1,147 persons accused of theft or robbery were researched. Based on the contents of the files, the researchers identified 401 defendants as Roma and 609 as non-Roma. 23 percent of non-Roma perpetrators became suspects as a result of being caught red-handed, whereas, among Roma defendants, this ratio was only 13 percent. At the same time, 29 percent of Roma were caught in the course of identity checks, while this was the case for only 17 percent of non-Roma perpetrators. This difference supports the theory that Roma persons are stopped and checked more often than non-Roma persons. The difference is only 1 percent with regard to juvenile offenders. This may be due to the fact that, in their case, the true reason for the check is age and not ethnicity. The research gave rise to the strong suspicion that what the American literature describes as racial profiling is not unfamiliar in Hungarian police practice. By paying special attention to the Roma, the Police have continued the practice that existed prior to the democratic transition. At that time, several internal orders prescribed the increased control of "Gypsy rows", pubs frequented by the Roma, and every police headquarters employed officers specialized in investigating so-called "Gypsy criminality".

After performing the identity check, the police officer fills out a so-called check sheet, which contains the data of the person checked, as well as the

time and place of and the reasons for the check.[9] The check sheet is preserved for 2 years (as "data gathered for purposes of crime and petty offence prevention").[10] In practice this means that the simple fact that someone takes a stroll in the street or spends some time in a pub may in itself lead to his/her data being entered into the *criminal* database of the Police. Unless some irregularities are detected, usually no check sheets are filled out in the course of traffic spot checks, so these checks are not statistically recorded either. Consequently, the annual number of identity checks is likely to be over 1.5 million.

Increased Control

The Police Act specifies that the Police may exercise increased control in public places and designated areas of public premises.[11] In the course of increased control, the identity of people entering such places and premises may be checked, and their clothing, luggage and vehicle may be searched. According to the law, increased control may be ordered in order to (i) apprehend the perpetrator of a crime, (ii) prevent or stop an act or incident threatening public security, (iii) prevent or stop an unlawful act threatening the security of traffic or an event, or the order of a public premises. Under the Service Regulations,[12] the head of the police organ, whose area of competence is detailed in the measure, may order increased control. County Police Chiefs may order increased control for their respective counties, while the National Commander and his deputies may order this measure for the whole country. This extensive interpretation of the authorization to exercise increased control compromises the original purpose-bound nature of the institution, since the prevention and stopping of crime and the apprehension of criminals are permanent tasks of the Police. On this basis increased control may be ordered anytime, anywhere. This may serve as the ground for spot checks and increased control of drivers, or the routine checking of bars and pubs.

In 2004 two young Roma men asked for the Hungarian Helsinki Committee's help. They complained that in a bar located in Budapest, 9th district, the police officers, in exercising increased control, only checked the identity of Roma guests and one non-Roma person who happened to be sitting with Roma friends, while other non-Roma guests were not checked. The head of the concerned police organ initiated an investigation based on the complaint. The officers heard claims that they had been instructed at the 9th District Police Headquarters to control certain bars and pubs in the district and to apprehend people against whom an arrest warrant had been issued or those who might be suspected of criminal offences. From the bar where they checked the identity of the plaintiffs no reports of any irregularity had been received; they apparently controlled the place routinely. They decided on whom to check on the basis of age, and not of ethnicity. Other guests were much older, and the likelihood of finding wanted or suspicious persons is much higher among younger people. The legal representative of the plaintiffs asked whether they also check another place, a certain well-known restaurant of the area, on a regular basis. The officer was surprised: "Why would we? That is a very expensive place. Why should we disturb people dining there?" The Police finally rejected the complaint but ordered that the check sheets of the plaintiffs be eliminated. But what was the ground for that if the identity check was lawful, and the legal provisions prescribe the preservation of the sheets for two years?

Secret Service Methods

Secret service methods are among the most frequently used instruments in the war on terrorism. Before the democratic transition, the use of such methods was mainly the privilege of the state security services. Informers were also used by the Police, however, who were also authorized to perform wiretapping as well as secret house searches with the assistance of the competent department of the state security services. Two years after the transition, two-thirds of secret service capacities were still used by the new national security services (which had succeeded the state security apparatus). Probably as a counter effect of this, competition arose among law enforcement organs, which had always put great emphasis on their independence from each other: all these agencies demanded independent investigative competences, including the authorization to use secret service methods.

Today, besides the four national security services (the Civil Security Service, the Military Secret Service, the Civil Intelligence Services and the Military Intelligence Service), the Police, the Border Guards, the Board of Customs and Excise, and the Defence Service of Law Enforcement Organs (eight agencies altogether) are entitled to use such secret methods. There are overlaps in the authorizations of the different organs. The Border Guards for example are vested with the right to perform alien policing controls, and conduct investigations into cases related to the control of borders and illegal stays in the whole territory of the country. Whether the Police or the Border Guards

investigate a case of the smuggling of human beings is only a matter of chance. Secret methods would most probably be applied in such an investigation, and it is possible that the Border Guard's informer would unveil the covered detective of the Police.

The overlap of competences is illustrated by the fact that precisely in the case of terrorist activities (the investigation of which is a typical secret service competence), the Police shall conduct the investigation if a report has been filed with the Police or if the Police have obtained information about such activities.[13] Thus, the law itself compels the Police and the security services to compete, although both the Police Act and the Act on National Security prescribe cooperation between these organs.

Of all the law enforcement agencies, only the Fire Brigade and the National Penitentiary Administration are not authorized to resort to secret service methods. Therefore, the Police operate the system of informers functioning within penitentiary institutions. The officer running the system is an employee of the Investigating Department of the County Police Headquarters, although his actual place of service is the penitentiary institution. With regard to a convicted prisoner, the Police could in theory only exercise certain rights in the framework of a new criminal proceeding or some extraordinary remedy procedure, but the Police are in fact conducting continuous investigative activities among prisoners, whose criminal case is already decided and finished. This Police activity could only indirectly be based on the Police Act's provisions[14] concerning the so-called "crime-prevention control", and by Articles 13-14 of Act LXXIV of 1999 on Organized Crime, which vested county police headquarters with the task to initiate crime-prevention control on the basis of the convict's behaviour in prison. However, in its Decision 47/2003 (X. 27.), the Constitutional Court annulled the institution of crime-prevention control, so the officers of county police headquarters have been working in penitentiaries without a legal basis — illegally, so to say — ever since the decision.

The public believes that the most intrusive secret service methods are wire-tapping, the monitoring of electronic telecommunication, the opening of postal communication and secret house searches. Therefore, great importance is attached to the judicial control of the use of such methods. In reality, the majority of information is gathered not through these judicially controlled methods but from reports prepared by natural persons cooperating with the secret services. Article 64 of the Police Act has made the employment of informers and undercover detectives possible since 1994. Therefore, the 1999 amendment inspired the idea of fight against organized crime did not bring along significant changes. The most important was that similar to national security services, the Police also received an authorization to initiate with employers the employment of their covered detectives. This means that unlike wire-tapping, which serves the clearing up of a concrete criminal case, the Police are allowed to place informers with the purpose of the continuous observation of sensitive work places. The investigating authority allows itself to gather information this way, so such measures may be taken without any concrete purpose, just for the sake of generally "preventing criminal activity".

Data Procession, the Connecting of Data

The main justification behind the adopting of Act LXXV of 1999 was not the war on terrorism, but rather the combat against organized crime. The law was an attempt to regulate several distantly related fields of law enforcement. Its primary goal was to set forth rules to handle the problem of prostitution (these turned out to be fully useless in the subsequent years), but it also extended the authorizations of the Police to gather information containing business secrets. The original 1994 provisions of he Police Act[15] already made it possible for the Police with the preliminary approval of the public prosecutor to oblige banks, tax authorities and telecommunication companies to disclose data for the purposes of investigating criminal offences punishable with two or more years of imprisonment.

