Shooting Down Hijacked Airplanes? Sorry, We're Humanists. A Comment on the German Constitutional Court Decision of 2.15.2006, Regarding the *Luftsicherheitsgesetz* (2005 Air Security Act)

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Abstract: The article analyzes a very remarkable decision of the Constitutional Court of Germany that struck down a law (2005 Air Security Law) that expressly authorized the federal government to shoot down hijacked airplanes, in case they were likely to be crashed against a target on the ground. The Court ruled that deliberately killing innocent people on board is incompatible with the right to human dignity, as established in the Basic Law. The article focuses on some of the main issues addressed by the Court (among others, the absolutization of human dignity, which makes unconstitutional for the legislature and for the executive to weigh between the lives of the passengers on board an the lives of the victims of the crash), and tries to situate it in the context of the German and European case law on antiterrorism and human rights.

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1. The Background of the Air Security Act. The Constitutional Court's Decision

On January 5, 2003 a mentally disturbed person, flying a light aircraft, overflew the town center of Frankfurt (Germany) and threatened to crash the plane on the Central European Bank building if he was not allowed to make a phone call to the US. General alarm was raised, buildings were evacuated, and one police helicopter and two Air Force fighters took off to track the aircraft. After 30 minutes, the man was allowed to make the phone call, and it was clear that the threat was not serious - nor dangerous. He landed the aircraft and surrendered without violence[1].

Concerned by what could have been a catastrophe (although obviously not comparable to the September 11, 2001 attacks), the German Administration believed it had to act. So it did. It introduced a bill in Parliament that was voted and approved on January 11 2005 as *Luftsicherheitsgesetz*, or Air Security Act (hereinafter ASA). ASA contained provisions to improve aviation security, and especially (in sections 13 to 15) tried to respond to the new risks and threats of air traffic with an unprecedented measure: it authorized the Air Force, with the assistance of the *Land* (State) Police, to intervene if a serious aircraft incident was likely to cause a disaster. According to ASA, the military can try to divert the presumably hijacked aircraft, or force it to land, or warn its pilot(s) about using force – and open warning fire. And, in the last resort, the ASA authorized the Air Force to shoot down the aircraft if the military were persuaded that the objective of the hijackers was to crash the airplane on the ground and destroy human lives, and if the shooting was the only possible response to the threat[2].

There are very few examples of legislatures explicitly establishing a rule according to which the military can open fire and shoot down commercial airplanes (possibly with dozens of innocent people on board)[3]. There are also very few examples of a

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[1] In July 2005 a solo pilot crashed a similar plane in front of the *Bundestag* (Germany's parliament) building, in Berlin, in what seemed an apparent suicide.

[2] Section 14 reads as follows: "1: To avoid a particularly grave disaster, Armed Forces can intervene in the airspace diverting airplanes, forcing them to land, warning them on the use of fire, and opening warning fire. 2: The Armed Forces must choose, among the possible measures, the less detrimental for individuals and for the people in general. Its scope and duration will not exceed the strict necessity for achieving its objective. The measure can not bring a disproportionate damage with regard to its objective. 3: The Armed Forces's attack will be legitimate only when, according to the specific circumstances, the conclusion can be reached that the airplane is going to be used against the lives of individuals and that the shooting is the only means of defense against this imminent danger. 4: Only the Federal Minister of Defense, or in his place an expressly authorized member of the Government, can order the measure in number 3. The Federal Minister of Defense can authorise the Air Force Commander to adopt the measures in number 1".

[3] While ASA bill was approved, the Russian parliament was discussing a similar bill that, among other counterterrorist measures aimed at fighting terrorist threats (in September 2004 chechen terrorists hijacked a school in Beslan, and at least 335 people were killed after the army intervention), expressly included a provision for the armed

Government deliberately shooting down a civil aircraft in peacetime[4]. The reasons and circumstances of the KAL shooting and the current terrorist threat are completely different. Obviously, we all have in mind the September 11, 2001 attacks in Washington and New York. Right after the attacks, and before the United Airlines airplane had crashed in Pennsylvania, President George Bush ordered the military to shoot down commercial airliners if necessary. He explained that he issued the order "to protect the nation's capital, and to protect Americans".

Before and after being passed, ASA generated in Germany a "widespread uproar"[5]. Mr. Horst Köhler, the President of the Republic, signed the law, but warned that it might contravene human rights by allowing passengers to be "sacrificed" to protect others, and called for a legal review on the grounds that the constitution prohibits the government from killing citizens.

Given the intense debate, it was not surprising that six persons filed a constitutional claim against section 14.3[6]. They alleged to have standing because they travel frequently by airplane[7]. Their point was that section 14.3 was unconstitutional for two reasons. First, it violates fundamental rights, and second, it encroaches upon the powers of the States (*Länder*). The Constitutional Court issued its decision on February 15, 2006[8], invalidating section 14.3 both on the grounds of the federalism issue and of the fundamental rights question.

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forces to shoot down aircraft or destroy ships that have been seized by terrorists, even if hostages are on board. President Putin signed the law in March 2006.

[4] On September 1983, in what could be considered one of the last episodes of the cold war, the Russian military shot down a civil flight (Korean Airlines – KAL - nº 007) flying from New York to Seoul. The official Russian explanation was that the airplane had invaded the Russian air space (which apparently was true), and that they did not know that it was a civil flight (which was considered extremely unlikely). See Farooq Hassan "The Shooting Down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers", 33 *International & Comparative Law Quarterly* 712-725 (1984). A survey of the modern airplane hijacks can be found at Larry Moore, "The World Trade Center. Terrorist Airline Destruction", *68 Journal of Air Law and Commerce 699-715 (2003).*

[5] Oliver Lepsius, "Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-Transport Security Act", 7 *German Law Journal* 5 (2006).

[6] Some of them were members of Parliament, led by Burkhard Hirsch, member of the Free Democratic Party and former Vice President of the *Bundestag*. There were also a flight captain, and an attorney.

[7] Regarding standing, in paragraph 78 of the decision the Court accepted that the six petitioners were entitled to sue, for section 14.3 actually affects their fundamental rights. They proved that they travel by airplane quite often, and so the Court admitted that it is likely that their fundamental rights were affected by section 14.3.

[8] The official reference of the decision is *BVerfG, 1 BvR 357/05 vom 15.2.2006*. We will follow the numerals of its paragraphs (nº 1 to nº 156). The decision can be found (in German) at www.bverfg.de. At the time of writing this article (December 2006) there was, as far as we know, no official or unofficial English translation of the decision, so the fragments contained in this article have been translated by the authors.

In paragraphs 2 to 6 we will sum up the main aspects of the decision. In paragraphs 7 to 10 we will refer to its background, its aftermath, and we will address some of the issues it solves and some of the issues it does not.

2. The Federal Question: The Powers of the States (*Länder*)

The federal issue might not be as interesting as the fundamental rights issue. Nevertheless, some in Spain, and in other European countries, might consider surprising that in this case the petitioners are allowed to raise federal issues, and by that means transform a subjective writ (for it is aimed at protecting fundamental rights) in an objective writ, aimed at preserving the objective system of powers of the Federation (*Bund*) and the States (*Länder*). As the decision points out, this is made possible by section 2.2 of the Basic Law, which establishes that only a parliamentary statute can regulate the right to life, or affect to the right to life: "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law".

Regarding the federalism issue, the Court took a very important step, considered from a methodological, logic point of view: it stated that it would analyze it first, and only if ASA is compatible with the system of allocation of powers among the Federation and the States, for it passes the federalism test, then it will analyze the other aspects (that is, the fundamental rights issues). So ASA must first fit in the federal system: according to the Court, in order to be valid and in order to validly affect or limit this fundamental right, the law "has to fit in the allocation of powers among the Federation and the States, has to respect the essential core (*Wesengehalt*) of the right to life, and must not collide with the fundamental provisions and principles of the Constitution" (paragraph 85 of the decision).

