

**Draft; date: 25-4-2008**

## **Shooting down a Hijacked Plane – A Violation of the Passengers’ Human Dignity?**

### **The German Discussion**

**Professor Dr. Tatjana Hörnle, Ruhr-Universität Bochum, Germany**

#### **1. The Provision in § 14 III Luftsicherheitsgesetz (LuftSiG, Air-Transport Security Act)**

In 2005, the German parliament passed a law to strengthen security measures with respect to air traffic. Concerns about security in this area were not only fuelled by the attacks which took place on September 11, 2001, but also by an incident which occurred in Germany two years later which was not related to a terrorist threat. At that day, the pilot of a small plane was circling over the city of Frankfurt for several hours, threatening to commit suicide, before he could be persuaded to return to the airport. The “Luftsicherheitsgesetz” (LuftSiG, Air-Transport Security Act) encompassed a controversial provision which permitted to use military weapons against an airplane in cases of immediate danger. According to § 14 III LuftSiG, the Secretary of Defence could order „the use of weapons against an airplane, if under the given circumstances one could presume that this airplane was going to be used against the lives of other human beings, and if the use of weapons was the only means against this present danger”. This provision did not last long: A year after it was enacted, the Federal Constitutional Court declared it to be unconstitutional,<sup>1</sup> a declaration which means that it is no longer valid, because laws deemed unconstitutional by the Federal Constitutional Court cease to be valid laws.<sup>2</sup> At present, there is no explicit legal basis if a hijacking would occur in Germany and the Secretary of Defence would order that the air force shoots at the plane (as he has announced to do if necessary).

---

<sup>1</sup> 115 Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts -BVerfGE- 118 (2006). See for discussion in English Michael Bohlander, *Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes – Taking Human Life and the Defence of Necessity*, 70 J. Crim. L. 147, 159-160 (2006); Michael Bohlander, *In Extremis – Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law*, Crim. L. R. 579, 590-591 (2006); Oliver Lepsius, *Human Dignity and the Downing of a Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 7 German Law Journal 761 (2006); Manuel Ladiges, *Comment – Oliver Lepsius’ Human Dignity and the Downing of a Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-Terrorism Provision in the New Air-Transport Security Act*, 8 German Law Journal 307 (2007); Tatjana Hörnle, *Hijacked Airplanes: May They Be Shot Down?*, 10 New Criminal Law Review 583 (2007).

We have now a political and legal debate whether, despite the Court's decision to declare § 14 III LuftSiG unconstitutional, the Secretary of Defense may order the shooting down of a hijacked airplane.<sup>3</sup> Within the air force, opinions are split whether pilots ought to refuse following such a directive.<sup>4</sup> However, in view of the constitutional views as expressed by the Federal Constitutional Court, if there are uninvolved passengers and crew members aboard, pilots deserve the practical advice that they would run serious risks if they follow the order. The Court left open how the shooting down of an airplane would be judged from the perspective of criminal law.<sup>5</sup> The majority opinion within German criminal law doctrine assumes that to shoot at the airplane could not be justified according to the rules of "justifying necessity" (§ 34 German Penal Code, see for its text footnote \* and the discussion below 4. a). Pilots might be content to hear that there is considerable support for the solution that they should, albeit not justified, be excused from punishment (see 4. a) – but how German criminal courts would in fact decide in a real case, is not altogether clear.

The Federal Constitutional Court had two separate and independent reasons to support its constitutional verdict against § 14 III LuftSiG. One relates to the organisation of defence mechanisms within the German constitution (Grundgesetz, GG). This concerns the question under which condition the federal army with its arsenal of military weapons may act to avert dangers. With respect to this point, the court argued that the Grundgesetz does not allow using military means as support for the police power (see below 2.). The second issue was whether the shooting down of a plane could be compatible with the normative framework provided in our human rights-catalogue. In this part of the ruling, the court relies on Art. 1 I Grundgesetz (GG), the human dignity-clause ("Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt" – „The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority“). The decision claims that Art. 1 I GG stands in the way of shooting down a hijacked plane because this would violate the human dignity of uninvolved passengers and crew members (see below 3.).

## **2. The Difference between Policing and Military Defence**

---

<sup>2</sup> See § 78 BVerfGG (Law on the Federal Constitutional Court).

<sup>3</sup> See Manuel Ladiges, Flugzeugabschuss auf Grundlage des übergesetzlichen Notstandes? Verfassungs- und befehlsrechtliche Beurteilung, 50 Neue Zeitschrift für Wehrrecht 1-15 (2008).

<sup>4</sup> Ladiges, supra note 3, at 9.

<sup>5</sup> BVerfGE, supra note 1, at 157.

The German Constitution is based on a clear-cut difference between tackling interior dangers (policing) and military defence in the case of war.<sup>6</sup> The sixteen German states (and not the federal state) are mainly responsible for policing, while the army is organised by the federal state. While the Grundgesetz does not go into details about matters concerning the police power (except, of course, the general human rights catalogue which sets limits for the states' police laws), it leaves only narrow room for the army applying force. As a result of political debates in the 1960s, art. 87a II-IV GG restricts actions by the army to the case of defence. Art. 35 II, III GG contains an exemption for natural or man-made catastrophes: the army may assist the local police activities to deal with such an event or to prevent the catastrophe. The relevant provisions in the LuftSiG referred to this role of the army as assistance for police tasks. The constitutional framework thus was to be found in art. 35 II, III GG.

The Federal Constitutional Court declared, however, that art. 35 II, III GG do not include the permission to apply military weapons. As far as security measures in the case of a catastrophe require the use of force, army personnel would need to restrict themselves to the means available to the police. Obviously, it would be pointless to shoot at an airplane with pistols or other police equipment, and to use missiles or military equipment on board of a fighter plane would exceed the boundaries of "assisting the police".<sup>7</sup> For this reason, the court declared § 14 III LuftSiG unconstitutional.<sup>8</sup>

Because the wording of the "LuftSiG" made it clear that this was intended as "assistance for the police", the Federal Supreme Court did not need to deal with another question: What exactly does the word "defence" in art. 87a GG mean? There is one part in art. 87a GG which might become relevant for terrorists' attacks: art. 87a IV GG permits to use army forces to fight rebels who are organised and themselves armed with military weapons, provided that there is a severe danger for the free and democratic state. But beyond such open combat with larger groups who rely on military equipment themselves and who cause a state of emergency resembling civil war,<sup>9</sup> the German constitution is very reluctant to grant access to the resources of the army. How far this reluctance goes, is a hotly debated topic in constitutional law at the moment. Three approaches are possible: firstly, one could conclude that the

---

<sup>6</sup> Matthias G. Fischer, *Terrorismusbekämpfung durch die Bundeswehr im Inneren Deutschlands?*, *Juristenzeitung* 376 (2004); Kay Waechter, *Polizeirecht und Kriegsrecht*, *Juristenzeitung* 61 (2007).

<sup>7</sup> BVerfGE, *supra* note 1, 146-151.