The Act on Organized Crime amended the provision. It authorized the Police to oblige health care institutions to disclose data, and it explicitly stated that when disclosing data requested by the Police, bank and tax information and other secrets shall also be provided. Based on this authorization, the Police may, in urgent cases, prescribe the disclosure of data without the approval of the public prosecutor if the matter concerns terrorism, drugs, arms trade, money laundering or organized crime. In such cases, subsequent approval is sufficient. In the United States, such authorizations were only given to the authorities two years later, by the Patriot Act.

The Act on Organized Crime, an amendment to Article 88 of the Police Act, also authorized the Police with the right to connect different data processing systems. The law now says that not only its own criminal and administrative data base may be connected by the Police, but that the Police may also perform individual data processing by getting connected to the data bases of other law enforcement agencies, investigating authorities and other data processors.

According to the terms of the amended Article 42 of the Police Act, the Police may permanently make video and audio recordings of street activity using cameras placed in public premises. Although it is exactly the Act on Organized Crime that claims that prostitution is neither a criminal act nor a petty offence, and that the offering of sexual services shall only be regarded as a petty offence if it takes place in so called protected areas (e.g. in the neighbourhood of schools and churches), the Police have on numerous occasions apprehended prostitutes and initiated proceedings against them on the basis that the camera recorded a guest entering a house after being called by a prostitute standing in the doorway of her apartment.

Money Laundering and Measures to Suppress the Financing of Terrorism

The impact of the New York terrorist attacks on Hungarian legislative processes may best be observed in the enactment of laws that prescribe a stricter state control of financial and economic transactions. Immediately after 9/11, the Hungarian Parliament adopted Act LXXXIII of 2001 on the Fight against Terrorism and the Prevention of Money Laundering (promulgated on 4 December 2001). The law declares the prohibition to conclude contracts exchange financial obligations with certain states as well as the citizens of and legal persons that reside in these states. It prohibits the launching of an enterprise in these states, and it also provides an authorization to introduce restrictive measures in order to refuse citizens of these sates the right to perform bank transfers. The law does not set forth which states are concerned. This is to be decided by the UN Security Council or the Council of the European Union. Thus, the statute that was hastily adopted after the attack simply converted a previously existing international obligation into a domestic law.

Act LIX of 2002 indicates a radical break with the Swiss principles of secrecy and anonymity because it obliges banks to identify clients, accounts and legal persons, and to report each transaction that concerns an unusually large sum or that of unusual nature. However, in spite of the chronology, this law was not a reaction to the new threats of terrorism. It is rather the national promulgation of the International Convention for the suppression of the financing of terrorism adopted under the United Nations' aegis on 9 December 1999. The Convention provides the following general definition of terrorism: a person commits an offence if that person provides or collects funds with the intention that they should be used or in the knowledge that they are to be used in order to carry out an act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

The scope of the Convention is restricted to financial transactions related to terrorism, and offences concerning more than one state (i.e. it may not be applied if the offence is committed within a single state, the alleged offender is a national of that state and is present in the territory of that state), but by obliging states to continuously monitor financial transactions, it sets forth the state control of economy in the form of an international requirement.

The Hungarian legislators interpreted this international requirement extensively. Act XV of 2003 on the Prevention of Money Laundering makes the identity verification of the client obligatory in case of each transaction exceeding HUF 2 million and each currency change exceeding HUF 300,0000 (or USD 1,500) regardless of whether or not there is a suspicion of terrorism. Financial providers are obliged to report transactions regarded as suspicious with the Police, and shall designate one or more contact persons who liaise with the National Police Headquarters. Taking into account the fact that financial providers are supervised by the National Inspectorate of Financial Organizations anyway, it seems unnecessary to compel each financial institution to have employees who are confidents of the Police by virtue of their job.

It is even more problematic that the obligation of identity certification is also imposed on attorneys and notaries public, and that, furthermore, suspicious transactions (such as suspicious purchases and sales of real estates) shall be reported by attorneys, except if the information was obtained in the framework of a criminal procedure. Attorneys shall report to the regional bar association, and the liaison person is appointed by the bar. It is easy to imagine how an attorney's practice is influenced if the news is spread that he/she is the police liaison.

There was one particular case when the public was informed about financial transactions related to terrorism. A Syrian physician legally residing and working in Hungary tried to transfer money to a Palestinian charity organization, which, according to the international banking sources, also supports terrorist organizations. The Hungarian bank reported the case to the National Security Office, and the physician was expelled from Hungary although he

was — by Muslim religious laws — married to a Hungarian woman (by Hungarian laws, the couple lived in a so-called life partnership). When asked about the case, the State Secretary Supervising Security Services claimed that the authorities had no discretionary rights, that they were obliged by law to expel the Syrian man.

This is not true. Article 32 (1) (b) of Act XXXIX of 2001 on the Entry and Stay of Foreigners (hereafter: Alien Policing Act) indeed prescribes that members of terrorist organizations shall be expelled from Hungary. However, the doctor was in fact expelled on the basis of Paragraph (2) (f) of the same Article, which claims that a foreigner whose entry or stay violates or threatens national security *may* be expelled. Thus, the authorities did have discretion in this case. In terms of Article 14 (1) of the Alien Policing Act, the spouse of a Hungarian citizen shall be entitled to a residence permit if he/she legally stays in Hungary, and possesses sufficient means to cover his/her expenses. As life partnership, according to a decision of the Constitutional Court, is essentially equivalent to marriage, the authorities should have assessed whether the doctor has true family ties with his partner, and whether the national security interest attached to his leaving the country was really stronger than his right to family life, which is protected under both the Hungarian laws and Article 8 of the European Convention on Human Rights.

The expulsion order failed to address these issues. It simply quoted the relevant legal provision, and also failed to claim how and why the Syrian doctor's stay in Hungary endangers the security of the nation. The decision was approved of by the court, and we have no information whether the expelled man has turned to Strasbourg or not. Thus, the questions outlined above remain unanswered.

Alien Policing, Asylum Matters

According to the 2004 Yearbook of the National Security Office,[16] the agency regards the control of migration as its second most important task after the fight against terrorism, but preceding the protection of economy and the combat against organized crime. Before the transition, the control of aliens — and also the permission and monitoring of the international travels of Hungarian citizens — was a task for the state security forces. Although formally they belonged to the Police, both alien policing and passport authorities were directly controlled by the state security apparatus. The National Central Authority Controlling Foreigners was the main authority above all non-Hungarians. Refugees were recognized only based on the political decision of the Hungarian Socialist Workers' Party.

In 1989 Hungary was the first country of the Soviet Block to join the Geneva Convention with the primary purpose of finding a solution for the problem of the legal status of ethnic Hungarians fleeing from Ceausescu's reign of terror. The Hungarian Government joined the Convention with a geographic restriction: it only undertook to provide protection to people fleeing from European conflicts. This restriction remained in effect for a long time, until March 1998. Although only a minority of those emigrating from Romania — 55 thousand people — were registered as asylum seekers, and only 6 percent of the latter were recognized as refugees, out of the 5,700 refugees recognized since Hungary's joining the Convention, approximately 4,000 are ethnic Hungarians from neighbouring countries.

In 1989 refugee matters were taken over by a civilian authority supervised by the Ministry of Interior. The clerks of the authority's regional organs were police officers belonging to the personnel of county police headquarters. In February 1990, the III/III Directorate of the state security apparatus (in charge of the fight against "internal enemy") was dissolved, and numerous state security officers found jobs at the regional organs of the refugee authority.

Between 1948 and 1989 hundreds of thousands of people emigrated from Hungary, while there was hardly any immigration. In the fall of 1990 the Government tried to stop the influx that started in 1988. This is when the first so-called "community shelter" (camp for the detention of foreigners illegally staying in Hungary) was set up. Based on a law decree, the Border Guards had been authorized since 1991 to deny the entry of those who — in the Border Guards' opinion — did not have sufficient means to cover their subsistence in the country. In the next two years, more than one million passengers were turned back from primarily the Romanian border. Interestingly, when in 1996 the regulation was amended to prescribe that the border guard shall fill out a form and communicate the decision to the concerned person in writing, the annual number of people turned back decreased from 300,000 to 50,000.

