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COMBATING TERRORISM AT THE EXPENSE OF INNOCENT PEOPLE. A CRIMINAL LAW PERSPECTIVE

1. INTRODUCTION

For a long time, Al-Qaeda and their predecessor organizations have been carrying out terrorist attacks, wherein they initially focused on Yemen, East Africa, Afghanistan and Pakistan. In fact, already in 1993 many people were killed and injured as a result of a terrorist attack on the World Trade Centre in New York. However, on September 11th the so called “attack on America” showed the whole world and the American people in particular in a devastating way the apparently new danger of Islamist terrorism. All of a sudden, one was confronted with an enemy acting against the Western world and its values by all available means. A new global threat scenario was created, which caused fears of further attacks. Despite various measures enacted to prevent and combat terrorism, there have recently been numerous disastrous terrorist acts all over the world – such as the attack on the satirical magazine “Charlie Hebdo” in Paris or the suicide bombings in Brussels – conducted by the Islamic State, which has been keeping the whole Middle East busy for months¹. National and international measures to prevent terrorism, however, are often implemented at the expense of innocent people, who thereby lose their lives or have to suffer impairments of their legal interests.

While in international or internal armed conflicts human and fundamental rights are to some extent precluded by what international humanitarian law refers to as *jus in bello*, which accepts so called “collateral damage” inflicted

¹ Even if terrorism is not new and people have been engaged with this topic for some time, there is still no commonly recognized definition of this phenomenon. Various government agencies and legal systems have their own differing definitions of terrorism. However, most of these definitions agree at least upon the fact that terrorism is the use or threat of violence in order to achieve a special goal, such as for example political, ideological or religious changes. This article mainly focuses on one part of terrorism – religiously motivated Islamist terrorism.

on civilians², in case of terrorist attacks and defensive measures national criminal law usually remains applicable³. Assessment of killings of innocent persons or of infringements of their legal interests raises a lot of questions on the grounds of criminal law: How far can counterterrorism go in affecting the rights of citizens? Is the sacrifice of innocent victims acceptable, if the struggle against terrorism so requires⁴?

2. SHOOTING DOWN OF TERROR-SUSPECT AIRCRAFT

2.1. GENERAL ASPECTS AND STATEMENT OF THE PROBLEM

Hardly has any other topic caused such heated discussions as the legal assessment of the ethically highly controversial shooting down of hijacked passenger planes posing a terrorist threat. Here, various possible scenarios must be distinguished: If there are only terrorists on board of the aircraft the situation is easier to assess: if the plane threatens to crash into a building or any other piece of infrastructure and to kill people on the ground, this is a clear case of emergency relief according to § 3 StGB⁵ (self-defence), which says that who defends oneself or another person in a way necessary to avert a current or imminent unlawful attack on life, health, physical integrity, freedom or property, does not act unlawfully. The behaviour is not justified if it is obvious that the defender has to face only a minor disadvantage and if the defence is inappropriate, especially because inflicting severe damage on the attacker would be necessary in order to avert the attack. Therefore, if there are only terrorists on board, the shooting down is lawful and allowed. This, however, does not hold true if also innocent passengers, who would be killed by shooting down the aircraft, are on the plane. Since the terrorist attacks on September 11, 2001, attempts have been made to find a solution to this moral dilemma of weighing human lives. It is controversial whether and under which conditions the sacrifice of innocent in order to save others shall be

² H. Schmitz-Elvenich, *Targetet Killing. Die völkerrechtliche Zulässigkeit der gezielten Tötung von Terroristen im Ausland*, Frankfurt am Main 2008, p. 224; B. Müller, *Den Rechtsstaat gegen Terror rüsten*, "diePresse", November 15, 2015, at <http://diepresse.com/home/recht/rechtallgemein/4867038/Den-Rechtsstaat-gegen-Terror-ruesten> (visited September 30, 2016).

³ D. Thürer, *Humanitäres Völkerrecht und amerikanisches Verfassungsrecht als Schranken im Kampf gegen den Terrorismus*, "Zeitschrift für schweizerisches Recht" 2006, p. 157 *et seq.*

⁴ As the legal situations in Austria, Germany and Switzerland are very similar in this field, the following considerations will include opinions and literature from the whole German-speaking area.

⁵ StGB = Austrian Criminal Code.

exempt from punishment or even allowed. In this regard the literature represents different approaches.

2.2. JUSTIFICATION

2.2.1. SELF-DEFENCE

Especially if the number of people who would be saved by shooting down an aircraft is much higher than the number of passengers who would have to let their lives, we may automatically and intuitively think of justifying the offender. However, according to the prevailing opinion there is no doubt that self-defence is no possible legal ground of justification in this situation, because this legal institution is directed only against the attacker and does not apply in case of a third innocent person being killed. The legal construct of self-defence is characterized by a special conflict between the unlawfully acting attacker and the defender⁶, that is why self-defence or emergency aid are the only possible means of justification if there are exclusively terrorists on board who use the aircraft as an instrument for suicide attacks. Furthermore, for comparison only – in other similarly dangerous situations, for example if an airplane is no longer controllable (because of technical defects or in case of the pilot's unconsciousness, caused by a loss of cabin pressure) and threatens to crash down into an urban agglomeration, no one would assume self-defence arises on those facts. A different opinion, however, is held by Spendel⁷, who thinks the injuring or killing of people shall be justified by means of self-defence in so called “protection shield cases”, in which innocent people are misused as a shield or for other purposes supporting the attack. In his opinion, in such constellations these people would be deeply mired in the crime scene and therefore standing on the side of injustice, so that the attacked people on the ground would seem more worthy of protection. Nonetheless, this argumentation is not really convincing, because these “human shields” – even if the passengers serve as a protector preventing the aircraft from being shot down – got into this threatening situation merely by accident. There is no reason to deviate from the ordinary self-defence rules in this case⁸.