<sup>8</sup> See for criticism Christian Hillgruber, *Der Staat des Grundgesetzes – nur "bedingt abwehrbereit"?*, *Juristenzeitung* 206, 214 (2007).

wording in art. 87a I, II GG “zur Verteidigung” (“for the purpose of defence”) includes defence in a “war on terror”. The second approach would be to presume that shooting down civil airplanes does not follow under the “defence provision” as it exists, but that the constitution should be changed. Or, thirdly, one can argue that the army should never be involved into fighting dangers for interior security and that therefore the provisions of the Grundgesetz should remain as they are. A minority of authors assumes that the word “defence” in art. 87a GG could be read broadly. From this perspective, any armed attack would be covered, and using a hijacked airplane as means for an attack is deemed sufficient.<sup>10</sup> However, the wording and the history of art. 87a GG support the traditional reading: “defence” means a state of war in the classical sense, that is, defence against an attack undertaken from abroad. Countermeasures against a hijacked airplane do not fall under “defence” in the sense of art. 87a GG.<sup>11</sup>

This leads to the question whether a sharp division between army and police might be too narrow and outdated. It presupposes a dichotomy of dangers: dangers coming from the outside, that is, the danger of a military attack by another state, and dangers coming from the inside, dangers within the homeland, that is, dangers posed by criminal offenders (individuals or groups acting in a organised way) which can be dealt with by the police forces. Critics point out that the legislators in the 1960s (when the basic structures of the “security architecture” of the German Federal Republic became part of our constitution) did not foresee later developments. They did not take into account that well organised, politically motivated or hate-driven groups would find ways of killing many others which can not be effectively fought with the weapons and means available to the police. This raises the question how to deal with new insights into human evilness and inventiveness as the September 11-attacks have yielded. One possible conclusion would be to adapt the constitutional provisions to social changes and to be less restrictive about the use of armed forces, for example when

---

<sup>9</sup> See for such cases of civil war and comparable states of emergency Fischer, *supra* note 6, 382-383.

<sup>10</sup> Ladiges, *supra* note 3, at 8.

<sup>11</sup> Elmar Giemulla, *Zum Abschuss von Zivilluftfahrzeugen als Maßnahme der Terrorbekämpfung*, *Zeitschrift für Luft- und Weltraumrecht* 32, 33-34 (2005); Wolfgang Hecker, *Die Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz*, *Kritische Justiz* 179, 180 (2006), Fischer, *supra* note 6, at 379-380; Christian Starck, *Anmerkung*, *Juristenzeitung* 417 (2006); Christoph Enders, *Der Staat in Not*, *Die öffentliche Verwaltung* 1039, at 1044 (2007); Einiko Benno Franz, *Der Bundeswehreinsatz im Innern und die Tötung Unschuldiger im Kreuzfeuer von Menschenwürde und Recht auf Leben*, *Der Staat*, 501, at 543-546 (2006).

dealing with hijacked airplanes<sup>12</sup> or maybe only for the case of dangerous planes without uninvolved passengers aboard.<sup>13</sup> This topic is on the political agenda.<sup>14</sup> The other position would maintain that scepticism against the army still has its foundations. It can not only be explained with the experiences gained during the world wars, especially and obviously in Germany, but there might also today be good reasons to curb the scope for activities by the army. Distrust of the army is widespread in modern Germany. It seems to me that the sceptical approach is based on two assumptions: first, carriers of state power become potentially more dangerous the heavier the weapons at their disposal are, and second, that armies tend to be hard-to-control sections of state power. At least the latter assumption can be backed up with (not only) historical evidence. This supports divisions of state power like in the Grundgesetz treating the army as a potentially dangerous entity which needs to be kept in narrow confinements. On the other hand, it is not beyond doubt whether, in modern times, the rule: “the more heavy the weapons, the more dangerous is this section of state power” is always conclusive. In other words: Can one put greater confidence in the exercise of police power than in the exercise of military power?

And, if one generally approves of restrictive limits for the armed forces, the question remains: what follows from that for hijacked airplanes-cases? The crucial point seems to be to thwart too much ambitions and influence of the army’s leading ranks. However, if a civil government needs technical support in forms of weapons not kept by the police, this is not a matter which might enhance the likelihood of a coup d’etat through army officers. If one has to make a difficult choice in the eye of a very severe danger posed by a terrorist threat, the question whether police equipment comes to use or army weapons seems not the most central concern. Rather, the crucial point is: Do individual rights stand against the application of force? If this is the case, the police-army-difference does not matter. However, if the examination of individual rights supports the conclusion that the danger may be averted at the cost of killing human beings, there must be weighty reasons behind such an outcome. Under such rare circumstances, I would not have fundamental objections against using military equipment.

---

<sup>12</sup> Otto Depenheuer, Selbstbehauptung des Rechtsstaates, 20-34 (2007); Manuel Ladiges, Flugzeugabschuss auf Grundlage des übergesetzlichen Notstandes? Verfassungs- und befehlsrechtliche Beurteilung, 50 Neue Zeitschrift für Wehrrecht 8 (2008).

<sup>13</sup> Wolf-Rüdiger Schenke, Die Verfassungswidrigkeit des § 14 III LuftSiG, 59 Neue Juristische Wochenschrift 736, at 738-739 (2006).

<sup>14</sup> Christian Pestalozza, Inlandstötungen durch Streitkräfte – Reformvorschläge aus ministeriellem Hause, 60 Neue Juristische Wochenschrift 492 (2007).

### 3. The Human Dignity Argument

If the German parliament considers widening the constitutional provisions allowing assistance by army forces, another obstacle remains in the case of hijacked airplanes. Unless the hijackers get hold of an empty plane and manage to take off on their own, at least some crew members, and maybe also the passenger of a scheduled or charter flight would be aboard. The second argument why the German Federal Constitutional Court declared § 14 III LuftSiG unconstitutional pointed to this fact. The judges postulated that the human dignity of passengers and crew members would be violated if they were to be killed.<sup>15</sup> Unlike most other constitutional provisions in the Grundgesetz (unlike, for example the right to life, art. 2 II GG), the verdict against violations of human dignity is absolute. There is no exemption clause which allows balancing the protected interest against other interests. To affirm that human dignity is at stake means that the conduct in question must be deemed unconstitutional without further arguments. Within the German constitutional discourse, evoking art. 1 I GG equals playing a trump card.

The Court's decision has found approval,<sup>16</sup> but it also provoked criticism.<sup>17</sup> The section about human dignity invites questions when the discussion extends beyond a German audience. The first question is whether talking about "human dignity" only makes sense within the special German constitutional context, the second asks what exactly the meaning of "human dignity" could be. To place human dignity at the very start of a human rights-catalogue is a German speciality. The European Convention on Human Rights (ECHR), for instance, does not include this expression. Obviously, human beings have more solid interests, for example, the right to life and physical integrity, freedom of movement etc. Whether "human dignity" is a subjective right at all, is under debate within German constitutional theory.<sup>18</sup> One could interpret art. 1 I GG (enacted in 1949) as a reminder of the atrocities committed by the

---

<sup>15</sup> BVerfG, supra note 1, at 152-154.

