O PERMANENTE ESTADO DE EXCEÇÃO E A LEI ALEMÃ SOBRE SEGURANÇA AÉREA – *LUFTSIG:* ADMITE-SE A MORTE DE UM INOCENTE (MAL MENOR), EM PROL DA VIDA DE OUTROS INÚMEROS INOCENTES (BEM MAIOR)?*

CHRISTIAN FRAU OBRADOR CHAVES**

RESUMO: Em 15 de fevereiro de 2006, der *Bundesverfassungsgericht* instado a se pronunciar acerca da denominada Lei sobre Segurança Aérea – *Luftsicherheitsgesetz*, ou *LuftSiG* – diploma normativo promulgado em janeiro de 2005 com a finalidade de regular o abate de aeronaves civis que, controladas por seqüestradores, pudessem vir a ser utilizadas como arma, reproduzindo o *modus operandi* dos terroristas que derrubaram as torres do *World Trade Center*, no inesquecível 11 de setembro de 2001 nova-iorquino. A segurança da nação, mais uma vez, foi utilizada como mote para negar aplicação a direitos fundamentais, em especial, o direito à vida e à dignidade da pessoa humana (cláusula geral dos direitos da personalidade). De acordo com a *LuftSiG*, os interesses de eventuais inocentes ocupantes da aeronave sequestrada foram relegados, em nome da segurança nacional, a um segundo plano. Os ocupantes das aeronaves passíveis de abate, afirmou o Tribunal não poderem ser transformados em objetos de direito, não só no confronto com criminosos como também perante o Estado, que se veria legalmente autorizado a considerá-los como seres inanimados e desprovidos de direitos, como sujeitos. Consoante a disposição do artigo 14, III, da *LuftSiG*, o Estado estaria autorizado a dispor, unilateralmente, da vida dos passageiros seqüestrados, sem que a estes fosse oferecida qualquer oportunidade de resistência. Tendo por esteio a proteção à dignidade humana, valor plasmado no artigo 1º da Lei Fundamental, entendeu-se possível afastar argumentos que, em defesa da validade da Lei sobre Segurança Aérea, procuravam fazer crer, por exemplo, que o embarque em uma aeronave traria consigo o consentimento implícito com o sacrifício da própria vida na eventualidade do seqüestro e uso do avião como arma. Reafirmando o papel garantidor do Estado, defendeu o *Bundesverfassungsgericht* o dever que àquele assiste de proteger igualmente a vida de todas as pessoas, merecendo, este valor fundamental, o mesmo grau de proteção, independentemente de sua duração. Nada autoriza o Estado a agir como os criminosos que pretende

Artigo recebido em 31.01.2011 e aprovado para publicação pelo Conselho Editorial em 12.04.2011.

* Artigo elaborado para a disciplina: Constituição e Direitos Fundamentais II, ministrada pelo Prof. Dr. Ingo Wolfgang Sarlet.

** Mestrando em Direito Público – PUCRS. Procurador da Fazenda Nacional de 1ª Categoria e atualmente exerce o cargo de Chefe da Divisão de Acompanhamento dos Grandes Devedores da 4ª Região (DIGRA4ª).

combater; a tarefa de defender os direitos mais essenciais da sociedade não pode ser afastada, nem mesmo diante da necessidade de combater o terrorismo.
PALAVRAS-CHAVE: Terrorismo; Lei Alemã de Segurança da Aviação; Segurança Nacional; Direito à Vida; Dignidade da Pessoa Humana; Princípio da Proporcionalidade; Tribunal Constitucional Alemão; Precedente.

ABSTRACT: On February 15, 2006, the *Bundesverfassungsgericht* was urged to take a stance on the so-called Law on Air Safety - *Luftsicherheitsgesetz* or *LuftSiG* – a legislative decree promulgated on January, 2005 with the purpose of regulating the take-down of civilian aircraft which, controlled by hijackers, could end up being used as a weapon, replicating the modus operandi of the terrorists who brought down the towers of the *World Trade Center*, on the unforgettable 9-11, 2001, in New York. The security of the nation, once again, was used as a cue word for denying the protection of fundamental rights, in particular the right to life and human dignity (the general clause of personal rights). According to the *LuftSiG*, the interests of any innocent occupants of the hijacked aircraft were relegated, in the name of national security, to a second level. The occupants of the aircraft that was capable of killing, according to the Court, could not be made into into mere legal objects, be it in the confrontation against criminals or vis-a-vis the state, which would – as per the *LuftSiG* – be legally entitled to consider them as inanimate and devoid of the entitlement to rights. According on the provision of Article 14, III, of *LuftSiG,* the state would be allowed to unilaterally dispose of the lives of hijacked passengers without giving them the opportunity to offer any resistance. Based on the protection of human dignity, a value enshrined in Article 1 of the Basic Law, it was considered possible to rule out arguments that, in defending the validity of the Law on Air Safety, tried to make believe, for example, that boarding an aircraft would imply consenting to the sacrifice of his or her own life in the event of abduction and use of aircraft as a weapon. Reaffirming the role of the warrant-state, the *Bundesverfassungsgericht* defended the state duty to equally protect the lives of all people. The fundamental value of dignity deserves the same degree of protection, regardless of its duration. Nothing empowers the state to act as the criminals it fights, the task of defending the most essential rights of society cannot be ruled out even in light of the need to combat terrorism.
KEYWORDS: Terrorism; German Law of Aviation Security; National Security; Right to Life; Human Person Dignity; Proportionality Principle; German Constitutional Court. Precedent.