⁶ H. J. Hirsch, *Defensiver Notstand gegenüber ohnehin Verlorenen*, (in:) M. Hettinger, J. Zopfs, T. Hillenkamp, M. Kühler, J. Rath, F. Streng, J. Wolter (eds.), *Festschrift für Wilfried Küper zum 70. Geburtstag*, Heidelberg, München, Landsberg, Berlin 2007, p. 153.

⁷ For further literature references, see A. Archangelskij, *Das Problem des Lebensnotstands am Beispiel des Abschusses eines von Terroristen entführten Flugzeuges*, Berlin 2005, p. 86 et seqq.

⁸ To the same effect A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 89; H. J. Hirsch, *Defensiver Notstand...*

2.2.2. (PRESUMED) CONSENT

Moreover, it is partly taken into consideration that the passengers might in this situation agree with their own killing, because they are lost in any way, which is why they – as reasonable subjects – would want to sacrifice themselves for the benefit of others acknowledging the meaninglessness of their own remaining lifetime⁹. It is argued that even on September 11th some passengers – aware of their upcoming death – selflessly decided to down the aircraft at the expense of their own lives, in order to save the population on the ground¹⁰. It is, however, not convincing to assume a justification through “presumed consent”¹¹ in this situation since human life is not a disposable object of legal protection. On the one hand, this already results from § 77 StGB and § 216 of the German Criminal Code, which both regulate the punishability of “killing on request”, because in these cases the unlawful content of the behaviour may be reduced, nevertheless killing of other people is still not legitimate and therefore remains punishable¹². This illustrates that the legal order considers protection of human life itself more important than the affected persons’ right to self-determination. This also applies if the threatened people are hopelessly doomed to death, because human life is not worth less just because of its limited duration¹³. By analogy, euthanasia is unlawful too even if the person willing to die is lethally ill. On the other hand, the assumption of presumed consent of the passengers in case of the shooting down of hijacked planes is based on a “quixotic fiction”¹⁴, as the German Federal Constitutional Court rightly decided. In this situation probably only very few people would agree with the shooting down, even if they knew they were anyway going to die soon. Although some may be that heroic and understanding, such a general assumption

⁹ For more details cf. T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen Beurteilung von Tötungshandlungen im Lebensnotstand*, Baden-Baden 2009, p. 364 *et seqq.*; I. Bott, *In dubio pro Straffreiheit? Untersuchungen zum Lebensnotstand*, Heidelberg, München, Landsberg, Frechen, Hamburg 2011, p. 119 *et seqq.* It might also be argued that shooting down of a hijacked aircraft could be justified by a *given effective consent*, assuming that the passengers express their implied consent as early as they book the flight and enter the plane. Under this assumption, however, the same problems arise.

¹⁰ I. Bott, *In dubio pro Straffreiheit?...*, p. 119.

¹¹ “Presumed consent” is a legal justification which arises when an authorized person cannot be asked for permission, but it may be presumed that they would agree to a violation of their legally protected rights under the given circumstances.

¹² Cf. H. J. Hirsch, *Defensiver Notstand...*, p. 159 *et seqq.*; F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter? Anmerkungen zum Defensivnotstand bei terroristischen Angriffen*, (in:) M. Jahn, H. Kudlich, F. Streng (eds.), *Strafrechtspraxis und Reform. Festschrift für Heinz Stöckel zum 70. Geburtstag*, Berlin 2010, p. 137.

¹³ Cf. note 22.

¹⁴ BVerfGE 115, 118 (157); F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*

should not be made¹⁵. That is why killings of people can never be justified under the principle of (presumptive) consent.

2.2.3. JUSTIFYING NECESSITY

Apart from (presumptive) consent, a legal justification might arise by virtue of “justifying necessity”. This legal justification, which is not explicitly featured in the Austrian Criminal Code, has been developed by the judiciary and the doctrine and applies whenever the offender averts an imminently threatening disadvantage from himself or others and thereby violates a lower-value interest deserving of legal protection in order to save one of a higher value. At first, we can say that legal assessment is less problematic if the hijacked aircraft threatens to crash into an empty building or an object of infrastructure on the ground, because in this case the life of the passengers and crew on board weighs clearly more than the legally protected interest of “property”, and therefore justifying necessity is anyway excluded in this situation. The question of life-emergency, however, is more complicated in constellations where one life comes into conflict with another in a way that it can only be rescued at the expense of the other. Regarding the shooting down of terrorist-hijacked aircraft, justifying necessity can in particular be considered if the number of saved people is higher than the number of those being killed. For some might say it seems intuitively plausible not to condemn the choice of “the lesser of two evils”¹⁶ in such extreme situations, but on a closer inspection this pragmatic approach is difficult to substantiate and therefore largely rejected in literature. The prevailing opinion is right to emphasize in this context the principle of equivalence of human lives. According to this widely recognized principle every human life has the same value and is an absolute maximum¹⁷. It is neither quantifiable nor qualifiable and a weighing

¹⁵ T. Hörnle, *Töten, um viele zu retten. Schwierige Notstandsfälle in moralphilosophischer und strafrechtlicher Sicht*, (in:) H. Putzke, B. Hardtung, T. Hörnle, R. Merkel, J. Scheinfeld, H. Schlehofer, J. Seier (eds.), *Strafrecht zwischen System und Telos. Festschrift für Rolf Dietrich Herzberg zum siebzigsten Geburtstag*, Tübingen 2008, p. 556 et seqq.; H. J. Hirsch, *Defensiver Notstand...*, p. 159; I. Bott, *In dubio pro Straffreiheit?...*, p. 119 et seqq.

¹⁶ For more details, see I. Bott, *In dubio pro Straffreiheit?...*, p. 33 et seqq.