The most peculiar feature of the first alien policing act adopted after 1993 (Act LXXXVI of 1993, hereafter 1993 Alien Policing Act) is that it failed to give any consideration to the family ties of foreigners. Family ties did not make the foreigner eligible for a residence permit, or its prolongation: if the foreigner did not possess sufficient means to cover his/her accommodation and other expenses, he/she could be called to leave the country even if he/she had a Hun-

garian spouse or children. The Hungarian Helsinki Committee represented dozens of foreigners (mostly men), who failed to obtain a residence or settlement permit, because, in the authority's view, their income did not enable them to provide for their families. Obviously in such cases, if the low income father has to leave the country, his Hungarian citizen children will have even less: this however was not considered to be an issue of alien policing. The alien policing authority could not care less.

As early as 1993, alien policing legislation promised benefits for ethnic Hungarians. In terms of the 1993 Alien Policing Act,[17] foreigners whose ancestors were Hungarian citizens were exempted from the obligation to reside legally in Hungary for three years before they became eligible for submitting a request for a settlement permit. They were however not exempted from the obligation to be able to cover accommodation and subsistence. This requirement can usually be only met if one is able to legally work in Hungary. However, the 1993 Alien Policing provided ethnic Hungarians with no benefits with regard to employment permits. And the present Alien Policing Act is no different. It is like a helicopter, whose escape ladder is swinging two meters above a drowning person: if you can reach this high, we will save you. This approach seems especially cynical in light of the fact that according to the general political rhetoric, ethnic Hungarians are members of the Hungarian nation, with a right to benefits concerning the acquisition of Hungarian citizenship — as long as they do not wish to actually settle in Hungary.

In 1997, upon the repeated urging of the Office of the United Nations High Commissioner for Refugees (UNHCR), the Hungarian parliament adopted the Asylum Act (Act CXXXI of 1997). As the law is practically a transposition of an international convention (the Geneva Convention), and in Article 35 of the Convention, the Parties undertook to inform the Office of the High Commissioner about legislative initiatives concerning asylum matters, the UNHCR and its Budapest Office closely followed the legislative process, and made sure that the law would not deviate too much from the Convention and its interpretation as set forth by the decisions of the Executive Committee of the UNHCR. In spite of this, differences were created. For instance, the UNHCR strives to reduce the differences between the status of refugees recognized on the basis of the Convention, and asylum seekers receiving other forms of humanitarian protection.

As opposed to this, only with regard to refugees does the Asylum Act oblige state authorities to promote their integration,[18] whereas the integration of so-called "persons authorized to stay" (a form of humanitarian protection) is in fact hindered by the obligatory annual revision of their status and the fact that they need a special permission to work legally. Furthermore, in terms of Government Decree 24/1998 (II.18.),[19] a bylaw of the Asylum Act, only foreigners with an established identity may be recognized as persons authorized to stay. No such restrictions could be imposed with regard to refugees, as the Convention does not contain such conditions. But the Convention does not define other forms of humanitarian protection, so the legislators were free to regulate the status of persons authorized to stay as they wished. Although the above quoted provision of the Government Decree has no legal basis in the Asylum Act, the national security interest in keeping foreigners out of the country was obviously stronger than the necessity of constitutional law making. As a result of the strong pressure from the opposition backed up by the expert participation of the Hungarian Helsinki Committee, Article 15 (2) of the new Alien Policing Act adopted in 2001, expressly states that the issuing of humanitarian residence permit of persons authorized to stay shall not be denied because of the lack of verified identity. However, by that time, authorities had managed to exclude thousands of asylum seekers of the Kosovo War from humanitarian protection between l998 and1999.

After a bill has been submitted to the Parliament, it may not be modified by the Government. It is however fully possible for a Government member to confidentially ask an MP to submit a modifying proposal as his/her own. A sufficiently influential Government official may do so even behind the back of his/her Minister. According to a modifying proposal submitted by an MP during the Parliamentary debate of the Asylum Act, it should be possible for the alien policing authorities (concretely the Border Guards) to forward the application of the asylum seeker to the refugee authorities without sending the asylum seeker him/herself to the reception centre operated by the refugee authorities. The alien policing authority is authorized to designate the asylum seeker's mandatory place of residence in one of the community shelters run by the Border Guards. This seemingly innocent proposal was taken on board by the Liberal Minister of Interior, so it was adopted as one of the modifying proposals submitted by MP's and accepted by the Government.

The catastrophic consequences became clear one year later. The Austrian Government kept pressuring the Hungarian Government to put an end to illegal immigration to Austria via Hungary. In August 1998,

the National Commander of the Border Guards and that National Commander of the Police — with the approval of the Conservative Government elected a couple of months earlier but without any legislative basis — adopted a "joint measure", in terms of which foreigners may only leave community shelters under extraordinary circumstances. This measure condemned thousands of asylum seekers for indefinite detention. The overcrowding, the horrible physical conditions and the effective imprisonment of children triggered fierce and unanimous criticism in the international (primarily German language) press. Despite this, one year later, the above mentioned Act on Organized Crime legalized the practice of detaining foreigners in community shelters without a judicial decision. It is true though that the amended legal provision[20] set the maximum length of detention at 18 months, "if the circumstances serving as the basis for the ordering of detention, prevail due to reasons for which the foreigner is not at fault".

Compared to this, the new Alien Policing Act adopted in 2001 brought about rather positive changes. This is partly due to the fact that the Hungarian Helsinki Committee prepared several modifying proposals for the Socialist Faction, which was in opposition at the time and which made the adoption of the Act (requiring a qualified, two-third majority) dependent on the adoption of these modifications. According to the terms of the new regulation, a judge shall decide on the detention of foreigners, the longest possible time of detention was reduced to 12 months, and the detention shall be terminated if it becomes obvious that the expulsion may not be executed. In practice, the Hungarian judges usually do not terminate the detention even after 6 or 9 months, and they fail to examine why the expulsion could not be carried out in such a long time.

Before 1989 Hungary was emitting refugees. Not even after the democratic transition did it become a reception country. Like all the new EU member states, it remained a transit country. Since the coming into effect of the Asylum Act (1 March 1998), approximately 40,000 persons applied for asylum. Between 1999 and 2002, 57 percent of the proceedings were terminated, because the asylum seeker disappeared before his/her hearing. Out of the 1,500 refugees recognized in 8 years, at most 500 are still in Hungary. The others have left for old member states of the European Union. The new members wish to share the burdens of the asylum procedure with the old ones, and for this purpose, they are exploiting the European slogans of the combat against illegal migration.

The number of asylum seekers has radically decreased: as opposed to 11,000 in 1999, this year, less than 1,500 people applied for asylum. The decrease is a pan-European phenomenon, and is likely to be connected to the end and/or alteration of events and conditions creating large waves of refugees. 60 percent of asylum seekers arriving to Hungary came from Yugoslavia, Afghanistan and Iraq, fleeing from the war, the Taliban or the reign of Saddam Hussein respectively. However, the decrease of asylum seekers in Hungary exceeds the European average. And this is not due to the end of crises, but, on the one hand, to the strengthening of the guarding of the Eastern borders, and on the other, to the fact that it is absolutely unpredictable whether a particular asylum seeker will end up in one-year Border Guards detention or in an open reception centre run by the asylum authorities. Now migrants prefer to go West through Slovakia, where they are not detained and brutally deported back to the Ukraine.

Today the key issue of asylum policy is integration. Adapting to the expectations of Western Europe, asylum and alien policing authorities also claim to regard this as a priority. However, one can hardly talk about integration if refugees have hardly any chance to get employed, learn Hungarian and finally become a Hungarian citizen. Between 1999 and 2001, 17,000 persons got Hungarian citizenship. 86 percent of them were Hungarian nationals, and only 54 persons out of the 17,000 requested citizenship as refugees, although the law guarantees certain benefits for refugees in the process of naturalization.

