

## SHOOTING DOWN CIVILIAN AIRCRAFT: ILLEGAL, IMMORAL AND JUST PLANE STUPID

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Résumé de l'article

Cet article cherche à savoir s'il est licite pour un état d'abattre un avion civil qui a été transformé par des terroristes en un missile-suicide. Est-il justifié de tuer des passagers innocents pour sauver la vie de personnes au sol ? Est-ce que l'arithmétique humaine peut constituer un calcul juridique ? Afin de déterminer la façon dont une démocratie libérale devrait répondre à un deuxième 11 septembre, l'auteur examine les différentes classifications du droit et tente de mettre en évidence des principes juridiques découlant de décisions nébuleuses portant sur l'interception d'avions civils et militaires. Ayant conclu que le droit ne fournit pas de réponse formelle, et, à vrai dire, s'est abstenu de fournir une telle réponse, l'auteur se tourne vers la moralité, et est amené à trouver celle-ci plus flegmatique dans la poursuite de sa déplaisante analyse. D'entrée de jeu, il devrait être noté que la suggestion n'est pas ici que les avions menaçants ne pourraient jamais être abattus, mais plutôt que de telles mesures devraient être illégales. Ce qui est suggéré est que dans certaines circonstances, l'interception d'un vol civil pourrait bien être la meilleure mesure à prendre, mais cette interception demeurerait tout de même un tort punissable par la loi. En d'autres mots, dans des cas extrêmes, abattre un avion civil pourrait être *justifié moralement* mais ne devrait pas pour autant être *légalement justifié* – ceci ne signifie pas que la moralité et le droit doivent se distancer l'un de l'autre mais plutôt qu'ils développent et précisent leur entendement mutuel; que la règle de droit et l'intégrité d'une société soit préservé, sinon restauré, par ce qui apparaît comme le châtiement draconien d'héros. Il y a lieu de croire que le décortilage d'une situation donnée permettra de tirer des conclusions utiles pouvant avoir de multiples utilités. La préférence de l'auteur est de ne pas s'exprimer sur ces conclusions de nature plus générale.

## SHOOTING DOWN CIVILIAN AIRCRAFT: ILLEGAL, IMMORAL AND JUST PLANE STUPID

*Par Rory Stephen Brown\**

This paper discusses whether it should be legal for a state to shoot down a civilian plane, converted by terrorists into a deadly suicide missile. Is it justifiable to kill innocent airline passengers to save lives on the ground? Can 'human arithmetic' be a legal calculus? To decide how a liberal democracy should respond to a repeat of September 11, the author examines several relevant registers of law, and attempts to discern helpful principles in murky cases of past interceptions of military and civilian aircraft. After concluding that law can provide no definitive answer, and, indeed, has shied away from sodoing, he turns to morality, tending to find her more phlegmatic in this distasteful inquiry. At the outset, it should be noted that the suggestion here is not that threatening passenger aircraft should never be shot out of the sky; rather, that such resorts should be legally prohibited. That is, in certain circumstances, interception of a civil flight might well be the best thing to do, the most laudable action, yet remain a wrong, a lesser evil, punishable in law: In other words, in extreme cases, the shooting of a plane may be *morally justified*, but it should not be *legally excused* - this does not entail that morality and law sourly part company; rather that they develop and refine their understanding; that the rule of law and integrity of society may be preserved, if not restored, by the seemingly Draconic punishment of heroes. It is hoped that the quarrying of a specific situation might extract valuable lessons of broader use. The author's preference here is to leave these more general lessons unexpressed.\*\*

Cet article cherche à savoir s'il est licite pour un état d'abattre un avion civil qui a été transformé par des terroristes en un missile-suicide. Est-il justifié de tuer des passagers innocents pour sauver la vie de personnes au sol? Est-ce que l'arithmétique humaine peut constituer un calcul juridique? Afin de déterminer la façon dont une démocratie libérale devrait répondre à un deuxième 11 septembre, l'auteur examine les différentes classifications du droit et tente de mettre en évidence des principes juridiques découlant de décisions nébuleuses portant sur l'interception d'avions civils et militaires. Ayant conclu que le droit ne fournit pas de réponse formelle, et, à vrai dire, s'est abstenu de fournir une telle réponse, l'auteur se tourne vers la moralité, et est amené à trouver celle-ci plus flegmatique dans la poursuite de sa déplaisante analyse. D'entrée de jeu, il devrait être noté que la suggestion n'est pas ici que les avions menaçants ne pourraient jamais être abattus, mais plutôt que de telles mesures devraient être illégales. Ce qui est suggéré est que dans certaines circonstances, l'interception d'un vol civil pourrait bien être la meilleure mesure à prendre, mais cette interception demeurerait tout de même un tort punissable par la loi. En d'autres mots, dans des cas extrêmes, abattre un avion civil pourrait être *justifié moralement* mais ne devrait pas pour autant être *légalement justifié* – ceci ne signifie pas que la moralité et le droit doivent se distancer l'un de l'autre mais plutôt qu'ils développent et précisent leur entendement mutuel; que la règle de droit et l'intégrité d'une société soit préservé, sinon restauré, par ce qui apparaît comme le châtement draconien d'héros. Il y a lieu de croire que le décorticage d'une situation donnée permettra de tirer des conclusions utiles pouvant avoir de multiples utilités. La préférence de l'auteur est de ne pas s'exprimer sur ces conclusions de nature plus générale.

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This article discusses whether or not it should be legal for a state to shoot down a civilian plane, converted by terrorists into a deadly suicide missile. I argue that law and morality inform a negative answer to this question. At the outset, it should be noted that the argument is not that dangerous passenger aircraft should never be shot out of the sky, rather, that it should remain illegal so to do. That is, while interception of a civil flight might well be the best thing to do, it remains a lesser evil and, therefore, a wrong punishable at law. In other words, in extreme cases the shooting of a plane may be morally justified, but it should not be legally excused – this approach does not entail that morality and law sourly part company, but rather develops and refines their mutual understanding. Given that the topic of this article seems to have more in common with a bad film than an important legal and ethical inquiry, perhaps some scene-setting is in order. A chilling revelation regarding September 11 appeared in the *Washington Post* in 2004:

Pursuant to the president's instructions, I gave authorization for them to be taken out,' Cheney told Rumsfeld, who was at the Pentagon. Informing Rumsfeld that the fighter pilots had received orders to fire, Cheney added, 'It's my understanding they've already taken a couple of aircraft out'.<sup>1</sup>

Further, as Jockel reports, since September 11,

[...] fighter aircraft have been patrolling in the vicinity of several North American cities, most notably, of course, New York and Washington. Americans and Canadians alike have learned that procedures are now in place in both countries for giving fighter pilots instructions to destroy any hijacked planes that threaten a repeat of the World Trade Center and Pentagon calamities.<sup>2</sup>

In England, the *Guardian* reported that “Tony Blair has moved F3 Tornado fighter jets closer to London in order to blow out of the sky any hijacked aeroplanes which threaten to crash on the capital ... Blair and Bush have given notice that they may have to murder innocent citizens in the cause of a greater good.”<sup>3</sup>

Overlooking this rather broad usage of the term “murder”, we should ask whether these precautions are based on real as opposed to imaginary dangers. Given that “waves” of hijacking have been discerned by flight officials in the past,<sup>4</sup> the probability that successful hijacking has a contagion effect,<sup>5</sup> and that, as a cheap, destructive and highly demonstrative tactic, suicide terrorism has proved effective in

<sup>1</sup> Dana Milbank, “Cheney Authorized Shooting Down Planes” *The Washington Post* (18 June 2004) A01 (Lexis).

<sup>2</sup> Joseph T. Jockel, “After the September Attacks: Four Questions about NORAD's Future” (2002) *Can. Mil. J.* 11 at 11.

<sup>3</sup> Mark Lawson, “A wing and a prayer just isn't enough” *The Guardian* (6 October 2001), online: *Guardian Unlimited* <<http://www.guardian.co.uk/world/2001/oct/06/afghanistan.theairlineindustry>>.

<sup>4</sup> Alana E. Evans, “Aircraft Hijacking: Its Cause and Cure” (1969) 63 *A.J.I.L.* 695 at 705.

<sup>5</sup> Robert T. Holden, “The Contagiousness of Aircraft Hijacking” (1986) 91 *Am. J. of Sociology* 874.

achieving terrorists' goals,<sup>6</sup> it is not irrational to expect hijacking of the suicide bombing variety to be increasingly popular.

Though it is perhaps surprising to the reader new to air law, the shooting down of civilian aircraft is a well-established practice in South America under the banner of the Air Bridge Denial Programme (ABDP). This scheme was designed to combat the massive drug problem plaguing the Columbian and Peruvian regions. One of the most notorious incidents in this programme occurred in 2001, when a Peruvian interceptor emptied two machine gun barrels into the side of an aircraft mistakenly identified as a drug runner, which was carrying American Baptist missionaries and their two adopted children. The father and son survived whilst the mother and daughter perished.<sup>7</sup> In what seems to be a race to the bottom, Brazil and Peru are in the process of implementing similar "shootdown" legislation.<sup>8</sup> In Africa, Guinea-Bissau's Prime Minister recently signed an order legalising shootdown of civilian planes to reduce "rampant cocaine trafficking."<sup>9</sup> As can be seen, the present inquiry has real, day-to-day relevance for civil air travel. Furthermore, the answer to this question has far-reaching implications for the nature of the state and interpretative legal frameworks for war, crime, rights and human dignity. Trivial or simple, it is not.

Before beginning the analysis, it is apt to consider the values at stake when a state contemplates the destruction of a civilian passenger craft. This scenario touches upon many interests, the most important of which are the human dignity and right to life of persons both in the plane and on the ground; the state's concern for national security, and the general public interest in the predictability of legal outcomes, or legal certainty. This article argues that the *integrity* of the state is a major issue, which is often overlooked in legal analysis. In answering the type of question addressed in this paper, society chooses an identity for itself; it chooses what kind of society it wants to be. Legal certainty relates to the preliminary question of which *laws* are applicable. At first blush, it might be considered that a state under attack within the confines of its own territory need only refer to its domestic law or, at the most, to a *jus naturale* right to protect itself. However, by dint of the very nature of civil aviation, the scenario contemplated involves a complex interplay of norms including international treaty law, rules on the use of force in general, customary law pertaining to aircraft in particular, international human rights law and domestic law (mainly constitutional). This list of norms dictates the structure of the first part of this article. The last section will consider the more fundamental moral arguments that reinforce the fragile answers provided by legal argumentation.

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<sup>6</sup> See generally Robert A. Pape, *Dying to Win: The Strategic Logic of Suicide Terrorism*, 1st ed. (New York: Random House, 2005).

<sup>7</sup> Stephen J. Hedges, "U.S., Columbia to Resume Air Patrols; Anti-Drug Flights Halted in '01 After Missionary's Death" *Chicago Tribune* (20 August 2003) (the United State's support operation for the Air Bridge Denial Program was entitled "Support Justice").

<sup>8</sup> "Brazil Carries the War on Drugs to the Air" *New York Times* (July 30 2008), online: NY Times <<http://query.nytimes.com/gst/fullpage.html?res=9B02EFD6173DF936A15754C0A9629C8B63&n=Top%2FReference%2FTimes%20Topics%2FSubjects%2FL%2FLaw%20and%20Legislation>>.

<sup>9</sup> "G Bissau 'to shoot drug planes'" *BBC News* (31 August 2007), online: BBC News <<http://news.bbc.co.uk/2/hi/africa/6972468.stm>>.

## I. International Law

Astoundingly, Huskisson tells us that, “[i]nternational law will clearly excuse the shutdown of an airliner being used in a suicide attack.”<sup>10</sup> Before testing this claim, a brief introduction to the features of international law and international legal scholarship is apposite.

Since “the shock effect of the eruption of violent conflict and terrorism tends to produce an environment in which international human rights mechanisms may display a high degree of indulgence to state claims”, we must analyse claims such as Huskisson’s with heightened vigilance.<sup>11</sup> Gray issues a similar warning, reminding us that,

in the vast mass of cases – both before and after 9/11 – there is no controversy as to the applicable law... Thus the natural focus of writers on controversial cases where states invoke self-defence in protection of nationals, anticipatory or pre-emptive self-defence, and response to terrorism inevitably gives an unbalanced picture and distorts our perception of state practice.<sup>12</sup>

These warnings dovetail neatly with Higgins’ argument that apparent lack of consensus may in fact be instances of “repeated breaches of international law, symptomatic of the crisis in which international law finds itself today.”<sup>13</sup>

Indeed, we do not look to Jack the Ripper’s egregious conduct for evidence of the content of the law on rape. That said, we cannot ignore state practice simply because we find it distasteful. The international legal order remains Vattellian insofar as consensual relations between states, state opinion and practice are determinative of the law.

A further note should be made about the interaction of various international legal norms. International legal norms are malleable. This is best brought out by Jennings’ insight that every treaty rule exhibits simultaneously a codification and a generative phenomenon, which inevitably derogates from its customary instantiation through the process of its transformation into writing.<sup>14</sup> In light of the fluid nature of international legal norms, the interpreter must reserve judgment until his

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<sup>10</sup> Major Darren C. Huskisson, “The *Air Bridge Denial Program* and the Shutdown of Civil Aircraft Under International Law” (2005) 56 A.F.L. Rev. 109 at 130.

<sup>11</sup> Colm Campbell, “‘Wars on Terror’ and Vicarious Hegemons: The UK, International Law, and the Northern Ireland Conflict” (2005) 54 I.C.L.Q. 321 at 353.

<sup>12</sup> Christine D. Gray, *International Law and the Use of Force*, 2d ed. (Oxford: Oxford University Press, 2004) at 97.

<sup>13</sup> Rosalyn Higgins, “The Identity of International Law” in Bin Cheng, ed., *International Law: Teaching and Practice* (London: Stevens, 1982) at 35.

<sup>14</sup> See generally Robert Jennings, *Judicial reasoning at an International Court*, Universität des Saarlands. Vorträge Reden und Berichte aus dem Europa-Institut, Ress ed., No. 236 (Saarbrücken 1991).

consideration of *all* of the relevant law is complete. The process of distilling international legal rules from the various interdependent sources is necessarily holistic.

Despite international law's shortcomings, as will be seen, states *do* tend to attempt to clothe their actions in the robes of legality. On occasion, these attempts weaken international norms, degrade important legal categories, and bring the whole system into disrepute. However, "[g]overnments aware that other nations will expect them to justify their actions in explicitly legal terms will more likely pay heed to international law in their decisionmaking processes, if only for reasons of pure expediency."<sup>15</sup>

### A. The *Chicago Convention*

The *Convention on International Civil Aviation*<sup>16</sup> (*Chicago Convention*) is the core document regulating international civil aviation. Its governing body, the International Civil Aviation Organisation (ICAO) is responsible, amongst other duties, for minimum standards of flight safety.

The first query must relate to the status of the treaty. Basically, it is widely accepted that an international convention might be declarative, crystallising, or generative of international law.<sup>17</sup> For present purposes it suffices to note that after the destruction of Korean Air Lines 007 on the 31<sup>st</sup> of August 1983, all parties concerned agreed that the *Chicago Convention* was valid and its procedures coherent. In fact, the first legal responses of the affected state parties were tailored to its exact terms.<sup>18</sup>

The keystone provision of the *Chicago Convention*, Article 1, states that, "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."<sup>19</sup> This is an odd provision for an international treaty, as it seems to divert the focus away from international law towards municipal rules. Indeed, for Peru and Colombia this reaffirmation of sovereignty has been enough to whitewash the ABDP for the purposes of international law.<sup>20</sup> Similarly, in the aftermath of the destruction of Korean Air Lines Flight 007, the Soviets claimed an absolute right to protect their territorial airspace against intrusion.<sup>21</sup> However, as will be demonstrated, Soviet policy was in clear

<sup>15</sup> "Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007" (1984) 97 Harv. L. Review 1198 at 1211 [Legal Argumentation in International Crises].

<sup>16</sup> *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, 61 Stat. 1180, art. 9(a) [*Chicago Convention*].