SUMÁRIO: I. Considerações prévias: a decisão e seus comentários; II. Definindo o terrorismo; III. O permanente estado de exceção e a lei alemã sobre segurança aérea – *LUFTSIG*: admite-se a morte de um inocente (mal menor), em prol da vida de outros inúmeros inocentes (bem maior)?; IV. Breves comentários sobre a Lei nº 7.565, de 19 de dezembro de 1986; Considerações Finais; Referências Bibliográficas.

SUMMARY: I. Prior Considerations: The Decision And His Comments; II. Defining Terrorism; III. The Constant State Of Exception And The German Law On Security Air – *LUFTSIG*: There Is Admitted The Death Of An Innocent One (Badly Less), In Advantage Of Vida De Countless Innocent Others (Bigger Well)?; IV. Short Comments On The Law nº 7.565, of 19 Of December Of 1986; Final Considerations; Bibliographical References.

I. CONSIDERAÇÕES PRÉVIAS: A DECISÃO E SEUS COMENTÁRIOS

Antes de criticarmos o acerto ou desacerto da decisão da Suprema Corte Alemã, importa trazê-la, na íntegra, à baila:

HEADNOTES:

Article 35.2 sentence 2 and 35.3 sentence 1 of the Basic Law (Grundgesetz – GG) directly grants the Federation the right to issue regulations that provide the details concerning the deployment of the armed forces for the control of natural disasters and in the case of especially grave accidents in accordance with these provisions and concerning the cooperation with the Länder (states) affected. The concept of an "especially grave accident" [within the meaning of Article 35.2 sentence 2 of the Basic Law] also comprises events in which a disaster can be expected to happen with near certainty.

Article 35.2 sentence 2 and 35.3 sentence 1 of the Basic Law does not permit the Federation to order missions of the armed forces with specifically military weapons for the control of natural disasters and in the case of especially grave accidents.

The armed forces' authorisation pursuant to § 14.3 of the Aviation Security Act (Luftsicherheitsgesetz – LuftSiG) to shoot down by the direct use of armed force an aircraft that is intended to be used against human lives is incompatible with the right to life under Article 2.2 sentence 1 of the Basic Law in conjunction with the guarantee of human dignity under Article 1.1 of the Basic Law to the extent that it affects persons on board the aircraft who are not participants in the crime.

Judgment of the First Senate of 15 February 2006 on the basis of the oral hearing of 9 November 2005– 1 BvR 357/05 –

in the proceedings on the constitutional complaint of - authorised representative of complainants 1 to 6: Lawyer Dr. … –

§ 14.3 of the Aviation Security Act (Luftsicherheitsgesetz – LuftSiG) of 11 January 2005 (Federal Law Gazette (Bundesgesetzblatt – BGBl) I p. 78).

RULING:

1. § 14.3 of the Aviation Security Act of 11 January 2005 (Federal Law Gazette I page 78) is incompatible with Article 2.2 sentence 1 in conjunction with Article 87a.2 and Article 35.2 and 35.3 and in conjunction with Article 1.1 of the Basic Law and hence void.

2. The Federal Republic of Germany is ordered to reimburse the complainants their necessary expenses.

GROUNDS:

A.

1

The constitutional complaint challenges the armed forces' authorisation by the Aviation Security Act to shoot down, by the direct use of armed force, aircraft that are intended to be used as weapons in crimes against human lives.

I.

2

1. On 11 September 2001, four passenger planes of US American airlines were hijacked in the United States of America by an international

terrorist organisation and caused to crash. Two of the planes hit the World Trade Center in New York, one crashed into the Pentagon, the Ministry of Defence of the United States of America. The crash of the fourth plane occurred southeast of Pittsburgh in the state of Pennsylvania, after, possibly, the intervention of passengers on board had resulted in a change of the plane's course. More than 3,000 persons in the planes, in the area of the World Trade Center, and in the Pentagon died in the attacks.