<sup>16</sup> See, for example, Schenke, supra note \*, 736; Lepsius, supra note 2; Lepsius, Das Luftsicherheitsgesetz und das Grundgesetz, in: Fredrik Roggan (ed.), Festgabe für Burkhard Hirsch, 47 (2006); Wolfgang Hecker, Die Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz, 39 Kritische Justiz 179 (2006); Reinhard Merkel, § 14 Abs. 3 Luftsicherheitsgesetz: Wann und warum darf der Staat töten?, 62 Juristenzeitung 373 (2007).

<sup>17</sup> Josef Isensee, Menschenwürde: Die säkulare Gesellschaft auf der Suche nach dem Absoluten, 131 Archiv des öffentlichen Rechts, 173, 191-193 (2006); Isensee, Leben gegen Leben, in: Michael Pawlik/Rainer Zaczyk (ed.), Festschrift für Günther Jakobs, 205, at 227-228 (2007); Christian Hillgruber, Der Staat des Grundgesetzes – nur "bedingt abwehrbereit"?, 62 Juristenzeitung 209 (2007); Enders, supra note \*, at 1043; Ulrich Palm, Der wehrlose Staat, Archiv des öffentlichen Rechts, 95, at 108-113 (2007); Ladiges, supra note 1, at 309-310.

<sup>18</sup>

national-socialist regime. It is beyond doubt that this provision contains a general declaration of belief into a decent state and the normative goal to organise the new German Republic in a different way than the national-socialist state. In addition, art. 1 I GG might also grant a subjective right to individuals, based on their interest to have their dignity protected. Human interests extend beyond the material and tangible like one's own body, property, housing etc. The philosopher Ernst Cassirer has coined the expression of man as "animal symbolicum".<sup>19</sup> This point has been taken up by Avishai Margalit in his book "The Decent Society": Human beings have strong interests to avoid treatment which is perceived as mistreatment. Severe humiliation hurts people in a non-physical, but nevertheless substantial way. To avoid severe humiliation of citizens by state officials (and also severe humiliation by their fellow citizens) is an interest which a constitution ought to protect. This way, one can develop arguments against cases of torture which do not involve grave physical pain. If painful treatment is administered, the more tangible, universal human interest to avoid serious pain is the basis of a defensive right. But one does not need much fantasy to imagine situations (of a sexual kind, for example) where bodily pain is negligible but which are seriously demeaning.

Interpreting art. 1 I GG by pointing to the human interest not to be seriously humiliated is my solution – I have to add that this interpretation is shared by few in the German literature.<sup>20</sup> The majority opts for more vague descriptions when analysing the meaning of art. 1 I GG. The Federal Constitutional Court has on several occasions relied on a phrase which reappears in the ruling about § 14 III LuftSiG: the treatment of human beings as "mere objects". The court argued that the persons in the plane were to be treated as "mere objects" if they were shot down.<sup>21</sup> Although Immanuel Kant is not explicitly mentioned, the source is obvious: the expression "mere object" goes back to Kant's Second Categorical Imperative.<sup>22</sup> However, references to the Second Categorical Imperative as such are not very helpful for at least two reasons. Firstly, Kant has developed it as a basis for moral reasoning. One has to keep in mind that one of the main features of his work was to draw a sharp distinction between moral theory ("Tugendlehre") and legal theory ("Rechtslehre"). To transfer a very general criterion from

---

<sup>19</sup> Versuch über den Menschen, S.

<sup>20</sup> See the contributions by Schaber, Baumann, Stoecker, in: Ralf Stoecker (ed.), Menschenwürde

<sup>21</sup> BVerfGE, supra note 1, at 154.

<sup>22</sup> „Handle so, dass du die Menschheit, sowohl in deiner Person, als in der Person eines jeden anderen, jederzeit zugleich als Zweck, niemals bloß als Mittel brauchest“, Grundlegung zur Metaphysik der Sitten (1785), in Werkausgabe Band VII 61 (Wilhelm Weischedel ed., 1968). („Act in such a way that you treat humanity, whether in your own person or in the person of any other, always at the same time as an end and never simply as a means.”)

Kant's moral philosophy to legal theory is thus problematic. Secondly, the formula is too vague to be applied to specific problems.<sup>23</sup> For these reasons, it is more convincing to focus on a certain conduct's severely humiliating features.

But where does this lead us if we turn from human dignity in general to the more specific question: could killing a human being violate not just this person's right to life, but also his or her human dignity? Within debates about abortion or bioethics, lawyers have argued that "life is the vital basis of dignity" and that therefore every killing violates human dignity.<sup>24</sup> But this way of framing the relationship between life and human dignity yields a misleading picture:<sup>25</sup> The "right to life"-provision in German constitutional law (art. 2 II GG) contains (in contrast to art. 1 I) the clause that laws can permit killing a human being. Also, beyond the scope of positive German law, it can be hardly debated that the right to life can not be guaranteed as an absolute right without any possibility for balancing against the interests of others. Otherwise, for example, self-defence or defending another person against a serious attack would be impermissible if the defensive act kills the aggressor. Art. 2 I 1 and II of the ECHR, for example, list exemptions from the general prohibition of killing. The right to life and the scope of human dignity-arguments are not identical. However, it would also not be convincing to argue that there could never be an overlap. Sending someone to the gas chamber, for example, does not only kill this person, but this treatment also violates the victim's human dignity.

In the case of killing, the reasons for pointing to human dignity are somewhat different than in the case of severely humiliating treatment which the victim survives. The "no humiliation"-arguments gain force through descriptions of how survivors suffer from the memories what has been done to them. If the victim is dead, loss of life is the most important setback of interests which overshadows details of the killing. One could argue that "human dignity as a subjective right"-arguments are important if the application of force is cruel and severely humiliating, but not if someone is killed in a quick way, without preceding physical or mental cruelties. However, it seems premature to discontinue with human dignity-concerns. Although "right to life" is of central relevance from the victim's perspective, from the constitutional

---

<sup>23</sup> See also Schenke, *supra* note \*, at 738; Franz, *supra* note \*, at 511-512.

<sup>24</sup> See BVerfG, 39 Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts -BVerfGE- 1, 42 (1975); Ernst Benda, *Verständigungsversuche über die Würde des Menschen*, 54 *Neue Juristische Wochenschrift* 2147 (2001).

perspective and from the perspective of political philosophy it remains important to emphasize absolute prohibitions against killings. The national-socialist murders of handicapped or mentally persons or Jewish people would be an obvious example. These murders had one feature in common: they were based on the premise that the victims' lives were of particularly low worth and thus may be sacrificed for collective goals (financial interests, or "purity of the race"). Such reasoning expresses utmost contempt, and thus attacks the victims' human dignity in addition to their right to life.