¹⁷ For example R. Moos, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch*, Vol. 1, 35th ed., delivery 12, Wien 2005, § 10, marginal No. 91; F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 137; F. Höpfel, (in:) F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd ed., delivery 22, Wien 2012, § 10, marginal No. 14; for Germany see, for example: W. Perron, (in:) A. Schönte, H. Schröder (eds.), *Strafgesetzbuch Kommentar*, 29th ed., München 2014, § 34, marginal No. 23 et seqq.; F. Zieschang, (in:) H. W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (eds.), *Leipziger Kommentar zum Strafgesetzbuch*, Vol. 2, 12th ed., Berlin 2006, § 34, marginal No. 65; V. Erb, (in:) W. Joecks, K. Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd ed., München 2011, § 34, marginal No. 116; for further literature references, see T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 39; for Switzerland G. Stratenwerth, *Schweizerisches Strafrecht. Allgemeiner Teil I: Die Straftat*, 4th ed., Bern 2011, § 10, marginal No. 45.

exercise is not possible. The situation here is much the same as a mathematical principle: every single life has the value “infinite” and is therefore worth the same as 100 lives, because “infinity” is not an increasable factor¹⁸. Compared to other emergency situations, in the case of life-emergency the principle of accumulation, which says that the values of saved or violated objects of legal protection must be added (e.g. 20 cars are worth more than 3), does not apply¹⁹. This inadmissibility of the quantification of human lives, which is mainly supported within the German-speaking legal area²⁰, is nothing self-evident on an international comparison though. Especially in the English and American literature we can find various opinions which support quantitative weighing and consider the prohibition of killing single persons particularly to rescue many people as unacceptable²¹.

According to the prevailing view within the German-speaking literature, human life may not be examined from a qualifying perspective as all life represents the same value. Human value always remains unaffected by and independent of factors such as age, illness, life expectancy or others²². However, especially within the German literature, calls for a more generous solution are noticeable. It is – with diverging approaches and nuances – argued that, although human life is always a maximum value, the balancing of legal interests in the context of justifying necessity would require a careful consideration of all legal and factual circumstances of each case. Not only the abstract ranking ratio of the colliding objects of legal protection (life against life), but also further factors and criteria would have to be taken into consideration²³. In this context, especially the short remaining lifetime of the passengers is often given as a reason for assuming a situation of justifying necessity. In comparison to those factual constellations in which everybody is exposed to a threat to the same extent within so called “risk-bearing communities”, it comes to an asymmetrical distribution of the chances of rescue where terrorist-hijacked aircraft is concerned²⁴. While the

¹⁸ A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 29 et seq.; T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 39.

¹⁹ T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 36 et seqq.

²⁰ Also, the German Supreme Court follows this opinion as it for example (the so-called “Cat King-Case”) rejected the justification of necessity even in case of one person being killed to avert a danger for one million other people or the whole human race, stating that this legal instrument would never allow a weighing of lives.

²¹ A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 31 et seqq.; T. Hörnle, *Töten, um viele zu retten...*, p. 558.

²² For example R. Moos, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch...*, § 10, marginal No. 91; T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 34; U. Neumann, (in:) U. Kindhäuser, U. Neumann, H.-U. Paefgen (eds.), *Strafgesetzbuch Kommentar*, Vol. 1, 4th ed., Baden-Baden 2013, § 34, marginal No. 74.

²³ W. Perron, (in:) A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar...*, § 34, marginal No. 22; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 27 et seqq.

²⁴ T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 304.

passengers on board would in any scenario be doomed to die and have no chance of escaping the danger, the people on the ground might survive if the plane was shot down. In these cases of unequally distributed chances the killing of the passengers should – in their opinion – be justified and legal since it is rationally hard to explain why those who could still be saved should be forced to die together with those lost in any case²⁵. Such “overdone solidarity” could and should not be demanded by the legal order, as the protection of life would have to take the second place in this situation²⁶. In this context, thought has also been given to the fact that no arbitrary selection of victims is made and the offender does not intervene in the passenger’s fate²⁷. The inevitable entry of death would only be accelerated by shooting down the airplane²⁸. Assessing the conduct as unlawful would lead to the protection of life being, as it were, reversed because in these cases, paradoxically, it would precisely be the killing that serves the protection of the people on the ground²⁹. As we can see, some follow quite a utilitarian point of view, proposing a justification for the perpetrator in the case of the shooting down of a hijacked aircraft as this solution would lead to the greatest overall benefit. There are, however, convincing arguments against these approaches, taking for example unequal chances of rescue and short remaining lifetime as criteria of consideration. On the one hand, clear forecasts about the course of events are almost impossible, as even an unexpected rescue at the last minute could be imaginable³⁰. Besides, thereby the fundamental principle of not-assessing human lives would be given up, which may lead to undesired results. At this point, often the example of a terminally ill or moribund person is given, one who is killed intentionally in order to remove the still working body organs. If this were to be lawful through a justification, everyone would have to be afraid of being legally killed by someone who takes care of them when death is upon them, which is of course unacceptable³¹. Upcoming questions concerning life expectancy and quality of life necessary for a killing to be lawful through justifying necessity would convolute the problem *ad absurdum*. Even those doomed to death should enjoy the

²⁵ T. Hörnle, *Töten, um viele zu retten...*, p. 570; for further literature references C. Roxin, *Der Abschluss gekappter Flugzeuge zur Rettung von Menschenleben*, “Zeitschrift für internationale Strafrechtsdogmatik” 2011, p. 555.

²⁶ H. J. Hirsch, *Defensiver Notstand...*, p. 161.

²⁷ H. Otto, *Pflichtenkollision und Rechtswidrigkeitsurteil*, 2nd ed., Marburg 1974, p. 82 *et seq.*; for further literature references, see F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 141.

²⁸ V. Erb, (in:) W. Joecks, K. Miebach (eds.), *Münchener Kommentar zum Strafgesetzbuch...*, § 34, marginal No. 127.

²⁹ W. Küper, *Tötungsverbot und Lebensnotstand*, “Juristische Schulung” 1981, p. 787; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 46 *et seq.*

³⁰ F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?...*, p. 140; H. J. Hirsch, *Defensiver Notstand...*, pp. 160, 162.