3

On 5 January 2003, an armed man captured a sports plane, circled above the banking district of Frankfurt/Main and threatened to crash the plane into the highrise of the European Central Bank if he was not granted the possibility of making a phone call to the United States of America. A police helicopter and two jet fighters of the German Air Force took off and circled the powered glider. The police ordered major alert, the city centre of Frankfurt was cleared, highrises were evacuated. Slightly more than half an hour after the capture, it was evident that the hijacker was a mentally confused person acting on his own. After his demand had been complied with, he landed on Rhein-Main Airport and did not resist his arrest.

4

2. Both incidents caused a large number of measures aimed at preventing unlawful interference with civil aviation, at improving the security of civil aviation as a whole and at protecting it, in doing so, also from dangers that are imminent where aircraft (on the definition of aircraft, see § 1.2 of the Civil Aviation Act (*Luftverkehrsgesetz*) as amended on 27 March 1999, Federal Law Gazette I p. 550) are taken command of by people who want to abuse them for objectives that are unrelated to air traffic.

5

a) On 16 December 2002, the European Parliament and the Council of the European Union adopted Regulation (EC) No. 2320/2002 – amended by Regulation (EC) No. 849/2004 of 29 April 2004 (Official Journal of the European Communities (OJ) L 158 of 30 April 2004, p. 1) – Regulation (EC) No. 2320/2002 establishing common rules in the field of civil aviation security (OJ L 355 of 30 December 2002, p. 1). It provides the introduction of extensive air traffic security measures for the airports on the territories of the Member States of the European Community. These measures include the determination of planning requirements for national airports, regulations on surveillance over all airport areas accessible to the public, provisions on the search of planes and the screening of staff and items carried, provisions on the screening of passengers and their luggage, and guidelines for a national programme on the recruitment and training of aircrew and ground personnel.

6

b) In the Federal Republic of Germany, factual as well as legal measures have been taken whose intended objectives are to increase the security of air traffic and to protect it from attacks.

7

aa) Since 1 October 2003, a "National Air Security Center" (*Nationales Lage- und Führungszentrum „Sicherheit im Luftraum*"), which has been established in Kalkar on the Lower Rhine, has been operational. It is intended to ensure coordinated, swift cooperation of all authorities of the Federation and the *Länder* in charge of questions of aviation security as a central information hub in order to guarantee security in the German air space. In the National Air Security Center, members of the Federal Armed Forces, the Federal Police and the *Deutsche Flugsicherung* (German Air Navigation Services) survey the air space. The main function of the centre is to avert dangers that emanate from so-called renegade planes, which are civil aircraft that have been taken command of by people who want to abuse them as weapons for a targeted crash. Once an aircraft has been classified as a renegade – be it by NATO, be it by the National Air Security Center itself – the responsibility for the measures required for averting such danger in the German air space rests with the competent authorities of the Federal Republic of Germany.

8

bb) The legal basis for these measures is laid down in the Act on the New Regulation of Aviation Security Functions (*Gesetz zur Neuregelung von Luftsicherheitsaufgaben*) of 11 January 2005 (Federal Law Gazette I p. 78).

9

aaa) This Act, which, according to the *Bundesrat*, required the consent of the Bundesrat but did not receive such consent (see BRDrucks (*Bundesrat* document) 716/04 (*Beschluss*), on *Bundesrat* document 716/04 (*Beschluss*)), consolidates provisions concerning the averting of external dangers to aviation security which had until then been laid down in the Civil Aviation Act, and which had been combined with other matters to be regulated, and performs adaptations to Regulation (EC) No. 2320/2002 of the European Parliament and of the Council of 16 December 2002 (see *Bundestag* document (*BTDrucks*) 15/2361, p. 14). Article 1 of the Act contains the Aviation Security Act as the core of the new regulation.

10

(1) Pursuant to its § 1, the Aviation Security Act serves to provide protection from attacks on the security of air traffic, in particular from hijackings, acts of sabotage and terrorist attacks. Pursuant to § 2 of the Aviation Security Act, the aviation security authority has the function to avert attacks on the security of air traffic. Pursuant to § 3 it takes the measures necessary to avert a danger to the security of air traffic that may exist in an individual case to the extent that its competences are not specifically regulated in § 5 of the Aviation Security Act.