<sup>17</sup> Wlasylaw Czapliński, "Sources of International Law in the *Nicaragua Case*" (1989) 38 I.C.L.Q. 151 at 153.

<sup>18</sup> See the second ICAO report of KAL 007 shoot down, online, at ICAO <[http://www.icao.int/cgi/goto\\_m.pl?icao/en/trivia/kal\\_flight\\_007.htm](http://www.icao.int/cgi/goto_m.pl?icao/en/trivia/kal_flight_007.htm)>.

<sup>19</sup> *Chicago Convention*, *supra* note 16, art. 1.

<sup>20</sup> Huskisson, *supra* note 10 at 142.

<sup>21</sup> "Text of Congress's Resolution on Korean Jet", *The New York Times* (15 September 1983), online: NY Times <<http://select.nytimes.com/gst/abstract.html?res=F50F15F83B5C0C768DDDA00894DB484D81&scp=1&sq=korean+007+1983&st=nyt>>.

contravention of the spirit of the *Chicago Convention*. The ritualistic invocation of aerial sovereignty does not exhaust all that the *Chicago Convention* or customary international law has to say on the matter. In fact, when faced with the Soviet stance regarding Flight 007, United States' Secretary of State Schultz declared that national security concerns must be tempered by "human values."<sup>22</sup> Lissitzyn frames the question well: "Does [the principle of sovereignty over airspace] – very firmly established in international law since World War I – mean that any aircraft entering without such permission is completely at the mercy of the territorial sovereign?"<sup>23</sup>

One would hope not. Article 3 *bis* of the *Chicago Convention* addresses this question:

- (a) The contracting States recognize 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 recognize 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 used 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 relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft [...].<sup>24</sup>

Two main clues as to the status of this article in international law can be gleaned from the text and *travaux préparatoires* of the major amendment undertaken in 1984. Firstly, the wording of Article 3 *bis*(a) seems indicative of the existence of a rule of customary international law preceding the text of the *Chicago Convention*. Secondly, during the discussion of this rule at the Extraordinary ICAO Assembly in 1984, "no delegation challenged the fact that the prohibition of use of force against civil aircraft is already part of general international law."<sup>25</sup> Scholarly opinion supports the conclusion that Article 3 *bis* is a principle of customary international law.<sup>26</sup>

A potential complexity is whether or not the prohibition applies to both

<sup>22</sup> *Ibid.* at A15.

<sup>23</sup> Oliver J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law" (1953) 47 A.J.I.L. 559 at 559 [footnote omitted].

<sup>24</sup> *Chicago Convention*, *supra* note 16, art. 3 *bis* (a)-(b) [emphasis added].

<sup>25</sup> "International Organizations: 25th Session (Extraordinary) of the ICAO Assembly" (1984) 9 Ann. Air & Sp. L. 455 at 457.

<sup>26</sup> Malcolm N. Shaw, *International Law*, 5th ed. (Cambridge: Cambridge University Press, 2003) at 477.

foreign and domestic civil aircraft. Huskisson tells us, “the prevailing view is that protection afforded by Article 3*bis* is for foreign aircraft, not aircraft of a State’s own registration.”<sup>27</sup> This opinion should be rejected as ill-conceived. The drafters of the *Chicago Convention* could not have intended to draw a distinction between domestic and foreign civil aircraft because the practical result would be to make the fates of those on board a plane, and the powers of the subjacent state dependent on an arbitrary variable, namely, the aircraft’s country of registration. The obvious retort that flights on domestically registered aircraft are not within the purview of international law is dealt with below.

Another problem, noted by Huskisson, is that Article 3 *bis* was drafted at a time when “the State was seen as the major threat to international peace and security and the likely misuser of civil aviation as a threat against another State.”<sup>28</sup> In truth, this problem relates to the reference in Article 3(a) to the limitations of the *Charter of the United Nations*<sup>29</sup> (*Charter*). Therefore, discussion of it will be postponed until the next section.

In a statement directly relevant to the current puzzle, the United States maintained (though presumably would no longer) that Article 3(d) of the *Chicago Convention* flatly prohibits the shooting down of civilian craft.<sup>30</sup> Article 3(d) states that “[t]he contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.”<sup>31</sup> But, had this interpretation been intended, clearly Article 3(d) would have been drafted in more absolute terms. As it is, the text simply requires states to have “due regard” for the safety of civil flight in their issuing of regulations. The old American view, although supportive of the thrust of this article, reads far too much into the opaque language of Article 3(d). In a related vein, though inconclusive for present purposes, Hassan has surmised that Article 25 of the *Chicago Convention* requires that if a trespassing aircraft indicates its distress, “it is bound to be provided with suitable measures of help.”<sup>32</sup>

Further, by virtue of Article 3(a), the *Chicago Convention* only applies to *civil* aviation. Aircraft used in military service are deemed state craft. It is worth questioning whether a craft that has been hijacked by suicide terrorists becomes a “state” or “quasi-state” craft and is therefore no longer protected by Article 3 *bis*. There is a sense in which it is no longer “civil” by virtue of its new hostile, militaristic intent but it can hardly be described as “state” where it has been hijacked by terrorists. The argument that a civil craft loses its status has some merit when all

<sup>27</sup> Huskisson, *supra* note 10 at 126 [footnote omitted].

<sup>28</sup> *Ibid.* at 144.

<sup>29</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7 [*Charter*].

<sup>30</sup> U.S., Department of State, *Position Paper on the Use of Weapons Against Aircraft Suspected of Carrying Drugs* (1989), online: The National Security Archive <<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB44/doc2.pdf>>.

<sup>31</sup> *Chicago Convention*, *supra* note 16, art. 3(d).

<sup>32</sup> Farooq Hassan, “The Shooting Down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers” (1984) 33 I.C.L.Q. 712 at 721 [footnote omitted]; *Chicago Convention*, *supra* note 16, art. 25.



the persons on the craft *share that murderous intent*. It becomes more problematic when the plane is full of innocent passengers, none of whom manifest a “military” design in any real sense of the word. This problem of persons unwillingly posing a threat is not new, and will be discussed in the section on morality.

A related theme is raised by Article 89, which provides for the release of states from *Chicago Convention* obligations in case of war or emergency conditions. Lissitzyn puts it the following way: “The freedom of action of the contracting states whether as belligerents or as neutrals in case of war, or in case of declared state of national emergency, is expressly reserved.”<sup>33</sup> It could be argued that the invocation of this section would relieve a state of international responsibility for the shooting down of a plane. This viewpoint, though not necessarily incorrect, ignores the possible applicability to this situation of other international rules outside of the *Chicago Convention*, including the law of war. These controversial issues will be discussed in the context of the law of armed conflict, below.

The *Chicago Convention* also provides for the establishment of permanent prohibited zones for reasons of military necessity or public safety.<sup>34</sup> In this regard, each contracting state reserves the right to prohibit flight over the whole or any part of its territory “in exceptional circumstances or during a period of emergency.”<sup>35</sup> Such zones are of obvious importance but, in fact, do little to solve the problem at hand. A state must still decide whether to shoot down a flight, regardless of the zone in which it flies, and that decision will never be easy where the craft is civil.

Finally, Annex 2 of the *Chicago Convention*, promulgated pursuant to the authority of the ICAO, addresses the procedure to be followed during the interception of a civil aircraft. While it requires that interceptions must be undertaken as a last resort, the purpose of which must only be to identify craft, the issue of the use of weapons for the destruction of the craft is not addressed. Hence, although these provisions establish important guidelines in an attempt to standardize and improve the safety of interception procedures, they do not resolve the present problem. Most probably, the lack of guidance in Annex 2 stems from the belief that regulating this situation would involve an attempt to “codify the almost uncodifiable.”<sup>36</sup>

## **B. The Charter of the United Nations and Self-Defence**

The *Charter* is regarded by some as the zenith of international law, at least as regards the use of force.<sup>37</sup> Sadly, it has become more of a façade than a fortress.<sup>38</sup>

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<sup>33</sup> Lissitzyn, *supra* note 23 at 568 [footnote omitted].

<sup>34</sup> *Chicago Convention*, *supra* note 16, art. 9(a).

<sup>35</sup> *Ibid.*, art. 9(b).

<sup>36</sup> Peter Ateh-Afac Fossungu, “The ICAO Assembly: The Most Unsupreme of Supreme Organs in the United Nations System? A Critical Analysis of Assembly Sessions” (1998) 26 *Transp. L.J.* 1 at 22 (while this comment was made in relation to Article 3 *bis*, it is applicable by analogy to Annex 2).

<sup>37</sup> *Charter*, *supra* note 29.

Bowring has gone so far as to complain that “[t]he Security Council, and, in effect, the whole of Charter and customary law on the use of force and self-defence, have been jettisoned in the name of the war against terrorism.”<sup>39</sup> However, while the conclusion that the *Charter* machinery is inadequate to deal with both modern warfare and international terrorism may seem irresistible,<sup>40</sup> it is premature. States have failed to respect the system established for regulating the use of force, and not just in the context of the war on terrorism. By doing so, they have exacerbated the resentment that feeds into the reactionary rage they aimed to combat in the first place. However, the *Charter* remains a primary reference point in ascertaining the legality of a state’s use of force. In light of this and the direct reference to the *Charter* in the *Chicago Convention*, a consideration of its provisions is fundamental to the present investigation.

The basic rule in Article 2(4) requires that “[a]ll 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.” It is assumed that the use of force against a foreign civil aircraft, even within the boundaries of a nation state triggers international law in that it constitutes a “use of force” within the meaning of the above rule. A natural reading of Article 3(a) of the *Chicago Convention* supports the position that the *Charter* is implicated by the interception of an aircraft within a state’s territorial airspace, even if the plane is registered in that state. This article does not draw a distinction between home and foreign craft for the purposes of engaging the *Charter*, and allowing for such a distinction would lead to illogical practical results. It is submitted that this kind of reading would add unnecessary complexity to questions pertaining to the use of force against civil aircraft. Furthermore, Article 2(4) of the *Charter* is expressly limited by Article 51 of the same, which provides:

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. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.<sup>41</sup>

The scope of self-defence is a highly controversial issue.

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<sup>38</sup> For a discussion of the fissures between theory and reality in the Security Council see Niels Blokker & Nico Schrijver, eds., *The Security Council and the Use of Force: Theory and Reality, a Need for Change?* (Leiden: Martinus Nijhoff, 2005).

<sup>39</sup> Bill Bowring, “The Degradation of International Law?” in John Strawson, ed., *Law after Ground Zero* (London: GlassHouse Press, 2002) 3 at 15.

<sup>40</sup> Gregory M. Travalio, “Terrorism, International Law, and the Use of Military Force” (2000) 18 *Wis. Int’l L.J.* 145 at 173.

<sup>41</sup> *Charter*, *supra* note 29, art. 51 [Emphasis added].

## 1. TERRORIST ATTACK AS “ARMED ATTACK”

Much of the debate concerns the meaning of the phrase “armed attack”. As Gray notes, “[a]ll states agree that if there is an armed attack the right to self-defence arises, but there are disagreements as to what constitutes an armed attack.”<sup>42</sup> There is no consensus on whether or not terrorist acts fall within this definition.<sup>43</sup> Gray observes that “[o]ne of the most difficult questions arising out of 9/11 is whether the concept of ‘armed attack’ in Article 51 has undergone a revolutionary change so that it now extends to attacks by non-state actors in the absence of any state complicity.”<sup>44</sup> It would be perplexing if terrorist operations did *not* count as an armed attack given their massive destructive potential. Though it has been considered implicit in the terms of Article 51 that an “armed attack” must emanate from a state, there does not appear to be anything in Article 51 that would require this conclusion. Moreover, Security Council Resolution 1368 declared the right of self-defence in response to terrorist attacks.<sup>45</sup> However, Schmitt notes that “[w]hile it has become plain that non-State actors can be the source of an ‘armed attack’ under the law of self-defence, the issue of when an *individual act of terrorism* will rise to that level is murkier.”<sup>46</sup> Thus, the relevant question is whether a suicide flight constitutes an “armed attack”.

In the *Oil Platforms* case, regarding the American bombing of Iranian oil stations, ostensibly in self-defence, the International Court of Justice (ICJ) did not rule out “the possibility that the mining of a single military vessel might be sufficient” to constitute an “armed attack.”<sup>47</sup> The problem in that case was that, on the facts, the evidence of Iran’s involvement in the attack on an American vessel was inconclusive.<sup>48</sup> While this *dictum* suggests that a single terrorist attack could reach the threshold, the *kind* of attack required remains unclear.

The ICJ has provided some guidance on this point, indicating that an attack must be “most grave” in order to trigger the right of self-defence.<sup>49</sup> So, a suicide attack by a “general aviation craft” (a small plane) may not reach that threshold.<sup>50</sup> However, this is an unnecessarily restrictive approach to the notion of “armed attack”. The natural meaning of the concept has equal resonance in the spheres of war and crime. It is submitted that the problem is not *what* constitutes an armed attack in

<sup>42</sup> Gray, *supra* note 12 at 108.

<sup>43</sup> See Travalio, *supra* note 40 at 151-59.

<sup>44</sup> Gray, *supra* note 12 at 165.

<sup>45</sup> Threats to International Peace and Security Caused by Terrorists Act, SC Res. 1373 (2001), UN SCOR, 4385<sup>th</sup> mtg., UN Doc. S/RES/1373 (2001).

<sup>46</sup> Michael N. Schmitt, “*Bellum Americanum* Revisited: U.S. Security Strategy and the *Jus ad Bellum*” (2003) 176 *Mil. L. Rev.* 364 at 387 [emphasis added].

<sup>47</sup> *Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, [2003] I.C.J. Rep. 161 at 195.

<sup>48</sup> *Ibid.* at 195-96.

<sup>49</sup> *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at 101 [*Nicaragua*] (the Court’s consideration of the issue was restricted to attacks that had “already occurred”, *ibid.* at 103. While this point will be overlooked for the purposes of present argumentation, it is considered separately in the following section).

<sup>50</sup> Huskisson, *supra* note 10 at 145.

terms of scale. For example, a man hitting me with a stick is an armed attacker, and I consider his attack grave. Dinstein has argued persuasively along similar lines, noting that “[i]n reality there is no cause to remove small scale armed attacks from the spectrum of armed attacks.”<sup>51</sup> Hargrove echoes this position, arguing that Article 51 is not restricted “to especially large, direct, or important armed attacks.”<sup>52</sup> Hence, the notion of gravity or severity of an attack amounts to unhelpful legal clutter that is best thrown out.

Clearly then, the source of the problem (and the solution) lies in the proportionality of the response and in the distinction between crime and war. This distinction grows out of the statist ordering of the international system, the external and internal dominion over peoples of the concept of sovereignty. The validation of the use of force carries with it the image of a state sending fighter planes to drop bombs on another country or of infantry inserted in a foreign territory. In the fight against terrorism, this type of reaction is patently inappropriate. If a state officer could prevent a murder by shooting a dagger from the hand of a madman, he would do so, and his action would be legal as (extended) self-defence. Exactly the same is true of a terrorist who can be shot before he detonates a bomb in a tube station or of a sniper who can be killed before he pulls the trigger on a gun aimed at a political leader. When the notion of ‘state’ self-defence is disconnected from the image of military involvement in foreign lands the conclusion that the state can legally defend itself by using force in response to terrorist attacks becomes more palatable. This increased acceptability derives from the tailoring of the state response to the level of threat or aggression. To put the matter pejoratively, it is a symptom of disproportionate state use of force in response to minor insurrections that has perpetuated the artificial restriction of the category of “armed attack” so as not to legitimate projections of power in foreign lands. History furnishes us with countless examples, which need not be rehearsed here.

Having dealt with the notion of armed attack in the context of an isolated terrorist attack, the next issue is whether the state can respond in anticipation of an attack, before it has actually occurred. This may not seem to be relevant to the scenario where a state is contemplating firing on a civilian aircraft hijacked by terrorists, since the attack is already underway. However, the notion of pre-emptive attack is worth considering, firstly, because a civilian plane has only one kamikaze “shot”, and, secondly, security staff must operate in at least partial ignorance of the situation and intentions of those on board. What we are contemplating is a state firing before being fired upon.