The task thus is to identify those circumstances when "right to life"- and human dignity-arguments overlap. The Federal Constitutional Court, after reiterating the "mere object"-formula highlights one aspect of the passengers' situation: the fact that they can not escape or avoid the deadly shot (other than the hijackers who could give up and who would, according to the court, not be treated as mere objects if the plane were shot down).<sup>26</sup> One can read the court ruling as: "killing innocent or uninvolved persons violates their human dignity." On first view, this might seem a plausible reconstruction of the way the right to life and human dignity-arguments interact. It could be used, for example, to explain the reasons why killing in self-defence could be allowed (see art. 2 I, II ECHR): Under such conditions, the person killed is not uninvolved, but has contributed to the outcome through his or her own conduct.

However, there are at least two counterarguments (which the court does not discuss). One would be that this way of conceptualizing the overlap of human dignity and right to life might be too narrow. There is one commonly acknowledged exception to a prohibition against killing uninvolved persons: international law allows countries to defend themselves in war, even if this involves "collateral damages", that is, less euphemistically, to kill civilians during the course of military actions.<sup>27</sup> If one follows the path taken by the German Federal Constitutional Court, the right to military defence (art. 87a GG) would need to be severely restricted. This leads to very difficult questions: Is there is such a thing as a "just war" which could justify also the killing of civilians? Or could it be a possible solution from the point of German constitutional theory to make exceptions from the duty to obey human dignity in the

---

<sup>25</sup> Horst Dreier, *Menschenwürdegarantie und Schwangerschaftsabbruch*, 47 *Die öffentliche Verwaltung* 1036 (1995).

<sup>26</sup> BVerfG, *supra* note 1, 153-154.

<sup>27</sup> For terrorists' attacks, authors have drawn a parallel: Michael Pawlik, § 14 Abs. 3 des Luftsicherheitsgesetzes – ein Tabubruch?, 59 *Juristenzeitung* 1045, at 1053-1055 (2004); see also Schenke, *supra* note \*, at 738.

case of war? I will leave these questions open.<sup>28</sup> From a pacifist point of view, one could also conclude that to transfer the Federal Constitutional Court's decision to the case of war would be a desirable outcome because an absolute prohibition on the killing of civilians might mean a restriction which could make warfare impossible.

And one can argue that pointing to "innocent, uninvolved victims" as the sole criterion to differentiate between permissible and impermissible intentional killings might be unsatisfactory in other cases, that is, when discussing torture and the death penalty. If the central feature which triggers the human dignity-argument (and thus an absolute prohibition of the conduct in question) is innocence, then one could justify squeezing information out of those persons who have been involved in the creation of imminent danger. Also, human dignity-arguments would fail as arguments against the death penalty beyond the cases of painful executions. Those convicted for a serious crime are not innocent, uninvolved persons when it comes to the question if the state may kill them as response to the crime.

My conclusion is that the matter is more complicated. I do not want to challenge the proposition that it carries some weight if the victim of deadly force is an uninvolved person or an aggressor. If the later is the case, it is easier to argue that killing him does not trigger human dignity arguments. However, the argument "killing innocents *always* violates their human dignity" is too simple. Rather, *in addition* to the "lack of involvement"-argument, one also needs to examine whether the circumstances imply something demeaning about the victims. The difficulty is to become more specific about this phrase "something demeaning". In an earlier article, I had argued that art. 1 I GG prohibits utilitarian reasoning in general when justifying the killing of a human person.<sup>29</sup> However, it seems preferable to become more specific about those reasons for killing which are problematic from the "demeaning message about the victim"-perspective. One category would be arguments which maintain that the victim is of lesser worth than another human being (for example, because of its race) and that therefore "low lives" must be sacrificed for the benefit of more valuable human life. Also, arguments which weigh human lives against the interest to save costs and thus justify intentional killings to cut back public spending would be incompatible with the victims' human dignity.

---

<sup>28</sup> See for these problems Waechter, *supra* note \*, at 67-68.

Back to the case of a hijacked-airplane: observing the air force-personnel firing a missile, a demeaning treatment is not in the way obvious as it would be obvious, for example, if a prisoner is tortured through acts with sexual meaning. Nevertheless, one could imagine circumstances which violate human dignity because they carry with them a declaration about the victims' lower worth. This would be the case if state officials' reasoned, for example, that the passengers are foreigners and thus less worthy of protection than German citizens which would be killed if those who have hijacked the plane reach their goal. Or one could make the case that human dignity is disrespected if hijackers intend to crash the plane into a place where no human beings are present (for example, a newly built, but still empty stadium for the Olympic Games), however, the government argues that the passengers need to be shot down because re-building the stadium would cost too much. However, a more realistic scenario needs to assume that government opts for military force simply to protect the lives of many human beings on the ground, those who would become victims if the hijackers fly the plane into a densely populated spot or if the terrorists use the plane to spread toxic or disease-causing agents over a city.<sup>30</sup> Shooting down the plane with the aim to save the lives of many other human beings would convey nothing demeaning about the passengers and crew members aboard the hijacked plane.

I thus come to the following conclusion: although the notion to protect human dignity can be justified beyond the context of German positive law, and although one can assume an overlap of "disrespecting the right to life" and "violation of human dignity", in the end, such thoughts are not relevant for the constellations to be discussed here. Other than the Federal Constitutional Court argues, the human dignity-clause of our constitution is not an absolute barrier to shooting down a hijacked airplane which carries uninvolved passengers and crew members.

#### **4. The Passengers' Right to Life**

To criticize the Federal Constitutional Court's reliance on an ill-fitting human dignity-argument can not mean to end the discussion. We now have to turn to the question: Can the passengers' right to life be invoked against shooting down the plane? And a second set of

---

<sup>29</sup> Tatjana Hörnle, *Menschenwürde und Lebensschutz*, 89 *Archiv für Rechts- und Sozialphilosophie* 318 (2003).

<sup>30</sup> See for such a scenario Bohlander, *In Extremis* (supra note \*), at 581.

questions arises: in what way do the constitutional perspective and the criminal law interact? Let me turn to this second question first.