11

§ 5 of the Aviation Security Act vests the aviation security authorities with comprehensive competences as regards the screening and search of persons and objects in order to secure the airport areas not accessible to the general public. § 7 of the Aviation Security Act

confers to the aviation security authorities the competence to perform background checks of persons who become involved with flight, or airport, operations in a professional capacity. §§ 8 and 9 of the Aviation Security Act establish specific duties of airport operators and airlines concerning the protection from attacks on the security of air traffic. § 11 of the Aviation Security Act prohibits carrying along specific objects on board of aircraft. Finally, § 12 of the Aviation Security Act regulates the conferment of functions and competences to the commanding pilots of aircraft for the preservation of safety and order on board of the aircraft navigated by them.

12

Pursuant to § 16.2 of the Aviation Security Act, the functions of the aviation security authorities are, in principle, performed by the *Länder* on behalf of the Federation. However, the protection from attacks on the security of air traffic pursuant to § 5 of the Aviation Security Act is, pursuant to § 4 of the Federal Police Act (*Bundespolizeigesetz*), incumbent on the Federal Police to the extent that the requirements laid down in § 16.3 sentences 2 and 3 of the Aviation Security Act are met. Pursuant to the provisions last mentioned, the functions of the aviation security authorities, with the exception of those laid down in § 9.1 of the Aviation Security Act, can be performed by the federal authority designated by the Federal Ministry of the Interior by means of direct federal administration if this is necessary for guaranteeing that the security measures are performed uniformly nationwide.

13

(2) Under the title "Support and Administrative Assistance by the Armed Forces" („*Unterstützung und Amtshilfe durch die Streitkräfte*"), §§ 13 to 15 of the Aviation Security Act constitute a separate Part 3 of the Act. Where on account of a major aerial incident, facts exist that, in the context of the exercise of police power, give rise to the assumption that an "especially grave accident" within the meaning of Article 35.2 sentence 2 or 35.3 of the Basic Law is imminent, the armed forces can, pursuant to § 13.1 of the Aviation Security Act, be employed to support the police forces of the *Länder* in the air space to prevent such accident to the extent that this is required for effectively counteracting it. In the case of a so-called regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law, the decision about such deployment shall be taken by the Federal Minister of Defence upon request of the *Land* affected, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister (§ 13.2 of the Aviation Security Act); in the case of an interregional emergency situation pursuant to Article 35.3 of the Basic Law, the decision shall be taken by the Federal Government in consultation with the *Länder* affected (§ 13.3 sentence 1 of the Aviation Security Act). If a decision of the Federal Government is not possible in time, the Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister shall take the decision in consultation with the Federal Minister of the Interior (§ 13.3 sentence 2 of the Aviation Security Act). Pursuant to § 13.4 sentence 2

of the Aviation Security Act, the support by the armed forces in the context of the mission shall be rendered in accordance with the provisions of the Aviation Security Act.

14

The operations that are permissible in accordance with the Aviation Security Act and the principles that apply as regards their choice are specified in §§ 14 and 15 of the Aviation Security Act. Pursuant to § 15.1 of the Aviation Security Act, operations intended to prevent the occurrence of an especially grave accident within the meaning of § 14.1 and 14.3 of the Aviation Security Act may be taken only if the aircraft from which the danger of such accident emanates has previously been checked by the armed forces in the air space and if it has then been unsuccessfully tried to warn and to divert it. If this prerequisite has been met, the armed forces may, pursuant to § 14.1 of the Aviation Security Act, force the aircraft off its course in the air space, force it to land, threaten to use armed force, or fire warning shots. The principle of proportionality applies to the choice among these measures (§ 14.2 of the Aviation Security Act). Pursuant to § 14.3 of the Aviation Security Act, the direct use of armed force against the aircraft is permissible only if the occurrence of an especially grave accident cannot be prevented even by such measures. This, however, only applies where it must be assumed under the circumstances that the aircraft is intended to be used as a weapon against human lives, and where the direct use of armed force is the only means to avert this imminent danger. Pursuant to § 14.4 sentence 1 of the Aviation Security Act, the exclusive competence for ordering this measure rests with the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, with the member of the Federal Government who is authorised to represent the Minister.