³¹ C. Roxin, *Der Abschuss gekappter Flugzeuge...*, p. 556.

same protection of fundamental rights as healthy and young people, because it is not the positive future forecast but the present existence that is of importance. Similarly, the argument that in the future terrorists could take innocent passengers on board in order to prevent a – therefore unlawful – shooting down, is not carrying weight³². Also, the occasionally alleged lack not of worthiness of protection but of protectability³³ is not entirely convincing, because also the remaining lifetime of the passengers is under the state's protection and has to be preserved. It is, even if it is limited in time, neither worthless nor senseless. On the contrary, the last minutes of life are often the most important to pray, say goodbye to relatives or solve other matters³⁴.

In contrast to Austria, the German legislator explicitly regulated the question of the lawfulness of shooting down a passenger plane hijacked by terrorists in 2005 by enacting the ASA (Aviation Security Act). Paragraph 14 III para. 3 of this law stated that military forces were allowed to shoot down an aircraft in case of an explicit command of the defence minister when, according to specific circumstances, the conclusion could be reached that the plane was going to be used as a weapon against lives of individuals and if this was the only possibility to avert the imminent danger. The adoption of the Aviation Security Act has been mainly due to an incident occurring in the airspace of Frankfurt am Main in 2003: an armed and mentally disturbed man had hijacked a sports aircraft and was circling above the bank district of Frankfurt threatening to crash the plane into the European Central Bank building if his requirements of enabling a telephone call to the USA would not be met immediately. After a red alert had been triggered and large parts of the city had been evacuated, a police helicopter and two air force fighters took off to track the aircraft. Finally, after 30 minutes it turned out that the offender was only a confused single person and by no means a terrorist. He was allowed to make the phone call and surrendered without any use of violence³⁵. This incident was an occasion for the German administration to improve aviation security through specific measures and to provide appropriate legal regulations to intervene if a serious aircraft incident is likely to cause a disaster. The ASA tried to respond to the new threats and risks of air traffic with this unprecedented measure of explicitly allowing the shooting down of hijacked aircraft. In 2006, however, the German Federal Constitutional Court declared the authorization of the military forces according to § 14 III para. 3 ASA unconsti-

³² J. Isensee, *Leben gegen Leben. Das grundrechtliche Dilemma des Terrorangriffs mit gekapertem Passagierflugzeug*, (in:) M. Pawlik, R. Zaczyk (eds.), *Festschrift für Günther Jakobs zum 70. Geburtstag* am 26. Juli 2007, Köln, Berlin, München 2007, p. 225 *et seqq.*

³³ A. Sinn, *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?*, "Neue Zeitschrift für Strafrecht" 2004, p. 585.

³⁴ C. Roxin, *Der Abschuss gekapierter Flugzeuge*..., p. 556.

³⁵ FAZ, *Flugzeug-Entführung Irrflug versetzt Frankfurt in Angst und Schrecken*, February 5, 2003, at <http://www.faz.net/aktuell/gesellschaft/flugzeug-entfuehrung-irrflyg-versetzt-frankfurt-in-angst-und-schrecken-189977.html> (visited September 30, 2016).

tutional because it was not compatible with the right to life according to art. 2 para. 2 clause 1 GG³⁶ as long as people not involved in the action are aboard the aircraft that could be struck. Moreover, the killing of aircraft personnel and passengers was in conflict with the guarantee of human dignity of art. 1 para. 1 GG, because thereby the state disregarded their subject status degrading them into mere objects for the protection of others³⁷. After this decision the problem could have been seen as solved, however part of the German-speaking literature strongly insisted on the lawfulness of the shooting down of hijacked planes³⁸.

2.2.4. DEFENSIVE NECESSITY

Since this decision of the Federal Constitutional Court, the current legal situation in Germany is broadly comparable to the situation in Austria, where the problem of shooting down hijacked aircraft is now increasingly more discussed under the heading “defensive necessity”³⁹. In the case of defensive necessity, for specific reasons some people pose an increased threat to others and seem therefore less worth protecting⁴⁰. The threat, however, must not reach the extent of an unlawful attack because otherwise it would have to be considered a case of self-defence according to § 3 StGB.

Defensive necessity is therefore restricted to cases in which people are not to blame for the threat that comes from them because they are either not “acting” within the meaning accepted in the criminal law at all or at least not acting illegally⁴¹. Therefore, it is often spoken of a “special responsibility by virtue of the suffered loss of control over their own body”⁴², whereby the exact reason for justification is still controversial⁴³: partly it is presumed that this is a discrete legal justification inspired by § 228 BGB⁴⁴. According to this civil law regulation, anyone who destroys or damages another person’s property in order to avert

³⁶ GG = Grundgesetz = German Constitution.

³⁷ *Bundesverfassungsgericht*, “Neue Juristische Wochenschrift” 2006, p. 751 *et seqq.*

³⁸ For more details, see C. Roxin, *Der Abschuss gekappter Flugzeuge...*, p. 552.

³⁹ In the case of “defensive necessity”, an item poses a threat to someone else’s legally protected rights and is subsequently damaged or destroyed in order to avert disadvantages. In contrast to that, in cases of “aggressive necessity” it is not the threat-posing item but another one that is damaged.

⁴⁰ K. Schmoller, *Strafrechtliche Verantwortung in ethischen Grenzbereichen. Plädoyer für eine Zurückhaltung des Strafrechts jenseits fundamentaler Verhaltensregeln*, (in:) *Bundesministerium für Justiz*, Wien, Graz 2010, p. 23 with further literature references cited therein.

⁴¹ C. Roxin, *Der Abschuss gekappter Flugzeuge...*, p. 558; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 68.

⁴² M. Pawlik, *Der rechtfertigende Notstand. Zugleich ein Beitrag zum Problem strafrechtlicher Solidaritätspflichten*, Berlin 2002, p. 321; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 68.