### **a) The Relationship between Constitutional Judgement and Criminal Law**

Both constitutional lawyers and criminal lawyers write about the “hijacked airplane”-scenario, each group applying their own professional perspective. Criminal lawyers focus on the question of individual criminal punishment, constitutional lawyers on the question “what is permissible for the Secretary of Defence or the Head of Government (and thus for air force officers)”? As I have mentioned, the Federal Constitutional Court has left it open whether state officials who order to shoot at a plane or who carry out such an order would be subject to criminal sanctions.<sup>31</sup> An explanation for this somewhat mysterious “no criminal judgement is made here”-disclaimer could be that the court simply did not want to extend the volume of its ruling by unnecessarily extending it to aspects of criminal law. However, if one attempts to analyze the relationship between criminal and constitutional evaluations, the court’s statement might seem somewhat surprising. It implies that the criminal law perspective might come to different results than the constitutional perspective. How can that be the case if the human dignity-argument carries so much weight in the German legal system? Could conduct which is deemed “unjustifiable” within the constitutional discourse ever be evaluated “justified” within the field of criminal law? I presume that a general answer to the latter question has to be: “no” (I use the word “presume” because to judge this competently would require a much broader examination). With respect to the shooting down of a hijacked airplane, the answer is somewhat simpler: unjustifiable within constitutional law also means unjustifiable within criminal law because both perspectives apply a similar approach, that is, a weighing of interests. The criminal law justification to be discussed here is necessity (in German law: § 34 Penal Code).<sup>32</sup> The structure of this provision is similar to the constitutional approach which asks whether the right to life might be overridden by other, countervailing interests. If one argues within the framework provided by § 34 German Penal Code, the outcome must be similar: either the right to life prevails, or it is overridden by interests which carry considerably

---

<sup>31</sup> See text supra note \*.

<sup>32</sup> § 34 S. 1 StGB: Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib, Freiheit, Ehre Eigentum oder ein anderes Rechtsgut eine Tat begeht, um die Gefahr von sich oder einem anderen abzuwenden, handelt nicht rechtswidrig, wenn bei Abwägung der widerstreitenden Interessen, namentlich der betroffenen Rechtsgüter und des Grades der ihnen drohenden Gefahren, das geschützte Interesse das beeinträchtigte wesentlich überwiegt. „Who commits an offence in order to divert from himself or another person a present danger for life, bodily integrity, freedom, honour, property or another legal good, if this danger can not be averted otherwise, does not act illegally, if a weighing of the conflicting interests, namely the legal goods afflicted and the degree of danger for them, the protected interest outweighs the violated interest considerably.”

more weight. But still: this leaves the possibility open that an accused might be acquitted. Even if the conduct would not be justified, the defendant might be able to point to an excuse. Therefore, the Federal Constitutional Court's hint that the outcome from a criminal law perspective might be different makes sense: It has to be read in view of the distinction between justifications and excuses in German criminal law. One could conclude that someone who shoots at an airplane at least could be excused and thus exempted for punishment.<sup>33</sup> The possible solution to point to an excuse does, however, not become relevant if the conduct is justified. It is therefore necessary to continue with the question whether the Federal Constitutional Court's verdict "unjustifiable" holds if one closes the discussion about human dignity and turns to "right to life" and the question under which conditions this right must stand back.

#### **b) Weighing of Interests: The Passengers' Rights**

There are two seemingly easy, straightforward arguments why the passengers' right to life could not be decisive in the end. One can point to the fact that the passengers' lives are doomed: if hijackers succeed to fly the plane into a building or another spot, then all those aboard will die anyway. They either will die if the air force manages a controlled crash, or five minutes later if the hijackers have reached their target. One can thus argue that these last five minutes in the lives of passengers are not important enough to support a "right to life"-argument. This reasoning seems especially forceful if one takes into account that these five minutes might be spent in sheer terror if the passengers have realized what is happening with their flight. However, one can also imagine scenarios where the passengers could survive the hijacking (if the plane is not used as a means for destruction, but as a means to carry out other plans with deadly consequences for people on the ground, for example, by dropping a bomb). Under such conditions, we have not to deal with the "doomed life"-issue, but with the more general question: may lives be sacrificed if this is necessary to protect a greater number of other human beings from death?

Let me begin with the "doomed life"-approach for those cases where it could apply. There is a notable difference between the German stance towards this notion and the way it is taken up in an Anglo-American environment. In discussions with English or American colleagues, I

---

<sup>33</sup> I have argued in favour of such an excuse for an individual who decides to shoot at the airplane, Hörnle, *supra* note \*, at 599-560. If the accused was a state official, however, I conclude (in contrast to the Federal

have heard widespread approval for the “doomed life”-reasoning<sup>34</sup> while Germans tend to be much more sceptical.

“Doomed life”-scenarios often coincide with another possibly relevant condition: the fact that the persons about to be killed might also be the ones who cause the danger for those who are about to be saved. Consider the mountaineer-example: two mountaineers are connected by a rope; the one below stumbles and falls. If his comrade is not strong enough to pull him up, his weight will eventually pull the two of them down and both will die. Realizing this, the mountaineer above chops the rope. This is not a case of self-defence,<sup>35</sup> however, it might be justified according to the rules of necessity. German criminal law doctrine differentiates between „aggressive necessity“ (aggressiver Notstand) and „defensive necessity“ (defensiver Notstand). Some criminal lawyers argue that killing the person who is the source of the danger (this is the crucial point for defensive necessity in contrast to aggressive necessity) is justified under § 34 German Penal Code.<sup>36</sup> Similar argument would apply in conjoined-twin cases if one of the twins is doomed to die and endangers the other.<sup>37</sup> But in the hijacked plane-constellation, one can not point to the features of defensive necessity.<sup>38</sup> The passengers aboard did not make a causal contribution to the dangerous situation. Other than in the mountaineer example, there is no “impact through weight”: their bodies’ impact in a crash is negligible in comparison to the plane’s destructive force.<sup>39</sup> Nothing crew members or passengers did allows attributing the danger to them. Therefore, one has to make a distinction between the “defensive necessity”-cases and the “only five minutes left”-argument; in the hijacked airplane case, only the latter point could be relevant.

---

Constitutional Court) that relying on the category excuse is not necessary because a state official acting according to protective duties would be justified, see *ibid.* at 600-611, and below \*.

<sup>34</sup> See also Bohlander, *In Extremis* (supra note \*), at 580: “they are, to put it blandly, already dead”.

<sup>35</sup> The minimum requirement for an attack is an action, see Claus Roxin, *Strafrecht Allgemeiner Teil*, Band 1, 658 (4th ed. 2006).

<sup>36</sup> Harro Otto, *Grundkurs Strafrecht, Allgemeine Strafrechtslehre*, 146 (7th ed. 2004); Ulfrid Neumann, in: *Nomos Kommentar zum Strafgesetzbuch § 34 Nr. 87* (2nd. Ed. 2005); Roxin, supra note 16, at 760-761.

<sup>37</sup> See Bohlander, *Of Shipwrecked Sailors*, supra note \*, at 155-157.

<sup>38</sup> Eric Hilgendorf, *Tragische Fälle*, in: , 107, at 127 (2005); Hörnle, supra note \*, at 586-589; Manuel Ladiges, *Die notstandsbedingte Tötung von Unbeteiligten im Fall des § 14 Abs. 3 LuftSiG*, *Zeitschrift für Internationale Strafrechtsdogmatik* 129, at 132 (2008). This is debated, though. See for a different view Walter Gropp, *Der Radartechniker-Fall – ein durch Menschen ausgelöster Defensivnotstand*, 153 *Goltdammer’s Archiv* 284, 287-288 (2006); Hans Joachim Hirsch, *Defensiver Notstand gegenüber ohnehin Verlorenen*, in: *Festschrift für Wilfried Küper*, 149 (Michael Hetting et. al. ed., 2007); Klaus Rogall, *Ist der Abschuss gekappter Flugzeuge widerrechtlich?*, 28 *Neue Zeitschrift für Strafrecht* 1 (2008).