15

bbb) During the legislative process, the question that was contentious above all – apart from reservations that were expressed concerning the substantive constitutionality of § 14.3 of the Aviation Security Act – was whether §§ 13 to 15 of the Aviation Security Act keep within the constitutional bounds established by Article 35.2 sentences 2 and 3 of the Basic Law. This question was answered in the affirmative in the *Bundestag* by the Federal Government and the deputies of the governing parties (see Minutes of plenary proceedings of the *Bundestag* (*BTPlenarprotokoll*) 15/89, pp. 7882-7883, 7886 (A), 7900 (C)); it was answered in the negative, however, by the representatives of the opposition parties (see Minutes of plenary proceedings of the *Bundestag* 15/89, pp. 7884, 7890-7891). Also in the expert hearing conducted by the Committee on Internal Affairs of the *Bundestag*, the opinions expressed concerning this question were controversial (see Minutes no. 15/35 on the committee meeting of 26 April 2004). The same applies to the debates of the *Bundesrat* (on the opinions of the committee majorities, see the recommendations in *Bundesrat* document 827/1/03, pp. 1 et seq., and *Bundesrat* document 509/1/04, pp. 13-14).

16

The different assessment of the constitutional situation manifested itself also in the fact that bills which provided an amendment of Article 35 and Article 87a of the Basic Law were repeatedly submitted by the *Länder* (see above all *Bundesrat* document 181/04) and by the CDU/CSU parliamentary group (see *Bundestag* document 15/2649; 15/4658). However, an amendment of the Basic Law did not take place (see Minutes of plenary proceedings of the *Bundestag* 15/115, p. 10545).

17

ccc) The wording of the provisions on the support and administrative assistance by the armed forces in §§ 13 to 15 of the Aviation Security Act is as follows:

18

§ 13 Decision of the Federal Government

19

(1) Where on account of a major aerial incident, facts exist that, in the context of the exercise of police power, give rise to the assumption that an "especially grave accident" within the meaning of Article 35.2 sentence 2 or 3 of the Basic Law is imminent, the armed forces can be employed to support the police forces of the *Länder* in the air space to prevent such accident.

20

(2) The decision about a mission pursuant to Article 35.2 sentence 2 of the Basic Law shall be taken by the Federal Minister of Defence upon request of the *Land* affected, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister, in consultation with the Federal Minister of the Interior. Where immediate action is required, the Federal Ministry of the Interior is to be informed without delay.

21

(3) The decision about a mission pursuant to Article 35.3 of the Basic Law shall be taken by the Federal Government in consultation with the *Länder* affected. If a decision of the Federal Government is not possible in time, the Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister, shall take the decision in consultation with the Federal Minister of the Interior. The decision of the Federal Government is to be brought about without delay. Where immediate action is required, the *Länder* affected and the Federal Ministry of the Interior are to be informed without delay.

22

(4) Further details shall be regulated between the Federation and the *Länder*. The support by the armed forces shall be rendered in accordance with the provisions of this Act.

23

§ 14 Operations, authority to give instructions

24

(1) To prevent the occurrence of an especially grave accident, the armed forces may force the aircraft off its course in the air space, force it to land, threaten to use armed force, or fire warning shots.

25

(2) From several possible measures, the one which will probably least impair the individual and the general public is to be chosen. The measure may only be carried out as long as and to the extent that its purpose requires. It may not result in a detriment that is recognisably out of proportion to the aspired success.

26

(3) The direct use of armed force is permissible only where it must be assumed under the circumstances that the aircraft is intended to be used against human lives, and where this is the only means to avert the imminent danger.

27

(4) The measure pursuant to subsection 3 can only be ordered by the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, by the member of the Federal Government who is authorised to represent the Minister. …

28

§ 15 Other measures

29

(1) The measures pursuant to § 14.1 and 14.3 may only be taken after a check [of the aircraft] and unsuccessful attempts at warning and diverting [the aircraft]. For this purpose, the armed forces can, upon request of the authority responsible for air traffic control, check, divert or warn aircraft in the air space …

30

(2) The … Chief of Staff of the Federal Air Force is to inform the Federal Minister of Defence without delay about situations that could lead to measures pursuant to § 14.1 and 14.3.

31

(3) The other regulations and principles of administrative assistance shall remain unaffected.

II.

32

With their constitutional complaint, the complainants directly challenge the Aviation Security Act because, as they argue, it permits the state to intentionally kill persons who have not become perpetrators but victims of a crime. The complainants put forward that § 14.3 of the Aviation Security Act, which under the conditions specified in the law authorises to shoot down aircraft, violates their rights under Article 1.1, Article 2.2 sentence 1 in conjunction with Article 19.2 of the Basic Law. They argue as follows:

33

1. The constitutional complaint is admissible. The complainants' fundamental rights are directly violated by the challenged regulation. Because they frequently use planes for private and professional reasons, the possibility that they could be affected by a measure pursuant to § 14.3 of the Aviation Security Act it is not merely a theoretical one.