The German Basic Law establishes a system, similar to the US system, of federal enumerated powers, and so, as Lepsius points out, ensuring public security – and including the prevention of terrorists attacks – is to be done not at federal level but at state level. Indeed, the Basic Law (sections 35.2 and 35.3[9]) allows the Federal Army, in

[9] "Section 35 [Legal and administrative assistance; assistance during disasters]: (1) All Federal and *Land* authorities shall render legal and administrative assistance to oneanother. (2) In order to maintain or restore public security or order, a *Land* in particularly serious cases may call upon personnel and facilities of the Federal Border Police to assist its police when without such assistance the police could not fulfill their responsibilities, or could do so only with great difficulty. In order to respond to a grave accident or a natural disaster, a *Land* may call for the assistance of police forces of other *Länder* or of personnel and facilities of other administrative authorities, of the Armed Forces, or of the Federal Border Police. (3) If the natural disaster or accident endangers the territory of more than one *Land*, the Federal Government, insofar as is necessary to combat the danger, may instruct the Land governments to place police forces at the disposal of other *Länder*, and may deploy units of the Federal Border Police or the Armed Forces to support the police. Measures taken by the Federal Government pursuant to the first sentence of this paragraph shall be rescinded at any time at the demand of the *Bundesrat*, and in any event as soon as the danger is removed".

case of natural disaster or serious catastrophe, to cooperate with the State Police in the jurisdiction of the latter, that is, public security.

So the problem was that "the *Länder* are generally in charge of security measures but they do not have the military means to shoot down aircraft. The *Bund*, on the other hand, has the military means but may not generally use them in a domestic setting apart from defense purposes"[10].

The Court ruled that the cooperation between the Federal authorities and the States, as established in section 35 of the Basic Law, has to limit itself to the same province and responsibilities that the State functions which are being complemented by the Federation (paragraph 106). Federal cooperation is merely a task force, or a technical support, that does not modify the existing powers allocated by the Basic Law. Furthermore, those constitutional provisions do not regulate nor allow the Federation authorities to use specific military weapons as described in section 14.3 ASA. The Court dismissed the argument of the Federal Government according to which the constitutional concept of "defense", as mentioned in section 87a of the Basic Law[11], includes terrorist attacks, and therefore authorises the Federal Army to intervene – and to shoot down airplanes[12].

Pursuant to this rationale (section 35 do not authorize the Federation to interfere in state matters, that is, in public security, and section 87a – defense – do not include terrorist attacks), section 14.3 ASA is rendered unconstitutional in terms of federal allocation of powers. And according to the quite strict methodological order of analysis it had established, the Court could have stopped here (and actually the briefs of the

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[10] Lepsius, *supra* note 5, at 78-79

[11] "Section 87a [Establishment and powers of the Armed Forces]: (1) The Federation shall establish Armed Forces for purposes of defense. Their numerical strength and general organizational structure must be shown in the budget. (2) Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law. (3) During a state of defense or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defense mission. Moreover, during a state of defense or a state of tension, the Armed Forces may also be authorized to support police measures for the protection of civilian property; in this event the Armed Forces shall cooperate with the competent authorities. (4) In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a *Land*, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and in combating organized armed insurgents. Any such employment of the Armed Forces shall be discontinued if the *Bundestag* or the *Bundesrat* so demands".

[12] A deeper analysis would have led the Court to tackle a very important issue: Is the "fight" or the "war" on terror a police (*ergo* civilian) matter or is it a military matter? Can it be properly and legally called a "war"? Section 87a(3) of the Basic Law specifically authorizes the Armed Forces to intervene in police matters such as traffic control or protecting property – provided that a "state of defense" or "state of tension" has been declared. Obviously, this was a good argument for the Federal Government, but was not accepted by the Court.

Governments of Bavaria and Hessen urged the Court to do so). Instead, it went on analyzing section 14.3 ASA from the point of view of its compatibility with fundamental rights – maybe because, in case of a declaration of nullity for encroaching state powers, some bills had previously been sent to Parliament to amend section 35 of the Basic Law (paragraph 16)[13]. The Court decided to check the compatibility of section 14.3 ASA with the substantive provisions of the Basic Law, that is to say, with the unmodifiable core of the constitutional system (established by the so-called "eternity clause", section 79.3 of the Basic Law[14]).

3. The Core of the Decision: Human Dignity Forbids Treating Human Beings as a Mere Means or Objects of the Action of the Authorities

The Court ruled that section 14.3 ASA violated the right to life (section 2.2 of the Basic Law), in relation to human dignity (section 1.1 of the Basic Law)[15]: for it authorizes the Air Force to shoot down a hijacked aircraft that is likely to be used as a weapon to kill innocent people, and as far as this authorization affects not only the terrorists but also third parties, section 14.3 is not compatible with the Basic Law.

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[13] Before the decision was issued, some authors had casted doubts on the constitutionality of the powers section 14.3 granted to the Federation. See Elmar Giemulla, "Zum Abschuss von Zivilluftfahrzeugen als Maßnahme der Terrorbekämpfung", *Zeitschrift für Luft- und Weltraumrecht (ZLW)*, (2005), p. 32, especially 47; Henriette Sattler, "Terrorabwehr duch die Streitkräfte ohne Grundgesetzänderung. Zur Vereinbarkeit des Einsatzes der Streitkräfte nach dem Luftsicherheitsgesetz mit dem Grundgesetz", *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, (2004), p. 1286, especially 1291. Manfred Baldus, "Streitkräfteeinsatz zur Gefahrenabwehr im Luftraum. Sind die neuen luftsicherheitsgesetzlichen Befugnisse der Bundeswehr kompetenz- und grundrechtswidrig?", *Neue Zeitschrift für Verwaltungsrecht (NVwZ)*, (2004), p. 1278, especially 1285, on the other hand, was in favour of the federal powers to intervene. See also the authors quoted in Gabriel Doménech, "¿Puede el Estado abatir un avión con inocentes a bordo para prevenir un atentado kamikaze?", *Revista de Administración Pública* nº 170 (2006), pp. 391-392.

[14] Section 79.3 of the Basic Law forbids any constitutional amendment if it limits, or touches, human dignity. The prohibition is absolute, and has no time limit (that is why it is called "eternity clause"). It reads: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Sections 1 and 20 shall be inadmissible". We will return to this later.

[15] "Article 1 [Human dignity]: (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law. Article 2 [Personal Freedoms]: (1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law".

The rationale of the decision is rather simple. The Court started drawing a clear distinction between the hijackers, on the one hand, and the hijacked passengers and crew, on the other hand. Referring to the latter, the Court stated straightforwardly the reason for striking down section 14.3: human dignity forbids the public authorities to use human beings as objects of their action, and as a mere means for the salvation of others. When the authorities use the death of innocent and helpless people to save other individuals, the former are being transformed into objects. And this neglects the constitutional status of the individuals as subjects with inherent dignity and inalienable rights.

In doing so, the Court refused to go into any hypothetical balancing, based upon the utilitarian – and obvious – consideration according to which if the aircraft is not shot down, all its occupants will die when it will crash against its objective on the ground, adding to this the death of more human lives in the crash; but if it is shot down, the death of some hundreds of individuals (the occupants of the aircraft, both hijackers and hijacked) can save thousands of lives. The Court took out of the scales the option of the shooting down (because incompatible with human dignity) and therefore made impossible the balancing, both from a logical and from a legal point of view. Balancing is impossible when you have only one scale. And balancing is forbidden when one of the scales is unconstitutional[16]. As a result, it rejected the claims of some of the parties that had argued in favour of the validity of section 14.3 ASA stating that relativizing the value of the right of both the crew and the passengers to life may allow a rational balancing between the lives of those who are in the aircraft and the lives of them all.

In paragraph 119 the Court quoted its precedents on the right to life and on human dignity, underlining that human life is the vital basis of human dignity, which is a fundamental principle and a supreme value of the Basic Law; all human beings – even the terrorists - are entitled to human dignity, regardless of capacities, social status, mental or physic situation, and regardless also of the foreseeable duration of life.

The German jurisprudence about human dignity is usually very rigid, and for some also very activist, so it was not surprising that the Court stressed the importance of section 1.1 of the Basic Law.

In paragraph 120 the Court stated that sections 1.1 and 2.2 of the Basic Law imply not just a prohibition for the public authorities to violate the right to life, but also a duty to defend it against other people's attacks[17]. The exact content and scope of this duty can not be established *ex ante* and abstractly, but according to the Court the German Basic

[16] This rationale implies that when the two scales can be legally weighed, the balancing is possible. We will see later (in paragraph 6) that this is the case when the airplane is occupied only by the hijackers, and there are no innocent passengers.