⁴³ A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 69; F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?*..., p. 144 *et seqq.*

⁴⁴ BGB = German Civil Code.

the threat that it poses to the defender or others does not act unlawfully, so long as the damage or destruction is necessary to avert the threat and if it is not disproportionate against it. In this case, the interest in protecting the good threatened by a foreign object weighs higher than the preservation of the threat-causing object itself. Although according to its wording (“objects”), the regulation seemingly does not cover human lives, some voices in the literature call for an analogous and expanded application in criminal law⁴⁵. The opposite opinion considers the legal thought behind § 228 BGB and the fact of the danger coming from the victims’ sphere within the weighing decision that has to be made in the frame of justifying necessity⁴⁶. This justification is regulated in § 34 German Criminal Code and in large part corresponds with the Austrian regulation. Ultimately, both opinions lead to the same result: intentional killings in situations of defensive necessity shall be considered lawful. Differing ideas and concepts have been proposed regarding defensive necessity. Some scholars argue that even if the threat for the people on the ground does not directly come from the passengers on board of the plane, they are “inseparably connected with the source of danger”⁴⁷ and therefore as such part of “attack and injustice”⁴⁸. One reason for the justifying effect of defensive necessity is also that the flight would have taken place just because of the passengers who booked it⁴⁹. This argumentation can be discarded as it is doubtful under causation rules, for the flight would have taken place even if single passengers would not have booked it. Besides, some passengers might be on board not out of their own volition, such as children for example⁵⁰. Overall, the presumption of defensive necessity in case of the shooting down of terrorist-hijacked aircraft does not seem convincing. It is doubtful that this random incident can be ascribed to the victims who are not to blame for the dangerous situation. The mere fact that the threat derives from the sphere of the victims cannot be a reason for the prevalence of the interests of the people on the ground who might still be saved. Furthermore, the passengers on board are in fact not part of the attack, because they do not contribute to or increase the danger at all⁵¹. Even if we may not deny some relevance to defensive necessity, this aspect is not strong enough to legitimize an intended killing which normally is one of the most severe crimes.

⁴⁵ Cf. H. Frister, *Strafrecht Allgemeiner Teil*, 7th ed., München 2016, chapter 17 marginal No. 21; U. Neumann, (in:) U. Kindhäuser, U. Neumann, H.-U. Paeffgen (eds.), *Strafgesetzbuch Kommentar...*, § 34, marginal No. 86 with further literature references.

⁴⁶ W. Perron, (in:) A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar...*, § 34, marginal No. 30 with further literature references cited therein.

⁴⁷ H. J. Hirsch, *Defensiver Notstand...*, p. 164.

⁴⁸ F. Streng, *Gerechtfertigte Aufopferung Unbeteiligter?*..., p. 146.

⁴⁹ W. Gropp, *Der Radartechniker-Fall – ein durch Menschen ausgelöster Defensivnotstand? Ein Nachruf auf § 14 III Luftsicherheitsgesetz*, “Goltdammer’s Archiv” 2006, p. 288.

⁵⁰ F. Streng *Gerechtfertigte Aufopferung Unbeteiligter?*..., p. 147.

⁵¹ M. Pawlik, *§ 14 Abs. 3 des Luftsicherheitsgesetzes – ein Tabubruch?*, “Juristen Zeitung” 2004, p. 1049.

Accidental external circumstances of being involved in the dangerous situation alone cannot lead to a loss of the existential right to live⁵². A justification of the killing must therefore be denied.

3. EXCULPATION

As follows from the above, the shooting down of an airplane hijacked by terrorists cannot be justified by means of justifying necessity, therefore impunity of the offender might only be reached through “exculpatory necessity”. The relevant legal provision is § 10 StGB, which regulates that the perpetrator is excused and therefore not punishable if he commits a crime in order to avert an imminently threatening disadvantage from his or another’s legally protected interest, if the damage caused is not disproportionate to the threatened violation of legally protected interests if the same behaviour was expected from a person tied to the legally protected values. This regulation takes account of the fact that there exist psychologically extremely burdening situations in which the offender reaches the limits of reasonable compliance with the rules. The behaviour of the offender remains unlawful in this situation, however he is not to blame for his offence. In contrast to justifying necessity, § 10 StGB also applies if the saved legally protected interest is worth the same or even less than the one violated by the criminal action⁵³. The present dilemma of life-emergency due to hijacked planes is generally a case of § 10 StGB as people on board are killed in order to avert the imminently threatening danger of death from those on the ground. However, as the limits of reasonableness are hard to define, it is questionable how far exculpation reaches in cases of life-emergency. The underlying principle of exculpatory necessity particularly finds expression in the construct of a “person tied to the legally protected values”. But overall this figure, which is a peculiarity of the Austrian regulation and does not appear in either the Swiss or German exculpatory necessity rule⁵⁴, does not seem convincing. This is, on the one hand, due to the fact that the construct of a “person tied to the legally protected values” is dispensable, because it has no other function than activating legal practitioners to think case-comparingly⁵⁵. As regards

⁵² K. Schmoller, *Strafrechtliche Verantwortung in ethischen Grenzbereichen. Plädoyer...*, p. 23.

⁵³ R. Moos, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch...*, § 10, marginal No. 22.

⁵⁴ Instead of this figure, both foreign regulations directly ask if lawful behaviour could have been reasonably expected.