34

2. The constitutional complaint is also well-founded. The Aviation Security Act infringes the complainants' fundamental rights to human dignity and to life pursuant to Article 1.1 and Article 2.2 sentence 1 of the Basic Law. The Act makes them mere objects of state action. The value and the preservation of their lives are left to the discretion of the Federal Minister of Defence according to quantitative aspects and to the life span presumably remaining to them "under the circumstances". In the case of an emergency, they are intended to be sacrificed and to be intentionally killed if the Minister presumes, on the basis of the information available to him or her, that their lives will only last a short time and that, in comparison with the losses which are imminent otherwise, they therefore are no longer of any value at all or are, at any rate, of reduced value.

35

The state may not protect a majority of its citizens by intentionally killing a minority – in this case, the crew and the passengers of a plane. A weighing up of lives against lives according to the standard of how many people are possibly affected on the one side and how many on the other side is impermissible. The state may not kill people because they are fewer in number than the ones whom the state hopes to save by their being killed.

36

A qualification of the passengers' right to life also cannot be substantiated by arguing that they are regarded as part of the weapon that the plane has become. Whoever argues in this manner makes them mere objects of state action and deprives them of their human quality and dignity.

37

The constitutional requirement of the specific enactment of a statute in Article 2.2 sentence 3 of the Basic Law [if fundamental rights are to be restricted] does not lead to a different result. The guarantee of the essence of fundamental rights enshrined in Article 19.2 of the Basic Law rules out an encroachment upon the right to life by intentional physical destruction.

38

The complainants argue that their fundamental rights to life and human dignity are violated also because the Aviation Security Act and the deployment of the armed forces within the domestic territory provided therein are unconstitutional because they violate Article 87a of the Basic Law. They put forward that the requirements set forth in subsection 2 of

Article 87a are not met. They further argue that §§ 13 to 15 of the Aviation Security Act cannot be justified by invoking Article 35.2 and 35.3 of the Basic Law. These provisions are said to intend the partial introduction of martial law in order to deal with a desperate borderline situation. A war-like operational mission of the Federal Armed Forces within the domestic territory with military means, however, is said not to be covered by Article 35 of the Basic Law.

39

The complainants put forward that it is also incompatible with Article 35.2 and 35.3 of the Basic Law that the deployment of the armed forces is not intended to be performed in the responsibility of the respective *Land* government and also not on the basis of the *Land* police law but according to the new provisions of federal law. Pursuant to the police laws of all *Länder*, the intentional killing of persons who are deemed innocent bystanders under police law is ruled out. The federal legislature cannot evade this consequence by describing the deployment of the Federal Armed Forces as administrative assistance in § 13.1 of the Aviation Security Act and by justifying the competence of the Minister of Defence pursuant to § 13.2 of the Aviation Security Act making reference to the Minister's command authority in times of peace, but substituting, through § 13.4 sentence 2 of the Aviation Security Act, the police law of the *Länder* by the provisions of the Aviation Security Act.

40

Apart from this, § 14.3 of the Aviation Security Act is alleged not to be constitutional already because the Aviation Security Act has been enacted without the consent of the *Bundesrat*. The Act is said to require the consent of the *Bundesrat* pursuant to Article 87d.2 of the Basic Law because it amends provisions by which air traffic administration has been conferred on the *Länder*. The requirement of the consent of the *Bundesrat* is said to refer not only to individual provisions of an Act but to the Act as a whole if it contains, or contained, parts requiring the consent of the *Bundesrat*.

III.

41

The German *Bundestag*, the Federal Government, the Government of the Free State of Bavaria, the *Land* government of Hesse, the German Armed Forces Association (*Deutscher BundeswehrVerband*), the Cockpit Association (*Vereinigung Cockpit*) and the Independent Flight Attendant Organisation UFO (*Unabhängige Flugbegleiter Organisation UFO*) have submitted written opinions on the constitutional complaint.

42

1. The German *Bundestag* regards the challenged regulation as constitutional. It submits as follows:

43

a) It [the challenged regulation] has its constitutional basis in Article 35.3 sentence 1 of the Basic Law. Also events that are caused by humans fall under the concept of an especially grave accident within

the meaning of this provision. Apart from this, the accident need not have occurred already. It is enough that it is imminent. In the cases covered by the Aviation Security Act, the territory of more than one *Land* is endangered. The federal territory is divided into units which are so small that a commercial aircraft flying at cruising speed will inevitably pass the borders of several federal *Länder*.

44

There is no infringement of Article 1 of the Basic Law. When proceeding pursuant to §§ 13 to 15 of the Aviation Security Act, it is not the state – which only reacts – which deprives the people on board the plane of their dignity and makes them objects but the one who takes command of a plane with the intention to not only kill the people on board but to even use them while they are dying as instruments to annihilate more people. The state comes close to an infringement of Article 1 of the Basic Law only if it negates the quality as subjects that the people affected have, expressing thereby that it despises the value which is due to a human being by virtue of his or her being a person. This, however, is not the Air Security Act's objective. The Air Security Act constitutes the legislature's effort to provide a legislative framework also for desperate situations.

