

# **The Use of Force by State Officials: Can One Ban Its Use and Yet Provide a Criminal Law Defense? (Shooting Down a Hijacked Airplane)**

By: Miriam Gur-Arye\*

## **1. Introduction**

In time of emergency states are often faced with the need to use extraordinary means to overcome extreme threats. Such extraordinary means may violate basic rights protected by the legal system. Courts usually do not want to legitimize the violations of such rights explicitly. A possible legal solution is to ban all acts violating these rights and yet grant a criminal law defense to an individual official who violated such a right in a concrete emergency situation. Such a solution was adopted by the Israeli Supreme Court in the case of torture.<sup>1</sup> The court held that the use of force in interrogating terror suspects is illegal; however, an individual interrogator who has used force in a ticking-bomb situation may make use of the criminal law defense of necessity.

This paper examines whether a similar solution could be applied to the case of shooting down a hijacked airplane, which was dealt by the German Constitutional Court.<sup>2</sup> The Court declared unconstitutional a statute authorizing the Minister of Defense to order the shooting down of a hijacked airplane, with its passengers and crew, in order to stop it from crashing into a crowded building. The German Court explicitly limits itself to the constitutionality of the statute; it did not take a stand on whether shooting down the plane in such circumstances should carry criminal liability.

---

\* Judge Basil Wunsh Professor of Criminal Law, Hebrew University of Jerusalem

<sup>1</sup> H. C. 5100/94 *Public Committee against Torture in Israel and Others v. The State of Israel, The General Security Services and Other*, 53(4) PD 817 (1999) English translation can be found at <http://www.court.gov.il/mishpat/html/en/system/index.html>

<sup>2</sup> Judgment of the Bundesverfassungsgericht Feb. 15 2006, BverfGE, 1 BvR 375?05. Abstracts of the ruling, translated into English, were published in *German Law Journal*, 161 (February 2008). For an elaborate summary of the ruling see: Oliver Lespius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act", 9 *German Law Journal* (September 2006).

For the purposes of this paper I will assume that the Court was right in holding that a state official ought not to be authorized by statute to shoot down a hijacked airplane along with its innocent passengers and crew, and the arguments advanced in this paper support that assumption. The issue will be whether a criminal law defense may nevertheless be granted to an individual official once he has, in fact, shot down an airplane in these circumstances, and killed its passengers and crew.

I shall first explain why criminal law excuse, which enables one to hold that the shooting down of the airplane is wrong and yet to excuse the official from criminal liability, should not be granted to individual official who has shot down the airplane. I shall then turn to the more challenging issue, whether granting a criminal law justification can be reconciled with the German constitutional court ruling. My main argument is that, although state officials ought not to be authorized by statute to shoot down airplanes along with its crew and passengers (as the court held), the shooting down of such an airplane by an individual state official may nonetheless be justified under criminal law justifications.

## **II. An Excuse**

On the face of it, granting an excuse seems an easy way to preserve the ban on the use of force by officials, while at the same time guaranteeing fair treatment to an official who used such force. A similar solution was proposed in the context of torture, where it was suggested that “necessity” should excuse the criminal liability of an individual interrogator who resorted to torture in a ticking-bomb situation.<sup>3</sup>

---

<sup>3</sup> Alan M. Dershowitz, Is It Necessary to Apply “Physical Pressure” to Terrorists – and to Lie About It? 23 *Isr. L. Rev.* 192, at 200 (1989); Paul H. Robinson, Letter to the Editor 23 *Isr. L. Rev.* 189 at 190 (1989). Elsewhere I showed that the Israeli Supreme Court’s judgment (supra note 1) was based, implicitly, on the same solution. See: Miriam Gur-Arye, “Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience” *Torture: A Collection*, Sanford Levinson, editor (Oxford University Press, 2004), 183 at p. 188