⁵⁵ K. Schmoller, *Zur Argumentation mit Maßstabfiguren – Am Beispiel des durchschnittlich rechtstreu Schwachsinnigen*, “Juristische Blätter” 1990, p. 706 et seqq.

content, it does not bring any specification; it merely indicates that every determination of guilt is rooted in a case comparison⁵⁶. On the other hand, if the hypothetical figure is not eliminated, the legislator should choose a more “plastic” expression, taken from real life. Indeed, it is hard to imagine what behaviour is to be expected from a “person tied to the legally protected values”, which, in turn, leads to very different assessments. Furthermore, this hypothetical figure often fails to render a solution to special legal problems, just as in the case of the shooting down of hijacked aircraft, because in such extreme situations we are not able to make an estimation regarding the potential behaviour of others since this is simply beyond our imagination. There is also no general answer to this question, as probably every fighter pilot would act differently in this situation. In brief, the mode of regulation of exculpatory necessity should be reconsidered and improved because it often does not offer a solution to special problems, such as the one in question here. All in all, it is of course difficult to find reliable and consolidated standards for the assessment of the reasonableness of lawful conduct as such assumptions are mainly based on estimates. There are different approaches in the literature – especially in Germany⁵⁷ – regarding the shooting down of hijacked planes, wherein a majority⁵⁸ – with different reasons and nuances – is in favour of excusing the perpetrator in this case owing to the massive moral dilemma and the psychological predicament under which he is acting. It is argued that, even if the pressure motivating the offender to conduct the unlawful act does not result from an urge of self-preservation or preservation of relatives, it would not be less

⁵⁶ F. Haft, *Der Schuldiallog: Prolegomena zu einer pragmatischen Schuldlehre im Strafrecht*, Freiburg im Breisgau, München 1978, p. 78 *et seqq.*

⁵⁷ In Germany, in this and similar cases the scope of exculpation is disputed as well. It is, in particular, problematic that the legal regulation of exculpatory necessity, prescribed in § 35 German Criminal Code, contrary to the Austrian regulation, only applies if the defendant acts in order to protect himself or a person close to him. The catalogue of people is therefore much narrower compared to the Austrian counterpart as uninvolved third parties do not belong to the protected group. This would lead to the offender being punishable when shooting down a hijacked aircraft, that is why a very prevailing opinion – in contrast to the judiciary – considers § 35 German Criminal Code too narrow. They think this unintended legal loophole should therefore be closed by tools of academic and judicial construction. The existence of so called “exculpatory necessity beyond law” is commonly recognized (U. Neumann, (in:) U. Kindhäuser, U. Neumann, H. U. Paefgen (eds.), *Strafgesetzbuch Kommentar...*, § 35, marginal No. 54; T. Zimmermann, *Rettungstötungen. Untersuchungen zur strafrechtlichen...*, p. 262 *et seqq.* – both with further literature references cited therein) but its limitations are still unclear and controversial. In this context, the majority agrees to an exculpation in cases of so called “risk-bearing communities with asymmetrical chances of rescue”, that is when a group of people is in a serious danger to their lives whereby the factual possibility of salvation is *a priori* limited to one part of this group. As far as the shooting down of a hijacked aircraft is concerned, the passengers on board would in all likelihood be dead within a few minutes so that the offender who just follows the altruistic goal of saving as many lives as possible should not be guilty.

⁵⁸ A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 77 with further literature references cited therein.

strong. This can as a result be agreed upon, as a conviction would seem unreasonable in this regard. The fighter pilot has to make a weighted decision about life and fate of other people within a very short period of time, which is an extremely burdening task, the consequences of which he should not be blamed for.

4. LEGAL VACUUM AND SIMILAR MODELS

Another solution of the present problem has been proposed by representatives of the theory of a “legal vacuum”, the centrepiece of much scholarly discussion in Germany. Proponents of the idea point out that there are extreme and borderline situations in which a legal assessment would not be suitable. In these situations that drop out of everyday life in a random, unanticipated manner, the law could not distinguish between right and wrong so that a legal regulation would not be appropriate. Therefore, the legal order should retreat from this area. In such unsolvable conflict situations, where all action alternatives seem inadmissible, the law would have to accept the actor’s decision and leave it all to his conscience, whilst abstaining from a legal assessment and declaring the behaviour “unforbidden”, which means legally neutral, neither unlawful nor lawful. In such tragic factual constellations rational criteria would be failing, that is why the assumption of a legal vacuum would help⁵⁹.

The idea of a legal vacuum, however, is not convincing. On the one hand, the legislator apparently did not want to leave these factual configurations unregulated, since § 10 StGB as well as §§ 34, 35 of the German Criminal Code and art. 17 and 18 of the Swiss Criminal Code aim at the regulation of just such situations⁶⁰. On the other hand, the legal value of “life” is under protection of the legal order and therefore belongs to the legally regulated area. The existence of a killing outside of the legally regulated area is dogmatically not possible if the legal elements of the offence of “murder” are fulfilled. By creating a criminal offence the legislator does already make an assessment. Behaviour can therefore be either unlawful or lawful, and mixed categories are not intended. Overall, the legislator should clearly state its position also in difficult matters and decide whether given conduct is unlawful or not.

A similar concept was developed by Otto⁶¹ who says that the offender would have to save as many people as possible. If he lives up to this decision,

⁵⁹ H. J. Hirsch, *Defensiver Notstand...*, p. 157 *et seqq.*; A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 17 *et seqq.* – both with further literature references cited therein.

⁶⁰ Cf. A. Archangelskij, *Das Problem des Lebensnotstands...*, p. 21.

⁶¹ H. Otto, *Die strafrechtliche Beurteilung der Kollision rechtlicher gleichrangiger Interessen*, „Jura” 2005, p. 479.

it would neither be unlawful in the light of the legal order's values nor lawful as against the victims. Instead, it would just be "not unlawful". This, however, is also not an apt solution because as a result it would lead to killings being allowed in this situation which is, as stated above, not a development worth endorsing⁶². Günther⁶³ tried to solve the problem by creating a construct of a "situation similar to necessity". This would be an interim stage between the legal defences of exculpatory and justifying necessity, whereby the unlawfulness of an act would be denied, the punishable wrongful content of the crime would, however, still remain intact. This model is also not convincing because Austrian law does not contain such mixed forms. We should aim at finding a solution within the given legal categories⁶⁴.