45

Article 2.2 sentence 1 of the Basic Law is also not violated. Admittedly, the fundamental right to life of the crew of a hijacked plane, of its passengers and of the hijackers is encroached upon in the most serious manner possible. But this is constitutional. Article 2.2 sentence 3 of the Basic Law expressly permits the killing of a human being. If, in view of a danger which will hopefully never occur but is nevertheless realistic, the legislature issues a regulation that comes down to having a relatively smaller number of people killed by the armed forces in order to avoid an even higher number of deaths, the decisive question regarding Article 2.2 sentence 1 of the Basic Law is in reality whether the Act ensures that this will only happen in an extreme emergency. This question can be answered in the affirmative here. In the densely populated and relatively small Federal Republic of Germany, it factually is almost inconceivable that the option provided in § 14.3 of the Aviation Security Act will occur.

46

The guarantee of the essence of the fundamental rights, which is enshrined in Article 19.2 of the Basic Law, is also not infringed. The Aviation Security Act establishes high obstacles to the most serious encroachment conceivable. Thus, it is said to be guaranteed that ultimately, a passenger plane will probably only be shot down if it is possible to limit the number of victims at least with a certain probability to the people on board the plane.

47

The only choice that the legislature had was between remaining inactive and issuing a regulation that must reach into the borderline area of what can be regulated at all. Terrorism along the lines of

11 September 2001 is fundamentally different from cases of justifiable defence and of necessity as defined by criminal law. In such cases, the law may only legitimise the action of the persons in charge, with the consequence that by their lawful action, they cause wrong in order to prevent an even greater wrong. Consequently, § 14.3 of the Aviation Security Act establishes a personal reason for justification, which is derived from their functions, for the Federal Minister of Defence and the executing soldiers.

48

b) The parliamentary group of ALLIANCE 90/THE GREENS has stated in a supplementary opinion that it had consented to § 14.3 of the Aviation Security Act on the premise that the shooting down of a passenger plane would not be permitted if it involved the killing of people who are not participants in the crime. The provision is said not to establish new constituent elements justifying such action. Otherwise, the ability to know right from wrong would be undermined in a dangerous manner as regards the fundamental right to life.

49

The parliamentary group of ALLIANCE 90/THE GREENS further argues that a quantitative or qualitative weighing up of human lives against human lives is not provided by § 14.3 of the Aviation Security Act. The shooting down of an aircraft is said to be constitutionally admissible at most if only the “peacebreaker” who by his or her conduct wants to cause an especially grave accident is on board. On the contrary, the targeted intentional killing of persons who are not participants in the crime is said to be prohibited by Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law. According to the parliamentary group of ALLIANCE 90/THE GREENS, also an obligation of the individual to sacrifice his or her life in situations in which the existence of the state and the common good are endangered in order to preserve them is to be rejected. If a passenger plane is used as a weapon, the rights of the passengers and of the crew to forbearance of an encroachment by the state upon their right to life may not come second to the duty of protection that is derived from this right in favour of the persons on the ground endangered by the targeted shooting down of the plane.

50

2. The Federal Government is also of the opinion that the challenged provision complies with the constitution. It submits as follows:

51

With the Aviation Security Act the state fulfils its obligation to protect every human life. If – as in this case – the right to life of one human being and the right to life of another come into conflict with each other, it is incumbent upon the legislature to determine the kind and the extent of the protection of life. As regards concrete measures, the competent authorities are to decide about them in duty-bound discretion. In this context, the active encroachment upon the fundamental rights of the people on board the plane is of extraordinary importance. This, however,

cannot *ipso jure* enforce non-performance of the duty of protection vis-à-vis third parties where the same legal interest, life, is directly endangered as far as they are concerned. The function of averting a danger does not take precedence over the function of protection. To perform the latter function, the legislature may therefore provide that an imminent attack on human lives may be averted even if, in doing so, other people are killed or endangered for instance by falling plane wreckage. A weighing up of lives against lives does not take place in this context.

52

Neither the essence of Article 2.2 sentence 1 of the Basic Law nor the principle of proportionality is violated. The strict prerequisites of § 14 of the Aviation Security Act in particular rule out the direct use of armed force against an aircraft with people on board who are not participants in the crime, with all conceivable courses of events being taken into account. This follows from the fact that the provision requires maximum normative certainty about the imminence of an especially grave accident. What is called for apart from this is to prevent worse damage in the densely populated Federal Republic of Germany.