This however has nothing to do with terrorism and the ethnic tensions bursting out from time to time in Western Europe. Its reasons are to be found in the mentality properly illustrated by the words of the former Minister of Interior famous for his outspoken nature: "Hungary's social, economic and societal conditions simply do not make it possible to provide for a massive influx of immigration. [...O]ur poor country may not be expected to realize ideas of a small group. [...] All nations have self-interest, it is not possible to receive everyone with arms open wide, and this is not discrimination."[21]

No one has ever said that everyone should be received with arms open wide. However, national self-interest would have allowed us to spare ethnic Hungarians from Voivodina twelve tough years of living in camps, before they received the residence permit based on the special discretion of the fifth Minister of Interior (Mónika Lamperth) in office since their vicissitudes started.

Similar to the closing of the airport terminal during the Gulf War, Hungarian law enforcement policy makers reacted with spectacular action to the September 11 attacks as well. Minister of Interior Sándor

Pintér instructed the Director General of the Office for Naturalization and Immigration of the Ministry of Interior "to take actions to guarantee the safety of threatened foreign citizens, and to prevent the harmful effects of potential future events".[22] Based on the instruction, the Director General ordered that "those residents of reception centres who claim to be Afghanis" have to be transported to the Debrecen reception centre, and non-afghani residents in Debrecen shall be transported to other centres. In preparation, the Director General gave an oral instruction on 22 December 2001 that foreigners staying in reception centres and contracted places of accommodation may not leave their designated place of accommodation (i.e. the centres or contracted places of accommodation). Hearing the news, several foreigners, who were staying in reception centres but were somewhere else at the time, decided not to return. The transfer of Afghanis was carried out the next day with the participation of significant Border Guards and Police forces. After the Afghani asylum seekers arrived in Debrecen, chaos broke out. People had to find a place to sleep in the camp on their own. Several foreigners who had jobs in Debrecen and whose children went to school there were now compelled to leave and go to one of the other two reception centres located in Békéscsaba and Bicske. The newcomers in Debrecen did not get a warm meal for three days after their arrival. Citing reasons of medical screening, they were not allowed to leave the reception centre, not even the recognized refugees. Some of the concerned foreigners were already screened, but under the new circumstances they had to stay in one room with persons who had not been screened yet. In the meantime as more Afghani asylum seekers crossed the border, and as overcrowding in Debrecen was on the rise, the atmosphere became volatile. The Ministry of Interior wanted to solve the problem by opening a new reception centre for Afghanis in Kalocsa, but the outcry of the city's residents upset the plan. The Afghani asylum seekers locked up in Debrecen wrote a letter to the Hungarian Government: "we fled from the prisons of the Taliban and were imprisoned in Hungary", they said. Two weeks after the introduction of the measure, the gates of the Debrecen camp were opened again. By December, less Afghani citizens stayed in the reception centre than before the closing, although a thousand new asylum seekers had arrived in the meantime. The report of the Deputy General of the Parliamentary Commissioner for Human Rights was discussed and adopted by the Parliamentary Committee of Human Rights, Minority and Religious Affairs at its external session held in Debrecen. No one was removed or moved except for the Afghanis, who went on to Western Europe.

NOTES

1. High ranking politicians, party leaders and state security officials of the Socialist regime.
2. Ottilia Solt was a member of the democratic opposition, one of the editors of the underground journal "Beszélő". After the transition, she served a term (1990-1994) as an MP of the Hungarian Parlaiment.
3. In protest against an abruptly announced increase in the price of gasoline, taxi drivers blockaded the bridges of Budapest with their cars on 25 October 1990. Within hours protests started all over the country. In the beginning, the Government planned to put an end to the blockade through the use of military power. However, sensing the power of the movement, the government later decided to negotiate with the protesters. Finally, the two sides agreed on a smaller increase of prices.
4. Before the transition Gábor Demszky was a member of the democratic opposition, publisher of uncensored "underground" literature. After the incident described here he was sentenced to six months prison on one count of violence against an official. In 1988 he was one of the founders of the Party "Alliance of Free Democrats". Since 1990 he has been the Mayor of Budapest.
5. Act XXXIV of 1994, § 29.
6. Police Act, § 29 (1).
7. Police Act, § 29 (4).
8. Police Act, § 97 (1) (b).
9. Decree 3/1995. (III. 1.) of the Minister of Interior on the Service Regulations of the Police (hereafter: Service Regulations), § 32 (2) (f).
10. Police Act, § 84 (p).
11. Police Act, § 30 (1).
12. § 33 (2).
13. Police Act, § 69 (4).
14. Police Act, § 35.
15. Police Act, § 68.
16. www.nbh.hu.
17. 1993 Alien Policing Act, § 17. § (4) (b).
18. Asylum Act, § 48 (1).
19. Government Decree 24/1998, § 29.
20. 1993 Alien Policing Act, § 43/A (1).
21. Interview with Péter Boross in Belügyi Szemle (Review of the Ministry of Interior) 2000/1. p. 94.
22. Report of the Parliamentary Commissioner of Human Rights, 2002.3.1.1.

HUNGARIAN HELSINKI COMMITTEE ACTIVITIES AND ACHIEVEMENTS

Helsinki –
Thirty Years Ago,
Twenty Years Ago, Ten Years Ago...

In signing the Helsinki Final Act in 1975, European and North American governments committed themselves to the respect of human rights, freedom of conscience, freedom of expression and the free flow of information. In 1976 a group of human rights activists, calling themselves the Moscow Helsinki Group, attempted to exercise rights that the Soviet government had committed itself to respecting. The activists were imprisoned and sentenced to forced labour.

However, all across Central and Eastern Europe, including Hungary, individuals referring to Helsinki began to exercise their human rights in defence of the belief that people indeed have inalienable human rights regardless of what the law says.

It was in this spirit that the International Helsinki Federation for Human Rights was founded in 1983. Its first impressive event was held in Budapest twenty years ago in October 1985.

The Hungarian Helsinki Committee was established in 1989. It started is permanent activities ten years ago towards the end of 1994. Since then, the HHC has been monitoring how effectively rights that are ensured by domestic law can be exercised, and it has been evaluating whether Hungarian legislation guarantees the rights that it should with respect to international treaties and general principles of human rights. Are persons who flee persecution and seek protection in Hungary able to exercise these rights? Are persons who differ from the majority due to the colour of their skin or another trait able to assert these rights? Are these rights observed in police jails and prisons? For over ten years, the Hungarian Helsinki Committee has been analyzing and — if justified — criticizing legislation and legal practice and making efforts to influence the legislative process to ensure that domestic law fully respects human rights principles. For over ten years, the HHC has been providing legal assistance to those whose human rights were violated by public authorities responsible for ensuring the exercise of human rights.

Exercising one's human rights was nearly the sole form of autonomous political activity twenty years ago. Raising our voice for human rights remains political even today. Fortunately, however, winning and losing votes is not the issue for human rights defenders. The only thing they have to keep in mind is Thomas Jefferson's more than two-hundred-year-old idea: "Nothing then is unchangeable but the inherent and inalienable rights of man."

Ferenc Kőszeg
President, Hungarian Helsinki Committee

Our Mission

The Hungarian Helsinki Committee monitors the enforcement in Hungary of human rights enshrined in international human rights instruments, it provides legal assistance to victims of human rights abuses by state authorities and it informs the public about rights violations. The HHC strives to ensure that domestic legislation guarantees the consistent implementation of human rights norms. The HHC promotes legal education and training in fields relevant to its activities, both in Hungary and abroad.

The HHC's main activities focus on protecting the rights of asylum seekers and foreigners in need of international protection, as well as on monitoring the human rights performance of law enforcement agencies and the judicial system. It pays particularly attention to detention conditions as well as the effective enforcement of the right to defence and equality before the law.

What We Do

Human Rights Legal Counselling Office

The Human Rights Legal Counselling Office provides free legal assistance in human rights violation cases that fall under the scope of the organization's activities. Legal assistance is given in both domestic and international proceedings (e.g. the European Court of Human Rights). The forms of available legal assistance range from verbal advice to drafting legal documents and legal representation before authorities and courts. The majority of cases concern police mistreatment, complaints relating to detention, as well as immigration, family unification and asylum cases.