[17] However, this argument (the duty to protect the right to life) could be used to criticize the Court: as we will point out briefly *infra* in paragraph 5, this same idea could have had the effect of upholding section 14.3, because it could had been argued that the state's duty to protect the right of the passengers to life (making the shooting down unconstitutional) is at least as significant as the state's duty to protect the right to life of the possible victims on the ground (and therefore making unconstitutional the decision not to shoot down the airplane, or at least allowing the authorities to choose between both decisions).

Law assumes the hypothesis, or is grounded on the assumption, that all individuals can freely shape their own life, can freely develop their personality, and have a right to be treated as members of a society having an inherent value. All this forbids making them a mere "object of the state". For this reason, any statute, decision or conduct related to the duty of protection which put into question the subjectivity of human beings, and their status as individuals entitled to rights and liberties, is unconstitutional. In other words: the state certainly has a positive duty to protect people's life against attacks, but it cannot implement it at the expense of the values that result of the combination of the right to human dignity (section 1.1 of the Basic Law) and the rest of the elements of the right to life (section 2.2 of the Basic Law). The duty to protect is not unlimited.

The Court added that the verification of a particular norm or behaviour, and its compliance with the aforementioned category, must take into account the specific circumstances of the case (paragraph 121). And it went into it in paragraphs 123 and 124, and came to the conclusion that section 14.3, as applied to the passengers and the crew of the aircraft, was unconstitutional as it puts them in the situation of a constitutionally forbidden "depersonalization", depriving them of their intrinsic value as human beings. When the shooting order is taken, it assumes that the hijackers have transformed the airplane into a weapon which is presumably lethal for the lives of the people who are in the place in which the hijackers want to crash it. "In this extreme situation, the passengers and the crew are in a dead end in which they can not determine their lives freely and independently" (paragraph 123).

> "This transforms the victims of the hijack (passengers and crew) not only into objects controlled by the hijackers, but also into objects controlled by the State. The State treats these innocent people - absolutely defenseless – as mere objects of its intent of saving other peoples' lives. The defenselesness, and the impossibility of avoiding the hijacker's action, characterizes the situation of the victims in the airplane also regarding the authorities that order and execute the shooting. Due to their dramatic circumstances, passengers and crew have no means of defense against the hijackers, nor against the authorities' decision. They are inevitably and hopelessly bound to a decision of the authorities that will result in their deliberate elimination (and in the elimination and destruction of the hijackers and the airplane). This is not compatible with the conception of the passengers and the crew as individuals entitled to dignity and to inviolable rights. Using their death as an instrument to save other people's lives, the state treats them as if they were objects, and deprives them of their rights. When the authorities unilaterally decides upon their lives, they are depriving innocent people in the aircraft – who, on the contrary, deserve protection – of the inherent value of every human being" (paragraph 124).

By doing so, the Court brought up an old theory called "the object formula" that it had sometimes used in the fifties[18], and created an explicit constitutional rule rooted in

[18] See Matthias Herdegen, in Maunz/Dürig/Herzog, *Kommentar zum Grundgesetz* (2005), commenting section 1 of the Basic Law, in paragraph 33 (quoting what in the 1950's Dürig had called "object formula" – *Objektformel* - , as one of the possible ways to interpret human dignity, based on Kant's ethics); Hans J. Wolff – Otto Bachof, *Verwaltungsrecht I*, 9th edition, Munchen, 1974, 216, also quoting Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, 1785 (in later editions the sentence about the

human dignity: individuals can not be objectified, that is, can not be treated as mere objects or means of the action of the state.

We must bear in mind that the conviction that individuals constitute an end in themselves and are never a means nor an object is deeply rooted in western thought, and particularly in German philosophy[19] - even though in Europe it has not always been so in practice. Maybe section 1.1 of the Basic Law, and its derivations (the "eternity clause" of section 79.3), can only be understood because of the terrible history of Europe before and during World War II. Whatever its origins are, the solemn declaration of section 1.1 of the Basic Law has greatly influenced other constitutions[20] and EU law provisions[21].

4. The Difficulty of Time and of an Accurate Assessment of the Circumstances of the Hijack

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individual as "an end in itself" has been deleted: see Wolff/Bachof/Stober, *Verwaltungsrecht*, vol. 1, 11th edition, Munich, 1999, p. 490). See the latest developments of the "object formula" in Ralf Müller-Terpitz, "The 'Uniqueness' of the Human Being in Constitutional Law", in Hans-Rainer Duncker – Kathrin Priess (eds.), *On the Uniqueness of Humankind*, Wissenschaftsethik und Technikfolgenbeurteilung vol. 25, Springer (Berlin & Heidelberg), 2005, pp. 107-122

[19] From the secular philosophy of Enlightenment, an idea similar to Kant´s can be found in the anthropological and philosophical Christian thinking: see Robert Spaemann, *Personen. Versuche über den Unterschied zwischen "etwas" und "jemand"* [the title speaks by itself: *Essays on the difference between something and someone*], 2nd edition, Stuttgart, 1998.

[20] Section 10.1 of the Spanish constitution (1978) heads the Bill of Rights (sections 10 to 52), and establishes that "Human dignity, the inviolable and inherent rights, the free development of personality, and the respect for the law and for the rights of others are the foundation of political order and social peace". Section 54.1 of the Hungarian constitution (1949, with 59 amendments): "In the Republic of Hungary everyone has the inherent right to life and to human dignity. No one shall be arbitrarily denied of these rights". Section 1 of the Constitution of Portugal (1976): "Portugal is a sovereign Republic, based on the dignity of the human person and the will of the people, and committed to building a free and fair society that unites in solidarity". Section 1.2 of the Constitution of Finland (1999): "The constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society". Some more recent European Constitutions, perhaps more inspired by the US, do not contain a specific right to dignity (see section 3 of the Bosnia and Herzegovina 1995 Constitution, or Parts 1 and 2 – sections 14 to 47 – of the 1990 Croatia Constitution, revised in 2004).

[21] The 2000 EU's Charter of Fundamental Rights, now included in the Treaty Establishing a Constitution for Europe, states in its Preamble that "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity", and the immediate posterior Section II-61 of the Treaty reads as follows: "Article II-61 Human dignity. Human dignity is inviolable. It must be respected and protected".

The Court added to the previous rationale some reflections about the difficulty (rather the impossibility) of a careful and accurate balance and assessment of the situation, and, consequently, of a correct checking if the conditions required by section 14.3 to allow the shooting do actually occur: "According to what was testified by some of the *amici* or the parties, we believe it is not possible to verify – with a minimum level of accuracy – whether the factual situation that legally permits the shooting is actually taking place" (paragraph 125). As Lepsius points out, this is a serious criticism the legislature: "The whole setting the statute presumes is at odds with reality. It draws upon a speculative situation which hardly ever will occur"[22].

Indeed, the Court had asked some expert witnesses to testify, and both the *Vereinigung Cokpit* (association of professional pilots and aeronautical engineers) and the *Unabhängige Flugbegleiter Organisation UFO* (association of professional cabin crew) had stated that during a hijack it was extremely difficult for the authorities to establish communication with the crew, and to check if the information given by the hijackers is real or not. They stressed also the fact that the outside watching of the aircraft might not provide valuable information, and the fact that the situation on the aircraft can change in minutes, or in seconds (paragraphs 126 – 128). The Court considered those testimonies convincing, and added that the legal regulation of the steps previous to the shooting decision – that demands the participation of several authorities – would necessarily require a certain amount of time for the authorities to asses the situation and to weigh the possible options. This minimal time, taking into account the relatively small extension of the German air space, means that the shooting decision would be adopted under extreme pressure, which increases the possibility of a hasty, erroneous decision:

> "It is true that in other fields of police or armed forces regulation there are cases in which it is not possible to completely avoid insecurity in prospective judgments. But in this case, the dignity of all persons (Section 1.1 of the Basic Law) leads us to the conclusion that the authorisation to deliberately kill innocent people (passengers and crew) in a desperate situation – and therefore the decision to do so - is completely unacceptable, even more if there is no certain assessment of what is actually happening in the airplane"[23].

[22] Lepsius, *supra* note 5, at 10.