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<sup>51</sup> Yoram Dinstein *War, Aggression, and Self-defence*, 2d ed. (Cambridge: Press Syndicate of the University of Cambridge, 1994) at 173.

<sup>52</sup> John Lawrence Hargrove, “The Nicaragua Judgment and the Future of the Law of Force and Self-Defense” (1987) 81 A.J.I.L. 135 at 139.

## 2. THE LEGALITY OF A STATE FIRING BEFORE BEING FIRED UPON

The President of the United States thinks that a state may fire pre-emptively:

Some have said we must not act until the threat is imminent. Since when have terrorists and tyrants announced their intentions, politely putting us on notice before they strike? If this threat is permitted to fully and suddenly emerge, all actions, all words and all recriminations would come too late. Trusting in the sanity and restraint of Saddam Hussein is not a strategy, and it is not an option.<sup>53</sup>

Aside from the factual inaccuracy of this declaration – many terrorists do give ample warnings<sup>54</sup> – it still indefensibly appeals to basic human urges. In reality, some of the more exorbitant interpretations of the right of self-defence, particularly those propounded by the Bush administration, could sensibly be described by the word “attack”. In domestic criminal law, if a person was aware that another was plotting his demise, the former would not be excused for killing the latter in “pre-emptive self-defence”. Such an action would constitute murder. The only legal route available to the prospective victim would be to inform the police of the other’s plot. For some, the lack of an effective international police force lends credence to United States “foreign policing.”<sup>55</sup> That being said, it is hard to argue against the position that respect for the *Charter* would greatly reduce the incidence of war, obviating the need for one superpower maintaining order from a position above the law. In December 2004, the United Nations *High-level Panel on Threats, Challenges and Change* authoritatively declared that “the risk to the global order and the norm of non-intervention on which it continues to be based is simply too great for the legality of unilateral preventive action, as distinct from collectively endorsed action, to be accepted. Allowing one to so act is to allow all.”<sup>56</sup> This short digression aside, self-defence in international law still requires an attack to have occurred or, at the very least, to be *imminent*.<sup>57</sup>

<sup>53</sup> President George W. Bush, “President Delivers “State of the Union”” (State of the Union address presented 28 January 2003), online: The White House, Office of the Press Secretary <<http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>>.

<sup>54</sup> Some terrorists, for example the Suffragettes in the United Kingdom, actively sought to avoid killing in order to emphasize, the morality of both their cause and the unacceptability of the absence of the female from the body politic. Osama bin Laden’s rhetoric, to give a prominent example, consists in large part of warnings. See Bruce Lawrence, ed., *Messages to the World: The Statements of Osama Bin Laden*, trans. by James Howarth (New York: Verso, 2005).

<sup>55</sup> For an excellent argument for the necessity of the United States taking on a international policing role see Robert Kagan, *Paradise and Power: America and Europe in the New World Order* (London: Atlantic Books, 2004).

<sup>56</sup> *A more secure world: our shared responsibility, Report of the High-level Panel on Threats, Challenges and Change*, UN GAOR, 59th Sess., UN Doc. A/59/565 (2004) 1 at 55, online: UN <<http://www.un.org/secureworld/report.pdf>>.

<sup>57</sup> For an excellent discussion of these rules, see Michael Byers, *War Law: International Law and Armed Conflict* (London: Atlantic Books, 2005).

The meaning of imminence was neatly expounded in the *Caroline* case: the then incumbent American Secretary of State said that the necessity to respond should be “instant, overwhelming, leaving no choice of means, and no moment of deliberation.”<sup>58</sup> Not a great deal of advancement has been made since then. At the other end of the scale to the Bush idiom, a handful of scholars maintain that the *Charter* forbids *any* right of anticipatory self-defence, requiring that an armed attack must *actually* have occurred.<sup>59</sup> In response it is argued that this reading leads to illogical and practically unworkable results. On this interpretation if a state must wait to be attacked before acting, and the attack consists of a single bombing, then the attack is over before the right accrues. The discrete attack being over, the usage of the term “defence” becomes unnatural whilst ‘retaliation’ would be a more apt description of the victim state’s reaction. A ban on using force until an actual attack has occurred would be both unrealistic and counterproductive.

A more natural reading of the section is that a state must wait until an attack has begun; until the missile is launched, bomb bays are opened, or tanks have rolled. This position has the additional advantage of consonance with domestic criminal law. One does not have to wait to be stabbed before striking a blade from an aggressor’s hand. That said, it is difficult to set limits on any form of anticipatory self-defence. It is the job of international lawyers to find workable distinctions that do not tie state hands until they actually *incur* damage *without* simultaneously giving them a green light on unrestrained pre-emptive force. The key must lie in the recognition that some manifestation of hostility, leading to the reasonable conclusion that an attack is imminent, triggers the right to respond with force. In this respect, fidelity to principles developed in domestic criminal systems is desirable. Those who wish to betray these long-standing principles tend to moralism, terrorism, or imperialism.

Naturally, civil aircraft seldom manifest hostility. In addition, the phrase “no moment of deliberation” is most perturbing in the context of the shooting of a passenger craft. Apparently, this was the case when a commercial airliner was reported to be 80 miles off Washington: “Cheney decided ‘in about the time it takes a batter to swing’ to authorize fighter jets scrambled from Langley Air Force Base in Hampton, Va., to engage it.”<sup>60</sup>

It is extremely difficult to conceive how a purely pre-emptive action against a civilian plane could be proportionate. Once a plane has manifested hostility, by deviating from a flight path, entry into a no-fly zone, erratic flying, or by threatening radio messages, the nature of the problem changes. That is, if a suicide attack is reasonably suspected to be underway, we are on different terrain. This discussion now turns to the related problem of imminence.

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<sup>58</sup> *Letter from US Secretary of State, Daniel Webster, to British Minister, Mr. Fox, (1840-41) 29 British & Foreign State Papers 1129 at 1137-38.*

<sup>59</sup> See e.g. Dinstein, *supra* note 51.

<sup>60</sup> Milbank, *supra* note 1.

### 3. PROPORTIONALITY AND IMMINENCE

Proportionality and imminence are considered together because, as will be seen, the imminence of the impact of a plane impinges on the proportionality of shooting it down and vice versa.

The ICJ has held that “[t]he submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law... This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.”<sup>61</sup>

Further, as Gray has observed, “[a]s part of the basic core of self-defence, all states agree that self-defence must be necessary and proportionate.”<sup>62</sup> Therefore, these factors are vital to an understanding of the legality of shooting down a civilian plane. And pre-emption creates difficulties for the calculus of necessity and proportionality. First, it will seldom be possible, in a situation where terrorists have hijacked a civil plane for use as a suicide missile, to *know* whether or not it is *necessary* to shoot it down. Even in the highly unlikely event that a terrorist radios ground control to signify her intention, it is possible, given the practical ingenuity and deviousness of terrorist plots, that her message is a hoax. Second, questions of proportionality involve the balancing of risk against indeterminacy: How can the proportionality of firing upon a passenger plane that may crash into a building be measured if the potential damage to be caused is averted? The practicalities involved in this balancing act are considered next.

In a recent case before the *Bundesverfassungsgericht (BvG)*,<sup>63</sup> the *Unabhängige Flugbegleiter Organisation* argued that there is always the danger in a potential hijacking that the situation on board might be misunderstood by ground control. Part of the problem is that the lines of communication between the craft and the ground are long and disjointed. The pilot may also be largely ignorant, receiving only indirect information from the cabin staff. The ground staff are blind following the blind. In the event that control of the aircraft is regained, there is the further danger that this information will not be communicated in time, or may not be believed even if transmitted.<sup>64</sup> Though these challenges are not insurmountable,<sup>65</sup> it was by dint of such communicational complexities that the *BvG* drew the conclusion that “it would be practically impossible for ground controllers, deciding under extreme time pressure, reliably to judge whether or not an emergency situation, persisted.”<sup>66</sup> The determination that a flight falls into the category of “threat” is exceedingly difficult to

<sup>61</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at para. 41.

<sup>62</sup> Gray, *supra* note 12 at 120 [emphasis added].

<sup>63</sup> *Die Luftsicherheitsgesetzentscheidung, BVerfG, 1 BVR 357/05 vom 15.2.2006* [2006] BVerfG, 1 BVR 357/05 vom 15.2.2006 [Die Luftsicherheitsgesetzentscheidung].

<sup>64</sup> For this type of argument see *ibid.* at para. 125.

<sup>65</sup> For example, passwords could be used to ensure the integrity of messages. I am grateful to Professor Kramer for this practical suggestion.

<sup>66</sup> *Die Luftsicherheitsgesetzentscheidung, supra* note 63 at para. 128 [translated by author].

make, given the volume of modern air traffic. This relates back to the question of whether a hijacked plane can constitute an “armed attack” before impact. On this point, *Vereinigung Cockpit* insightfully submitted to the *BvG* that an assessment of the motivation of a hijacker will remain speculative until the last moment of the hijack.<sup>67</sup> Remember, this was *not* the case on September 11 due to the serial nature of the flights - sometimes intentions might be terrifyingly clear.

Another problem in the application of the principle of proportionality is that the success or failure of the terrorists’ suicide mission is contingent on countless variables. Added to this is the fact that the situation on board could change in the course of several seconds.<sup>68</sup> The quality of preparation for emergencies affects the determination of actions taken in accordance with apparent necessity on the relevant day. Consequently, energy should be devoted to improving intelligence and security checks on the ground, reinforcing cabin security, improving cabin-steward-ground communication lines and techniques, and more effective screening of, or indeed banning of, hand luggage.<sup>69</sup>

The lesson learned from the *USS Vincennes*’ erroneous destruction of a civilian air liner was that aircraft recognition capabilities are an imprecise science and that decisions made in haste court disaster. This uncertainty bolsters the argument that a state’s effort to counter aircraft terrorism must focus on clever, pre-take-off preventive measures rather than crude in-flight cures.

As will be discussed in more detail later, in light of many of these considerations, the *BvG* concluded that the necessity of “going to guns” against an aircraft will *virtually never* be established. While this is perhaps an overstatement, states will inevitably overreact sometimes. As such, the ever-present possibility of a disproportionate reaction is built into the proportionality analysis. Here, much of the calculus will depend on factors including the sensitivity of the target (e.g. a city, a military base, a nuclear installation, an oil platform, a field), the number of persons at risk on board and on the ground, and the size and speed of the plane. These factors should be considered now in order to facilitate speedy decision-making in times of emergency flights.

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<sup>67</sup> *Ibid.* at para. 68.

<sup>68</sup> *Ibid.*

<sup>69</sup> If flight food, entertainment, communications, baggage handling, and medical provisions were of a higher quality, complaints about bans on hand luggage would be correspondingly subdued. While the nature of such security arrangements and safety precautions are beyond the scope of this paper, however, for a summary of measures that can be taken to prevent accidental aircraft shootings see the International Civil Aviation Organization, “Resolution and Report Concerning the Destruction of Iran Air Airbus on July 3, 1988” (1989) 28 I.L.M. 896 [Destruction of Iran Air] and International Civil Aviation Organization, *Secretary General’s Report on the Korean Air Lines 007 Incident*, Summary of Findings and Conclusion, Restricted Attachment (1983) ICAO Doc. C-WP/7764 [Secretary General’s Report].



#### 4. THE IRRELEVANCE OF THE CHARTER

As was mentioned earlier, self-defence under Article 51 is usually mobilized to justify incursions into the territory of another state. This is not the problem here. Correspondingly, some commentators hold that the right to use force in self-defence is not limited to “armed attack”. The argument runs as follows:

[s]ince [Article 51] is silent as to the right of self-defence under customary law (which goes beyond cases of armed attack), it should not be construed by implication to eliminate that right. ... It is therefore not implausible to interpret Article 51 as leaving unimpaired the right of self-defence as it existed prior to the Charter.<sup>70</sup>

This view – that Article 51 leaves untouched a pre-existing right – is very difficult to reconcile with both the ICJ’s clear statement to the contrary in *Nicaragua*<sup>71</sup> and the tide of scholarly opinion.<sup>72</sup> However, perhaps most importantly:

Even when relying on a wide right of self-defence in the absence of an armed attack on their territory, or on their armed forces outside their territory, states invoke Article 51. Either this is just ritual incantation of a magic formula, not expected to be taken seriously, or their case is implicitly that Article 51 allows a wider customary right, including anticipatory self-defence or forcible response to terrorism.<sup>73</sup>

Thus, state practice can be interpreted as supportive of a wider right. International law does not comprise only scholars’ writings and the ICJ’s pronouncements. The better view is not to limit “armed attack” to major incidents, but to focus on proportionality and imminence in order to instantiate a more nuanced right of self-defence.

Nevertheless, as has been demonstrated, a consideration of the *Chicago Convention* and the *Charter* does not go a long way in illuminating the legality of destroying a threatening civilian craft, though the notions of imminence and proportionality are key. The consolatory consequence of the many air tragedies that have occurred is that the rules of customary international law provide more detailed guidance, albeit only by inference, on this theme. However, before discussing rules it is worth contemplating the general defences available to states for acts that would otherwise be illegal under international law.

<sup>70</sup> Oscar Schachter, “International Law: The Right of States to Use Armed Force” (1984) 82 Mich. L. Rev. 1620 at 1633-34.

<sup>71</sup> *Nicaragua*, *supra* note 49 at 103.

<sup>72</sup> See *e.g.* Dinstein, *supra* note 51.

<sup>73</sup> Gray, *supra* note 12 at 99.

### C. General Customary International Law

Various legal defences to state breaches of international responsibilities are codified in the Draft Articles on State Responsibility,<sup>74</sup> generally agreed to reflect customary international law.<sup>75</sup> The first defence that is materially relevant is distress. Recall that the position taken in this article is that though shooting down a plane may be justified, it should never be excused; while it may be right in the circumstances, there is great merit in recognising it as a wrong, or a lesser evil.

#### 1. DISTRESS

Article 24(1) provides: “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.”<sup>76</sup> This paragraph will not apply if “the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or ... the act in question is *likely to create a comparable or greater peril*.”<sup>77</sup>

Huskisson argues that “the defense of distress could be invoked as a justification for destroying” a foreign civil aircraft posing a threat to persons on the ground “even though it would involve killing all on board.”<sup>78</sup> However, he further argues that

the use of this defense would probably not be appropriate to justify the shutdown of an aircraft that is likely to crash far from populated areas ... nor would it justify the shutdown of an airliner carrying hundreds of persons in order to save the lives of a few on the ground. However, when the threat is immediate enough, the defense of distress is more important in this area than even the law of self-defense.<sup>79</sup>

This analysis glosses over certain complexities. First, the “author” of the act in question in a shutdown scenario is not only entrusted with the lives of those on the ground but is also responsible for those in the aircraft, regardless of nationality. Second, Article 24(2) prevents reliance on the defence of distress where the act in question - in this case, the firing upon a civil aircraft - is *likely to create a*

<sup>74</sup> “Report of the International Law Commission on the work of its fifty-third session: Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries” in *Yearbook of the International Law Commission 2001*, vol. II, part 2 (New York: UN, 2001) at 31, online: UN <[http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf)> [Responsibility of States].

<sup>75</sup> *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 at 47.

<sup>76</sup> *Ibid.*, art. 24(1).

<sup>77</sup> *Ibid.*, art. 24(2) [emphasis added].

<sup>78</sup> Huskisson, *supra* note 10 at 153.

<sup>79</sup> *Ibid.* at 154 [footnote omitted].

*comparable or greater peril*. It is difficult to distinguish the loss of life on a plane from the loss of life on the ground, unless one is prepared to engage in human arithmetic<sup>80</sup> which, it is suggested, is regrettable but inevitable in war or emergency situations. Indeed many states with public health services have policies on organ donation built on human arithmetic. The same logic that dictates that a vital organ should be given to an otherwise healthy child rather than an elderly person on their deathbed also drives the conclusion that, if it is possible to save persons on the ground by killing those hostages whose lives are effectively over, inaction would be more reprehensible than action. Third, the difficulties of assessing the immediacy of the threat are manifest. They have already been discussed and need not be rehearsed here. Suffice to recall the confusion which prevailed on September 11. The goal here is not armchair moralising, but to provide practical answers to potential problems, however unpleasant the contemplation of those problems might be. Fourth, state practice demonstrates, contrary to Huskisson's view, that notions of "self-defence" have been more important in this field than the idea of "distress". Finally, it does not follow from the premise that an act is the right thing or least wrong thing to do, that it should be legal.<sup>81</sup> Having hopefully demonstrated the slipperiness of this purported solution, the second potential defence requiring examination is that of necessity.