Main achievements:

— Since 1995 the Office has provided legal assistance in an average of 500 cases per year.

— Since 1998 more than 3,300 clients have been given free legal assistance in human rights cases.

— In the last two years, the HHC has provided free legal representation to foreign nationals (including ethnic Hungarians from the neighbouring countries) in over 60 cases to ensure that our clients can stay in Hungary with their Hungarian national family members.

— The HHC raises public attention to human rights violations by generating media coverage for special cases and phenomena.

— Through reports and legal analysis, the HHC advocates for changes in legislation and legal practice in order to prevent future rights violations.

Human Rights Monitoring of Detention

The quality of treatment of detainees and respect for their human rights is one of the most important indicators of how civilized a society is.

The Hungarian Helsinki Committee began human rights monitoring of police jails in 1996 in pursuit of a cooperation agreement concluded with the National Police Headquarters. Monitoring teams of attorneys, doctors and sociologists are entitled to enter any police building in the country where persons can be detained at any time of day without having to give advance notice. They observe the physical conditions of detention and may speak with detainees without supervision. Should the human rights monitors find any concerns or irregularities, the HHC notifies the police unit in charge of the jail, the National Police Headquarters or the prosecutor's office immediately.

Following a cooperation agreement concluded with the National Prison Administration and based on the success of monitoring police jails, the HHC also began carrying out human rights monitoring in prisons in 2000.

Main achievements:

The regular human rights monitoring of closed institutions (which previously were not transparent to civil society) has brought about a number of achievements:

— The HHC published three comprehensive reports: one on the treatment of pre-trial detainees, one on convicted prisoners and one on prison conditions.

— Since 2000 a total of 786 visits have been made to police jails and 50 visits to prisons.

— Legal assistance has been provided to 1,200 detainees in detention related complaints.

— Our human rights monitoring program has contributed to improving the treatment of detainees and physical conditions of detention.

— The human rights monitoring activity has contributed to making the functioning of detention facilities more transparent.

Promoting Access to Justice

Ensuring one's rights must not remain the privilege of those who can afford to hire a lawyer. Hence the Hungarian Helsinki Committee advocates for securing high-quality and accessible state-funded legal aid for the disadvantaged and it promotes improving the overall quality of the legal aid system. In the interest of improving access to justice in Hungary, the HHC analyzes and evaluates the current situation and makes legislative and structural recommendations.

Main achievements:

— The Model Legal Aid Board Program substantially contributes to laying the foundations for criminal legal aid reform and ensuring wide-ranging support for an effective state-funded legal defence system.

— At the request of the Ministry of Justice, the HHC makes recommendations concerning the establishment and further improvement of legislation on the state-funded legal aid scheme.

— Our advocacy activities resulted in ensuring that non-governmental organizations and university-based legal clinics are able to register as legal aid providers.

Legal Assistance to Persons in Need of International Protection

The principle of respecting the right to asylum and the obligation of protecting refugees is enshrined in numerous international human rights instruments that form an integral part of European civilization.

As of 1998 the Hungarian Helsinki Committee is an implementing partner of the UN High Commissioner for Refugees (UNHCR). The HHC coordinates a national network of asylum lawyers who provide free legal assistance to asylum seekers in Hungary. The organization regularly visits reception centres and community shelters where asylum seekers and migrants are accommodated. It also comments on draft legislation in the field of asylum and immigration as well as analyses legal practices. In addition, the HHC provides legal advice and country of origin information to our network of asylum lawyers and organizes professional trainings on domestic, European and international asylum and immigration law and practice.

The refugee law clinic program based at law faculties in Budapest, Gyor and Debrecen provides law students with insight into Hungarian and international asylum law and its implementation, thus creating a pool of young professionals in Hungary who are trained in a highly complex and specialized legal field.

Main achievements:

— Since 1998 the HHC has provided free legal assistance to over 4,500 asylum seekers.

— The legal status of nearly 130 ethnic Hungarians who had fled Yugoslavia during the war was resolved by acquiring long-term residence status, which granted as a result of the HHC's intervention.

— HHC staff have been involved in over 30 refugee law trainings in Hungary or abroad, organized for Hungarian and foreign NGOs as well as for officials working in the field of refugee status determination, immigration or border control.

Legal Assistance through Refugee Clinics (LARC)

Legal Assistance through Refugee Clinics (LARC)

is a project of the Hungarian Helsinki Committee. It aims to strengthen the effective legal protection of refugees and asylum seekers in Central and Eastern Europe by building the capacity of refugee law clinics, their professionals, and students. To achieve this goal, LARC organizes skills development events and professional consultations as well as facilitates the network of 24 refugee law clinics in 11 countries in the region. The project was created in 2001 with the support of the United Nations High Commissioner for Refugees (UNHCR).

LARC hosts Europe's only asylum law moot court: the Annual International Asylum Law Moot Court Competition. The event — organized since 2001 — aims to provide an opportunity for refugee law clinic students to practice their legal argumentation skills as well as to deepen their knowledge in international asylum law under the supervision of internationally acclaimed refugee experts.

LARC also publishes The Refugee Law Reader — the first-ever online curriculum for the study of the rapidly evolving field of international asylum and refugee law (www.refugeelawreader.org). The Reader is primarily aimed for the use of professors, lawyers, advocates and students across a wide range of national jurisdictions.

Main achievements:

— Since 2001 refugee law clinic students have provided free legal aid to over 10,000 asylum seekers and refugees.

— By October 2005, over twenty thousand people have visited The Refugee Law Reader website. The online publication has served as the basis for refugee law courses at over 20 universities in the region. .

— Since the launch of the project, more than half of the refugee law clinic students have stayed in the asylum field after graduation.

International Activities

International Helsinki Federation for Human Rights (IHF)

The HHC is a member of the International Helsinki Federation for Human Rights (IHF), a self-governing group of non-governmental, not-for-profit organizations that act to protect human rights throughout Europe, North America and Central Asia. A primary specific goal of the IHF is to monitor compliance with the human rights provisions of the Helsinki Final Act and its Follow-up Documents. Each year the HHC produces a report on the situation of human rights in Hungary as part of the IHF's annual report. The HHC is represented on the IHF Executive Committee in the 2004—2006 period.

European Council on Refugees and Exiles (ECRE)

The European Council on Refugees and Exiles (ECRE) is a pan-European network of refugee-assisting non-governmental organizations, concerned with the needs of all individuals seeking refuge and protection within Europe. The HHC gained membership in ECRE in 2002 and participates in ECRE activities on a regular basis by cooperating with other refugee assisting NGOs in Europe, reporting on refugee protection issues in Hungary, and taking part in activities promoting the rights and interests of refugees aiming at influencing refugee policies in Europe. The HHC is currently representing NGOs from the North Central Europe region in the ECRE Executive Committee.

Alternative NGO Reports

The HHC regularly prepares alternative reports on Hungarian human rights issues for various committees of the United Nations and the Council of Europe that monitor the enforcement of human rights.

In recent years we have prepared reports for the

— UN Committee against Torture,

— UN Human Rights Committee,

— UN Committee on the Elimination of Racial Discrimination,

— Council of Europe Anti-Torture Committee,

— European Commission against Racism and Intolerance,

— Commissioner for Human Rights of the Council of Europe.

Services

The Hungarian Helsinki Committee, utilizing its many years of professional experience, provides the following services:

— training on asylum and immigration law for lawyers, social workers, judges and public servants,

— training on the legal regulation of anti-discrimination, and meeting the requirements of equal opportunity ruling for local governments, state institutions and corporations,

— counselling on the development of equal opportunity policy for corporations and organizations,

— planning and organizing human rights-related conferences and professional meetings,

— preparing comprehensive and thematic legal reports concerning the enforcement of human rights in Hungary,

— conducting human rights trainings for non-governmental organizations and youth groups.