Necessity as an excuse is explicitly recognized by the German criminal code,<sup>4</sup> which distinguishes between necessity as an excuse and necessity as a justification.<sup>5</sup> Applying necessity as an excuse to an official who shot down an airplane with its passengers and crew in order to prevent the plane from crashing into a crowded building<sup>6</sup> would enable us, first and foremost, to declare that the official's conduct is wrong. Such a message would be based on the same deontological reasoning which led the German constitutional court to declare unconstitutional the statute authorizing official to shot the airplane in such circumstances. The message would be that it is wrong to treat the innocent passengers and crew, whose lives were sacrificed, only as a means in saving the lives of potential victims of the airplane's attack. At the same time, necessity as an excuse would enable us to release the individual official from criminal liability on the grounds that it would be unfair to attribute criminal blame to the individual official who was motivated by the desire to save life and by the need to stop the airplane from crashing into a crowded building. Elsewhere I have elaborated why, as a matter of policy, excuses like necessity should not be granted to state officials in their capacity as officials.<sup>7</sup> The main argument rests on the **wrongful** nature of the conduct which is being excused. Thus, if we assume that the legal system is committed to the deontological view that the sacrifice of innocent passengers' lives in order to stop the airplane

---

<sup>4</sup> Sec. 35 of the German Criminal Code, 1975, in its English translation [28 *The American Series of Foreign Penal Codes* (1987)] defines necessity as an excuse as follows:

Whoever commits an unlawful act in order to prevent a present danger to the life, limb or liberty of himself, a relative or a close person, acts without guilt. However, this does not apply if under the circumstances, and in particular if he has brought about the danger or has a special legal obligation, the perpetrator should be expected to cope with the danger.

<sup>5</sup> Sec. 34 of the German Code, in its English translation (*Ibid.*) defines necessity as justification as follows:

Whoever in a present and otherwise not preventable danger to life, limb, liberty or any legal interest acts to prevent the danger to be inflicted on himself or another person, does not act unlawfully if the balance of conflicting interests, in particular the legal interests involved and the intensity of the imminent danger, shows that the defended interest is entitled to prevail over the one which is infringed. This is admissible, however, only in so far as the act is an adequate means for preventing the danger.

I have elaborated on that distinction elsewhere *see* Miriam Gur-Arye, Should a Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse? 102 *L. Q. Rev.* 71 (1986).

<sup>6</sup> For the interpretation of the German court ruling as leaving a room for necessity as an excuse see: Kai Moller, On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the German Federal Constitutional Court, *Public Law*, 457 (2006).

<sup>7</sup> See: Miriam Gur-Arye, "Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience" *supra* note at 188.

from attacking other innocent persons is wrong (the assumption underlying necessity as an excuse in this context), state officials should be required to overcome the pressure to shoot the airplane down as part of the requirement that they avoid committing wrongs while carrying out their official duty.

The conclusion that necessity as an excuse ought not to apply to state officials in their official capacity can be based on the personal nature of excuses. Like other excuses, necessity as an excuse is a personal defense; it is granted only to the actor whose own life, bodily integrity or liberty, or that of a close relative, was severely and imminently in danger.<sup>8</sup>

### **III. Criminal Law Justifications and Official Empowerment**

Criminal law justifications constitute exception to the prohibitory rule. When a rule prohibits the use of force by state officials, criminal law justifications may nonetheless justify the use of force by an individual state official in exceptional circumstances. The debate in the context of torture can be read as touching upon criminal law justifications rather than excuses and as dealing with the question whether, despite the general ban on torture, criminal law justifications (either necessity or self-defense) should apply to an individual interrogator who resorts to torture in ticking-bomb situations.<sup>9</sup>

On the face of it, a parallel debate cannot be raised in the context of shooting down the hijacked airplane. The statute which was held unconstitutional by the German Court related to the exceptional scenario. The statute authorized the shooting down of the hijacked airplane along with its crew and passengers in circumstances that could give rise to the justification of necessity: the power to shoot down the airplane was limited to instances where there was no other way to avoid the airplane from crashing into a crowded building and killing more innocent people. Therefore, one may be forced to conclude that the same reasoning that led the German Court to declare the statute authorizing the

---

<sup>8</sup> See the references at note *supra*. See also, Miriam Gur-Arye, "Should a Criminal Code Distinguish between Justification and excuse?" V(2) *Canadian Journal of Law and Jurisprudence*, 215, at 225-226 (19 ).