[23] See the opposite argument in Paul Schultz, "The Necessity Defense Revisited: An Examination Through the Case of Regina v. Dudley & Stephens and President Bush's Order to Shoot Down Hijacked Aircraft in the Wake of September 11, 2001", *3 Rutgers Journal of Law & Religion 9 (2001)*: "There will always be some uncertainty as to whether a terrorist intends to crash an aircraft or simply use the hostages as a bargaining chip. If the terrorists did not intend to crash the plane and it is shot down then the result is a net loss of life rather than a net benefit. Still, the decision would still be correct, provided that it is made prudently, with an evaluation of all available alternatives and without rushing to any conclusion as to the hijackers' motives, because it can rarely be known with absolute certainty in cases of necessity that the course of action taken will prevent the harm which is sought to be avoided. Reasonable certainty is the standard which must be adhered to", at 31-32.

The Court declined, as irrelevant, to consider the situation under the principles of criminal law[24].

5. Rejecting the Argument that Would Have Lead to Relativizing the Crew's and the Passengers' Right to Life, or to Weighing this Right Against a Supposedly Superior Value

As we said before, the Court struck down any possibility of using a balancing approach. This is surprising, especially because the balancing approach was explicitly employed in section 14.2 ASA[25].

The balance, of course, would consider, on the one hand, the lives of the passengers and the crew, and on the other hand, the lives of the passengers and the crew plus the lives of the persons on the ground that are being targeted by the hijackers. Before the decision was taken, some had compared the issue with the traditional "moral dilemma", in which any of the possible courses or action leads to undesirable or lethal consequences. Under this perspective, and assuming that it is beyond any doubt that the authorities must act in some way[26], the constitutional analysis could take into account that also without the intervention of the police or the military the passengers and the crew would probably die; and that – as cynical and utilitarian as it might seem – the dilemma could be solved in terms of which decision saves more human lives[27]. Another author had stressed the fact that this is not a case in which two lives are at stake and one can be saved (so the choice is between saving the life of A and saving the life of B, and the outcome is in any case the saving of someone's life): here the choice is between the death of some innocent individuals (the passengers and the crew) and the death of a much greater number of innocent individuals (the passengers and the crew, plus the victims of the crash, presumably more numerous)[28].

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[24] Most of the scholarly opinions previous to the Court's decision had taken into account criminal law. The decision discusses them in paragraph 130. See also Giemulla, *supra* note 13, at 41-42, who justifies the criminal law approach arguing about the "unity of Law" – which, he says, would allow to extend the balancing decisions present in the justification cause's theory (specifically, the defense of necessity) to constitutional and administrative law.

[25] "The Armed Forces must choose, among the possible measures, the less detrimental for individuals and for the people in general. Its scope and duration will not exceed the strict necessity for achieving its objective. The measure can not bring a disproportionate damage with regard to its objective".

[26] Baldus, *supra* note 13, at 1279: if there is a hijacked airplane, and the threat is to crash it to a target on the ground killing innocent people, it is not conceivable that the authorities remain inactive.

[27] Baldus, *supra* note 13, at 1285 points out that a prompt shoot down of the airplanes that crashed against the World Trade Center and the Pentagon on September 11th. 2001 could have saved thousands of lives. See an economic cost-benefit analysis of the German decision in Miguel Ángel Roig Davison – Carlos Alb. Ruiz García, "La valoración de la vida humana. Comentario a la Sentencia del Tribunal Constitucional Federal alemán de 15.2.2006 (BVerfG, 1. BvR 375/05 vom 15.2.2006, Absatz. Nr. /(1.156))", *InDret* 4/2006.

[28] Giemulla, *supra* note 13, at 40-41.

The Court specifically rejected these arguments.

It also refused to take into account the presumption that the passengers and the crew are inevitably bound to die, regardless of whether the shooting decision is taken: "Human life and human dignity have the same constitutional protection, regardless of how long lasts the physical existence of a person" (paragraph 132). "We must add to this the aforementioned uncertainty of the actual facts during the hijack, that necessarily influences the forecast of how long will the lives of the persons in the airplane last – now turned into a lethal weapon – or the forecast of whether there is a chance of salvation. Most likely, it would not be possible to make an accurate opinion on whether those people's lives are inevitably lost" (paragraph 133).

The argument concerning the passengers and the crew turning into weapons is rejected as follows. The persons in the airplane could be considered as part of a weapon (the airplane itself), but "this hypothesis openly shows that the victims of the hijack are not considered anymore as persons, but rather as parts of an object. The human being is so treated as an object, and this is not compatible with the anthropological conception embedded in the constitution, which is based on individuals with a right to freely develop. For this reason, they can not be treated as a mere object of the action of the authorities" (paragraph 134). The Court reasoned similarly as to the self-sacrifice argument, according to which "individuals would be, in extreme cases, obliged to sacrifice their own life to preserve the existence of the state, if this would happen to be the only way of defending the community against attacks aimed at its destruction". The Court did not want to analyze the possible scope of this duty of self-sacrifice[29], and did not accept the argument according to which the passengers and the crew would authorize their own death[30].

Finally, the Court said that the duty of the state to protect the lives of the people on the ground (which are threatened by the hijacked airplane) is not sufficient to uphold section 14.3:

> "The state has a wide policy margin to implement its duty to protect fundamental rights. Fundamental rights, taken from a subjective point of view, are rights that individuals have against the state and have a precise content, but the state's duties and obligations to protect those rights, objectively considered, are potentially indefinite. So it is the province of the public authorities to decide how to carry through this duty of protection (which includes the obligation to protect the right to life). Indeed, in some cases related particularly to the right to life, the aforementioned freedom to choose the policy and the means may be limited to only one possibility – when it is the only existing way to effectively

[29] It stressed the fact that the constitutional basis of section 14.3 is section 35.2 and 3 of the Basic Law, and those norms establish a power to "prevent serious disasters", but do not mention the self-defense against attacks that threatens the existence of the state. For this reason, in paragraphs 135 and 136 the Court stated that this should not be the case to require the sacrifice of innocent lives to prevent the state to be destroyed.

[30] "We do not accept the idea, mentioned during the trial, that anyone that boards an airplane, as a passenger or as crew, would presumably give consent to the shooting, and to his or her own death, in case of a hijack" (paragraph 131).

protect life. In any case, the freedom of choosing the means can only refer to those means compatible with the constitution. And section 14.3 is not. The decision to use military force against the airplane, and the shooting itself, overlook that the victims of the hijack that are actually on board (the passengers and the crew) are also entitled to have their lives protected by the authorities. The piece of legislation in question here not only deprives those individuals from the protection they are entitled to, but establishes that it is the state who will actually deprive the lives of the passengers and the crew. As we have already said, this is not compatible with the consideration of the victims as individuals entitled to rights and liberties that arise from the human dignity (section 1.1 of the Basic Law), and with the prohibition for the state to kill, also rooted in human dignity. Nothing in this argument changes if it is taken into account that section 14.3 is bound to protect other people's lives" (paragraphs 138-139).

6. The No-Innocent Passengers Hypothesis. The Proportionality Test.

As we said, in analyzing the constitutional aspects of section 14.3 the Court started with a very important premise, which delimits the boundary between what is constitutional and what is unconstitutional (and establishes the possibilities of using a balancing argument). The premise is the distinction between the hypothesis in which the hijacked airplane is occupied by innocent people, on the one hand, and the hypothesis in which it is a remote-controlled or guided airplane, or occupied only by hijackers which threaten to use it as a weapon and to crash it on the ground, on the other hand. In the first case, the shooting down is incompatible with human dignity, and therefore can not be weighed against other possibilities.

The decision ends with the analysis of this second case (airplane with no innocent passengers). Obviously, the shooting of a remote-controlled airplane does not have any constitutional implications. But the other case (a hijack with no hostages, for the airplane is occupied only by the hijackers) is closely examined by the Court:

> "When the state takes defensive measures against the authors of an illegal and criminal attack, and, complying with its duty to protect the lives of the people on the ground, avoids the crash, it does not put into question the subjective quality of anybody, or treat anybody as a mere object of the action of the state. On the contrary, the measures result from the subjective position of the authors, that is, their deliberate criminal action, and so it allows the personal attribution to the authors of the consequences of their deliberate acts, and therefore allows holding them responsible of the course of action in which they have the initiative. The defensive action taken by the state does not violate the respect that the hijackers deserve as individuals" (paragraph 141).

According to the Court, in this reasoning it is irrelevant the difficulty to verify the real factual circumstances of the hijack. This uncertainty is not comparable with the uncertainty that occurs when there are innocent people on board[31].