Zoltán Miklósi

TERRORISM, CONSTITUTIONALISM, SOVEREIGNTY

The notion that the liberal democracies of the world are to find new solutions in order to avert the threat of terror or at least to effectively decrease it, has become commonplace since 9/11. The foundation of this argument rests upon the generally accepted idea that, since it is the prime obligation of each state to defend the lives, safety and assets of all of its citizens and since terror attacks aiming at randomly selected groups of citizens threaten these interests, the state is obliged to protect its citizens even if the measures applied restrict other important moral interests. Therefore, the argument continues, only naive people or human-rights-absolutists would insist on maintaining the level of protection of human rights which is usual and expected during more peaceful times. The assumption, then, is that the life and safety of citizens can only be defended if the state restricts certain individual rights.

It is not only the irrefutable reasoning of this basic statement that makes this argument a conclusive prima facie. Who would ever like to appear to be endorsing the idea that risking other peoples' lives is an acceptable price to pay in exchange for ensuring the lack of restriction of the rights that are so dear to one's heart? Taking a closer look at this discussion on the same level of abstraction, however, raises more questions than it can answer. Even though we (as most people) do not dispute that when sufficiently severe reasons arise, the exercise of all human rights can be restricted, we should also note that the above reasoning (it would perhaps be more appropriate to say way of thinking) says nothing about the relations which would explain how having less freedom yields greater safety. Prima facie nothing supports the theory that liberal democracies would be more vulnerable to terrorism than the regimes, which restrict or do not consider human rights at all.[1] Therefore, a sensible dispute has to start with identifying the features, which make a society or a government especially vulnerable to terror threats. Secondly, the danger which terrorism has to the life of society and the operation of the state needs to be analysed thoroughly. Only after the completion of such an analysis can a sensible discussion proceed to the solutions to these threats and the possible effects of such threats on individual rights and the usual order of democratic political processes. Therefore, any discussion over the answers to the threat of terror and their affect on constitutionalism (individual rights, rule of law, separation of powers, etc.) must be based on the analysis of the real nature of terrorism.

Naturally, I do not have the opportunity to conduct this analysis here, not only because of the limited space of the present article, but also because of the lack of the information available. However, I would like to make one or two quite general comments in relation to what makes a society vulnerable and what outcome this has on the success of fighting terror. Following these comments, I would like to briefly discuss a recently published a text on general constitutional reform, which stirred fierce debate. Finally, I would like to consider the presumptions that serve as the basis of typical state responses and to try to reformulate these presumptions. A reformulation of presumption, of course, yields a modification of conclusions as well.

If we momentarily look at the terrorist attacks or the conflicts that use terrorist measures which occurred over recent years with the biggest impacts and casualties (such as New York, Bali, Moscow, Riyadh, Madrid, Casablanca, Beslan, London, the Israeli–Palestinian conflict, etc.), we find that, below a superficial general similarity, there are only substantial differences. The context of these attacks shows no similarities in terms of the political system, cultural background, and political concept of the societies in question. Among these societies, there are liberal democracies, oligarchic systems with significant democratic features, theocratic monarchies and secular dictatorships. There are places where terrorism arises from local conflicts that can be well defined and other places where the relation is not that obvious and direct. Among the countries in question, some of the wealthiest and the most effective states in the world can be found along with developing societies struggling with an elongated structural depression as well as poor and dysfunctional states. This suggests that it is extremely difficult, if at all possible, to identify the general political circumstances that provide a context that is particularly conducive to the occurrence of terrorist attacks. If we look at the circumstances of these attacks in the

strictest sense, we might come to the trivial conclusion that terrorist acts can be most easily carried out in an environment where a large number of persons that are not related to one another meet on a regular basis and where it is impossible to track every person's (or even the majority of the persons') movements, i.e. metropolitan public transportation, crowded streets and busy locations. But these conditions are characteristic of modern urban living and not of liberal democracies, and one can hardly imagine how these basic conditions can be changed without the sorts of deep alterations to the modern way of living that are, of course, not desirable nor seriously considered by anyone.

From the above considerations, one preliminary trivial consequence can be drawn. Technological solutions, better coordination, collection and exchange of information together with more effective regulations and institutional reforms may bring limited results (which would be an achievement on its own), but the factors that make modern societies vulnerable to terrorism can hardly be averted by technical or institutional instruments. A realistic policy cannot be viable unless it begins by accepting the fact that in the near future we have to live with the threat and reality of terrorist attacks. The success of long-term strategies that last for generations largely depends on the attitude of governments towards this reality: whether they decide to face it, prepare their societies for it and what they will do to handle the continuous feeling of threat, even if it is reasonable.[2]

This conclusion leads to the second part of the discussion.

CONSTITUTION AND STATE OF EMERGENCY

Recently, Bruce Ackerman, a well-known American constitutional lawyer, formulated proposals as to how liberal democracies should adapt their constitutional systems to the constant threat of terrorism. His proposals, which have generated fierce debate, are primarily tailored to the American Constitution, but his ambitions are more general. In his view, the solution that he proposes should be employed in all liberal democracies.[3] First, I should note that, although I do not share Ackerman's analysis and conclusions, his undertaking is respectable from both a moral and intellectual point of view because he reflects on real problems and does not hesitate to re-examine established dogmas. There is one more reason why I find his paper notable. His propositions explicitly aim to avoid the situation where a constitutional government slips into a permanent (though not explicitly declared) state of emergency in which the erosion of individual rights and other constitutional guarantees is irreversible. Consequently, Ackerman's proposal tries to isolate the periods of emergency to secure a "constitutional interval" in order that the Executive complies with rule-of-law requirements. The purpose of this solution is to avoid the violation of the integrity of the system of rights and guarantees.

Ackerman's proposal is of primary importance for my argument since his analysis begins with an assessment of the social impact of terrorism and terrorist threats and the institutional reactions that are tailored to hypothetical mass psychology effects. He begins by defining the threat that terrorism poses to the *state*, *which* is quite distinct from the obvious threat that terrorism means to society. He points out that the frequently evoked war-analogy is fundamentally mistaken. As opposed to a foreign invasion or a civil war, terrorist attacks, including more devastating ones than the 9/11-attack, do not jeopardize the existence of the state. Troops do not march in, take power and set up oppressive institutions. Only victims and debris remain, and the Executive should cope with this problem anyway. Thus, according to Ackerman, terrorism challenges the political authority of the state but not its existence. Its aim is to destroy public confidence in the operability of the state by constantly inducing the feeling of menace in society. In this way terrorism undermines state control within its boundaries. According to Ackerman's vision, within a relatively short period of time large-scale, persistent attacks will take place, which will totally undermine the power of direction and the legitimacy of the Executive. The constitutional system must be reformed in order to enhance the ability of the Executive to sustain public's confidence in its operability. Measures introduced right after a terrorist attack must aim to prevent the outbreak of panic. This reassurance rationale, as Ackerman calls it, differs from the extraordinary measures introduced during a time of war, since the latter are justified by the idea of the protection of the existence of the state.

What reforms are justified by the reassurance rationale in Ackerman's view? While the exact details of the proposal are not necessarily known, the general concept can be evaluated without closely examining. In case of a terrorist attack, Legislature would declare state of emergency. During this period the Executive could take measures without the usual checks and balances, including the general guarantees in case of detaining individuals (habeas corpus, judicial review, the right to defence, reasonable suspicion). Ackerman elaborates with regard to the latter

competence. The purpose of the presumably mass preventive detentions (when the authority would not have to justify the ground for reasonable suspicion) is to show the citizens that the Executive is in its place. It acts and takes effective measures to capture and neutralize the perpetrators and their abettors in order to prevent another attack from occurring in a short period of time. In order to guarantee that the state of emergency does not remain in place for an unlimited period of time, Ackerman proposes that its upholding be conditioned upon a sufficient majority of the political elite and the Legislature deeming it necessary. Ackerman would introduce the system of system of the supermajoritarian escalator. A majority vote would be required to continue the state of emergency for the first two to three months, then a sixty-percent vote would be required to extend the emergency two more months, followed by a seventy percent vote that would be required for the next two months, and eighty percent thereafter. According to Ackerman, this solution ensures that the state of emergency is upheld only as long as it is justified. He obviously places more confidence in the balance of the political process than in judicial review. The actions of the Executive would not be scrutinized judicially during the emergency. However, he would preserve some of the substantial limits, e.g. the absolute ban on the torturing of detainees.