<sup>9</sup> See: Miriam Gur-Arye, "Can the War against Terror Justify the Use of Force in Interrogations? Reflections in Light of the Israeli Experience", *supra* note at 189-195

shooting down of the airplane unconstitutional should also prevent granting the justification of necessity to an individual official who in fact shot down a plane under the same circumstances.

Below I shall offer a distinction between official empowerment (authorization) and criminal law justifications applied to officials and argue that, although state officials ought not to be empowered by statute to use lethal force in exceptional circumstances, the use of such force by an individual state official may nonetheless be justified under criminal law justifications.

Statutes empowering state officials to carry out tasks which involve the violation of individual rights give priority to the official task over the rights of any given individual. The assumption is that the legislature weighed the conflicting interests and the proportionality between them and arrived at the conclusion that the official task overrides the individual rights. The constitutionality of the empowering statute which gives priority to the official task over the individual rights may be reviewed. However, unless the empowering statute is struck down, carrying out the official task does not constitute a prima-facie criminal wrong.

The message underlying criminal law justifications is significantly different. Criminal law justifications provide a justified reason to violate a prohibitory rule.<sup>10</sup> The underlying assumption is that a criminal prohibition aimed at preventing harm has been prima-facie violated and the harm has indeed occurred. However, because of the exceptional circumstances, there was a justified reason for causing that harm.

To clarify the distinction between empowerment and criminal law justifications applied to officials, let me compare an executioner with an official who killed someone in self-defense.<sup>11</sup> The message underlying the empowerment of the executioner is that the legislator decided that the death penalty is the appropriate punishment for certain grave offences. While carrying out her duty,

---

<sup>10</sup> Below I shall touch upon the question whether justification is based on the right or only permissible reason. See

<sup>11</sup> The comparison between the two examples is taken from Meir Dan-Cohen, *Harmful Thoughts, Essays on Law, Self, and Morality* (Princeton University Press, 2002) at 234.

the executioner does not commit any wrong, and a society which permits the death penalty does not treat her as a "killer". The self-defender, on the other hand, commits a prima facie criminal wrong – she prima facie violated the prohibition against killing. Even when the self-defender has used the lethal force under her official capacity she still is to be treated as a "killer in self-defense", who in order to escape criminal liability will have to justify the killing<sup>12</sup> by the exceptional circumstances constituting justificatory self-defense<sup>13</sup>.

The distinction between official power and criminal law justifications can be developed further by the concept of “role distance” suggested by Dan-Cohen.<sup>14</sup>

According to Dan-Cohen, public officials may maintain a “role distance”, which "diminishes [their] personal responsibility as well as their vulnerability".<sup>15</sup> To clarify this point, Dan-Cohen uses the same comparison between a self-defender and an executioner.

By interposing a justification defense, the self-defender concedes his responsibility for the killing. It is precisely because of his responsibility that the self-defender must demonstrate that the killing was justified. ...[T]he executioner... may deny being a killer altogether. He may attempt to avoid his personal responsibility for the killing.<sup>16</sup>

The executioner will achieve that goal through “role distance”.

For Dan-Cohen the notion of “role distance” serves as an example of the dynamic relationship between the law and the self. “By recognizing official duty as barring responsibility, the law codifies a specific conception of the self”.<sup>17</sup> According to that conception” [t]he self can assume a detached and

---

<sup>12</sup> I am not taking a stand on the issue of burden of proof.