[31] If the hijackers are not going to use, or do not want to use the airplane as a weapon to crash it on a target on the ground, and even so the authorities have some doubts about it,

As in this case (no innocent passengers) there is no "objectification" o "depersonalization", the Court went into the balancing test that had refused to apply in the other case. So it discussed the compliance of section 14.3 with the so called principle of proportionality. In paragraph 145 the Court ruled that section 14.3, if applied only when the airplane carries no passengers or crew (and so the shooting would only kill the hijackers), fits the constitutional duty of saving human lives, this duty being so compelling that it justifies such an extreme intervention. Regarding the first element of the proportionality test, the shooting authorisation, and the shooting itself, are suitable for the purpose established by ASA because it is very likely to verify – with a high degree of certainty – that only the hijackers are on board and that the shooting will eliminate their threat for innocent people on the ground (paragraph 146).

The second requisite of the proportionality test (the necessity of the measure) is also met: in this specific case, there seems to be no other way to save innocent lives but less harmful for the hijackers' lives (paragraph 147)[32]. So is the third element of the test, that is, proportionality *stricto sensu*: a weighing judgment between the intensity of the action on the hijacker's right to life, on the one hand, and the values and principles that are being protected, on the other hand, gives out an adequate and balanced result – provided that it is certain that the situation described in section 14.3 is actually taking place (paragraph 149)[33]. And there is a final part on the proportionality test, which consists of the possibility that someone could be hurt by the wreckage of the down airplane. If it is certain that this damage is going to occur, then the shooting will not be allowed. However, in paragraphs 152 and 153 the Court stated that this circumstance does not affect the judgment of the abstract (un)constitutionality of section 14.3, but it is rather related to its application in the specific case.

Even if the Court had came to the conclusion that section 14.3 was constitutional if the airplane was occupied only by the hijackers, the final ruling declared the unconstitutionality and the nullity of section 14.3, because – as we mentioned before –

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the hijackers can easily respond to the measures that can legally be taken (warning of use of force, warning fire) and therefore show that their aim is not to use the airplane as a weapon – for example diverting the airplane, or landing it. So in case the airplane is occupied only by the hijackers or presumed suicides, they can easily make clear the confusion and uncertainty that arises in the other case (paragraph 142). But if the hijackers can avoid the uncertainty, and they do not do it, the consequences (i.e, the shooting) will be attributed to them and not to the state (paragraph 143).

[32] ASA contains a wide range of measures to improve air security, particularly regarding hijacks or attacks, but – says the Court – it does not and can not provide a complete and absolute protection, and for this reason it might be necessary to use the military force against a hijacked airplane – only as *ultima ratio.*

[33] The fact that the hijackers are causing the reaction of the state, and the fact that they can actually stop it anytime by giving up their criminal action, were both considered by the Court as circumstances that actually change the balancing, because they diminish the weigh that the detriment of their fundamental rights has in the balancing.

the Court had started its analysis with the federal issue and had stated that section 14.3 exceeded the powers of the federal authorities[34].

7. The Reaction to the Decision and the Political Background

We will now focus on some particular aspects of the Court's decision. First, the legal and political reactions to it. Second, the use of the balancing approach and the "principled" argument. And third, its relation to what is commonly known as "the war on terror", and particularly to the constitutional provisions in moments or emergency or crisis (and the limited capacities of the law)[35].

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[34] It should be noted that the Court declared unconstitutional not only section 14.3, but also the actual action of shooting down the hijacked airplane, when it carries on board innocent people – regardless of its legal regulation.

[35] Therefore, we will not address some issues like the so-called moral dilemmas, in part because they have been a frequently addressed topic (see for instance Charles Fried, *Right and Wrong*, Harvard University Press, 1978: in p. 10 he discusses the case in which "killing an innocent person may save a whole nation", and writes that "in such cases it seems fanatical to maintain the absoluteness of the judgment to do right even if the heavens will in fact fall"; Doménech, *supra* note 13, refers at 392-397 compares the shooting case to other cases – real or hypothetic – like cannibalism, conjoined twins, and the quite well-known "trolley problem". Nor will we refer to other aspects surrounding the state's deliberately killing (or authorising to kill), or torture an individual (as is the case of death penalty, or euthanasia, or the "ticking bomb" case). Our purpose being modest, we will not get into these moral issues, nor into some of the most common criticisms or praises that have been pointed out in the first comments that have been published. For instance: The federalism issue (and the activism showed by the Court by not being willing to stop its analysis after having declared void section 14.3 for encroaching the state's powers); The argument according to which it is constitutional to shoot down the plane if it is occupied only by the hijackers (pointing out the possible contradiction of the "treating people as objects" argument, because it can be arguably said that killing the hijackers, when the no-passenger airplane is shot down, is also treating them like objects or like a means to save innocent people (Roig and Ruiz, *supra* note 27, argue that the dignity clause is not a coherent rationale for striking down section 14.3 because the individuals on the ground that presumably are going to be attacked have also a right to dignity, that is being disregarded by the Court when it absolutizises the passengers and the crew's right to human dignity); The Court's disregard of the constitutional state's duties to protect people (and the society) against terrorism, that could have, and for some should have, led to the Court to uphold section 14.3; The "certainty" problem (that raises the question: if absolute certainty is required, then it is almost impossible for the authorities to act, for there always could be some doubt about the circumstances of the hijack); The comparison, pointed out by Lepsius, Eberle, and Kommers, between the German dignity clause and the US substantive due process clause, for they are both open and provide backing broad rights such as privacy. And finally a somewhat new approach that has been recently pointed out: the importance given to life by occidentals (and specifically by the German Constitutional Court) is irrelevant when dealing with suicide terrorists, for whom life has apparently no meaning, nor value, if it be not a sacrifice for a superior, divine ideal or god. From that point of view, the case has no (useful) solution because its rationale (the sanctity

How was the ASA decision was taken in Germany? It has been already said that the ASA bill, when introduced in Parliament, when approved, and when finally signed by President Köhler, caused a great political debate. When in 2004 ASA was sent to Parliament, Mr. Schroeder was the Prime Minister or Chancellor, and his party (SPD, the Social-Democratic Party) was in the Government. Its Minister of the Interior, Mr. Otto Schily, a law and order man, was not too sympathetic to the left wing of the party. The right-wing opposition CDU (the Christian Democratic Union) officially supported the bill, but not unanimously. In fact, President Köhler was a member of the CDU, although as President of the Republic he acted quite independently. So at that moment both of the two big parties were divided, and so was the public opinion – or so showed the polls.

The February 2006 decision was issued in a different political scenario. The coalition government led by Ms. Merkel criticized the Court: the most conservative and orthodox CDU politicians (for example current Interior Minister, Wolfgang Schäuble) or CSU politicians[36] (Mr. Edmund Stoiber, former Chancellor candidate, and Mr. Gunther Beckstein, Bavaria's Minister of the Interior) made the usual arguments, according to which the Court, and all those who support the decision, are siding with the terrorists, or are foolishly depriving the state of an essential tool in the war on terror[37]. Other CDU Government members spoke about amending the Basic Law[38], and urged that it be done quickly[39]. The amendment would consist in authorizing the armed forces for domestic, civil use (i.e., terrorist use). Some SPD members of the Government stepped back discretely from their CDU temporary allies, unwilling to support a constitutional reform (either because they were not so strongly against the decision, or because they wanted to send to their electorate a different message)[40].

Even before the decision was issued, some state parliaments initiated the procedure for constitutional amendment, but it would have been a very difficult result to achieve.

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and dignity of human life) is not recognized by the most extremist of those who are pointed out as being potential terrorists.

[36] CSU (Social Christian Union, a conservative Bavarian party)

[37] They also said that the decision was another arrogant step of the Court, taken by "law priests" that preferred to save the constitution ("their" constitution) rather than to save the people. Some of the critics had a point when, taking literally the words of the decision, said that the constitution is not a end by itself, it is a means of protecting citizens (and therefore when the "law priests" fail to protect citizens they are seriously mistaking and misinterpreting their job).

[38] Mr. Schäuble has been for years seeking the deployment of armed forces in Germany for civil purposes. In fact, some commentators said that the decision was personally directed to him.

[39] The soccer world cup was taking place in a few months, and CDU members of the Government thought that some terrorist attack could happen.

[40] Paradoxically, some SPD leaders welcomed the decision that struck down a law that their party had favoured and passed. The current SPD chief, Mr. Peter Struck, was Minister of Defense when ASA was introduced into parliament, and his reaction to the decision was ambivalent: he felt obliged to criticize the Court (and to reaffirm section 14.3 ASA), but he did not support the proposals to amend the Basic Law.