## 2. NECESSITY

Article 25(1) of the Draft Articles provides:

Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:

- (a) Is the *only way* for the State to safeguard an essential interest against a *grave and imminent peril*; and
- (b) Does not seriously impair an *essential interest* of the State or States towards which the obligation exists, or of the international community as a whole.<sup>82</sup>

Article 25(2) states that, in any event, "necessity may not be invoked by a State as a ground for precluding wrongfulness if: ... the international obligation in question excludes the possibility of invoking necessity". The existence of the necessity defence has been confirmed by the ICJ in the *Gabčíkovo-Nagymaros* case.<sup>83</sup> The Court went further and gave some indication as to the *content* of the defence,

<sup>80</sup> Discussed below in Section V under the title The Sum of the People, at p. 37.

<sup>81</sup> For similar arguments in the context of coercive interrogation, see Rory Stephen Brown, "Torture, Terrorism, and the Ticking Bomb: A Principled Response" (2007) 4 J. Int'l L. & Pol'y and Jeremy Waldron, "Torture and Positive Law: Jurisprudence for the White House" (2005) 105 Colum. L. Rev. 1681.

<sup>82</sup> Responsibility of States, *supra* note 74 [emphasis added].

<sup>83</sup> *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 7 at 51.

holding that it was not available on the facts (predominantly) because the imminence of the threat was too uncertain.<sup>84</sup> A further indication as to the application of the defence was provided in the *State Responsibility Commentaries* to the effect that “[i]t has been invoked to protect a wide variety of interests, including safeguarding the environment, preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian population.”<sup>85</sup> Accordingly, national security is precisely the kind of interest envisioned by the ICJ as falling into the category of “essential interest”. However, four considerations militate against the conclusion that a state may invoke necessity as a defence for firing upon a civilian passenger plane.

First, Article 25 refers to a *grave and imminent* danger. The problems involved in determining the immediacy of the threat have been set out above. The gravity of the peril is equally problematic. It is frightfully difficult to predict the flight path of a hijacked plane with any degree of accuracy. Even if it were possible, the situation is of such volatility that it may change in the course of a few seconds. Hence, it is very difficult to make a judgment as to the gravity of the threat. Even if the decision maker is prepared to weigh life against life, it will be very tricky to predict that more lives will be lost if the plane is shot down than if it is not. Second, Article 25(a) forbids the breach of an international obligation unless the act is the *only way* for the state to safeguard the essential interest. There are other ways for a state to preserve the safety of civil aviation, including improved security checks before embarkation. Failure to do so should negatively affect the assessment of whether it was *necessary* to shoot down the plane and whether state carelessness contributed to the necessity of using lethal force.<sup>86</sup> Third, Article 25(2) dictates that a state may not invoke the necessity defence if it is excluded by the international obligation in question. In this case, the international duty is enshrined in Article 3 *bis* of the *Chicago Convention*, specifically, to refrain from the use of force against civilian aircraft. This Article expressly states that it does not alter states’ rights and obligations under the *Charter*. In turn, the *Charter* allows national projection of force exclusively in self-defence, thereby arguably barring a state from invoking the necessity justification.<sup>87</sup> Finally, there is a more deep-seated reason to reject the necessity defence: a famous Englishman, Oliver Cromwell, who knew all about force, said that, “[n]ecessity hath no law. Feigned necessities, imaginary necessities are the greatest cozenage that men can put upon the Providence of God, and make them pretenses to break known rules by.”<sup>88</sup>

Though this argument tends to the metaphysical, there are certain rules, the departure from which constitutes an invitation to anarchy<sup>89</sup> and the tendency to equate national security with necessity is well documented in case law. The reader is invited

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<sup>84</sup> *Ibid.* at 42-43.

<sup>85</sup> Responsibility of States, *supra* note 74 at 83.

<sup>86</sup> For a judgment to similar effect, see *McCann and Others v. United Kingdom* (1995). 21 E.H.R.R. 97 [McCann].

<sup>87</sup> See above the discussion regarding Article 51 of the *Charter* and its effect in international law.

<sup>88</sup> Oliver Cromwell, in a Speech to the First Protectorate Parliament (12 September 1654).

<sup>89</sup> See Waldron, *supra* note 81.

to consider two propositions which, it is argued, would represent an advance in the modern understanding of morality and law. First, a prohibition can have great value even if we anticipate its violation in certain extreme circumstances. Second, punishment for choosing the lesser of two evils, for acting in a manner which was *good* and yet still *wrong*, or *bad* and yet still *right*, is desirable for society, individuals, and those whose rights have weighed less in the scales.<sup>90</sup>

Having discussed the general defences in customary international law, it is time to turn to the more specific rules of air law.

#### D. Customary Law of the Air

The statements made by states in the aftermath of international crises are of great importance for determining the content of *opinio juris*.<sup>91</sup> However, the interpreter must be mindful of the fact that such declarations are as political as they are legal, and that states may in reality under-, over- or misstate the content of a legal norm in order to serve a domestic or international political goal.<sup>92</sup> This notwithstanding, states also comment on international law in order to convince other members of the international community of the correctness of their legal posture. In addition, the inter-state recognition of external standards by which behaviour is measured sets apart *ex post* legal argumentation from “pure political debate between nations”<sup>93</sup> and contributes to rule formation in an important way.

##### 1. MILITARY AIRCRAFT

Without going into the many largely irrelevant incidents of the destruction of military aircraft, it is worth noting scholarly opinion on the interception of such craft in order to construct a useful comparator in our consideration of civil planes. Lissitzyn rightly notes that “[i]t is ... significant that there have been numerous alleged, and several admitted, cases of deviation of Allied aircraft from the corridors prescribed for flights to Berlin over East Germany in which the Soviet forces apparently refrained from firing on the intruders.”<sup>94</sup> That is, care must be taken in this field of international law not to rely on the prominent exception to (dis)prove the rule. Notwithstanding the mystery surrounding these incidents, and in spite of our healthy scepticism as to the verisimilitude of what governments tell us, what they do say gives us clues as to what they would regard as ideal or legal behaviour (even if they have flagrantly departed from it themselves).

In a seminal survey of intruding aircraft, Lissitzyn observes:

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<sup>90</sup> These ideas are not new but have fallen into disuse. For example, the idea that the unjust man lives with an inquietude of which the just man is free is Epicurean.

<sup>91</sup> See Andreas F. Lowenfeld, “Looking Back and Looking Ahead” (1989) 83 A.J.I.L. 336 at 337; Harold G. Maier, “*Ex Gratia* Payments and the Iranian Airline Tragedy” (1989) 83 A.J.I.L. 325 at 325.

<sup>92</sup> See generally Legal Argumentation in International Crises, *supra* note 15.

<sup>93</sup> *Ibid.* at 1210.

<sup>94</sup> Lissitzyn, *supra* note 23 at 580 [footnote omitted].

The striking fact is that the Soviet Government has in no case claimed the right to open fire on an intruding aircraft without warning, but alleged in most of these cases that the intruders had been the first to open fire. In some cases where this was not alleged, the Soviet fighter was said to have opened fire by way of warning only.<sup>95</sup>

This is a powerful observation. Based on the case law, it could even be argued that during the Cold War there was a convention, if not a customary international law rule, of not firing on intruding aircraft until fired upon. At the very least, it can be maintained that

[n]ations clearly have a duty, before using force against intruding aircraft, to determine that the aircraft are hostile. ... [G]iven that the lives of civilian passengers are at risk in cases of mistaken identification of intruding aircraft, the failure to use air-to-air identification procedures can be justified only in extremely compelling circumstances.<sup>96</sup>

Hassan concludes that practice demonstrates that intruding military aircraft “*should be warned by well-recognised interception procedures ... [so] a fortiori a civilian passenger aircraft must at least be entitled to the same treatment.*”<sup>97</sup> Even back in 1953, Lissitzyn claimed that

[i]n cases where there is reason to believe that the intruder’s intentions may be hostile or illicit, a warning or order to land should normally be first given and the intruder may be attacked if it disobeys. ... This standard may be regarded as a special application to aviation of a more general standard of international law restraining states, in the exercise of their otherwise undoubted sovereign powers, from unnecessarily or unreasonably endangering the lives and property of foreign nationals.<sup>98</sup>

I suggest that a more advanced argument can be developed on the same basis. Practice and reason would dictate that, at least in peacetime, no military aircraft may be shot down unless it has been warned *and* it displays hostile intent, for example, by commencing a bombing run over a sensitive area, firing shots, or opening missile bays. Even if some degree of danger or threat can be inferred from a departure from flight path, entry into a no-fly zone, erratic flying, unresponsiveness to warnings, or radio silence, by virtue of not being armed a civilian craft will not normally manifest hostile intent until the very last moments. Authorities must be alert, prepared, and patient. Hassan, writing before the tragedy of September 11, argued along similar lines:

*Prima facie* a passenger airliner, whether trespassing intentionally or not,

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<sup>95</sup> *Ibid.*

<sup>96</sup> Legal Argumentation in International Crises, *supra* note 15, at 1203.

<sup>97</sup> Hassan, *supra* note 32 at 718 [emphasis in original].

<sup>98</sup> Lissitzyn, *supra* note 23 at 587 [footnote omitted].

cannot be considered to pose that kind of military threat to a territorial sovereign which can justify its destruction by force by the subjacent State. A mere refusal to land, after being ordered to do so, would not be, it is submitted, a valid basis for use of force by the territorial sovereign concerned. Actual hostility committed or about to be committed by the trespassing aircraft would be the only basis which could juridically allow the subjacent State to use force against such an aircraft.<sup>99</sup>

It is noteworthy that Hassan does not expressly exclude the legitimacy of destroying a passenger plane. A conclusion based on practice related to military craft is unsuited to an inquiry into the legality of firing on civilians. Tragically, there are numerous examples of the mistaken destruction of civilian craft available to aid the analysis.

## 2. CIVILIAN CRAFT

These cases will now be discussed in order to determine whether any legal principles can be distilled from the pronouncements made by states after the shootings.<sup>100</sup>

On the 29 April 1952, an Air France Airliner, alleged to have deviated from its scheduled flight path through the Berlin Corridor, was attacked by Soviet MiG-15 fighters using cannons and guns. Mercifully, no lives were lost. The remaining four powers stated that, irrespective of the location of a civil aircraft, the usage of weapons (even in warning) was “entirely inadmissible and contrary to all standards of civilized behaviour.”<sup>101</sup> As Huskisson correctly observes, the most telling reaction was the Soviet characterisation of the event as accidental, in that the gunfire was intended to be a warning only.<sup>102</sup> Though this does not exclude that the Soviets reserve a right to destroy a civil craft, the perfectly sensible Soviet position appears to be that such action would not have been warranted in the case of a mere intrusion into airspace.

On the 23 July 1954, Chinese fighters shot at a British flight, causing it to crash into the sea. Ten passengers and three crew members were lost from the 21 persons on board. Of course, the incident was condemned by the British and Americans, who referred to the breach of “universally recognized rules of international law,”<sup>103</sup> but the more interesting response was again that of the assailants. The Chinese expressed a belief that the craft was hostile, headed for a sensitive naval installation on Hainan Island. Again, in the language of mistake (this time identification), the Chinese issued a formal apology. The obvious implication is that they would never openly have fired upon the plane or condoned the interception

<sup>99</sup> Hassan, *supra* note 32 at 722 [emphasis in original].

<sup>100</sup> For detailed discussions of these events, see Major Bernard E. Donahue, “Attacks on Foreign Civil Aircraft Trespassing in National Airspace” (1989) 30 A.F.L. Rev. 49; Lissitzyn, *supra* note 23.

<sup>101</sup> *The New York Times* (1 May 1952), cited in Lissitzyn, *ibid.* at 574.

<sup>102</sup> Huskisson, *supra* note 10 at 128.

<sup>103</sup> See generally Lowenfeld, *supra* note 91.

of the craft had they been aware of its civil status.

On the 27 July 1955, an Israeli passenger craft, headed from London to Tel Aviv, encroached on Bulgarian aerial territory (outside of its assigned Grecian flight path) and was summarily obliterated by state fighters with a total loss of life. The British affirmed that the shooting down of a civil aircraft in peacetime was forbidden and the French, in a comment not typical of their diplomacy, denounced the Bulgarian response as an “act of war.”<sup>104</sup> Bulgaria’s initial response was to indicate intent to punish the fighter pilots. It later withdrew from this position and blamed the crew of the Israeli plane for the entire incident. Sadly, despite concerted efforts by the United States, the United Kingdom and Israel, the case before the ICJ was hampered by the Bulgarian refusal to submit to its jurisdiction. On the basis of the Israeli Memorial,<sup>105</sup> Hassan concludes that “a State which owns a civil aircraft which has trespassed into another country’s air space can legally expect that the subjacent State – *instead of shooting down the intruder straight away* – will issue the aircraft with appropriate warnings and then take measures to make it land safely.”<sup>106</sup> Such an approach to international aviation still seems dangerous. Though this case cannot be ignored as an undiluted expression of sovereignty over airspace, like all Cold War cases its relevance for today’s assessment is refracted through a historical lens. The brusque Bulgarian stance is perhaps best accounted for by the then-prevailing chill winds in the international community and a crude conviction that respect (or at least the semblance thereof) for the states’ territorial integrity would facilitate peaceful international relations.

On the 21 February 1973, Israeli interceptors engaged a Boeing 727 passenger craft over the Sinai Peninsula, a highly sensitive area replete with military installations. After failed attempts to cause the plane to land, it was adjudged to be a suicide flight, and destroyed. Despite Israel’s statement that it would not have fired had it known that it was a passenger craft,<sup>107</sup> the ICAO condemned the shooting as a flagrant violation of the “principles enshrined in the Chicago Convention.”<sup>108</sup> It should be mentioned that Israel expressed its profound sorrow at the tragedy and paid compensation for each victim. This is a particularly interesting case. Assuming the veracity of the Israeli contention, the condemnation by the Council indicates that it is unacceptable to bring down a civilian craft, even if its mission is of the suicidal variety. Granted, this interpretation reads much more into the Council statement than it contains but the Council’s condemnation and the extremely negative reaction of the international community stand in stark contrast to Huskisson’s afore-mentioned contention that “[i]nternational law will clearly excuse the shootdown of an airliner

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<sup>104</sup> See Eric Edward Geiser, *The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime*, 4 J. Int’l Legal Stud. (1998) 187 at 195.

<sup>105</sup> *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria)*, Preliminary Objections, [1959] I.C.J. Rep. 127 at 130.

<sup>106</sup> Hassan, *supra* note 32 at 717 [emphasis added].

<sup>107</sup> Donahue, *supra* note 100 at 59.

<sup>108</sup> International Civil Aviation Organisation, “Council Resolution Concerning Israeli Attack on Libyan Civil Aircraft” (1973) 12 I.L.M. 1180 at 1180.



being used in a suicide attack.”<sup>109</sup> At the very least, it can be deduced from this case that the international community will require a very high standard of proof that a state considered a civil aircraft to pose a military threat before it will condone its destruction. The invocation of military necessity as an international law justification in such circumstances – Israel’s original tactic – is particularly suspect. This article poses the deeper question: If states and peoples regret actions taken in legitimate self-defence, why should those actions be legal? Would the criminalization of such actions express that very regret? Would not the criminalization of the responsible defence secretary express society’s deep repentance that it resorted to such extreme means for the protection of its own? And would it not be in the official’s own interests?