<sup>13</sup> The suggested distinction between empowerment and criminal law justifications fits into the distinction between the definition of crime and criminal law justifications [see: George Fletcher, *Rethinking Criminal Law*, 555-569 (2000)]. Empowered acts do not violate the definition of crime (the executioner did not violate the definition of murder); whereas justificatory conduct violates the definition of the offense (the self-defender violated the definition of at least manslaughter).

<sup>14</sup> Dan-Cohen, *supra* note at 233-235, 255-257.

<sup>15</sup> *Ibid.* at 256.

<sup>16</sup> *Ibid.* at 234.

<sup>17</sup> At 235.

instrumental attitude toward a particular role and can perform it in an alienated fashion.”<sup>18</sup>

I would like to suggest that whether or not an official may maintain role-distance in carrying out her duties should be decided by the legal system through the distinction elaborated above between official empowerment and criminal law justifications applied to officials. Empowering officials will usually make role distance possible, whereas justifications applied to official will always prevent this distance. Preventing the official from maintaining role-distance through the notion of “justifications” would guarantee that even in her official capacity the state official makes her own decision as to whether the concrete circumstances are indeed so exceptional as to justify violating the prohibitory rule and causing harm.

To gain additional support for the conclusion that applying criminal law justifications to officials will prevent them from maintaining "role distance" let me mention the view that justifications require awareness of the justifying circumstances.<sup>19</sup> According to that view, an actor who is ignorant of the justifying circumstances does not have a justified reason to violate the prohibitory rule. I would like to suggest that we go one step further. Because we are dealing with exceptional circumstances that give rise to justified reasons for prima-facie violation of a criminal prohibition, the actor should not only be aware of the factual circumstances but should also be required to consider, before acting, whether the concrete circumstances indeed provide a justified reason for violating the prohibition in the specific situation. By defining justifications the legislator provides only a framework for when prima-facie violation of the criminal prohibition might be justified by giving guidance for the balance of the interests involved. To justify her concrete conduct the individual must deliberate on the concrete balance.

---

<sup>18</sup> At 234..

<sup>19</sup> George Fletcher, *The Right Deed for the Wrong Reason: A reply to Mr. Robinson* 23 *U.C.L.A. L. Rev.* 253 (1975); J.C. Smith, *Justifications and Excuses in the Criminal Law*, 28-44 (1989)

#### **IV. Shooting Down the Hijacked Airplane: Criminal Law Justifications and the German Court Ruling**

In its ruling the German constitutional court reasoned that:

The State may not protect a majority of its citizens by intentionally killing a minority, in this case the flight crew and the passengers on the airplane.<sup>20</sup>

I suggest reading that reasoning in light of the distinction between official empowerment and criminal law justifications elaborated above. The court's reasoning supports the conclusion that a state official ought not to be empowered to shoot down an airplane along with its crew and passengers. It is true that the State has a duty to protect life and to stop terrorist attacks. However, when the only way to protect life requires the sacrifice of other people's lives, states ought not to ignore the prima-facie wrongfulness involved in the sacrifice of life. In such cases the State should not allowed its officials to maintain role-distance. An individual official who shoots down such an airplane will have to take responsibility and to justify the killing of passengers and crew by the criminal law justification of necessity. She will have to show that the final decision to shoot down the airplane was hers and that she deliberated before shooting about the justificatory circumstances: she could not have thought of another way to stop the plane from crashing; she had gathered all the possible information about the probability of the crashing of the airplane into a crowded building and weighed it against the probability that the crew and passengers would be killed.

Reading the German court ruling in light of the distinction between empowerment and criminal law justifications, as suggested above, does not necessarily support the conclusion that the individual official will indeed be granted the criminal law justification of necessity. Whether or not justificatory necessity will be granted to an individual official depends further on whether the deontological reasoning underlying the German ruling has an impact on criminal law justifications.