Even if the quorums and proceedings could have reached a satisfactory conclusion[41], a constitutional amendment seemed difficult, for it would confront the "eternity clause" (section 79.3 of the Basic Law), as interpreted by the Constitutional Court. Even if the amendment was passed, and the armed forces were authorised to intervene in public security or terrorist matters, it could not bypass the Constitutional Court ruling that the authorities (military or not) could not deliberately kill innocent individuals. This seems to be a major challenge for the military: if the "war" on terrorism is considered a "war", as they do in the US, how can the military make "war" without killing innocent people?

In fact, in Germany there is an ongoing debate over security, and specifically on the constitutional system and its virtues as an operative framework. Treating the human dignity as an untouchable absolute leads to the petrification of the constitution – at least of the philosophical, moral core of the constitution. The dignity clause, or eternity clause, as interpreted by the Constitutional Court, is immune not only to legislated law, but also to constitutional amendment. Therefore, "Under article 79(3) of the Basic Law, even constitutional law can be unconstitutional, insofar as such unconstitutionality results from a constitutional amendment (the so-called unconstitutional constitutional amendment)"[42]. What has sometimes been called the tyranny of the framers has lead to a political and constitutional uneasiness that is somewhat new: maybe for the first time in post war Germany, the feeling among many politicians and possibly among more and more citizens is that the interpretation of the Basic Law, or the 1949 Basic Law itself, is rather too rigid. After all, it is now a different Germany, a different Europe… a different world.

Finally, regarding the scholarly debate, it seems that a majority of the German legal academics were not enthusiastic about section 14.3, or simply disagreed with it[43]. After the February 2006 decision, the German and European articles or reviews were very divided[44]. Now we will try to point out several aspects not treated, or understated, in those articles.

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[41] The Basic Law has been amended 51 times since it was enacted in 1949.

[42] Nicolas Nohlen, "Germany: The Electronic Eavesdropping Case", *International Journal of Constitutional Law*, 2005; 3: 680 – 686

[43] See the authors quoted by Lepsius, *supra* note 5, at footnote 9, and Doménech, *supra* note 13, at footnotes 4 and 5.

[44] Lepsius, *supra* note 5, in general praises the decision. Doménech, *supra* note 13, writes harsh criticisms. Roig and Ruiz (*supra*, note 27) argue a very specific criticism based on a cost-benefit analysis, according to which law should authorize the authorities to take the best decision, measured in terms of social efficiency (including economic costs of the accidents, insurances, and human lives). Schultz (*supra* note 23), commenting not on the German decision but on President Bush's order to shoot down airplanes on September 11, 2001, writes that "Although the President's order is controversial, it is the proper decision to make in this type of situation", and states four kinds of justifications (religious, deterring future acts of terrorism, utilitarian balancing, and economic considerations). One of us (José María Rodríguez de Santiago, "Una cuestión de principios. La sentencia del Tribunal Constitucional Federal alemán de 15 de febrero de 2006, sobre la ley de seguridad aérea, que autorizaba a derribar el avión secuestrado para cometer un atentado terrorista", *Revista Española de Derecho Constitucional* nº 77 [2006]) has previously stressed mainly technical arguments.

8. On Principles and Rules: ¿Do we Balance or Not?

The Court outlawed - except in the quite extreme case in which the airplane is occupied only by the hijackers - what can be called an utilitarian-balancing argument, weighing up the pros and the cons of the possible solutions to answer the question whether the state can validly shoot down an airplane which carries on board passengers and crew. This would have led it to consider and to balance two alternatives: if the airplane were shot down, only those on board would die, but if on the contrary the state remained inactive and did not shoot, there would be more deaths (those on board plus the victims of the crash on ground). It seems as if the Court wanted to approach the issue as a matter of principle, which means that, regardless of any other consideration, the state can not deliberately kill innocent people to save other innocent people.

But, analyzed from jurisprudential and argumentative premises – the distinction between principles and rules, pointed out, among others, by Ronald Dworkin and Robert Alexy – it appears that the case is definitely not a "question of principles"[45]. According to these well-known theories, *rules* are norms that can only be upheld or not upheld, so they can only be applied or not applied, in a syllogistic fashion. There is no intermediate possibility (it is an all-or-nothing decision). On the contrary, *principles* are optimization mandates that allow different levels of implementation and application. They establish that something must be done (or prevented) insofar as it is legally and practically possible, and operate through a balancing between opposing principles and interests that lead to apply one and disregard the other[46].

From this methodological point of view, the German Court has not followed a "principle" approach but a "rule" approach. It has established a constitutional *rule* rooted in human dignity (section 1.1 of the Basic Law): individuals can not be treated as mere means or objects of the state's action. The abstract contrast of section 14.3 with this rule is negative: the authorisation for shooting is not compatible with it, and therefore the Court declares section 14.3 unconstitutional and void. Once this specific rule is established, the Court does not look for some constitutional principle or value that might prevail. It just verifies whether section 14.3 respects the rule or not. If constitutional interpretation establishes that, regarding specific matters, the framers wanted to set up a rule unmodifiable by the legislature, then the legislature, when dealing with fundamental rights, can not validly weigh up principles.

9. Some German Case Law: Siding (more often) with Liberty than with Security

[45] Of course, "principle" in the Dworkin's terminology is a technicality, and is different from "principle" in the ordinary meaning (as, for instance, in the sentence "Paul has always lived up to his principles").

[46] See Ronald Dworkin, *Taking Rights Seriously*, Harvard, 1977, chapters 2 and 3. See also Robert Alexy, *Theorie der Grundrechte*, 3rd. ed., Frankfurt, 1996, p. 71 (English translation: *A Theory of Constitutional Rights*, Oxford, 2002)

The German Constitutional Court decision we are commenting is remarkable, almost unique. It poses one of those hard cases that Prof. Dworkin fancies - and entrusts the Honorable Judge Hercules to solve[47].

Actually, the case is more than remarkable. It is also striking because the Court *could* - maybe *should* - have avoided such a difficult issue. It could have stopped its reasoning after stating that section 14.3 was unconstitutional for violating the states' powers. Therefore, it could have left undecided the question of the killing of innocents to save (more) innocents. Was it activism? Yes, indeed[48]. But we will not get into this quite obvious issue.

It is obvious, too, that in balancing security and liberty, the Court has sided with liberty. This is not a specific feature of the decision: many more German Constitutional Court decisions have struck down anti-terrorist provisions due to their breach of human rights[49]. On March 2004 the German Constitutional Court ruled that the regulations of acoustic surveillance of private houses, or eavesdropping, was partially contrary to the Basic Law[50]. On April 2005 it upheld the police use of global positioning systems (GPS), but it established pretty strict limits to it (mainly, it banned the police from using it in conjunction with other surveillance methods that could eventually lead to the construction of a personality profile of the person observed)[51]. On July 2005 it refused to turn over to Spain a German citizen of Syrian origin, Mr. Darkazanli, claimed to be a key figure in the European section of *Al-Qaeda*, arguing that a recent European agreement to streamline extradition procedures (the European Arrest Warrant) violated the rights of German citizens, and therefore was unconstitutional. Although the court did not question the legality or constitutionality of the EU Arrest Warrant itself, it held that the German law implementing the Warrant's arrest procedures did not provide sufficient protection regarding constitutionally guaranteed fundamental rights. On April 2006 the Court also struck down the practice of screening data across several public and private databases in order to find potential terrorists. It ruled that the German police may not trawl databases to identify possible terrorists without a specific threat to national security, human life or freedom: "A general threat situation, of the kind that has

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[47] We do not intend to use the idea as Bernhard Schlink does (see Bernard Schlink, "Hercules in Germany?", *International Journal of Constitutional Law*, 2003 1: 610-620). Schlink argues that Dworkin's approach (mainly the rule / principle dicothomy) is too narrow for the German legal or constitutional mentality. He also writes that "From the point of view of the German scholars and judges of constitutional law, [Dworkin's] institutional interplay not only does not require a Herculean judge, it can not tolerate one" (at 618).

[48] Lepsius (*supra* note 5, at 4) writes that "[the Court] decided more than it had to decide, and bowed to public expectations".

[49] See a general overview in Georg Vanberg, *The Politics of Constitutional Review in Germany*, Cambridge University Press, 2005.