April 20 1978 was marked by an amazing piece of flying by the captain of Korean Airlines Flight 902. After straying into USSR airspace, his Boeing 707 plane was hit by a missile fired from a MiG. Despite losing most of a wing, the pilot managed to land the plane on a frozen lake. Only two passengers perished. The case is interesting for several reasons. Firstly, there was little diplomatic outrage. This may be explained by the Korean desire to secure the safe return of their flight crew, the relatively low loss of life, or the Soviet stranglehold on the United Nations. Secondly, American intelligence suggests that Soviet rules of interception did not provide for the engagement of civil aircraft, and that a conviction on the ground identifying the plane as a reconnaissance craft motivated the order to fire.<sup>110</sup> Though an intelligence report carries little weight in the determination of an international norm, it contextualizes the Soviet reiteration of their sovereign right to defend their airspace against any intrusion.

The events of the 31 August 1983 are infamous. Having allegedly drifted off its course to Seoul, Korean Airlines Flight 007 was tracked by Soviet interceptors for over an hour. They eventually fired on the passenger plane, causing it to descend into the sea. Due to substandard visual identification procedures and an unusual angle of approach employed by the Soviet fighters, it is not beyond the realm of possibility that “neither the Soviet pilot nor ground controller ever appreciated that the target was a civilian passenger airliner.”<sup>111</sup> In fact, the findings of the ICAO confirm that the Soviets believed that KAL 007 was a spy plane.<sup>112</sup> This case evoked strong condemnatory statements from the international community – both the ICAO and the United Nations held emergency sessions. Australia stated that it was unequivocally impermissible to fire upon an unarmed civil aircraft that had no military purpose,<sup>113</sup> and the United States described the tragedy in the evocative terminology of criminality against humanity.<sup>114</sup> The Australian comment leaves the door open to firing on a civilian plane if it can be construed as serving a “military purpose”. That said, whether a passenger plane that has been hijacked by suicide terrorists falls into

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<sup>109</sup> Huskisson, *supra* note 10 at 130.

<sup>110</sup> Donahue, *supra* note 100 at 61-62.

<sup>111</sup> *Ibid.* at 62 [footnote omitted].

<sup>112</sup> Secretary General’s Report, *supra* note 69.

<sup>113</sup> Major John T. Phelps II, “Aerial Intrusions by Civil and Military Aircraft in Time of Peace” (1985) 107 *Mil. L. Rev.* 255 at 257.

<sup>114</sup> *Ibid.*

this category is debatable; this issue is discussed below in reference to the law of war. For present purposes, the vehement condemnation of this incident both in the ICAO and on the part of states should be noted. This precipitated the amendment to the *Chicago Convention* which replaced the duty of “due regard” for civil aviation with Article 3 *bis* in its present form. Therefore, it is clear that, after this atrocity, there was consensus in the international community that the rule restraining the use of force against civilian aircraft in flight needed reinforcement.

On the 3 July 1988, Iran Air Flight 655 was shot down by the floating artillery of *USS Vincennes*. Protesting that the shooting had not violated international law, the United States invoked the language of reasonable mistake and self-defence, arguing that it had been part of an ongoing battle, and that it had fired upon what it believed to be a hostile Iranian military aircraft. The reasonableness of that mistake has subsequently been called into question, *inter alia*, by an ICAO fact-finding investigation.<sup>115</sup> In its weakest form, the legal principle enshrined in the ICAO Report and in third state criticism is, as stated by Huskisson, that “[t]he international community would simply require more positive identification before it would tolerate such shootdowns.”<sup>116</sup> It is questionable whether it will *ever* be acceptable for any state to fire upon a civilian passenger craft, whatever the circumstances. Best efforts must be made to identify the plane, its intentions and its status, before warnings – let alone shootdown – are even contemplated.

One incident stands out as an especially flagrant violation of international law. The “Brothers to the Rescue”, a small political group with access to aircraft, had taken to using incursions on Cuban airspace as an expression of political dissatisfaction. Tired of this behaviour, on the 24 February 1996, the Cubans scrambled MiGs and destroyed two small Cessna aircraft belonging to the organization without so much as a warning shot. This case is worth mentioning because it triggered an international response that reaffirmed the status of Article 3 *bis* as an expression of customary international law. This confirmation came first from the ICAO and was later affirmed by the Security Council.<sup>117</sup>

The afore-mentioned practice of shooting drug trafficking craft in South America, originating in the 1990s, has attracted little international attention and has not been widely condemned. This is not grounds for concluding that the practice of a state shooting down a domestic civil craft is not illegal under customary international law. Particularly in an embryonic international legal order, the lack of evidence for a prohibition does not mean that it does not or should not exist. A simple retort to this position is that customary international law relies on evidence of both state practice and *opinio juris* for its existence.<sup>118</sup> However, to deploy this argument in order to

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<sup>115</sup> See Destruction of Iran Air, *supra* note 69.

<sup>116</sup> Huskisson, *supra* note 10 at 132.

<sup>117</sup> United Nations, Press Release, “Security Council Condemns Use of Weapons Against Civil Aircraft; Calls on Cuba to Comply With International Law” (27 July 1996), online: UN <<http://www.un.org/News/Press/docs/1996/19960727.sc6247.html>>. See also SC Res. 1067, UN SCOR, 3683d Mtg., UN Doc. S/RES/1067 (1996).

<sup>118</sup> *Nicaragua*, *supra* note 49 at 108-09.

exclude the operation of the customary rule against the use of force against civil aircraft irresponsibly relies on the weakness of the international system of rule formation.<sup>119</sup> Further, it should be borne in mind, as noted above, that both states and the Security Council have made statements to the effect that Article 3 *bis* reflects customary international law and that it makes no distinction as between foreign or domestic craft. As such, it is submitted that even this intra-state practice is contrary to customary international law. The shooting of drug planes is particularly hard to justify, as they have small tanks and their crew can be arrested on landing, a luxury not available when it comes to suicide bombers. Even if this were not the case, any municipal destruction of a domestic or foreign civil aircraft remains subject to the law of armed conflict, considered below.

### E. The Law of Armed Conflict

The ICJ has held that, “a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the laws applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.”<sup>120</sup> For present purposes, this presents another yardstick by which to measure the legality of the destruction of a civilian plane. That said, it would be artificial unequivocally to accept the Court’s declaration for two reasons. Firstly, the question before the ICJ related to potential nuclear warfare, a situation very different from a terrorist attack in peacetime. Secondly, it is not the case that a state resorting to force in self-defence or in defence of its citizens is automatically at war. However, it has forcefully been argued that the United States is at war with Al-Qaeda and that, as such, terrorist acts should be responded to according to the strictures of the norms of war rather than those of crime.<sup>121</sup> As such, it is worth considering (if only eventually to reject) the argument that a hijacked plane should be responded to within the framework of the law of armed conflict. Certainly, encroachments led by the United States into the Middle East now mean that an international armed conflict is taking place, at least in broad terms. As for international law, it is at least arguable that the traditional definition of armed conflict is not made out.<sup>122</sup> However, for the purposes of argumentation, this definitional impediment may be overlooked on the basis that the line of demarcation between states of war and peace is increasingly blurred.<sup>123</sup> A fusing or mutual enrichment of the two sets of norms is desirable.

The law of armed conflict comprises, in part, the 1949 Geneva Conventions which are almost universally considered representative of customary international

<sup>119</sup> For this type of argument, see Huskisson, *supra* note 10.

<sup>120</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 245 [*Nuclear Weapons*].

<sup>121</sup> See David Meltzer, “Al Qa’ida: terrorists or irregulars?” in John Strawson, ed., *Law after Ground Zero*, (London: GlassHouse Press, 2002) 71.

<sup>122</sup> A difference between ‘two states’ continued by military means is required to trigger the Law of Armed Conflict. See the discussion of this issue in *United States v Manuel Antonio Noriega 808 F. Supp. 791 (SD Fla. 1992)* at 795.

<sup>123</sup> See Keith Hayward & Wayne Morrison, “Locating ‘Ground Zero’: caught between the narratives of crime and war” in John Strawson, ed., *Law after Ground Zero* (London: GlassHouse Press, 2002) 139.

law.<sup>124</sup> Indeed, the ICJ has declared that the fundamental rules flowing from these principles bind all states, irrespective of whether they have ratified the Hague and Geneva Conventions, since they constitute “intransgressible principles of international customary law”<sup>125</sup> at the core of which lies the “overriding consideration of humanity.”<sup>126</sup> There are three principles of this body of law that are relevant to the question at hand. Before considering these three principles, it is tentatively submitted that the Martens clause is relevant to the analysis at this stage. The brainchild of Russian diplomat Fyodor Fyodorovich Martens first appeared in the Hague Convention II containing the Regulations on the Laws and Customs of War on Land in 1899. It reads:

Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.<sup>127</sup>

The legal import of this text has been the subject of much debate, making it an unstable foundation for arguments about the law.<sup>128</sup> Indeed, the clause would appear to be devoid of any substantive legal content. However, it is used here as a *canon of construction* where there is ambiguity in the legal standards to be applied in a particular case of international humanitarian law. In such circumstances, the clause compels the interpreter to construe the law of war in a way that is consonant with general standards of humanity and the demands of the public conscience as distilled from international human rights standards and declarations of representative international bodies.<sup>129</sup> Thus, in attempting to ascertain the true meaning of international humanitarian principles, the Martens clause directs the observer to have reference to international human rights standards, such as those developed in the jurisprudence of the European Court of Human Rights. Hence, this interpretative construct supports analysis based on the jurisprudence of human rights standards. Further, the Martens clause enjoins the lawyer to attempt to square his conclusions with the assertions of international organizations, including the U.N. and the ICAO.

<sup>124</sup> At the end of 2003, almost all the world's States - 191, to be precise - were party to the Geneva Conventions.

<sup>125</sup> *Nuclear Weapons*, *supra* note 120 at 257.

<sup>126</sup> *Ibid.* at 262.

<sup>127</sup> Translation reported in *The Hague Conventions and Declarations of 1899 and 1907 accompanied by Tables of Signatures, Ratifications and Adhesions of the Various Powers, and Texts of Reservations*, 2d ed. by James Brown Scott (New York: Oxford University Press, 1915) at 101-02. See also the preamble to the *Convention IV – Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277, 1 Bevans 631.

<sup>128</sup> For differing interpretations, see Georg Schwarzenberger, *The Legality of Nuclear Weapons* (London: Stevens, 1958); Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict” (1997) 317 *Int'l Rev. Red Cross* 125; *Nuclear Weapons*, *supra* note 120 at 375-428 (Dissenting Opinion of Judge Shahabuddeen).

<sup>129</sup> See Antonio Cassese, “The Martens Clause: Half a Loaf or Simply Pie in the Sky?” (2000) 11 *E.J.I.L.* 187.

In this sense, the Martens clause facilitates the interdependent relationship of these seemingly separate bodies of international law. It is significant for this paper because it provides a medium through which the various streams of analysis can flow and converge with one another, encouraging a holistic approach to legal investigation. Support for this type of approach to the Martens clause is found in *Kupreškić*, where it was used to restrict the margin of discretion afforded to belligerents pertaining to the rules on reprisals against civilians, a topic closely related to the present debate.<sup>130</sup> Having established the interdependent nature of these international norms, I now move to a consideration of the three principles of international humanitarian law.

The first principle is necessity. This principle requires that a target must be a military objective, i.e. an object that contributes effectively to the enemy's military goals, the neutralization of which would provide a definite advantage to the attacker.<sup>131</sup> A civil aircraft used for military purposes could potentially fulfil this requirement if, for example, it were used as a deadly missile in the hands of a suicide bomber. However, as Huskisson has put it, "if there is a doubt as to whether it is a military object, it may not be attacked."<sup>132</sup> As is borne out in the decision of the *BvG*,<sup>133</sup> there will almost never be certainty as to the situation on board a potentially hijacked plane, which can change in a matter of seconds. Therefore, the principle of necessity alone will, except in the most extreme circumstances, such as the World Trade Center attacks, *bar* the destruction of a civilian aircraft because it can seldom be claimed beyond reasonable doubt that it is necessary to destroy a passenger airliner.

The second guideline is the principle of distinction, which requires belligerents, at all times, to "distinguish between the civilian population and combatants and between civilian objects and military objectives."<sup>134</sup> Article 52(2) of Additional Protocol I defines military objectives as "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."<sup>135</sup> As Cassese observes, the "appraisal of whether 'in the circumstances ruling at the time', the object does offer 'a definite military advantage', falls of course to the belligerent that is about to launch the attack."<sup>136</sup> At first blush, setting aside the artificiality of using wartime norms in peacetime, it appears that a hijacked plane could amount to a "military objective".

However, any attack that is indiscriminate in the sense of involving civilians

<sup>130</sup> *Prosecutor v. Zoran Kupreškić et al. (Lašva Valley Case)*, IT-95-16-T, Judgement (14 January 2000) at para. 527 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) [*Kupreškić*].

<sup>131</sup> *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [*Civilians Convention*].

<sup>132</sup> Huskisson, *supra* note 10 at 149 [footnote omitted].

<sup>133</sup> See *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63.

<sup>134</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 48 [*Protocol I*].

<sup>135</sup> *Ibid.*, art. 52(2).

<sup>136</sup> Antonio Cassese, *International Law*, 2d ed. (Oxford: Oxford University Press, 2005) at 416.

is illegal.<sup>137</sup> This principle was confirmed by the ICJ in the *Legality of Nuclear Weapons* case<sup>138</sup> and has been declared part of customary international law by the International Criminal Tribunal for the Former Yugoslavia (ICTY).<sup>139</sup> *Prima facie*, this principle seems to forbid the destruction of a passenger plane because the attacker not only fails to discriminate between the civilian population and the quasi-military entity, but *actively targets* the civilian population to save those on the ground. Naturally, the intention of the interceptor is not to kill the passengers, this is a foreseeable rather than a willed consequence. This distinction between what is foreseeable and intended, sometimes known as the doctrine of double-effect, will be discussed later.

But, the principle of distinction is tempered by the third principle, namely, proportionality. The proportionality principle directs that combatants shall

[r]efrain from deciding to launch 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*.<sup>140</sup>

This principle is considered part of customary international law.<sup>141</sup> It requires of decision makers that they engage in a balancing test between the risk of killing civilians and the concrete and direct military advantage anticipated. It contemplates human arithmetic. Indeed, Huskisson concludes that it would legitimate attacks on civilian aircraft where “the military advantage to be gained is substantial.”<sup>142</sup> On closer analysis, this principle might also operate to exclude the destruction of a passenger craft that has potentially been converted into a lethal projectile by terrorists. This is because in such a situation, the state does not choose between a *risk* of killing civilians to achieve a *direct and concrete* military objective, namely, saving the lives of those on the ground. Rather, due to the inherent uncertainties of a hijack situation, the state chooses to sign a *certain* death sentence for those on board a plane in order to allay the *indirect and speculative risk* of civilians dying on the ground.<sup>143</sup> The principle of proportionality is designed to maximize protection to civilians by allowing forces to *risk* their *incidental* death only to achieve a *definite and direct* military objective.<sup>144</sup> Where suicide terrorists have hijacked a passenger plane, these

<sup>137</sup> *Protocol I*, *supra* note 134, art. 51(4).

<sup>138</sup> See *Nuclear Weapons*, *supra* note 120.

<sup>139</sup> *Prosecutor v. Pavle Strugar, Miodrag Jokic & Others*, IT-01-42-PT, Decision on Defence Preliminary Motion Challenging Jurisdiction (7 June 2002) at paras. 18-21 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

<sup>140</sup> *Protocol I*, *supra* note 134, Articles 57(2)(a)(iii) [emphasis added]. See also *ibid.*, arts. 51(5)(b), 57(2)(b).

<sup>141</sup> See e.g. *Kupreškić*, *supra* note 130 at para. 524 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber).

<sup>142</sup> Huskisson, *supra* note 10 at 150.

<sup>143</sup> The speculative nature of the threat need not be repeated. It is discussed, above in the section on proportionality and imminence.