<sup>39</sup> Merkel, supra note \*, at 373, 384-385.

The German Constitutional Court has treated it in a brisk way. The ruling states that each human life is of equal worth, independent of how long it is likely to last.<sup>40</sup> To curb all considerations concerning the specific situation and the duration of the remaining life span must be contra-intuitive for many persons with an Anglo-American background.<sup>41</sup> But the vast majority of German lawyers share the view expressed by the German Constitutional Court.<sup>42</sup> One reads that it would “violate a taboo” if one were to evaluate the actual value of a human being’s life.<sup>43</sup> This invites the question: what stands behind this taboo which is prevalent in the German legal culture? I suppose that at its roots is the fear to fall back into national-socialist ways of thinking. The expression “lebensunwertes Leben” (life not worth living) was coined to justify killing the handicapped and mentally ill.<sup>44</sup> If one would, in contemporary Germany, emphasize quality of life-arguments in the context of justifying intentional killings, one has to expect sharp disapproval for ostensibly reviving discourses about “lebensunwertes Leben”. This criticism would not be entirely convincing as one can differentiate between “quality of life” and “quantity of remaining life-span”, and even “quality of life-arguments” must not necessarily into “let’s kill those who are not useful for the ‘Volksgemeinschaft’-kind of conclusions. However, it might explain why the German Constitutional Court and contemporary writers shy away from anything which could be associated with “lebensunwertes Leben”-type of arguments and thus refuse to compare specific circumstances of individual lives altogether.

If one searches for a more rational foundation of the German scepticism, it could be found in slippery slope-arguments. Considering the remaining life span might support problematic solutions in times of increasingly rare medical resources. One might, for example, expel

---

<sup>40</sup> BVerfG, supra note 1, at 158.

<sup>41</sup> See for example Eric Rakowski, *Taking and Saving Lives*, 93 Col. L. R. at 1163 (1993) who discusses Bernard Williams’ „Jim and the Indians“-example and expresses the view that of course it matters that all Indians were doomed to death anyway; Bohlander, supra note \*.

<sup>42</sup> Wilfried Küper, *Tötungsverbot und Lebensnotstand*, 21 Juristische Schulung 785, at 792-793; Roxin, supra note \*, at 738-739; Günter Jerouschek, *Nach dem 11. September 2001: Strafrechtliche Überlegungen zum Abschluss eines von Terroristen entführten Flugzeugs*, in: *Festschrift für Hans-Ludwig Schreiber*, 185, at 193 (Knut Amelung et al. ed., 2003); Arndt Sinn, *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?*, 24 *Neue Zeitschrift für Strafrecht* 585, 586 (2004); Wolfram Höfling & Steffen Augsberg, *Luftsicherheit, Grundrechtsregime und Ausnahmezustand*, 60 *Juristenzeitung* 1080, at 1083-1084 (2005); Burkhard Hirsch, *Verfassungsbeschwerde gegen das Gesetz zur Neuregelung von Luftsicherheitsaufgaben*, 89 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 3, at 8, 12 (2006); Schenke, supra note \*, at 738.

<sup>43</sup> Torsten Hartleb, *Der neue § 14 III LuftSiG und das Grundrecht auf Leben*, 58 *Neue Juristische Wochenschrift* 1397, at 1398 (2005); Schenke, supra note \*, at 738; also Pawlik, supra note \*, at 1050; Höfling & Augsberg, supra note \*, at 1084.

<sup>44</sup> Concepts for such projects were developed well before the national-socialists came into power, see Karl Binding/Alfred Hoche, *Die Freigabe der Vernichtung lebensunwerten Lebens* (1920).

terminally ill patients from hospitals for the benefit of newly arrived patients with better prospects.<sup>45</sup> However, it is doubtful whether slippery slope-arguments are conclusive in our context. It does not seem likely that a decision in an extremely rare state of emergency like the hijacking of an airplane automatically would lead us down the slippery slope. From the normative perspective, there are reasons to refrain from kicking out patients (dying undisturbed in peace and dignity is a valid claim on its own) which do not determine the outcome in the hijacked plane-case.

While I am not convinced by references to taboos and slippery slopes, there are reasons which might support the supposition that the right to life must prevail. The main problem is: can one demand from the victims to sacrifice their life for the benefit of others? This issue becomes especially pressing if the passengers' life is not necessarily doomed; that is, if the hijackers intend to land the plane after their destructive plans have been carried out. Under such conditions, one has to proceed to "protect the greater number of lives"-arguments. An agent neutral *view*<sup>46</sup> would simply compare the numbers of expected deaths in both scenarios (shoot or not). There are also attempts to support the same outcome with contractual arguments: persons under the veil of ignorance (that is, ignorant about their individual position should the drama later become real) might agree beforehand that a shot should be allowed as it is statistically more likely that they would be among the victims on the ground.<sup>47</sup>

Again, there is a remarkable difference between the view expressed in Anglo-American legal writings that the greater number of human beings ought to be saved<sup>48</sup> and the dominant views in Germany. German contributions reject calculations if they lead to the killing of a human being.<sup>49</sup> How should one proceed in view of such different assessments? The key is, in my view, to analyze the constellations not from an agent neutral perspective but by examining

---

<sup>45</sup> See for this argument Roxin, *supra* note \*, § 16 Rn. 34; Hilgendorf, *supra* note \*, at 119.

<sup>46</sup> See for the agent-neutral perspective John Gardner, *Complicity and Causality*, 1 *Criminal Law and Philosophy* 127 (2007).

<sup>47</sup> For such an approach to difficult life-against-life-cases: Eric Rakowski, *Taking and Saving Lives*, 93 *Columb. L. Rev.* 1063 (1993); Lothar Fritze, *Moralisch erlaubtes Unrecht*, 51 *Deutsche Zeitschrift für Philosophie* 213 (2003). Alan Strudler and David Wasserman argue in a similar vein that it matters if the deaths are approved by a fair procedure in which those concerned could participate (*The First Dogma of Deontology: The Doctrine of Doing and Allowing and the Notion of a Say*, 80 *Philosophical Studies* 51, 64-66, 1995).

<sup>48</sup> *Smith/Hogan, Criminal Law*, at 322 (11<sup>th</sup>. ed. 2005); Bohlander, *Of Shipwrecked Sailors*, *supra* note \*, at 158.