5. FURTHER EXAMPLES OF PREVENTING TERRORISM AT THE EXPENSE OF INNOCENT PEOPLE

One very tragic example that immediately comes to our mind when thinking of the topic of combating terrorism at the expense of innocent is the drone strikes in the Near and Middle East, for example in Pakistan, Afghanistan or Yemen. These drone attacks are – especially for the USA – an effective means in the war against terrorism and are used particularly for so called "targeted killings" of terrorists or terror suspects. However, they often lead to devastating effects, as not only the intended person, but dozens of innocent civilians are killed every year in the aftermath of these attacks. In the process, also other legally protected interests might be violated, especially houses and foreign property. But in fact, a legal assessment of this phenomenon is not a problem in the Austrian criminal law. As a neutral state Austria is not allowed to participate in any warfare activities, besides, the Austrian Criminal and Criminal Procedural Codes do not provide for such sanctions. If a soldier, however, decides to commit such a crime, or if for some reason Austria is the place of jurisdiction and Austrian criminal law is applicable, this would lead to punishability of the offender if there is neither a current nor an imminently threatening attack (which would allow self-defence) nor a situation of necessity (imminently threatening significant disadvantage). That is why such attacks are committed without a legal basis leading to the offender being sued for the relevant crime (murder, injury, damage to property...).

Moreover, counter-terrorism can affect people in other ways. Owing to the recently increasing number of – especially Islamist – terrorist attacks in Europe, there is high pressure on the police to investigate terrorist crimes and criminal

⁶² C. Roxin, *Der Abschuss gekappter Flugzeuge...*, p. 560.

⁶³ For further literature references C. Roxin, *Der Abschuss gekappter Flugzeuge...*, p. 560.

⁶⁴ C. Roxin, *Der Abschuss gekappter Flugzeuge...*, p. 560.

activities as well as to arrest the offenders. At the same time, severe security precautions are taken in advance to prevent further attacks and to investigate other potential terrorists. In the frame of an effective fight against terrorism the police are equipped with wide powers of intervention and investigation. Regarding this, the Austrian Code of Criminal Procedure allows – under specific formal and material conditions – for personal and house searches, seizure of assets⁶⁵, monitoring of messages and people, arrest of suspects as well as computer searches (“Ras-terfahndung”)⁶⁶. In the view of the current threat caused by the IS, a number of major raids have been conducted in the course of which lots of house searches took place where many suspect jihadists were arrested. Fulfilling of these official duties is a special justification defence within the Austrian Criminal Code. While – for example – a search of a house (regulated in §§ 119 *et seqq.* StPO⁶⁷) would be unlawful according to § 109 StGB, an arrest of a person (§§ 170 *et seqq.* StPO) would be unlawful as deprivation of liberty according to § 99 StGB and electronic eavesdropping (§ 136 StPO) would fulfil the crime of “abuse of sound recording and listening devices” under § 120 StGB, the behaviour is no longer unlawful when the official is acting within the scope of their legal authorization. In fact, most of the circumstantial conditions existent in a particular set of facts are to be seen from an *ex-ante* point of view. Investigative custody can for example be imposed lawfully only in case of a “strong suspicion”. Even if it turns out afterwards that the suspect is *de facto* innocent, detention was nevertheless justified and therefore lawful. Owing to a large amount of investigative measures to recognize and combat terrorist acts in a timely manner, a lot of innocent people have to suffer violations of their interests, and this applies in particular to foreigners and Muslims. If all the applicable legal criteria are fulfilled, however, they have to accept these impairments that result from the justifying effect of these regulations.

6. CONCLUSION

A legal assessment of killings of innocent people in order to save others raises a lot of difficulties. Regarding the shooting down of hijacked aircraft different

⁶⁵ According to § 109 *et seqq.* of the Austrian Criminal Procedural Code, on the instructions of the Public Prosecutor the Criminal Investigation Department is allowed to acquire temporary authority to dispose of certain assets or items, especially in order to secure evidence. It can also forbid the owner of a certain item or asset to sell, pledge or release it. This is called “Sicherstellung”. Furthermore, the law regulates that the court can decide to continue the temporary “Sicherstellung” and seize these assets.

⁶⁶ This is a computer-aided search employed with regard to wanted persons whereby data of a large number of people is checked against existing data in a database.

⁶⁷ StPO = Austrian Criminal Procedural Code.

opinions are held, with the focus of the discussion being mainly placed upon the question whether the legal justification of necessity arises. To summarize a plethora of contrasting viewpoints, it can be said that in the end all approaches supporting the existence of a justification of the offender do not seem convincing. The decisive aspect is that human life is not a disposable object of legal protection and not apt for any weighing. Every life is worth the same regardless of one's age, life expectancy or health, therefore killings in the state of life emergency are in any case unlawful. The same principle prevails not only for terrorist attacks but also in other fields, since the legal order does not allow every kind of danger defence. Our verdict on this matter, however, does not necessarily imply a punishment of the perpetrator. Even if the legal order condemns killings in these situations, the perpetrator (under certain circumstances) deserves forbearance. They are not acting out of any criminal motivation but among enormous pressure of having to make a decision about the life and fate of others. All in all, various measures to prevent such scenarios are taken. The combat of terrorism is often combined with a loss of freedom, this, however, is the price we have to pay for safety.

Summary

Nowadays terrorism is becoming an increasing world-wide problem. To prevent and combat terrorist activities various national and international measures are implemented, however thereby often innocent people are killed or suffer infringements of their legal interests. This article deals with the question of how far counterterrorism can go and if even the sacrifice of innocent civilians is accepted, if the struggle against terrorism requires this. Since 9/11 the topic of shooting down a hijacked passenger aircraft that threatens to crash into a building on the ground, has caused heated discussions. Is it lawful and therefore allowed to kill innocent in order to save others? Or shall the perpetrator be excused and therefore exempt from punishment? This article shows the legal situation as well as the current opinions in Germany and Austria and aims to make a contribution to the solution of this legal problem.