---

<sup>20</sup> Section 15 of the ruling, as cited by Lespius, *supra* note 2

According to the German court,

[The ordering] and carried out of the shooting down of the aircraft ... ignored the status of the persons affected as subjects endowed with dignity and inalienable fundamental rights. By virtue of their killing being used to save others, they were treated as mere objects and at the same time deprived of their fundamental rights.<sup>21</sup>

Whether such reasoning has an impact on the criminal law justification of necessity derives **partly** from the nature of criminal law justifications. There is a disagreement between criminal law scholars as to whether justifications imply morally right conduct<sup>22</sup> or only permissible conduct.<sup>23</sup>

According to those who identify criminal law justifications with moral right, an individual official who shot down the airplane might be required to justify the killing of passengers and crew, by the same moral reasoning prevailing in the legal system. The German court ruling expresses commitment to an absolutist deontology which does not allow balancing between lives of innocent persons. Such a commitment will prevent an individual official from demonstrating that the killing of passengers and crew was justified because it was necessary to stop the airplane from crashing into crowded building, and she will be held criminally liable. In legal systems influenced by consequentialist moral theory, an individual official will be able to justify the killing of passengers and crew by the need to stop the airplane from crashing into a crowded building, as would probably be the conclusion in various states in the US.<sup>24</sup> A midway moral commitment, according to which the need to prevent catastrophic results limits deontological commitment, will enable the individual official to justify

---

<sup>21</sup> Section 2(a) of the ruling as cited in the abstracts of the ruling, *supra* note 2

<sup>22</sup> See: George Fletcher, Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?, 26 *UCLA L. Rev.* 1355, at 1359-1360 (1979); Dan Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 *Colum. L. Rev.* 269, 318-19 (1996); Heidi Hurd, Justification and Excuse, Wrongdoing and Culpability, 74 *Notre Dame L. Rev.* 1551, 1558 (1999).

<sup>23</sup> Kent Greenawalt, The Perplexing Borders of Justification and Excuse 84 *Colum. L. Rev.* 1897, 1904-1905 (1984); Joshua Dressler, New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher's Thinking and Rethinking, 32 *UCLA Law Rev.* 61, 84-87 (1984); Mitchell Berman, Justification and Excuse, Law and Morality 53 *Duke L.J.* 1 (2003). See also note *infra*

<sup>24</sup> American Law Institute, Model Penal Code.....

the killing of passengers and crew only when it was indeed necessary to prevent catastrophic results.

In this context it is important to note that the various moral commitments may only influence the question of whether criminal law justification of necessity will be granted. According to this paper's argument, state officials ought not to be empowered by statute to sacrifice the lives of passengers and crew, no matter to which moral theory the legal system is committed.

On the other hand, those who believe that criminal law justifications grant permission to violate the prohibition, and justified conduct within the criminal law means only tolerable conduct, might arrive at the conclusion that even under the German legal system, an individual official will not be bound to justify the killing of passengers and crew by the same deontological reasoning underlying the German constitutional court ruling. She may emphasize the fact that the passengers and crew were doomed to die anyway by the crashing of the aircraft into the crowded building and "killing a person who is doomed to die anyway, as a side effect of saving others, is permissible."<sup>25</sup>

There is yet another variation on the view that criminal law justifications grant permission to violate the prohibition, suggested by Husak.<sup>26</sup> According to Husak "A ... justification **diminishes the wrongfulness** of an act to a sufficient degree to preclude liability [emphasis added]".<sup>27</sup> Therefore, a criminal law justification might even be granted when the conduct is considered morally wrong, as long as the wrongfulness of the conduct does not cross the minimum threshold of criminal wrongfulness. According to that view, we may conclude that the killing of passengers and crew as the only way to stop the hijacked plane from crashing into a crowded building was not objectionable enough to constitute criminal wrongfulness; and therefore the

---

<sup>25</sup> Eyal Zamir & Barak Medina, Law, Morality and Economics: Integrating Moral Constraints with Economic Analysis of Law, 20 *Cal. L. Rev.* 101 at 154 (2008) (see also the references at note 199 *ibid.*) It should be noted that according to the German court ruling "the assessment that the persons were doomed anyway could not change the fact that the killing of innocent people is by nature infringement of these people's right to dignity" (section 2(a) of the ruling.) According to this paper's suggestion that reasoning does not affect criminal law justification understood as granting permission to prima-facie violation of the prohibitory rule.