<sup>144</sup> Although the terrorist plan may not achieve its full expression with the destruction of a target on the ground, the state that shoots down an aircraft achieves part of the enemy’s “military objective” by

criteria are often not satisfied. This reasoning is echoed by the International Commission of the Red Cross in its *Commentary*, where it states that “it is not legitimate to launch an attack which only offers *potential or indeterminate* advantages.”<sup>145</sup> Aside from extreme cases, it is difficult to contend that the advantages conferred by the destruction of a civilian plane would be anything other than potential and indeterminate. That said, rare cases do arise and we would do well to consider what to do in such eventualities. Furthermore, very many military calculations are hugely indeterminate. A decision maker must work with these indeterminacies.

Notwithstanding these fundamental problems with such a “war-based” analysis of an airborne suicide attempt, the shooting down of a civilian plane is subject to the additional problem that the targeting of civilians is a war crime, punishable universally.<sup>146</sup> Indeed, it is not unheard of for proceedings to be brought before a foreign court for crimes against aircraft abroad.<sup>147</sup> Furthermore, this issue was clearly one of concern for the *Deutscher Bundeswehrverband* with respect to the new *Luftsicherheitsgesetz*, which failed to provide for a rule exempting fighter pilots from liability before criminal and civil courts both in Germany and abroad, in the event that they were called upon to shoot down a passenger plane.<sup>148</sup> Now, a state which sends interceptors does not intend to kill the passengers on the plane, but merely to avert the further disaster on the ground in order to save as many lives as possible. This does not detract from the fact that the passengers’ deaths are a foreseeable consequence of the interception. Nor is it a reason to extend immunity to the decision maker. If society regrets his act, why should he not face punitive consequences? There is restorative effect in punishment, both for the rule of law and for the individual concerned. Further, why should the state itself be immune? Should it not compensate the families of the unfortunate passengers in an expression of its deep remorse?

We can now take a bird’s eye view of the relevant international law, before moving on to consider human rights provisions. All members of the U.N. have undertaken to “settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”<sup>149</sup> The potential for the escalation of violence when force is used against a foreign aircraft of any description is clear. The understated comment of the American Commander in Berlin (following the forcible interception of an American hospital plane) springs to

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killing a large number of citizens (the passengers of the plane) and completing the terrorists’ suicide mission (by killing them).

<sup>145</sup> International Committee of the Red Cross, “Commentary, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977”, at para. 2024, online: ICRC <<http://www.icrc.ch/IHL.nsf/COM/470-750067?OpenDocument>> [emphasis added].

<sup>146</sup> According to the Rome Statute founding the International Criminal Court, the directing of attacks at civilians is a war crime. *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 U.N.T.S. 3 (entered into force: 1 July 2002).

<sup>147</sup> For a brief discussion of such cases, see Andreas F. Lowenfeld, “U.S. Law Enforcement Abroad: The Constitution and International Law” (1990) 83 *A.S.I.L.* 880.

<sup>148</sup> *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63 at para. 66.

<sup>149</sup> *Charter*, *supra* note 29, art. 2(3).

mind: “You may wish to reflect on the full measure of responsibility that Soviet authorities must be prepared to accept for the possibly disastrous outcome of such reckless use of weapons.”<sup>150</sup>

So what does international law have to say about the legality of “going to guns” on a passenger plane in order to foil a suspected suicide mission? Neither the *Chicago Convention* nor the *Charter* and the rules on self-defence lead to a definite conclusion on this issue. That said, if a suicide mission constitutes an armed attack within the meaning of Article 51 of the *Charter*, the analysis of proportionality, necessity and imminence strongly suggests that firing upon any kind of civilian aircraft will rarely be legal. The argument here, to repeat, is that, though it may be morally justified in extreme cases, it should *never* be legal. The customary rules that have developed in relation to the treatment of military aircraft suggest, *mutatis mutandis*, that it would be acceptable only in the most extreme of emergencies for state interceptors to open fire on a civilian plane. This conclusion is borne out by an analysis of the rules that have developed in relation to civilian aircraft, which suggest that the conditions of civil aviation are such that it will seldom be justifiable for a state to intercept a civilian craft in peacetime. Finally, though resort to the law of armed conflict appears to be an attractive option for those wishing to legitimate the shooting down of passenger craft in extreme circumstances, this solution displays two flaws. Firstly, a degree of intellectual dishonesty is required because the norms of war are applied to an incident occurring in peacetime. Secondly, even if the law of war is appropriate to deal with a suicide flight, those rules do not automatically justify shootdown. Rather, an intricate balancing process is required and authorities can be expected to exhaust all other available measures before resorting to the use of lethal force.<sup>151</sup>

## II. Human Rights Law

International law comprises more than one set of norms. Hence, in the event that the conclusions drawn above are based on the *Charter*, the *Chicago Convention*, the customary rules of international law, and the law of armed conflict are wrong, it may be the case that the same answer is reached by an application of international human rights law. The reader will have noticed that the *Charter*, customary law and even the *Chicago Convention* focus on the state rather than on individual victims. This is not to say that the international community is, or has been, ignorant of human values, but it is clear from the nature of these rules that they are products of the Cold War, during which the protection of sovereign territory was accorded primacy in international rule formation and the ostensible pursuit of peace. The ongoing development of human rights in international law is a valuable counterweight to the

<sup>150</sup> “Soviet Plane Attack Draws New Protest” *The New York Times* (17 October 1952) 7.

<sup>151</sup> One caveat is worth mentioning. Where civilian planes are employed as part of a military programme in a war zone in support of a war of the traditional variety, these arguments pan out in the same way. However, even in that situation, the emphasis must be on positive identification and extreme caution. As the various tragedies discussed above show, mistakes are all too easily made.



emphasis on state boundaries. The question here is whether rights jurisprudence tells us anything about the legality or otherwise of the shooting down of a civilian plane. At this point, it is worth reiterating that the Martens clause impels the construction of the laws of war according to international human rights standards. Consequently, in this section, some basic instruments will be considered before attention is turned to the maturing jurisprudence of the *European Convention on Human Rights*<sup>152</sup> (ECHR).

Before embarking on this analysis, it is necessary to address the status human rights enjoy in international law. This difficult question has been answered expertly by Maier:

International human rights are not a function of domestic law. The duties of states under international human rights law extend to persons simply because they are human beings. People, as people, have certain rights that are universally recognized by the world community, even though often honored in the breach. Those rights flow from that community to individuals without the necessity of national law as a conduit. The rights belong directly to natural persons. They are not derivative from duties owed by one nation to another although all nations have a legitimate interest in the observance of human rights by all others. The complete scope and content of these human rights and state duties is not yet clearly defined. That law is developing.<sup>153</sup>

The *Universal Declaration of Human Rights* is a General Assembly resolution widely considered to embody customary international law. Article 3, the terms of which are echoed in many other treaties, holds that “[e]veryone has the right to life, liberty and security of person.”<sup>154</sup> As this right is not explicitly absolute, its interpretation has been subject to dispute. The question of when, how, and under what circumstances a state can take life is a focal point of this debate. Watkin has attempted to answer this question with reference to controlling the use of force in modern warfare. He states that the right to life is subject to “the right to self-defense, acting to defend others, the prevention of serious crime involving a grave threat to life or serious injury, and the use of force to arrest or prevent the escape of persons presenting such threats.”<sup>155</sup>

Every person’s right to life is limited, *inter alia*, by the corresponding right(s) of others. But, this does not take us very far in answering the question at hand. It serves merely as a restatement of the problem: Can we kill those in the air to save those on the ground? According to Watkin, we can, but this involves supposedly repugnant questions of human arithmetic. At this stage, it suffices to note that this

<sup>152</sup> *European Convention on Human Rights*, 4 November 1950, 213 U.N.T.S. 222 (entered into force 3 September 1953).

<sup>153</sup> Harold G. Maier, “The Downing of Iran Air Flight 655: *Ex Gratia* Payments and the Iranian Airline Tragedy” (1989) 83 A.J.I.L. 325 at 326-27.

<sup>154</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), art. 3.

<sup>155</sup> Kenneth Watkin, “Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict” (2004) 98 A.J.I.L. 1 at 10 [footnote omitted].

question looks much more difficult through the lens of human rights law. The values at stake are no longer national security and the safety of civil aviation but lives of innocent people on the ground and in the air. In his discussion of the ABDP Huskisson concludes, by reference to the decision in *García and Garza v. United States*<sup>156</sup> (a case in which a child was killed by an officer who fired upon a group making an illegal border crossing on a raft on the Rio Grande River), that

[s]o long as the threat posed by drug trafficking is a serious enough crime and suspects are properly identified and given an opportunity to submit to justice, ABDP operations would generally fall within the realm of legitimate law enforcement and would not fall short of recognized human rights norms.<sup>157</sup>

This conclusion is dubious on several fronts. Firstly, the firing of a gun at a raft on a river bears little resemblance to the firing of missiles at planes. As such, one would expect the factors in play in the former circumstance to have precious little relevance for the latter. Secondly, *García* was heard before the U.S.-Mexican Claims Commission, a court that had no experience in human rights adjudication as we know it today. Thirdly, the case was decided in 1926 and is hardly a basis for a consideration of the state of human rights law in the subsequent century. Finally, *García* was decided under the law of aliens. The decision did not take into account any framework of international human rights rules and as such can hardly be invoked in support of a preferred reading of such norms.<sup>158</sup>

On that note, *modern* human rights jurisprudence relevant to the right to life will now be examined. It is fair to say that one of the most advanced human rights systems in the world is built upon the *ECHR* and it is to the considerations of the European Court of Human Rights (European Court) that attention now turns. The immediate effect of the judgments of the European Court and the influence of the *ECHR* in the domestic law of the member states depends on the national method of implementation. Suffice to say that, the *ECHR* system has had a dramatic effect in improving the human rights standards in many European states, as well as in those states aspiring to European Union membership. This is in no small part due to the fact that the spirit, if not the reasoning, of the Court's judgments are held in high regard by national judiciaries and governments alike.

A preliminary issue pertains to the legitimacy of considering a regional human rights system in order to draw global conclusions. Several points can be made in this regard. Firstly, international human rights systems often have symbiotic relationships. An example is the cross-referencing that occurs between the various anti-torture frameworks. Secondly, regardless of one's stance on the plausibility of moral relativism,<sup>159</sup> cultural relativity dictates that conclusions drawn on the basis of a

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<sup>156</sup> *Teodoro García and M. A. Garza v. United States*, (1926) 21 A.J.I.L. 581.

<sup>157</sup> Huskisson, *supra* note 10 at 141.

<sup>158</sup> I am grateful to Professor Francioni for this final observation.

<sup>159</sup> I am thankful to Professor Kramer for alerting me to this important caveat.

European human rights culture do not apply globally. However, a standard considered law in Europe has a generative effect for the rest of the world and it is certainly worth discovering that standard. Thirdly, as will be demonstrated at the tail end of this discussion, similar trends can be detected in United States' rights jurisprudence.

After having gained an impression of what the right to life actually entails, “[t]he effort, then, is to decompose a right into its related state duties, and thereby gain a clearer notion of the content or proposed content of the right itself.”<sup>160</sup> This should, at the very least, produce some guidelines or a general principle which can then be applied to our case. Care has been taken in this section not to read more into the cases cited than can be deduced from the text. The general thrust of rights law is in the direction of careful planning, caution, and great reverence for human life.

To foreground this discussion, it is worth noting that the European human rights tradition, though it has deeper roots, grew out of the atrocious violations of human dignity during World War II. Though human dignity may be considered the source of other fundamental freedoms, we should be alert in our consideration of difficult moral questions, lest we overcorrect, steering away from one evil (the sacrifice of the one to the many) towards another (the sacrifice of the many to the one).

The right to life in the *ECHR* is enshrined in Article 2:

- (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- (2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - a. in defence of any person from unlawful violence;
  - b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
  - c. in action lawfully taken for the purpose of quelling a riot or insurrection.

The meaning of these provisions has been elaborated in the case law of the European Court. In perhaps one of the most politically charged cases ever heard, *McCann v. United Kingdom*, the Court was seized of litigation that threw the right to life into dramatic relief. In a nutshell, the case concerned the extra-judicial killing of a suspected Irish Republican Army terrorist cell in a Gibraltar public square by British security forces. The Court's judgment puts flesh on the bones of the right to life:

[I]t is not clear whether [the security officers] ... had been *trained or*

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<sup>160</sup> Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed., (Oxford: Oxford University Press, 2000) at 180-181.

*instructed* to assess whether the use of firearms to wound their targets may have been warranted by the specific circumstances that confronted them at the moment of arrest. Their reflex action in this vital respect lacks the *degree of caution* in the use of firearms to be expected from law enforcement personnel in a democratic society, even when dealing with dangerous terrorist suspects, and stands in marked contrast to the standard of care reflected in the instructions in the use of firearms by the police which had been drawn to their attention and which emphasised the *legal responsibilities of the individual officer* in the light of conditions prevailing at the moment of engagement. This failure of the authorities also suggests a *lack of appropriate care in the control and organisation* of the arrest operation.

[...] Having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the *use of force which was no more than absolutely necessary* in defence of persons from unlawful violence within the meaning of Article 2(2)(a) of the Convention.<sup>161</sup>

Mowbray notes that,

[w]hilst not expressly adopting the applicants' language of a positive duty both the majority and minority of the Court in *McCann* scrutinized the authorities' organisation and control of the challenged anti-terrorist operation as a fundamental element in assessing whether Article 2 had been complied with.<sup>162</sup>

This case shows the readiness with which the Court will analyze the degree of care exercised by member states in security operations.<sup>163</sup> Not only is the Court willing to scrutinize, but it is also vigilant in its scrutiny. In *Ergi v. Turkey*,<sup>164</sup> the Court stated that:

In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such *matters as the planning and control of the actions* under examination.<sup>165</sup>

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<sup>161</sup> *McCann*, *supra* note 86 at 101-02 [emphasis added].

<sup>162</sup> Alastair R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart, 2004) at 9.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ergi v. Turkey* (1998), 32 E.H.R.R. 18.

<sup>165</sup> *Ibid.* at para. 79.

Mowbray has observed that,

The judgment clearly elaborates the need for domestic authorities, when planning these operations, to *have regard to the dangers posed to innocent bystanders from both security personnel and the suspected terrorists/criminals against whom the operation is directed*. The authorities must develop and implement plans which ‘take all feasible precautions ... with a view to avoiding, and in any event, to minimising, incidental loss of civilian life.’ These are stringent requirements but given the importance of the right to life and the professionalism which can rightly be expected of security forces operating in democratic European states they are essential attributes of this positive obligation.<sup>166</sup>

These two cases offer several pointers for a situation in which a plane has been converted into a suicide missile by terrorists. Firstly, in light of *McCann* it is unlikely except in the clearest of circumstances that a purely *reflex* action taking life will *ever* be acceptable under the ECHR standards. The Court will check the particular facts of a case for diligent planning and control of operations where lethal force is used by state agents. Indeed, all feasible precautions must be taken with a view to avoiding the loss of life. Secondly, the use of force must be no more than *absolutely necessary* in defence of persons from unlawful violence. The Court will require a state to show that there was no other, less drastic, option that may have achieved the same result. Thirdly, the state must take into account the dangers to innocent bystanders caused by the terrorists and the state itself. For present purposes, this puts a duty on the state to value the rights of all parties, innocent passengers, innocents on the ground and suspected terrorist hijackers. Nevertheless, it has already been indicated that a state might well wish to take into account the fact that the lives on board would be predictably short. In other words, if the state *cannot* save those on board, but *can* save lives on the ground, should it not do so? Is not inaction here more objectionable than action? Recall the useful analogy of our elderly patient on his deathbed and the otherwise healthy child, both waiting for a life-saving organ transplant. It smacks of absolutism to say that both have an equal claim to the organ. Another relevant case is that of conjoined twins. If emergency surgery can save the life of one twin where without the surgery both would be condemned to an almost immediate death, is it not right (or less wrong) to save one twin, rather than to let both die? Is the greater evil not the death of both twins? Is it coherent to say that omission here is morally neutral, whereas intervention entails moral blame? Would it not be more natural to claim that intervention – saving the saveable twin—is morally praiseworthy and inaction – watching both twins die—is morally dubious? These questions are extremely sensitive, sacred even to some, but the aim here is to tease out a defensible answer in a choice between two courses of action, neither of which is

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<sup>166</sup> Mowbray, *supra* note 162 at 13 [emphasis added] [footnote omitted].

attractive.<sup>167</sup> Finally, though the facts were entirely different, it is worth noting *Osman v. United Kingdom*. Here the Court held that states are obliged to provide individuals with protection against immediate threats to their lives emanating from third parties.<sup>168</sup> This case is used here only to make the limited and common sense point that the state can be considered responsible for protecting us against threats from private actors.