BIBLIOGRAPHY

- Archangelskij A., *Das Problem des Lebensnotstands am Beispiel des Abschusses eines von Terroristen entführten Flugzeuges*, Berlin 2005
- Bott I., *In dubio pro Straffreiheit? Untersuchungen zum Lebensnotstand*, Heidelberg, München, Landsberg, Frechen, Hamburg 2011
- Erb V., § 34, (in:) W. Joecks, K. Mießbach (eds.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd ed., München 2011
- Frister H., *Strafrecht Allgemeiner Teil*, 7th ed., München 2016

- Gropp W., *Der Radartechniker-Fall – ein durch Menschen ausgelöster Defensivnotstand? Ein Nachruf auf § 14 III Luftsicherheitsgesetz*, “Goltdammer’s Archiv” 2006
- Haft F., *Der Schuldldialog: Prolegomena zu einer pragmatischen Schuldlehre im Strafrecht*, Freiburg im Breisgau, München 1978
- Hirsch H. J., *Defensiver Notstand gegenüber ohnehin Verlorenen*, (in:) M. Hettinger, J. Zopfs, T. Hillenkamp, M. Kühler, J. Rath, F. Streng, J. Wolter (eds.), *Festschrift für Wilfried Küper zum 70. Geburtstag*, Heidelberg, München, Landsberg, Berlin 2007
- Höpfel F., § 10, (in:) F. Höpfel, E. Ratz (eds.), *Wiener Kommentar zum Strafgesetzbuch*, Vol. 1, 2nd ed., delivery 22, Wien 2012
- Hörnle T., *Töten, um viele zu retten. Schwierige Notstandsfälle in moralphilosophischer und strafrechtlicher Sicht*, (in:) H. Putzke, B. Hardtung, T. Hörnle, R. Merkel, J. Scheinfeld, H. Schlehofer, J. Seier (eds.), *Strafrecht zwischen System und Telos. Festschrift für Rolf Dietrich Herzberg zum siebzigsten Geburtstag*, Tübingen 2008
- Isensee J., *Leben gegen Leben. Das grundrechtliche Dilemma des Terrorangriffs mit gekapertem Passagierflugzeug*, (in:) M. Pawlik, R. Zaczyk (eds.), *Festschrift für Günther Jakobs zum 70. Geburtstag* am 26. Juli 2007, Köln, Berlin, München 2007
- Küper W., *Tötungsverbot und Lebensnotstand*, “Juristische Schulung” 1981
- Moos R., § 10, (in:) O. Triffterer, H. Hinterhofer, C. Rosbaud (eds.), *Salzburger Kommentar zum Strafgesetzbuch*, Vol. 1, 35th ed., delivery 12, Wien 2005
- Müller B., *Den Rechtsstaat gegen Terror rüsten*, “diePresse”, November 15, 2015, <http://diepresse.com/home/recht/rechtallgemein/4867038/Den-Rechtsstaat-gegen-Terror-ruesten> (visited September 30, 2016)
- Neumann U., § 34, (in:) U. Kindhäuser, U. Neumann, H.-U. Paeffgen (eds.), *Strafgesetzbuch Kommentar*, Vol. 1, 4th ed., Baden-Baden 2013
- Otto H., *Die strafrechtliche Beurteilung der Kollision rechtlicher gleichrangiger Interessen*, Jura 2005
- Otto H., *Pflichtenkollision und Rechtswidrigkeitsurteil*, 2nd ed., Marburg 1974
- Pawlik M., § 14 Abs. 3 des Luftsicherheitsgesetzes – ein Tabubruch?, “Juristische Zeitung” 2004
- Pawlik M., *Der rechtfertigende Notstand. Zugleich ein Beitrag zum Problem strafrechtlicher Solidaritätspflichten*, Berlin, 2002
- Perron W., § 34, (in:) A. Schönke, H. Schröder (eds.), *Strafgesetzbuch Kommentar*, 29th ed., München 2014
- Roxin C., *Der Abschuss gekapertter Flugzeuge zur Rettung von Menschenleben*, “Zeitschrift für internationale Strafrechtsdogmatik” 2011
- Schmitz-Elvenich H., *Targeted Killing. Die völkerrechtliche Zulässigkeit der gezielten Tötung von Terroristen im Ausland*, Frankfurt am Main 2008
- Schmoller K., *Strafrechtliche Verantwortung in ethischen Grenzbereichen. Plädoyer für eine Zurückhaltung des Strafrechts jenseits fundamentaler Verhaltensregeln*, (in:) Bundesministerium für Justiz, 38. Ottensteiner Fortbildungsseminar aus Strafrecht und Kriminologie, Wien, Graz 2010
- Schmoller K., *Zur Argumentation mit Maßstabfiguren – Am Beispiel des durchschnittlich rechts-treuen Schwachsinnigen*, “Juristische Blätter” 1990
- Sinn A., *Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?*, “Neue Zeitschrift für Strafrecht” 2004

- Stratenwerth G., *Schweizerisches Strafrecht. Allgemeiner Teil I: Die Straftat*, 4th ed., Bern 2011
- Streng F., *Gerechtfertigte Aufopferung Unbeteiligter? Anmerkungen zum Defensivnotstand bei terroristischen Angriffen*, (in:) M. Jahn, H. Kudlich, F. Streng (eds.), *Strafrechtspraxis und Reform. Festschrift für Heinz Stöckel zum 70. Geburtstag*, Berlin 2010
- Thürer D., *Humanitäres Völkerrecht und amerikanisches Verfassungsrecht als Schranken im Kampf gegen den Terrorismus*, "Zeitschrift für schweizerisches Recht" 2006
- Zieschang F., § 34, (in:) H. W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (eds.), *Leipziger Kommentar zum Strafgesetzbuch*, Vol. 2, 12th ed., Berlin 2006
- Zimmermann T., *Rettungstötungen. Untersuchungen zur strafrechtlichen Beurteilung von Tötungshandlungen im Lebensnotstand*, Baden-Baden 2009

KEYWORDS

terrorism, hijacked aircraft, exculpatory necessity, justifying necessity, self-defence, consent

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terroryzm, porwany samolot, stan wyższej konieczności wyłączający winę, stan wyższej konieczności wyłączający bezprawność, obrona konieczna, zgoda