EVERY MEASURE THAT SERVES TO UPHOLD PUBLIC CONFIDENCE WITHOUT EFFECTIVELY SOLVING THE PROBLEMS IS COUNTERPRODUCTIVE IN THE LONG RUN.

In my view, even prima facie, there are three fundamental problems with Ackerman's view that are in part addressed by his critics. First, the moral justification of the limitations is very problematic; second, there is a serious mistake in his institutional design; and finally, his distrust of judiciary institutions makes him insensitive to the role that judicial review plays in interpreting the substantial limits he wishes to preserve. David Cole, who is one of his critics, points out the insufficiency of his moral justification. As we saw, Ackerman justifies the extraordinary authorisation of Executive powers and detaining a large number of individuals without reasonable suspicion by invoking a rationale of reassurance. This interest entails maintaining people's confidence in the operability of the Executive. However, it is not clear, and it is even doubtful that the assumed safety of the presumed majority of society justifies such grave intrusion.[4] It could also be argued that the psychological effect of the mass preventive detention presumed to be had on majority of the population is ambiguous. Why should we think that locking up thousands of people without individualised suspicion strengthens the perception that the Executive is in its place and in control of the situation? It is plausible to assume that initially this impression will develop in the public. Though, if mass preventive detentions do not lead to capturing the real perpetrators and their abettors (which is likely since Ackerman does require individualized suspicion as a precondition of detentions), then the public will perceive mass preventive detentions as they are: a series of steps displaying force that are independent of the legitimate aim of capturing terrorists.[5] It could also lead to the quick erosion of public confidence in the Executive.[6] This argument also shows that any justification that is based on the reassurance rationale is inherently mistaken. In the long run, confidence in the Executive and the political establishment cannot be separated from the substantive performance of the Executive in these fields. Every measure that serves to uphold public confidence without effectively solving the problems is counterproductive in the long run. (Mass preventive detentions do not primarily aim to fight terrorists effectively but to create the facade of effective counteractivity.) Only those measures are supposed to avert danger effectively can be justified from moral and practical points of view. Consequently, the reassurance rationale, which is independent from the real considerations of counter-terrorism, is unacceptable.

Setting aside this most fundamental, moral counter-argument, Ackerman's proposal regarding the institutional design seems to be gravely mistaken. Ackerman focuses his attention on preventing the abuse of emergency powers and their eternal expansion with the inflation of war-rhetoric. Thus, he accommodates the possibility of the further extension of the state of emergency to a minor yet gradually increasing element of the Legislature. He places all his confidence in a small element of the legislation that would be able to pose an obstacle to the aimless expansion of the state of emergency even in the time of general war psychosis. We have no reason to doubt that such an element will exist,[7] though it is questionable how effective it will be in a situation that Ackerman fears. Suppose that the majority of the legislature and the majority of the society are still dominated by the shock generated by a terrorist attack that killed thousands of people. The state of emergency is extended over and over again according to the supermajority required. However, at a certain point, 21% of the members of the legislative branch do not deem further extension necessary. Let us assume, for the sake of this example, that a majority

in the legislature and most of society disagree with them, but even so they manage to bar the further extension of state of emergency. If they stick to their position, they would manage to end the emergency period. At the same time, Ackerman's proposal does not give any indication as to how much time should lapse between the end of an earlier state of emergency and the introduction of a new one. This is not an incidental deficiency. Ackerman clearly states that the introduction of the state of emergency needs to be tailored to the necessities of the real world. If the Constitution requires that, again for the sake of the hypothetical scenario, one year must pass before introducing the state of emergency again, this, naturally, would not discourage terrorists from making another devastating attack. If the state of emergency cannot be introduced as a response to another attack, this scheme would not make much sense. If there is no such rule in the Constitution, going back to our example, nothing can bar the majority (or the supermajority required for first vote) of the Legislature to introduce a new state of emergency one day after 21% of the representatives denied the extension. And since we assumed that the majority of society agreed with upholding extraordinary measures, the Legislature would not have to weigh the negative political consequences. Thus, the system of the supermajoritarian escalator that is regarded by Ackerman as a constitutional silver bullet has no retentive force in cases when it would be mostly needed.

The third problem relates to Ackerman's scepticism regarding the courts' power of review (in centralized systems, constitutional courts). During a state of emergency Ackerman would not guarantee the judicial review of administrative decisions in relation to detentions, though, at the same time he would sustain some substantial limits as to the treatment of detainees. He explicitly names the prohibition of torture, but he also suggests that there are other limits as well. However, as his critics, Laurence Tribe and Patrick Gudgridge point out, in practice the issue of such absolute prohibitions come up as classifying certain practices, such as revoking sleep or broadcasting bad and loud music as torture. Evidently, it is not possible that a single act can regulate fully all cases that may evolve in the future. It is precisely for this reason that a judicial review, which can decide on borderline cases by making distinctions and applying analogies on a case-by case basis, is necessary. Judicial review makes the abstract moral principle of prohibition of torture applicable in individual cases.[8] Consequently, the operation the judicial system is indispensable in a state of emergency.

The statement relating to the prohibition of torture raises a more general problem regarding Ackerman's proposal. His reform plan seems to start from the naïve supposition that a state of emergency can be perfectly separated from times of "normal" constitutionalism — I referred to this concept by using the term "constitutional interval". This premise is evidently untenable. As the example above shows, the application of extraordinary measures and their limits in those special periods presumes a use of phrases that must be interpreted. The course of interpretation is dependent on the conceptual apparatus developed in earlier phases of constitutional development, the period of "normal" constitutionalism. If we do not want to end up with the result that Ackerman explicitly refuses whereby during a state of emergency, the Executive has unlimited discretion to act as it wishes, then we must accept that the two periods cannot be hermetically separated from each other.

The three problems (surely, many others could be brought up) I pointed out in relation to the Ackerman proposal all point in the same direction. My general conclusion is that, even in the case of a great threat such as terrorism, the subtle texture of constitutionalism that evolved over a long period of time should be modified step by step and with the utmost care. Countering terrorism is indeed a special state function that requires applying very special measures. Some of these may make it necessary to provide the state with authorisations that we would otherwise be cautious to provide for example collecting information). At the same time, however, the possibility of judicial review and judicial remedy must be guaranteed. Constitutional amendment as an ultimate solution is not a necessary and suitable measure to trace these changes.

STATE OPERABILITY

State reactions to terror threats can be described most generally as steps taken to extend state operability. The possibilities of state operability in relation to liberal democracies are restricted from the "inside" by procedural rules of the rule of law, basic rights guaranteed by the constitution and the balances within systems with different branches of powers. International law, treaties and institutes can be considered as factors that restrict and define from the "outside". (From the non-legal point of view, the available resources, the interests of groups in society and international relations also restrict operability.) It has clearly been the case in the United States since the

9/11-attack that governmental aspirations have been heading in the same direction both from the "inside" and the "outside". The Executive power was extended as largely as possible from the inside at the expense of the other branches of power and in detriment to individual rights, while neglecting the restrictions posed from the "outside" by the system of international institutions. I would like to point out that, though I am opposed to each of these trends, such a reaction is understandable because when a nation, especially if it is a superpower, is so violently provoked, all of society's instincts as well as those of the political class are receptive to the sorts of arguments that are similar to the one that George W. Bush once expressed: it is not needed to plead before any international instances in order for a state to protect the security of its citizens. However, I would like to devote the final section of this paper to describing the presumptions behind these typical state reactions and point out why they are, in my opinion, wrong.