<sup>26</sup> Douglas Husak, Partial Defenses, 11 *Can. J.L. & Juris.* 167, (1998)

<sup>27</sup> *Ibid.*, at p. 170

individual official who shoots down the airplane under these circumstances will be granted the justificatory necessity, no matter to which moral theory the legal system is committed.

I tend to agree with Husak's view. The main reason for that has to do with the unavoidable gap between moral standards and criminal law standards. This is true not only because the criminal law does not enforce morality as such, but also because the criminal law is concerned with the minimal social demands which can fairly be imposed in order to prevent harm.<sup>28</sup>

However, even if one adopts the opposite view, that justifications within the criminal law imply morally right conduct, it is very doubtful whether a certain legal system is indeed committed to one unitary moral theory. Moral issues are complicated and it might be impossible to gain wide social consensus on the various moral issues while consensus with regard to the way the criminal law should deal with such issues might be easier to gain. The suggested distinction between empowerment and criminal law justifications further supports the view that criminal law justifications should not imply a unitary moral theory. States may be required to commit themselves to one unitary moral theory and to avoid granting official power which is inconsistent with that commitment. By contrast, individuals, including state officials, should not be required to commit themselves to one moral theory and to justify the prima-facie violation of the criminal prohibition only by that theory. Under that view, the individual official who shoots down a hijacked airplane will be able to justify the shooting by the consequences she succeeded to prevent either as a limit to the deontological commitment or as part of a consequentialist moral theory.

The reading of the German court ruling in light of the distinction between official empowerment and criminal law justifications has an impact on additional issues mentioned by the German constitutional court.

---

<sup>28</sup> For the minimalist use of the criminal law, see: Andrew Ashworth, *Principles of Criminal Law* 32-37 (New-York: Oxford University Press, 4<sup>th</sup> ed. 2003); Douglas Husak, *The Criminal Law as Last Resort*, 24 *Oxford J. Legal Stud.* 207 (2004)

The German court related to **the danger of a mistaken appreciation of the situation:**

...the judgment as to whether a plane had actually been hijacked and could be used as a weapon was often based on pure assumption. Since it was not uncommon for a passenger plane to deviate from its prescribed route or lose radio contact, there was a considerable danger of making rash, and potentially, incorrect decisions<sup>29</sup>

The mere danger of mistake is not unique to the situation of the hijacked airplane. Situations of necessity, when a quick reaction to an imminent danger is required, by their nature involve risks of mistakes. That risk can be taken care of within the criminal law doctrine relating to a mistaken belief with regard to the justificatory circumstances. To avoid rash decisions in the face of imminent dangers, one can adopt the view that the mistaken belief in the existence of justificatory circumstances ought to be reasonable.<sup>30</sup> The reasonableness of the mistake will require the individual official to be cautious and to take reasonable steps in the concrete situation to ensure that the plane is indeed going to crash into a crowded building. It is true that it will not always be possible to gather all the necessary information. However, the fact that the official will not be able to maintain role-distance (as suggested in this paper) ensures that she will not take upon herself the responsibility of shooting down the airplane unless she believes with a high degree of certainty that the airplane is indeed going to crash into a crowded building. If despite her reasonable efforts, dictated by the concrete situation, she arrived at a mistaken conclusion, the shooting down of the airplane would be considered wrong, though the official might be criminally excused.<sup>31</sup>

---

<sup>29</sup> Section 2(a) of the ruling as cited in the abstracts of the ruling, supra note 2

<sup>30</sup> George Fletcher, *The Right and the Reasonable*, 95 *Harv. L. Rev.* 949 at 971-980 (1985). According to Robinson, on the other hand, "it seems appropriate for the legislation to excuse some unreasonable mistakes as to justification", see; Paul Robinson, *Criminal Law Defenses* Vol. I, at 410 (1984). It should be mentioned that the tendency in the Anglo-American legal systems is to give up the requirement that a mistake as to justificatory circumstances be reasonable, See ...