<sup>49</sup> Roxin, *supra* note \*, at 739; Otto, *supra* note \*, at 144; Neumann, *supra* note \*, § 34 Nr. 74; Volker Erb, in *Münchener Kommentar zum Strafgesetzbuch* § 34 Nr. 116 (2003); Jerouschek, *supra* note \*, at 192; Hilgendorf, *supra* note \*, at 120; Schenke, *supra* note \*, at 736, 738. See for a different outcome Dieter Birnbacher, *Tun oder Unterlassen*, 220-221 (1995) and for a critique of consequentialist thinking in general Julian Nida-Rümelin, *Kritik des Konsequentialismus* (1993).

individual rights of potential victims. In doing this, one needs to pay attention to the fact that there are two different subgroups of potential victims: those in the airplane, and the potential victims on the ground. If both groups do have valid claims against the state officials who have to make the decision, these claims (“do not shoot at the plane” versus “save me by eliminating the source of danger”) obviously are incompatible. If one has reached this conclusion, one needs to consider how state officials should deal with incompatible claims. But the first step should be to consider rights of each group of potential victims.

A crucial question is whether the passengers are obliged to help the many people who would benefit from a shot at the plane. The answer depends on to what degree there are duties of solidarity among human beings. Does one need to give up one’s life for others? From the perspective of moral theory, if one applies contractual arguments, one might be able to justify such a duty in a rational way. After all, if one has agreed under the veil of ignorance that the plane may be shot down, one must stick to this agreement even in the face of imminent danger after the veil has been lifted. However, our moral practice does not demand such sacrifices, not even in the most important, duty-creating personal relationships (husband-wife, parent-child). A person would be judged a true hero if she chose to give up her life for the benefit of a loved one, but the moral claim “you must do this” would seem harsh. This is even more obviously so when strangers are to be saved. With respect to a difference between the impersonal rationality assumed by contractual arguments and the more limited moral demands which could be upheld in actual cases of emergencies, one has to conclude that the former is too unrealistic. In a life-threatening situation, people can not be asked to sacrifice their life by pointing to a theoretical thought experiment which might have seemed rational beforehand.<sup>50</sup>

Should we, however, come to a different result at least for the “doomed life”-constellations? It seems much easier to construct duties of solidarity if the remaining life span is a matter of minutes and thus the personal sacrifice dramatically different. From the viewpoint of morality, one can well argue that the passengers should accept a shot at the plane.<sup>51</sup> Even if the passenger do not in fact consent, or at least not all of them, one could take the point of view that their right to life can not longer be decisive under such special circumstances. Does such a moral judgement lead us to a corresponding legal judgement? Even in the German

---

<sup>50</sup> See also Fritze, *supra* note \*, at 220.

<sup>51</sup> Stefan Huster, *Zählen Zahlen? Zur Kontroverse um das Luftsicherheitsgesetz*, 58 *Merkur* 1047, 1048 (2004); Pawlik, *supra* note \*, at 1049; see also Sinn, *supra* note \*, at 588-589.

discussion, a few authors arrive at this conclusion. Accordingly, they would justify the killing of the passenger as a case of necessity.<sup>52</sup> However, it seems questionable whether the moral claim “it would be better to sacrifice your life” translates into the legal result that the right to life has to stand back. What if an passenger points to the fact that he or she values the remaining last minutes very much precisely because not much time is left (to do last phone calls or to pray, for instance)? Although a refusal to accept a shot at the air plane might be questioned as selfish from the moral viewpoint, from a legal viewpoint, one must also acknowledge that this person is entitled to decide such fundamental matters autonomously, according to her own preference. The more difficult a decision becomes, the more the act in question concerns the personal sphere and the less it can be reversed, the less it is justifiable to override individual choices. While the justification called necessity allows taking or destructing property, stricter limits must be applied if the decision concerns body and life. For these reasons, one can argue that, even in the doomed life cases the passengers are not under a legal duty to give up their right to life.

If one looks at victims’ rights, it seems that one ought to conclude that the Secretary of Defence acts wrongfully if he or she gives the order to shoot down a hijacked plane carrying uninvolved passengers. However, as I have already argued above, the weighing of interests which both the criminal law (in the German Penal Code: § 34 StGB) and constitutional law require must include rights of both groups of potential victims. Thus, one also needs to turn to the question: Can those persons on the ground, those who are endangered by the hijackers’ plans, claim that state officials shoot down the plane before it reaches its target?

### **c) Weighing of Interests: The Rights of Those on the Ground**

If the endangered persons on the ground can point to rights of their own, these rights are of a different kind: they are not defensive rights, but protective rights. Such protective rights might exist towards state officials.<sup>53</sup> The first hurdle to be taken is to justify that there are protective rights at all. Starting point for such a justification is the notion that the state is obliged to guarantee some standards of protection. Explanations why citizens have to obey the law and

---

<sup>52</sup> Erb, *supra* note \*, § 34 Nr. 119-120; Neumann, *supra* note \*, § 34 Nr. 77; Ladiges, *supra* note \*, 138-140. See also Franz, *supra* note \*, at 520.

<sup>53</sup> A convincing case for protective rights can only be made within the relationship „endangered citizen – state officials”. Therefore, the results are different if a private citizen acts or someone who ignores orders and whose

keep peace, and why only the state has the prerogative to apply force, can not be developed in a convincing way without pointing to corresponding obligations the state has for the safety of its citizen.<sup>54</sup> The debated question, however, is whether the state's obligation amounts to a right of individual citizens. The German Federal Constitutional Court is reluctant to emphasize protective rights as the outcome of protective duties.<sup>55</sup> Behind this reluctance stand pragmatic considerations and considerations concerning the relationship between this court and government. This has been obvious in the case of a kidnapped politician, Hanns-Martin Schleyer, kidnapped by terrorists from the so-called "Rote Armee Fraktion" with the intention to press the government into releasing comrades from prison. Under these conditions, the court (who was called upon by Schleyer's family) did not want to grant a protective right.<sup>56</sup> Other decision would have narrowed the scope for political assessments how to deal with such difficult situations (although one has to keep in mind that acknowledging a right to life does not necessarily mean to acknowledge an absolute right – there still might be reasons which might, within a weighing process, be more important. But rejecting claims for protections becomes somewhat more difficult if one starts with declaring the existence of a right.). When deciding about the "Luftsicherheitsgesetz", the court argued in a similar way as in the Schleyer-case by stressing that government must set priorities and take decisions according to the rules of political responsibility.<sup>57</sup>

The positions within German constitutional theory are split. There is a growing number of constitutional lawyers who recognize citizens' rights beyond the mere defensive rights against the state.<sup>58</sup> Other authors warn against this tendency.<sup>59</sup> They fear that the classical liberal state whose main duty it was not to interfere with persons' businesses is in the process to be substituted by an increasingly intrusive state which uses issues like safety and protection to cut back on individual liberty.

---

actions can thus not be attributed to the state. Under such conditions, the actor can only be excused, see Hörnle, supra note \*, at 585-600.

<sup>54</sup> See for the philosophical and historical issues Josef Isensee, *Das Grundrecht auf Sicherheit* 3-26 (1983); Gerhard Robbers, *Sicherheit als Menschenrecht* 40-120 (1987).