State operability can be discussed from two perspectives. In the judicial sense it is usually connected with sovereignty and means the unrestricted right to appoint and implement state politics both in the field of domestic and international politics. From this approach, operability is increased if there are fewer national and international rules and institutions restricting the state's competence to decide. The other approach, which I would call the substantive approach, links operability to the effective enforcement and implementation of state policies. From this point of view, operability is increased if state policies can effectively achieve those goals that justified their introduction. So, while the first approach concentrates on the circumstances that ensure that the state can follow whatever policies it wants to, the second one concentrates on the circumstances that presumably allow state policies to achieve the expected results.[9]

It seems that the approach of the national political leaders in terms of terror aversion and international politics in general is totally dominated by the first of the approach. To be more precise, they appear to be thinking that the materialization of the first and the second desire are the same, i.e. that state policies would lead to the desired result if there were fewer restrictions in determining such policies. In reality, however, the conditions of the achievement of these two goals can be identical only among special and highly unrealistic presumptions. The circumstances among which these two sorts of desires are the same are "Vestfalian":[10] the basis of this view is a (Vestfalian) concept of sovereignty in which each state in itself constitutes a closed unity and has a jurisdiction restricted by nothing from the inside. Furthermore, it pictures nation societies and economies that are connected only in a reduced way, by moderate interstate movement of population, capital, etc. Among these circumstances, it is possible that the lack of (outside) international restrictions is the main condition of the effectiveness of nation state. (Though, it is a presumption even among Vestfalian conditions that inner restrictions of state power would decrease the effectiveness of state policies). But because of the density of relations between the modern industrial societies and their convergence, there is such a level of interdependence between the leading economic powers and in general the states integrated into a global economy that, without appropriate interstate coordination, none of the national politics in these countries could be efficient.[11] In practice, this means that the price of the effectiveness of state policies is coordination, i.e. restrictions of the freedom of decision on a state level. The restriction of sovereignty can lead to effective and more successful state policies among mutual interdependence.[12] In addition, strategic cooperation ensuring long-term predictability and planning implemented through the system of international institutions is sure to guarantee better results than ad hoc coalitions based on the collision of momentary interests that overestimate international participants based on rapidly changing considerations, which, as a result, will only generate the next centre of crisis.[13]

Naturally, these connections appear on different levels concerning each international participant. The bigger a country's military and economic power, the bigger its inner market is, the more indirect are the ways through which the consequences of mutual interdependence appear, elongating the duration of the period until the ability to delegate the disadvantages arising from the lack of coordination of others. Therefore, the urge to restrict the freedom of decision of the state will be smaller. If we try to interpret the international conflicts and ruptures of the recent years, we can come to the conclusion that the United States is following a unilateralist policy since 9/11 (and partially even prior to that date) not because of some sort of ideological obligation, but simply because it could do so on a short-term basis. Similarly, middle-sized European powers insist on keeping international frameworks because they sense the effects of the lack of coordination in a more direct way.[14] However, I am of the view that the present experience of the fight against terrorism supports the fact that even the leading military and economic power of the world cannot

ignore these relations. Among these interdependent relations, successful state politics (especially in the case of a global undertaking) can be executed through strategic coordination and, consequently, the partial restriction of state sovereignty. It is possible, though, that recent conflicts and crises concerning the system of international institutions will help to realize this perception.[15]

NOTES

1. In the past few years more terrorist attacks with the biggest impact and casualties occurred in partially or totally suppressor states (i.e. the Russian Federation, Saudi Arabia Bali, Morocco, Egypt) rather than in liberal democracies.
2. Of course, identifying and politically handling the deeper reasons of terrorism is one of these. I take it for granted that discussions on the deeper social and political reasons of terrorism will not result in a more tolerant attitude towards terrorism. I do not need to go further than mentioning the fact that legitimate political aims and real violation of interests can lead to use of unacceptable means, especially if other available means prove to be ineffective and reduced. The ineffectiveness of these means, however, does by no means refer to the illegality of the underlying aims and interests. This does not mean, of course, that the background of terrorism is always made up of acceptable aims and real injuries. These reasons, however, cannot be discussed here.
3. Bruce ACKERMAN, "The Emergency Constitution." *Yale Law Journal* 113 (March, 2004).
4. David COLE, "The Priority of Morality: The Emergency Constitution's Blind Spot." *Yale Law Journal* 113 (June, 2004). Laurence Tribe and Patrick O. Gudridge raise a partially similar problem. They contest that the purpose of the reassurance rationale is only, or at least most importantly, the state of emergency. According to them, Ackerman does not pay attention to the case of objectively justified restlessness: "In the end, lack of public tranquillity may reflect that there is no adequate reason for tranquillity." Secondly, public pressure in case of justified restlessness can be favourable since the Executive is more inclined to take all the necessary measures. Laurence TRIBE – Patrick O. GUDRIDGE, "The Anti-Emergency Constitution." *Yale Law Journal* 113 (June, 2004), p. 1812.
5. Cole rightly refers to the fact that the Ashcroft-raids that took place weeks and months after 9/11 (just like the Palmer-raids following WW1) lead to arresting thousands of people, but only three of them were indicted. Two of them were acquitted and serious procedural problems arose in the case of the only person who was "sentenced". COLE, *ibid.*
6. A further problem pointed out by Cole is that the proposed authorization is counter-productive from another aspect. If, as is plausible, the assumed terrorists have a specific (religious, ethnic etc.) social background and the same social group would be disproportionately affected by the detentions, the measures would probably have an adverse impact. Not necessarily because the targeted group, due to their alienation, would become the supporters of terrorism, since this correlation is indirect and distant. However, as an immediate consequence of such action the expected co-operation of the members of the targeted social group would increase as well.
7. Ackerman, who addresses his proposal to all liberal democracies of the world, bases his argument on the operation of the U.S. Congress. He is boldly insensitive to the largely different consequences (such as the party system or discipline required by legislative fractions) generated by differing systems of legislative elections.
8. "The Anti-Emergency Constitution", p. 1823.
9. Applying another differentiation, it can be said that the legal approach focuses on the legal output, while the substantive approach focuses on the actual outcome.
10. Quotation marks are used because the totally unrestricted national sovereignty is evidently an ideal that has not become a reality even during the period referred to as Vestfalian. (See, e. g., Stephen KRASNER, *Sovereignty: Organized Hypocrisy*. Princeton, N.J.: The University Press, 1999.)
11. The convergence of societies and their mutual interdependence, of course, do not eliminate clashes of interests between these states. The existence of these clashes of interests makes the cooperation of sovereign states more difficult.
12. In this approach, the integration of European nation states does not seem as the implementation of an ideological concept or a utopia (as the critics and fans declare alike), but as a strategic adaptation to the circumstances of mutual interdependence. In the European economic and social space getting more and more united, it is definitely true that state-level goals can only be achieved effectively by interstate coordination. (See Andrew MORAVCSIK, "Conservative Idealism and International Institutions." *Chicago Journal of International Law*, Autumn, 2000.)
13. As it can be seen from the example of American foreign policy, such politics led to the regional overestimation of first Iran, then Iraq and at the moment Pakistan (and Uzbekistan).
14. Differences in the capabilities and possibilities, of course, do not explain every difference. In this context, the standpoint of the critics of international law with a realistic view seems more convincing. (See, Andrew

MORAVCSIK, "Taking Preferences Seriously: A Liberal Theory of International Politics." *International Organization* 51:4, Autumn, 1997, pp. 513–553.)

15. In the third part of this paper I focused on rather the outer limits of the freedom of decision of the state, but I think that similar connections can be discovered in the sphere of inner constitutionalism, the balances among the branches of powers and the enforcement of individual rights. During times of threat, the instinctive reaction of state leaders is the suspension of procedural guarantees, the restriction of open political criticism, for example, by suppressing freedom of speech and parliamentary control. At the same time, empiric observations suggest, that restricting public deliberation and criticism (whether on an individual or institutional basis) results in more feeble decisions and in the end decreases the effectiveness of state politics. Therefore, the statement that the gradual decrease of restrictions of the executive power leads to more effective politics can never be taken as correct in a long-term period.