<sup>31</sup> See the references *Ibid.* In this context it should be mentioned that the policy for not granting excuses like necessity to state officials while acting in their official capacity (see supra note and the accompany text) does not apply to "putative justification" turning into an excuse.

The German court distinguished between **the "[u]se of force against aircraft with passengers and crew members on board"**<sup>32</sup> and **"[u]se of force against aircrafts with only hijackers on Board"**.<sup>33</sup> According to the court ruling, "the use of armed force against aircrafts with solely hijackers on board was permissible... so long as the powers of the armed forces were extended appropriately".<sup>34</sup>

Although there is a difference between killing innocent passengers and crew and killing the hijackers, the distinction between the two should be expressed within the criminal law justifications rather than through official empowerment. The shooting of the airplane with crew and passengers on it may be justified under necessity, whereas the shooting of the airplane with only hijackers on it will be justified under the stronger and wider justification of self-defense. In both cases the official will have to take personal responsibility and demonstrate that the shooting down of the airplane was justified either by the necessity circumstances or by the circumstances giving rise to self-defense. While elaborating above on the distinction between official empowerment and criminal law justifications I related to the example of self-defense as a typical example of criminal law justification, which is different from official empowerment, and there is no need to repeat the reasons for that here. Let me just mention that the distinction between empowerment and criminal law justification of self-defense, finds support in section 3.03 the Model Penal Code<sup>35</sup> defining "execution of public duty". The section distinguishes between conduct which is "justifiable when it is **required or authorized** by...the law defining the duties or functions of public officers"<sup>36</sup> and "**the use of force**" in executing public duties.<sup>37</sup> The use of force in executing public duty is not considered part of the conduct "required or authorized by law"; i.e. it is not within the official power. The use of such force may only be justified by the

---

<sup>32</sup> Section 2(a) of the ruling as cited in the abstracts of the ruling, supra note 2

<sup>33</sup> Section 2(b) *ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> American Law institute, Model Penal Code

<sup>36</sup> MPC section 3.03(1)

<sup>37</sup> *Ibid.* section 3.03(2)

criminal law justifications specified in other sections of Article 3 such as “use of force in self-protection”<sup>38</sup> and “use of force for the protection of other persons”.<sup>39</sup>

## V. Conclusion

The distinction between official empowerment and criminal law justifications suggested in this paper explains how one can accept the **ruling** of the German constitutional court that a statute authorizing state official to shoot down a hijacked airplane along with its passengers and crew is unconstitutional, and yet justify the shooting down of the airplane by an individual state official under the criminal law justification of necessity. In order to further reconcile the **deontological reasoning** underlying the German court ruling with granting justificatory necessity, one has to reject the view that criminal law justifications imply moral right and should reflect one unitary moral theory prevailing in the legal system. The rejection of that view can be based, inter alia, on the distinction between empowerment and criminal law justifications. States may be expected to commit themselves to a unitary moral theory and to avoid granting official power which is inconsistent with that commitment; individuals, including state officials, should not be expected to be bound by such moral theory in justifying the prima-facie violation of the criminal prohibition. Therefore, even where one accepts the absolute deontological reasoning of the German constitutional court that State ought never to empower its officials to sacrifice the life of innocent passengers and crew to stop a hijacked plan from crashing into a crowded building, the individual official will be able to justify the killing of passengers and crew by the consequences she succeeded to prevent.

---

<sup>38</sup> Section 3.04

<sup>39</sup> Section 3.05