[50] See Nohlen, *supra* note 42, and Jutta Stender-Vorwachs, "The Decision of the Bundesverfassungsgericht of March 3, 2004, Concerning Acoustic Surveillance of Housing Space", 5 *German Law Journal* nº 11 (2004).

[51] See Nicole Jacoby, "The Decision of the Bundesverfassungsgericht of April 12, 2005 Concerning Police Use of Global Position System as a Surveillance Tool", *6 German Law Journal nº 17 (2005)* and Jacqueline Ross, "Germany's Federal Constitutional Court and the Regulation of GPS Surveillance", *6 German Law Journal nº 12*.

existed continuously in regard to terrorist attacks since September 11, 2001, or external political tensions, is not sufficient," the high court said. The decision affected 11 laws from 11 *Lander*, and although it does not make illegal the screening itself, it considers illegal the wide, non suspicion-based screening. Finally, and although it is not a final judgement, on February 2006 the Court released from prison Mr. Motassadeq, a terrorist suspect, pending his appeal.

Besides, at the European level (ECJ, ECHR) there is some pro-liberty case law[52]. Some would say that the decision we are commenting on reflects what can be called the European approach to terrorism, which is said to be different from the US approach. Certainly, before the March 11, 2004 Madrid attacks there was a substantial difference. Now that Europe has also been hit by the "new" global terrorism, differences might not be so significant. Still, some differences still remain. Europeans (at least continental Europeans) do not speak of the "war" on terror but of the "fight" on terrorism. It is more than just a terminological issue. Europeans tend to consider counterterrorist policy as part of the general policy of fighting organised crime[53]. In Europe alleged terrorists have always been tried by ordinary criminal courts, and Al Qaeda suspects (regardless of their nationality) are being tried by ordinary courts, and not by special military tribunals[54].

Presently Europe faces another time in which it has to decide whether it still believes in law to solve its problems, or it sets aside law and, as some are now arguing in the US, relies on force and power. The question, in Europe as well as in the US, is the place law has in dangerous times (Posner speaks of "national emergency"), and if the constitutional system has to be adapted, or suspended, to face the new situation – and

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[52] See Paul de Hert, "Balancing Security and Liberty within the European Human Rights Framework. A Critical Reading of the Courts's Case Law in the Light of Surveillance and Criminal Law Enforcement Strategies after 9/11", *1 Utrecht Law Review 68 (2005)*. On May 2006, in the *Parliament v. Council* decision (cases C-317/04 and C-318/04) the ECJ struck down the 2004 EU-US agreement on the sharing of personal data of the airplane passengers (Passengers Name Record, or PNR). The reason was not substantive but formal: the resolution of the Council (2004/496/CE, May 17 2004) that approved the EU-US agreement lacked legislative backing.

[53] See the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism (Official Journal L 164 of 22 June 2002), and the Report from the Commission of 8 June 2004 based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism (Official Journal C 321 of 28 December 2004). See also the UE 2004 Hague Program, officially *Communication from the Commission to the Council and the European Parliament. The Hague Programme - Ten priorities for the next five years. The Partnership for European renewal in the field of Freedom, Security and Justice* [COM (2005) 184 final - Not published in the Official Journal].

[54] The issue of whether the "war" on terrorism should be tackled with the legal principles and tools of the so called law of war, or with the legal principles and tools of the ordinary criminal law system, or with a different model, is lately very discussed in the US (not so much in Europe). See, among others, Rosa E. Brooks, "War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror", 153 *University of Pennsylvania Law Review* 675 (2004), and Bruce Ackerman, *Before the Next Attack. Preserving Civil Liberties in an Age of Terrorism*, Yale, 2006, especially chapters 1 to 3.

particularly if certain human rights standards have to be adapted, or openly ignored. We will finish this article addressing briefly this issue.

10. Is Law Useful in Emergency Circumstances? (Schmitt Revisited)

Richard Posner has recently argued that "In conditions of great danger legalistic limitations fall by the wayside; officials act, leaving the legal consequences to be sorted out later […] Many soldiers and other security personnel live for such emergencies, and they are selected for their courage"[55]. He believes the president of the US has both the legal authority, and the moral duty, to violate the law if he considers that the nation is at risk[56].

In a similar way, Mark Tushnet refers to three possible positions regarding war emergencies in the US constitution: 1. applying the general, constitutional standards; 2. applying different standards; 3. not applying any legal or constitutional standards ("The war presents the possibility of justifying a widespread suspension of legality")[57]. He does not believe that law can rationalize and regulate emergency powers, and therefore those are, and should be, extra-constitutional and a-legal (that is, not regulated by law, because "extra-constitutional powers are 'reviewed', and disciplined, not by law but by a mobilized citizenry"): "The entire point of suspending legality in emergencies is to displace the rule of law"[58], precisely, he believes, to protect the rule of law[59].

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[55] Richard Posner, *Not a Suicide Pact. The Constitution in a Time of National Emergency*, Oxford, 2006, pp. 4 and 156.

[56] He speaks of "licensed civil disobedience" (*id*., at 152) when "circumstances with so great force that the rule must be bent, either by recognition of a new exception or by simply being ignored" (*id.*, at 153). Very similarly, addressing what he calls "the constitution of necessity", Paulsen states that to preserve the constitution (and the nation), the president is legally, constitutionally entitled to ignore specific constitutional provisions: see Michael Stokes Paulsen "The Constitution of Necessity", 79 *Notre Dame Law Review* 1257 (2004). Another prominent conservative scholar extends such disregard to international law: Robert Bork writes that "The US should not make the mistake of accepting that treaties have the force of law no matter what vital interests of the nation are at stake": Robert Bork, *Coercing Virtue. The Worldwide Role of Judges*, American Enterprise Institute, Washington, 2003, p. 19.

[57] Mark Tushnet, "Emergencies and Constitutionalism", in Mark Tushnet (ed.), *The Constitution in Wartime. Beyond Alarmism and Complacency*, Duke University Press, 2005, p. 39. A similar argument had been developed by Oren Gross in "Chaos and Rules: Should Responses to Violent Crimes Always be Constitutional?", *112 Yale Law Journal 1011 (2003)*, speaking about three possible models (the "business as usual" model, the "accommodation" model, and the "extra legal measures" model, which he favors, that allows the authorities to break the legal and constitutional rules when an emergency occurs). See also Oren Gross, "What "Emergency" Regime?", *Constellations vol. 13 nº 1 (2006)*, p. 74.

[58] *Id.*, at 51. See also Mark Tushnet, "Controlling Executive Power in the War on Terrorism," 118 *Harvard Law Review 1677 (2005).*

[59] Tushnet cites Louis Michael Seidman's "The Secret Life of the Political Questions Doctrine", *37 John Marshall Law Review 441 (2004).*

Indeed, the so called emergency powers topic is well known, especially in Germany[60], and is now reappearing in the US, possibly because the US constitution does not contain specific provisions on this matter[61]. From this point of view, the recent efforts to think about "the constitution in wartime", as Tushnet says, can be considered a valuable effort to establish at least the shape of an emergency law regime – putting aside the opinion one can have about Posner's, Gross', Seidman's or Tushnet's proposals.

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[60] Since the writings, among others, of Carl Schmitt, and the 1930's debate about the "defense of democracy" when democracy (the Weimar system) was in danger, and, some years later, about the legitimity of Nazi law. See an update of the debate in Andras Jakab, "German Constitutional Law and Doctrine on 'State of Emergency': Paradigms and Dilemmas of a Traditional (Continental) Discourse", *7 German Law Journal nº 5 (2006)*. There is some relationship (the nationalistic view) between the German and the (recent) US approach. As we have seen, Posner and Paulsen reason in terms of "first the nation": Posner writes that "The nation is prior to the constitution. National defense, not limited to defense against human enemies, is a core sovereign power and moreover one that traditionally is exercised by the executive" (*supra* note 55, at 4). In reality the nationalistic reaction is quite common to all the situations in which society (or politicians) consider there is collective risk. Recently, there seems to be an interest on Schmitt in the US: see the Heinrich Meier, *Carl Schmitt and Leo Strauss. The Hidden Dialogue*, University of Chicago, 2005; Ellen Kennedy, *Constitutional Failure: Carl Schmitt in Weimar*, Duke University Press, 2004, and for the influence of the writings of Schmitt on some US policies, see William E. Scheuermann "Carl Schmitt and the Road to Abu Ghraib", *Constellations* vol. 13, nº 1 (2006), pp. 108-124, and more broadly, Sanford Levinson, "Preserving Constitutional Norms in Times of Permanent Emergencies", *Constellations* vol. 13, nº 1 (2006), pp. 59-73 and Tushnet, *supra* note 57, at 46.