In a string of recent cases, the European Court has been confronted with taxing right to life issues. In *Khashiyev v. Russia*,<sup>169</sup> concerning killings of civilians by the Russian military in Chechnya, the Court held that *indiscriminate and excessive force* could not be considered compatible with the standard of care required of an operation involving the use of lethal force. Even assuming that the military officers were acting in response to unlawful attack, the Court did not accept that the operations had been planned and executed with the requisite care for the lives of civilians. This judgment is demonstrative of the importance of upholding the rule of law in war zones. The clear message is that law does not stop when war or emergencies start (no matter how tempting hackneyed Ciceronian quotes might be).

How does this case relate to the situation in hand? Firstly, any force that does not discriminate between innocent civilians and combatants or between bystanders and criminals is illegitimate. This principle (an echo of the Geneva Conventions) presents an immediate problem for security forces faced with a suicide bomber in a plane. If a civil craft is fired upon, only a theoretical distinction can be made between the aggressors and the innocent passengers and crew. No practical distinction can be made if the state wishes to save those on the ground. Secondly, the force used must not be excessive. The Court will require the state to demonstrate how it came to the conclusion that firing upon a civilian plane was a proportionate use of force. Given the many uncontrollable contingencies in play<sup>170</sup> and the fact that it will be hard for the state to predict accurately what damage would have been caused had the plane been left to fly its course, a state will find it extremely difficult to show that its use of force was the result of calculated action. Thirdly, the Court will require the state to demonstrate that the operation was planned and executed with the requisite care for the lives of civilians. This would no doubt include an assessment of the security arrangements on the ground to ascertain whether or not a mistake made earlier in the chain of events forced the state's hand when it decided to send up interceptors.

In *Bubbins v. United Kingdom*,<sup>171</sup> a case in which a police officer had shot a man brandishing a replica pistol in his own flat, the Court held that there had been no violation of Article 2. The Court paid particular attention to the "numerous warnings ... shouted and ample opportunities" to surrender that were given to the deceased

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<sup>167</sup> See e.g. *Re A (Children) (Conjoined Twins: Medical Treatment) (No. 1)* (2000), [2001] Fam. 147 (C.A.) [*Conjoined Twins*].

<sup>168</sup> *Osman v. United Kingdom* (1998), 29 E.H.R.R. 245.

<sup>169</sup> *Khashiyev v. Russia*, no. 57942/00, [2006] 42 E.H.R.R. 20.

<sup>170</sup> See the consideration of proportionality above.

<sup>171</sup> *Bubbins v. United Kingdom*, no. 50196/99, [2005] 41 E.H.R.R. 24.

prior to taking action.<sup>172</sup> In reaching the conclusion that the use of force was absolutely necessary, importance was placed upon the officer's *reasonable belief* in the threat to his life.

What does this tell us about the issue under consideration? There are three lessons. The first is that a Court will be more inclined to show deference to the state when it is clear that efforts were made to prevent, avoid and defuse the situation before the resort to lethal force. Warnings are the obvious example. While suicide terrorists, having already chosen to die, may be undeterred by such warnings, in the event that the situation on board is not as suspected, warnings may function to avert disaster. The second lesson is that the killing of a criminal will be more generously assessed by the Court if that person is given the opportunity to surrender. Though this should be offered to a suicide terrorist, the passengers have no opportunity to surrender and so the lesson is limited. Finally, the Court will be influenced by a reasonably held belief in a threat to life. In *Bubbins*, the officer was convinced that his life was in jeopardy. Though his belief turned out to be mistaken, the threat here was at least relatively certain. While the luxuries of such proximity to the threat and clarity as to its nature are not normally present when an aircraft has strayed off course, a series of suicide planes may generate virtual certainty or belief beyond reasonable doubt in the threat to people on the ground.

In *Nachova v. Bulgaria*,<sup>173</sup> a case stemming from a fatal shooting during the bungled arrest attempt of *Roma* military conscripts who were absent without leave, the Grand Chamber of the European Court went to pains to expose the lack of "an appropriate legal and administrative framework defining the limited circumstances" in which state officials may resort to lethal force.<sup>174</sup> Similarly, in *Makaratzis v. Greece*,<sup>175</sup> the Court found a violation under Article 2(1) as a result of the state's failure properly to protect life by a system of law and guidance as to the use of force. For present purposes, these cases indicate that, should the state legislate for the forcible interception of a civilian craft, the legal and administrative structures providing for that action must be clear and appropriate. This argument was addressed in the recent German decision on the new *Luftsicherheitsgesetz*. On behalf of the *Deutscher Bundeswehrverband* it was argued that the new statute was deficient to the extent that it "failed to name precise criteria for the measurement of life against life. That would present soldiers under orders to take forcible measures with a difficult conflict between obedience to command and a highly personal moral decision."<sup>176</sup> Consequently, there is merit in the view that morbid questions should be contemplated in the abstract before they arise in reality.

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<sup>172</sup> *Ibid.* at para. 145.

<sup>173</sup> *Nachova v. Bulgaria* (GC), no. 43577/98, [2006] 42 E.H.R.R. 43.

<sup>174</sup> *Ibid.* at para. 96.

<sup>175</sup> *Makaratzis v. Greece* (GC), no. 50385/99, [2005] 41 E.H.R.R. 49.

<sup>176</sup> *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63 at para. 66, ("Die Norm nenne keine präzisen Kriterien für die darin vorausgesetzte Abwägung Leben gegen Leben. Das führe für den zum Handeln gezwungenen Soldaten zu einem schweren Konflikt zwischen der Pflicht zum Gehorsam und der von ihm zu treffenden höchstpersönlichen Gewissensentscheidung.") [translated by author].

*Makaratzis* was an especially interesting case because of the absence of a corpse. The Court found a violation of Article 2 despite the fact that the police in that case opened fire only after the driver had behaved in an extremely reckless manner with scant regard for human life, and despite the fact that there was no killing. This case is demonstrative of the very high standard of protection demanded by the *ECHR* system. Does it offer any guidance for a suicide-hijacking scenario? It should be noted that, in most hijack situations, there are no obvious signs of criminality outside the aircraft. Predictably, the state's decision to use force must be made in at least partial ignorance of the behaviour of those on board. In light of the fact that the Court in *Makaratzis* found a breach of Article 2, despite the flagrant criminality of the claimant, it is questionable whether or not the Court will welcome arguments of absolute necessity. The state would face the additional hurdle that rather than firing upon one criminal, it is (however reluctantly) firing upon a number of innocents and suspected criminal(s). This does not preclude shooting down a plane; it simply means that a high probability of relatively numerous casualties on the ground must be a condition of the decision to intercept.

It is apparent that though human rights law in general and European human rights law in particular do not provide conclusive evidence of the illegality of a state shooting down a civilian aircraft, the cards are stacked against any executive decision to that effect, even assuming a statutory basis for the power. The major stumbling blocks for the state are the proportionality principle, the requirement that force is not indiscriminate, and the temporal extension of the Court's protection of the right to life beyond the split second in which the fatal decision is made, back to the prior planning and control precautions that were available to eliminate that possibility. Certain restraints on the choice of means are implied in the constitutional set up and ideology of liberal democracy. It should be noted by way of concluding this section that similar sentiments have been echoed in the Inter-American Court of Human Rights on several occasions: "regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the power of the State is not unlimited, nor may the State resort to any means to attain its ends."<sup>177</sup> This principle would apply *a fortiori* where innocents are irrevocably embroiled in a terrorist plot. As Nozick has it, the fact that the innocents are part of the threat, rather than bystanders, changes the complexion of the problem.<sup>178</sup> This argument did not find favour with the German *BvG* in the *Luftsicherheitsgesetz* judgment, but is discussed presently.

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<sup>177</sup> *Velasquez Rodriguez* (1988), Inter-Am. Ct. H.R. (Ser. C) No. 4, at para. 154. See also *Godinez-Cruz v. Honduras* (1989), Inter-Am. Ct. H.R. (Ser. C) No. 5, at para. 162; *Neira Alegria et al. Case* (1995), Inter-Am. Ct. H.R. (Ser. C) No. 21, at para. 75.

<sup>178</sup> See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 34-35.



### III. Domestic Law

Of course, it is difficult to speak in general terms about domestic law. It is clear that there are precious few inherent constraints on domestic sovereigns. Internal law is a matter for the state legislator. This has led one writer to state, in relation to the ABDP, that “questions of domestic law remain largely a non-issue.”<sup>179</sup> Hence, it is illuminating to consider how this issue has been dealt with by domestic courts. At the time of writing, the most recent and most relevant decision was that of the German *Bundesverfassungsgericht*.

As a reaction to the atrocities of September 11 and to a frightening solo-flight over Frankfurt early in 2003, a new German statute (the *Luftsicherheitsgesetz* or Air Safety Law) was passed, providing that a civil aircraft may be shot down if it is being used as a weapon against the civilian population.<sup>180</sup> However, the shooting of the plane must be a last resort. Before this power accrues, the aircraft must have been identified and checked by the air controllers, it must have been warned over radio and an attempt must have been made to redirect it.<sup>181</sup> Thereafter, the armed forces may attempt to force the plane to land, threaten the use of weapons, or fire warning shots.<sup>182</sup> The choice of means is to be informed by the principle of proportionality. Only once these methods have been exhausted, and the use of force is the only means for the defence against the imminent danger, does the Air Safety Law permit firing upon the craft. Pursuant to § 14(4), the Defence Minister or her representative is responsible for taking the decision to fire.

In essence, the *BvG* held that the granting of such power to the armed forces pursuant to §14(3) of the Air Safety Statute, insofar as innocent persons on board the aircraft would be affected, was not compatible with the right to life *combined* with the guarantee of human dignity enshrined in Articles 2(2) and 1(1) of the German Constitution.<sup>183</sup> Interestingly, this reasoning is heavily influenced and, it shall be argued, burdened, by the Kantian philosophical tradition. It would preclude the use of weapons against a civilian plane in flight even in a scenario where a sequence of aircraft had been hijacked and were being used as a wave of suicide missiles. This is cause enough to query the Court’s conclusions.

Though the judgment covers many interesting issues, there are two facets deserving of attention in this section. Firstly, of particular interest was the Senate’s discussion of the normalcy/emergency dichotomy and the constitutionally enshrined distinction between war and crime. First, the complainants objected that the government wanted to introduce the law of war in order to tackle an internal

<sup>179</sup> Huskisson, *supra* note 10 at 118.

<sup>180</sup> *Luftsicherheitsgesetz* of 11 January 2005 (BGBl. I S. 78), online: Bundesministerium der Justiz <<http://bundesrecht.juris.de/luftsig/BJNR007810005.html#BJNR007810005BJNG000100000>>.

<sup>181</sup> *Luftsicherheitsgesetz* (11 January 2005) §15 Abs. 1 (BGBl. I S. 78), online: Bundesministerium der Justiz <<http://bundesrecht.juris.de/luftsig/BJNR007810005.html#BJNR007810005BJNG000100000>>.

<sup>182</sup> *Ibid.* § 14 Abs. 1.

<sup>183</sup> *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63.

emergency situation.<sup>184</sup> Consequently, the *BvG* held that the literal meaning of the provision enabling the deployment of the armed forces for internal emergencies meant that they could only operate as “police forces”. The legislature had wanted to ensure that the army would only function as an extension of the police force and would, in their dealings with the public, operate within the correspondingly limited police powers.<sup>185</sup> Thus, the German decision expresses the distinction between crime and war, but is perhaps constrained by an overly rigid code, which is unresponsive to today’s threats. Two different sets of legal norms are applicable to the two distinct scenarios. Are terrorists not first and foremost criminals? Germany is singular in the way in which its bitter past is reflected in its constitutional arrangements. Ironically, the inhumane atrocities of the nation’s history and its subsequent and admirable regeneration have rendered it uniquely vigilant in dealing with governmental threats to human dignity today. However, this decision, while respectable in point of German law, might well be an example of the overcorrection mentioned earlier, as it tends to unsustainable moral absolutism. Can we be happy with a verdict that enjoins the interception of a hijacked passenger plane, irrespective of the damage that might be inflicted to life and limb on the ground?

The second point of note is that the *BvG* did not consider either international law or the state’s obligations pursuant to the *ECHR*. This is not necessarily because the Court considered the matter to be of purely internal ambit. Also possible is that the Senate was of the opinion that its interpretation of the Constitution was enough to settle the case and sufficiently robust so as not to require a consideration of wider legal provisions.

## IV. Morality

### A. The State of Rights

In the German decision, the Senate was concerned to divine the purpose of the state. In order to do so, it examined the fundamental documents of the German republic. In fact, though it was held that it would be unconstitutional to legalize the destruction of a civilian passenger craft in most circumstances, the Senate concluded that “[e]ven the right to life can be altered. A pre-requisite for that alteration however, is that it is line with the basic provisions of the constitution.”<sup>186</sup> In what follows, the same inquiry shall be pursued but in the abstract, without the high vantage point of a constitutional text. What is the state for and is it a valid function of the state to kill citizens in order to save the lives of others? Great theorists of *state* and *right* have not seen eye-to-eye as to the relationship between the two.

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<sup>184</sup> *Ibid.* at para. 41.

<sup>185</sup> *Ibid.* at para. 107 [paraphrased by author].

<sup>186</sup> *Ibid.* at para. 85 [translated by author from the original: “Auch in das Grundrecht auf Leben kann deshalb auf der Grundlage eines förmlichen Parlamentsgesetzes (vgl. BVerfGE 22, 180 <219>) eingegriffen werden. Voraussetzung dafür ist aber, dass das betreffende Gesetz in jeder Hinsicht den Anforderungen des Grundgesetzes entspricht.”].

Hobbes, writing in a period of religious unrest and political discord in England, famously declared that life in the absence of government is “solitary, poore, nasty, brutish and short.”<sup>187</sup> Man’s natural condition was “[w]arre of every one against every one ... It followeth, that in such a condition, every man has a Right to every thing, even to one another’s body.”<sup>188</sup> His theory is one of natural rights that are relinquished in order to obtain security. However, not all rights were relinquished. A person retained the right to resist being killed. Yet, Hobbes did envisage the Leviathan as an unrestrained sovereign. The following passage makes his conception of the state abundantly clear:

And because the End of this Institution, is the Peace and Defence of them all; and whosoever has right to the End, has right to the Means; it belongeth of Right to whatsoever Man, or Assembly, that hath the Sovereignty, to be Judge both of the meanes of Peace and Defence; and also of the hindrances, and disturbances of the same; and to do whatsoever he shall think necessary to be done, both before hand, for the preserving of Peace and Security, by prevention of Discord at home and Hostility from abroad; and when Peace and Security are lost, for recovery of the same.<sup>189</sup>

Hence, Leviathan could fire upon a civilian plane, so long as such means were considered compatible with the state’s ends. According to the Hobbesian formulation, the state’s power is unrestrained and its job is to ensure security. Though there is a *prima facie* contradiction in the state killing those it is charged to protect, for Hobbes the notion of individual rights against the state (i.e. not to be killed) was dangerous, to be dismissed in favour of general security for the majority. That said, his conception of the state might appear dated against the background of the jurisprudential centralization of individual rights and the liberalization of democracy that has fitfully taken place in the last couple of centuries in the West. Hobbes’ concern was the avoidance of internal strife in the form of civil war in 17<sup>th</sup> Century England. Thus, the state was preferable to anarchy. That remains true but when the incumbent government unwittingly or recklessly invites mayhem, its justification and, in healthy polities, its support, disappears.