<sup>55</sup> The court postulated protective duties of the state in a highly controversial area, that is, protective duties towards human fetuses, in a decision about abortion, see BVerfG, supra note \*

<sup>56</sup> 46 *Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts -BVerfGE-* 160, 164 (1977).

<sup>57</sup> BVerfG, supra note 1, at 160.

<sup>58</sup> Isensee, supra note \*; Isensee, supra note \*, at 226-227; Robbers, supra note \*; Johannes Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten* (1992); Wolfram Cremer, *Freiheitsgrundrechte*, 228-359 (2003); Christian Calliess, *Die grundrechtliche Schutzpflicht im mehrpoligen Verfassungsrechtsverhältnis*, 61 *Juristenzeitung* 321 (2006); Palm, supra note \*, at 108.

If one has to decide on a general level whether one favours the all-encompassing state which operates with values like safety, or a more restrictive state which respects individual liberties, there are good arguments for the liberal point of view (I have to postulate this here as there is not room for broad discussion). However, this does not force us to conclude that the notion of protective rights must be thrown overboard altogether. One can be suspicious about states which overly emphasize security concerns but still be sensitive about citizens' interests in the case of a present and deadly threat. Under such conditions, if lives can only be saved by interventions of state officials, we are not talking about a paternalistic or authoritarian security state but about legitimate demands from citizens. If the interest to survive in the face of secure and imminent death is at stake, citizens can point to their right to be protected against this danger.

#### **d) Incompatible Claims: How Should State Officials Decide?**

The foregoing thoughts lead me to conclude that state officials have to deal with conflicting rights of individuals: the potential victims on the ground can point to protective rights derived from the right to life, while the passengers can point to the right to life in its classical, defensive function. How should the Head of Government or the Secretary of Defence<sup>60</sup> decide with view to a collision between defensive and protective rights?

Under such conditions, it is often assumed that the state's duties corresponding to these rights are asymmetrical. The protective right amounts to the duty to act, while a defensive right only amounts to the duty to omit actions. When dealing with irreconcilable demands, the state must remain passive, runs the argument.<sup>61</sup> Within moral philosophy, it is contested whether acts and omissions should be judged differently.<sup>62</sup> For our purpose, a narrower question needs attention: is the acts/omissions-divide decisive for *state officials*? There are reasons why we should demand less from private citizens if one considers a duty to become active. Citizens may deny help because duties of assistance might be incompatible with individual liberty, that is, to decide for oneself what one wishes to do. Also, in truly tragic situations when helping

---

<sup>59</sup> Lepsius, *supra* note 1, at 773-774; Lepsius, *supra* note \*, at 63; Peter-Alexis Albrecht, *Menschenwürde als staatskritische Absolutheitsregel*, 89 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 295, 299 (2006); see also Hans Albrecht Hesse, *Der Schutzstaat geht um*, 46 *Juristenzeitung* 744 (1991).

<sup>60</sup> I leave the question open who is responsible within the structures of government.

<sup>61</sup> Höfling & Augsberg, *supra* note \*, at 1084; Merkel, *supra* note \*, at 381.

one person necessarily means harm for another, it is understandable that persons might be unable to arrive at a decision. However, we expect state officials to be more competent in dealing with such situations, and they are not entitled to refer to personal liberty when they decline to help citizens.<sup>63</sup> Therefore, relying on “in a true dilemma, do nothing” as the rule of default would not be appropriate for state officials.

Therefore, the conflict between two duties can not resolved by pointing to the difference between acts and omissions. If one turns from the normative to the empirical, however, it is possible to identify circumstances which favour one decision over the other. Commentators of the “Luftsicherheitsgesetz” and professional groups like pilots’ organizations have pointed out how difficult it would be for the Secretary of Defence to gain sufficient information in due time about a plane off its course.<sup>64</sup> Maybe the crew could gather information about the destination and forward it. However, it seems more likely that the hijackers do not inform anyone on board about their plans, or that they block communication between the crew and persons on the ground. This means that the government could only make guesses about the hijackers’ target, and it might even be the case that technical problems rather than an instance of hijacking obstruct communication between pilots and air traffic surveillance.<sup>65</sup> If there is no reliable factual basis, if there is the possibility of a false alarm, one must assume an asymmetry between the state’s protective duties and the duty not to kill the passengers. Under such conditions, the defensive claims of the persons aboard the plane must prevail.

However, if the facts are known, state officials are faced with the dilemma of irreconcilable duties derived from irreconcilable rights. It is under debate whether the law should strive to regulate such situations at all, or whether there can be an “area beyond the law” (rechtsfreier Raum).<sup>66</sup> One can argue that legislators should refrain from passing laws for these unsolvable constellations, and that the head of government ultimately must take a political decision beyond the legal sphere.<sup>67</sup> Others, however, maintain that it is essential to discuss beforehand

---

<sup>62</sup> See Birnbacher, *supra* note \*, Chap. 5; Gardner, *supra* note \*.

<sup>63</sup> Cass Sunstein & Adrian Vermeule, *The Ethics and Empirics of Capital Punishment: Is Capital Punishment Morally Required?*, 58 *Stan. L. Rev.* 703, at 725 (2005).

<sup>64</sup> Lepsius, *supra* note \*, at 64-67.

<sup>65</sup> The Federal Constitutional Court cites such factual difficulties to support its decision (*supra* note 1, at 154-156), however, this point was not decisive as the human dignity-argument would apply even if sufficient information would be available.

<sup>66</sup> See for this notion Arthur Kaufmann, *Rechtsfreier Raum und eigenverantwortliche Entscheidung*, in *Festschrift für Reinhard Maurach*, 327 (Friedrich-Christian Schoeder & Heinz Zipf ed., 1972).

<sup>67</sup> Lepsius, *supra* note \*, at 69-71.

about difficult situations which endanger the lives of many citizens and not to leave such fundamental issues to hasty ad-hoc decision-making outside of parliament.<sup>68</sup> In any case, even if one would be willing to do without a law, one should at least be able to formulate one's view about the proper criteria for the ultimate decision (one could hardly recommend throwing dices). Going back to the numbers of survivor in both scenarios (shoot or not shoot) is the single remaining rational argument. This argument, however, only is convincing in combination with the argument about protective rights. It would not work if the person shooting down the airplane is a private individual who is – unlike the state – not under a specific protective duty towards his fellow citizens.<sup>69</sup> Under such circumstances, pointing to the “greater number saved” would clash with the defensive rights the passengers have if their fellow citizens disrespect their right to life. However, if the actor as a state official is faced with both defensive and protective rights, the possibilities of a discourse about rights are exhausted. Under such circumstances, a consequentialist solution is recommendable.<sup>70</sup>

---

<sup>68</sup> Schenke, *supra* note \*, at 739; Enders, *supra* note \*, 1045-1046.

<sup>69</sup> But see for a different view Bohlander, In *Extremis* (*supra* note \*), at 587-588.

<sup>70</sup> Franz, *supra* note \*, at 514.