[61] Set apart Article I, Section 9, clause 2 of the US constitution, regarding the suspension of habeas corpus "when in case if rebellion or invasion the public safety may require it". The precedents of the use of emergency powers in the US can be found in Kim Lane Scheppele, "North American Emergencies: The Use of Emergency Powers in Canada and the United States", *International Journal of Constitutional Law 2006 4 (2)*, pp. 213-243. As is well known, in the last few years some authors have embrace the thesis according to which the President retains exceptional, implied powers in dealing with the "war on terror" – and therefore some legislation that interferes on such powers is unconstitutional. Posner, Yoo, and others, challenge explicitly what they call "the dominant paradigm" according to which a majority of scholars (Fisher, Heymann, Henkin, Koh, Glennon, Ely, Frank, Dempsey and Cole) argue in favour of requiring a Congressional approval of Presidential action – and therefore a minimal legal regulation - of military actions. Yoo, one of the builders of the legal architecture of President's Bush "war on terror", maintains that presidential war powers include a non authorized, or non legal, action (and, as the "war on terror" in which apparently we are engaged seems to be permanent, these exceptional, non regulated powers are also permanent: see John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11*, University of Chicago Press, 2005, pp. 155-181). For the latest developments of this debate, see Levinson, *supra* note 60, Ackerman, *supra* note 54, and Louis Fisher, *In the Name of National Security. Unchecked Presidential Power and the Reynolds Case*, University of Kansas Press, 2006.

As occurs most of the time, in Europe the debate is somewhat different, probably because most of the European constitutions do contain some kind of emergency powers or emergency regime[62]. And the European Convention of Human Rights contains some specific provisions regarding the exceptions to the normal human rights standards that can be legally adopted "in time of war or other public emergency" – but they do not apply to the right to life "except for lawful acts of war"[63]. In Europe, therefore, the issue

[62] Section 116 of the 1978 Spanish constitution establishes three levels of emergency (called states of alarm, of exception, and of siege) and the different participation of the parliament and of the executive, and section 55 specifies which constitutional rights can or can not be suspended, and the corresponding judicial review. Sections 115(a) to 115(l) of the 1949 German Basic Law establish a complete set of provisions for the state of defense. Sections 228 a 234 of the 1997 Polish constitution contain also a very detailed system (under the title "Extraordinary Measures", they include the martial law, suspension of some rights and liberties, limitation of judicial review, and forbid the suspension or exception of the core of the constitution). Section 16 of the 1958 French constitution, and Section 103 of the 1983 Netherlands constitution establish a specific regime (although not so detailed as the Spanish and German ones). Indeed, the French system can be deemed as the exception to the rule, because of its looseness (it does not give the parliament any participation, and establishes no limits, of matter or of time, to the emergency powers).

[63] "*Article 15. Derogation in time of emergency*

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16. Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17. Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18. Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".

In March 2006 the European Commission for Democracy Through Law (known as the Venice Commission), created within the Council of Europe, has issued and opinion – which reflects the mainstream view in Europe – about "The protection on Human

is much more settled, or at least there is a certain consensus at political and scholarly levels.

Despite those important differences of approach, one of the main contemporary issues, in the US as well as in Europe, seems to be whether the executives need a specific constitutional provision to suspend the constitution (or parts of it) in the so called emergency times. Or if they need a specific legal provision – like the German ASA – to use special force against terrorism – and to sacrifice particular human rights "in the name of freedom". This same issue can be seen from another point of view: whether human rights and constitutional freedoms and privileges should stand with the same intensity as they stood before the "war on terror" began – in case the "war on terror" is, as Posner says, an emergency time with constitutional implications.

Assuming that the military and the elected officials would probably consider a suicide airplane attack as an "emergency situation", and assuming that the attack would fit in the constitutional provisions we have mentioned (those who – at least in Europe – establish a more or less detailed regulation of the emergency powers and of the suspension of the ordinary constitutional provisions), then we have to consider the hypothetical reaction to the attack under this legal-constitutional framework. From this perspective, we believe the focus of the debate changes slightly, and the big issues are not the ones it seems.

Our point is that the major big issue is whether law is a useful tool (or a tool) in the "war" against terror, or, more broadly, in "emergency" or "necessity" times. Our point is that this is the hard case, rather than the question of whether authorities can legally kill innocent people to save (more) innocent people.

The shooting down airplanes case is indeed a hard case, in a dworkinian manner. But it might not be the deep, real question, and it is a hard case with no solution. At least with no correct, useful solution. By this we do not necessarily imply that we agree with Dworkin's critics that have argued that hard cases have no correct solution because they are generally moral cases, and moral cases cannot have "correct" solutions. We are rather saying that there are some circumstances in which law (as a pre-established system of rules) has a very limited place. As the so called "limits of law" approach has proved, there are some issues, or situations, that law can not envisage, and that, once happened, can not regulate nor solve. These situations are not necessarily extraordinary, or catastrophic, or that provoke chaos[64]. Rather, they have to do, for instance, with

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Rights in Emergency Situations" that reaffirms the rule of law in emergency circumstances and the necessity of protecting human rights (that is, the European Convention of Human Rights). See http://www.venice.coe.int/docs/2006/CDL-AD(2006)015-e.pdf. Other international treaties and conventions include a similar provision: see section 27.2 of the American Convention on Human Rights (Pact of San José), and section 4 of the International Covenant on Civil and Political Rights). See Claudio Grossman, "A Framework for the Examination of States of Emergency Under the American Convention of Human Rights", *1 American University Journal of International Law and Policy 35* (1986), and Héctor Fix-Zamudio "States of Emergency and Defending the Constitution", *Mexican Law Review* nº 7 (2007).

[64] Schmitt wrote that "there exists no norm that is applicable to chaos": *Political Theology: Four Chapters on the Concept of Sovereignty*, MIT, 1985, p. 13.

economy (in times of crisis, or even in ordinary situations), with advanced technology (because technology and science are usually far ahead of law), or with the power of keeping security, during "wartime" as well as in "peacetime".

Being realistic – and we think realism is the correct approach - does not necessarily mean we agree with the pragmatic Judge Posner and his ultra-nationalistic view[65]. Realism here consists in acknowledging that, as Seidman has written, "one can not use law to determine when legality should be suspended"[66], and that the debate on how can law anticipate, regulate, and encompass the emergency situations is somewhat futile. As Levinson puts it, "I increasingly believe that the discussion of emergency powers is ultimately a profoundly political one, with law, at least as traditionally conceived, having relatively little to do with the resolution of any truly live controversy"[67].

The big issue is not whether section 14.3 ASA is, or is not, constitutional. As Schmitt said more than seven decades ago, the big issue is whether law can regulate and foresee emergency situations, and establish a legal and constitutional framework for emergency situations - like the one described in the German ASA - that bind the sovereign or the public officials, and that can be a useful, reliable tool in those emergency situations. Seidman, and Tushnet, and others have given the correct, negative answer. So the German ASA case has no solution not (only) because moral hard cases can not be "correctly" solved, or settled, by law – or by judges. The case has no legal solution because when extreme, emergency situations arise, law is not a useful, viable tool to solve them.

[65] Posner (and the most conservative scholars), on the one hand, and the 1970's Critical Legal Studies scholars, on the other, would probably agree in this respect: law is just power (raw power), and reflects and legitimates power (and the dominance relationships, or economic dominance, or economic logic), and therefore law is set aside when it collides with power (or with the core capitalistic principles like the benefit, the risk, the market, the profits, and so on). So the most conservative judges and scholars, and the most critical, left-wing scholars would all agree that, even when it establishes negative limits to defense power, law has no place in "war" or in extreme or emergency circumstances.

[66] This is how Tushnet (*supra*, note 57, at 47) sums up Seidman's point (see Seidman, *supra* note 59).

[67] Levinson *supra* note 60, at 68. For a non legalistic approach, see Giorgio Agamben, *Stato di Eccezione*, Turin, Bollati, 2003 (English version: *State of Exception,* University of Chicago Press, 2005).