Locke had a different approach though he too argued for the existence of natural rights.<sup>190</sup> The problem for Locke in the absence of a sovereign, though not as gruesome as Hobbes’ state of nature, was that without external regulation, these rights were insufficiently concrete to be effective. Hence, individuals joined in a commonwealth for distributive purposes. However, Locke argued that individuals always retained certain rights that were intended to act as a brake on governmental power. The power of the sovereign was not therefore unrestrained. Locke’s theory must also be seen in context, but the notion of rights surviving government is

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<sup>187</sup> Thomas Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1991) at 89.

<sup>188</sup> *Ibid.* at 91.

<sup>189</sup> *Ibid.* at 232.

<sup>190</sup> See John Locke, *Two Treatises of Government*, Student ed. by Peter Laslett (Cambridge: Cambridge University Press, 1988).

important for our analysis. It is this intuition that rights exist against the state that is of interest. But where do these rights come from and what is their content? How credible is this intuition?

Burke found discussion of rights in the abstract tedious:

The metaphysic rights entering into common life, like rays of light which pierce into a dense medium, are, by the laws of nature, refracted from their straight line. Indeed in the gross and complicated mass of human passions and concerns, the primitive rights of men undergo such a variety of refractions and reflections, that it becomes absurd to talk of them as if they continued in their original direction.<sup>191</sup>

There is great merit in this approach to rights, particularly rights against the state. Dworkin's perception of rights complements this insight. In his view, rights are "best understood as trumps over some background justification for political decisions that states a goal for the community as a whole.... this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did."<sup>192</sup> But is it not more accurate to say that rights are neither rigid, nor absolute? Is it not the case that the extremities of a right change according to contemporary political morality? And that the core of an individual's right may crumble under the weight of the collected claims of others?

What can be deduced from this brief discussion of right and state? Where individuals threaten other individuals, whether innocently or intentionally, it is the state's role to intervene, even if that involves the elimination of its own citizens. In the final analysis, "right" may just be a term for making a claim about something of particular importance to us, something that is hard to displace, except with the rights claims of others.

The Senate of the *BvG* made a comment that sheds light on these issues. It said that, in the fulfilment of its duty to protect the citizen, the means to be chosen by the state are at its discretion, so long as they are in harmony with the basic constitutional document.<sup>193</sup> But, a parallel conclusion could be drawn in abstraction from any constitution document. If it is accepted that the primary purpose of the state is the protection of the individual, that goal may not be frustrated simply because individuals, innocently or otherwise, threaten other individuals. Where individuals threaten one another (be they mad or sick or criminal or otherwise), it is for the state to decide, according to publicly mooted and promulgated laws, whether that threat should be eliminated. The state should save lives where it can, according to the principles of the society of which it is the institutional manifestation.

<sup>191</sup> Edmund Burke, *Reflections on the Revolution in France*, (Oxford University Press, 1999) at 61.

<sup>192</sup> Ronald Dworkin, "Is There a Right to Pornography?" (1981) 1 *Oxford J. Legal Stud.* 177 at 200.

<sup>193</sup> *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63 at para. 138.

## B. Terrorist Rationality and State Irrationality

In this connection, it is worth considering the *purpose* of the terrorists that have captured a plane. If terrorists capture a passenger plane, their motive being dramatic suicide, and if that plane is left to fly its new course, there is a chance, dictated by the manifold uncertainties involved in any such operation, that the terrorists will fail in their mission. If, however, that plane is intercepted and shot down, the terrorists partially succeed in their theatrical mission, at least to the extent that they make the ultimate sacrifice in the name of their highest principles and take many innocent civilians with them, grabbing world media attention for their cause, striking at the heart of another society and causing fear amongst the wider population. But their success does not end there.

In a sense, terrorists succeed on a more profound level because they cause a state to kill its own citizens. On one view, the state not only does the terrorists' work for them, it ensures the partial success of their mission. Nonetheless, it is submitted here that this terrorist half-triumph can be reversed by the public condemnation of the killing, the state's expression of its remorse for a necessary evil committed in the name of the greater good. States must proceed with great caution, mindful of the easy propaganda win for terrorists prepared to play with such high stakes. A state ready to express its regret for measures taken in emergency displays a fidelity to principle, a potentially powerful message in the symbolic, narrative battle with terrorists.

## C. The Sum of the People

In the *BvG*, the *Bundesregierung* argued that "should the right to life of one individual come into conflict with that of another, it is the task of the legislator to define the nature and scope of that right."<sup>194</sup> But can it ever be the role of the state to kill its citizens in defence of other citizens? Can innocent human life be valued over innocent human life? *Prima facie*, the principle human dignity precludes this. But what if more people are threatened on the ground than are in jeopardy in the plane? Should a state not save those it can if others are in any event condemned to death? There is practical uncertainty in this macabre conundrum but this does not rob the theoretical exercise of its merit.

The complainants before the *BvG* disagreed with human arithmetic on principle, stating that "[t]he State cannot protect a number of persons by killing a smaller number of persons, in this case aircraft passengers and crew. Life cannot be weighed against life in quantitative terms."<sup>195</sup> The straightforward riposte to this position is that a state acts no differently when it sends its troops to war to protect a

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<sup>194</sup> *Ibid.* at para. 54 ("Träten – wie hier – das Lebensrecht des einen und das Lebensrecht des anderen zueinander in Konflikt, sei es Aufgabe des Gesetzgebers, Art und Umfang des Lebensschutzes zu bestimmen.") [translated by author].

<sup>195</sup> *Ibid.* at para. 38 ("Der Staat dürfe eine Mehrheit seiner Bürger nicht dadurch schützen, dass er eine Minderheit – hier die Besatzung und die Passagiere eines Flugzeugs – vorsätzlich töte. Eine Abwägung Leben gegen Leben nach dem Maßstab, wie viele Menschen möglicherweise auf der einen und wie viele auf der anderen Seite betroffen seien, sei unzulässig.") [translated by author].

civilian population or when it allocates medicinal resources according to life chances. Naturally, the state would be delighted if only the terrorists died in the blazing wreckage of an intercepted plane, in the same way that it would be overjoyed if all of its troops returned from battle or all its citizens who missed out on kidney donations recovered without medical intervention.

The following question might be asked: Why value a human life of probably very short duration over those persons with a longer life expectancy? (Remember our elderly and child patients). The *BvG*, confronted with this morally muddy terrain, held that a human being, by virtue of her very existence, possessed the right to respect for her dignity, regardless of considerations of personal characteristics, physical or material blessings, social status, performance, and the predicted duration of her life.<sup>196</sup> The notion that human dignity is irreducible is instantly and enduringly appealing to anyone who holds that life is more than a mere biological fact, to anyone who has a suspicion that there may be a spiritual dimension to our being, which cannot be materially qualified or quantitatively measured. And an interesting feature of these dramas in the skies is that the order given to fire is often not carried out by the pilot to whom it is given or is withheld by the ground controller who receives the indication from superior command.

[On September 11, both] the mission commander and the weapons director indicated they did not pass the order to fighters circling Washington and New York City because they were unsure how the pilots would, or should, proceed with this guidance, the commission reported. In short, the report added, while leaders believed the fighters circling above them had been instructed to ‘take out’ hostile aircraft, the only orders actually conveyed to the Langley pilots were to ‘ID type and tail’.<sup>197</sup>

This basic human repugnance for the taking of innocent life displayed by those trained to kill and conditioned to obey orders is of great importance to the analysis.

Kantian philosophy also impacts on the debate. Does the shooting of a passenger aircraft involve the reduction of a person to a means and, if so, is that wrong? Before the *BvG*, the respondent government argued that it was not the state, rather the terrorists that objectified the passengers by using the plane as a weapon. Consequently, the purely reactionary state was not guilty of any such reduction of persons to means.<sup>198</sup> The *BvG* concluded that a state, which shoots down a passenger

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<sup>196</sup> *Ibid.* at para. 120.

<sup>197</sup> Milbank, *supra* note 1.

<sup>198</sup> *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63 at para. 47: (“Nicht der – nur reagierende – Staat beraube bei einem Vorgehen nach den §§ 13 bis 15 LuftSiG die Menschen im Flugzeug ihrer Würde und mache sie zu Objekten, sondern derjenige, der ein Flugzeug in seine Gewalt bringe, um die

plane in the circumstances under contemplation, treats persons as the means to the specific end of protecting others.<sup>199</sup> Nozick argues that an innocent bystander is qualitatively different from a person who, against their own will, threatens another. It can certainly be argued that the passengers are threatening those on the ground so as to legitimate their deaths in self-defence. This was the moral impulse behind the decision to operate in the case of the conjoined twins where it was held that if one is killing the other, albeit unintentionally, it is legal to separate the twins, even if that separation almost certainly will cause the death of the “killer twin.”<sup>200</sup> In this case, a self-defence type argument was mobilized to justify intrusive surgery. Can a similar argument be employed in order to excuse the state’s firing upon a civil aircraft despite the virtually certain death of the passengers? In the *BvG*, the argument was run that those on board the aircraft became “part of the weapon” or “*Teil der Waffe*” and, as such, could be sacrificed on the altar of the safety of those on the ground. The Senate rejected this argument, objecting to the conceptualization of humans as *part of a thing* rather than as beings with a right of self-determination.<sup>201</sup> The English Court of Appeal conclusion in the conjoined twins case can be distinguished here because it was reached without reducing the “killer twin” to the status of a “thing”, without stripping her of her human dignity. It can be accepted that the passengers of a suicide flight are threats without stripping them of their dignity.

Importantly, the German Court indicated that, insofar as the statute sanctioned the shooting down of an *unmanned* craft or a craft occupied *only* by those on the suicide mission, it was consonant with the right to life enshrined in the constitution. This type of situation is much easier for the state to justify because the perpetrator’s aggression is intentional and he has the option of desisting.<sup>202</sup> It is submitted that the Court, weighed down by Kantian baggage, does not go far enough down this road. In effect, it arrives at the morally strained position that it would be wrong to kill an unintentional aggressor to save one thousand humans effectively threatened by that person who, in any event, is almost certainly condemned to death. One could remonstrate with the *BvG* for taking refuge in the *practical* problems of determining the situation on board in order to avoid facing the perplexing *moral aporia*, termed “incredibly difficult” by Nozick.<sup>203</sup>

Before offering a tentative solution, two comments are in order. First, it is helpful to note that the state no more intends for the innocent passengers to die as the innocent passengers intend to threaten their fellow citizens on the ground. Second, this puzzle can be looked at from another direction, perhaps neglected by the German judges. Is it morally desirable for the state to let more people die than is necessary? Is it not hard to answer that question in the affirmative?

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Menschen an Bord nicht nur zu töten, sondern sie noch in ihrem Tod zur Auslöschung weiterer Menschen zu instrumentalisieren.” [paraphrased by author].

<sup>199</sup> *Ibid.* at para. 138.

<sup>200</sup> See *Conjoined Twins*, *supra* note 167.

<sup>201</sup> *Die Luftsicherheitsgesetzentscheidung*, *supra* note 63 at para. 134.

<sup>202</sup> This conclusion is subject to the numerous difficulties discussed earlier, including identification, communication and imminence.

<sup>203</sup> Nozick, *supra* note 178 at 35.

For what it is worth, the position suggested here is that the circumstance of a suicide hijacking of a passenger plane careering towards a city skyscraper or a nuclear installation might well *morally justify* but should not *legally excuse* the lethal interception of the craft by state fighters.<sup>204</sup> This sort of reasoning informed the decision in the famous case of the shipwrecked sailors who ate a flagging cabin boy.<sup>205</sup> The reluctant cannibals received a criminal conviction but the sentence was commuted. Their behaviour was legally impermissible but morally understood. In other words, they were morally justified without being legally excused. An even more subtle understanding closer to what this article is driving at is that the moral justification of their actions was conditional on their criminal conviction, on their recognition and society's affirmation of their wrongdoing, even if that wrongdoing was a lesser of two evils. Going back to our scenario with this more subtle take on law and morality in mind, the moral justification for the interception of the aircraft can be regarded as contingent on the affirmation of criminal guilt. From another perspective, one might say that the right to life of the passengers, as involuntary aggressors, could meaningfully be vindicated in the punishment or removal from office of the individual who gave the command to eliminate the plane, and in the public expression of remorse on the part of the state through the payment of compensation to the victims' families.

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#### *A Lesser Evil, But an Evil Nevertheless*

Naturally, the many arguments above will not be rehearsed here. A summary of the conclusions is however necessary if only to gain an overview of the problem. This article asked whether it should be legal to shoot down hijacked passenger planes converted into destructive suicide missiles by terrorists.

Firstly, it is hoped that improvements in aviation security arrangements obviate the need for such macabre inquiries. Indeed, practical measures could make a big difference to the safety of air travel. In keeping with the tendencies of human imagination, too much attention has been paid to conjuring up nightmare scenarios, and too little attention has been paid to the practical efforts which could prevent their occurrence. Reinforced cabin doors, code words for secure and speedy cockpit-steward-groundstaff communication, improved security checks, effective intelligence screening, bans on hand luggage, and ground-based override of flight controls are all measures that would drastically reduce the chances of a passenger plane falling into deadly hands.

The existing international law on civilian aircraft does not automatically lend itself to excusing the emergency interception of a suicide flight but it might well

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<sup>204</sup> On this and other tough questions pertaining to the interest in the right to life, see George P. Fletcher, "The Right to Life" (1979) 13 Ga. L. Rev. 1371.

<sup>205</sup> *R. v. Dudley and Stephens* (1884), 14 Q.B.D. 273.



permit a state to take such steps in extreme circumstances. Similarly, human rights law does not rule out the balancing of life against life, though it does require states to hold human life in the highest regard, and this regard must be expressed through careful planning and preparation of emergency operations. Further, every possible means of preventing a fatal culmination of events must be exhausted before resort is had to lethal force.

Huskisson maintains that “a policy of employing an across-the-board prohibition on the use of force against civilian aircraft is doomed to fail, even if it allows for shootdowns in self-defense.”<sup>206</sup> This is not true. The fact that law is occasionally transgressed in the name of a higher purpose does not signify its failure. In this field, as in others (such as the general prohibition on torture), it is better to adhere to a bright line rule and to admonish those who cross it, whatever the reason.<sup>207</sup>

It has been argued here that, though an imminent threat to many lives on the ground might well *morally justify* the interception of a passenger plane, a *legal* prohibition on firing upon civil air traffic remains desirable. It may seem that this proposal entails that law and morality take leave of one another. Not so.

As Nozick intuited, involuntary aggressors – be they mad, sick, or merely unfortunate and unwilling participants in the evil designs of others – seem categorically different to innocent bystanders, because they threaten us, and in so doing, implicate our rights in a way that innocent bystanders do not.<sup>208</sup> This article contends that morality suggests that an imminently menacing suicide flight should be shot down, that the individual giving the order be ceremonially removed from office, and that the state publicly express its remorse, paying compensation to the heirs of the victims.

Such a legal prohibition reflects that the right to life of the ill-fated passengers was not simply obliterated with the aircraft. This approach reconciles the rule of law with the strictures of morality. It articulates society’s conviction that its agents may have done the *right* thing in saving the many on the ground by killing the already-imperilled few in the air, whilst symbolizing its acknowledgment that it was a *wrong* nevertheless, that the act was the lesser evil, but an evil nonetheless.

It is anticipated that this proposal will be criticized on the basis that it is overly Rhadamantine, that modern, hedonistic society would not contemplate the punishment of a hero, a saver of lives. That may well be the disappointing case. To that charge, there are two responses. First, does one qualify as a hero without personal sacrifice? If the individual giving the order is not removed from office, has he made a sacrifice making him a hero? Second, perhaps the most famous of all hedonists, Epicurus, instructed that a wrongdoer should covet punishment to cure the inquietude incurred in the wrongdoing.

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<sup>206</sup> Huskisson, *supra* note 10 at 166.

<sup>207</sup> See generally Waldron, *supra* note 81.

<sup>208</sup> Nozick, *supra* note 178 at 35.

I do not pretend to have found the “right” answer to the difficult question posed in this article. Yet, I hope that, in probing the nerve of the issue, by addressing sensitive questions of morality and law, and of their subtle interplay, this text provokes further, more sophisticated responses than the one offered here.