53

What must be taken into account apart from this is that the people on board the plane in the case provided for in § 14.3 of the Aviation Security Act are, so to speak, part of the weapon as which the aircraft is used. In view of the present threat to air traffic, the people on board a plane must be aware of the danger to which they expose themselves when they take part in air traffic. Only if the state acts in accordance with § 14.3 of the Aviation Security Act, at least some of the threatened lives can be saved. In such an extraordinary situation, this can also be done to the detriment of those who cannot be saved anyway because they are inseparably linked with the weapon.

54

The Aviation Security Act also respects human dignity. The dignity of the people on board an aircraft that will be shot down is respected. They are, albeit against their will, part of a weapon that threatens the lives of others. Only for this reason, and for lack of other possibilities of averting the attack, the state measures are also directed against them. The human dignity of third parties who are possibly also endangered is not violated either. The Act also serves their protection with all its provisions.

55

Apart from this, the Aviation Security Act also respects the order of competences established by the Basic Law. The legislative competence of the Federation results from Article 73 nos. 1 and 6 of the Basic Law to the extent that the deployment of the armed forces is concerned. The Federation also has administrative competence for aviation security. The Federation's own air traffic administration established by Article 87d.1 sentence 1 of the Basic Law includes the competence to ensure air traffic security through the Federation's own bodies. The administrative competence also results from Article 87a.1 and 87a.2 in conjunction with

Article 35.2 and 35.3 of the Basic Law. The deployment of the armed forces provided in the Aviation Security Act takes place in the framework of Article 35.2 and 35.3 in order to avert an emergency situation.

56

It does not follow from the function of such deployment to support the *Länder* in their police forces' dealing with dangers that it must always comply with *Land* law. The use of weapons necessary for such support does not make such support fall under the scope of Article 87a.1 of the Basic Law.

57

The deployment of the armed forces pursuant to §§ 13 to 15 of the Aviation Security Act serves the averting of an especially grave accident in the framework of Article 35.2 and 35.3 of the Basic Law. The use of an aircraft against the lives of people can result in such an accident. That such use happens intentionally does not contradict this. It is also not necessary for the accident to have already happened.

58

The Aviation Security Act did not require the consent of the *Bundesrat*. The same applies to the other regulations of the Act on the New Regulation of Aviation Security Functions.

59

3. In the opinion of the Government of the Free State of Bavaria and the *Land* government of Hesse, which have submitted a joint opinion, the constitutional complaint is, however, well-founded. They argue that the challenged regulation infringes Article 87a.2 in conjunction with Article 35.2 sentences 2 and 3 of the Basic Law. They submit the following:

60

It [the challenged regulation] is not covered by the Federation's right to enact legislation under Article 35.2 sentences 2 and 3 of the Basic Law. According to this provision, the armed forces can only act to support the *Länder* in the performance of police functions and in doing so they can only make use of the competences which are conferred on them by *Land* law. The fact that the Aviation Security Act authorises the Federation to employ the Federal Armed Forces for the averting of danger pursuant to Federal Law is not in harmony with this. Due to Article 87a.2 of the Basic Law, the exclusive legislative competence of the Federation pursuant to Article 73 nos. 1 and 6 of the Basic Law does not override this finding.

61

Moreover, it is incompatible with Article 35.2 and 35.3 that §§ 13 to 15 of the Aviation Security Act permit the deployment of the armed forces also for purposes of prevention. The constitution allows a supporting deployment of the armed forces only where an especially grave accident has already happened. Apart from this, the authority to give instruction regulated in § 14.4 of the Aviation Security Act does not take into account the fact that under the circumstances set out in Article 35.3

of the Basic Law, the Federal Government is called upon to decide as a collegial body.

62

If according to the statements made above, §§ 13 et seq. of the Aviation Security Act are unconstitutional already because the Federation has transgressed the framework established by Article 87a.2 in conjunction with Article 35.2 sentences 2 and 3 of the Basic Law, it need not be examined whether fundamental rights have also been violated. As a precaution, it is, however, pointed out that the complainants' opinion that Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law absolutely rules out the use of direct armed force against a hijacked passenger plane to prevent the occurrence of an especially grave accident is not shared.

63

4. The German Armed Forces Association expresses doubts as regards the constitutionality of the challenged regulation. It submits the following: The functions regulated by the Aviation Security Act in §§ 13 et seq. do not concern national military defence. Instead they are functions in the area of police power. The Federal Armed Forces lack the necessary basis of authorisation for the performance of such functions. The constitutional complaint rightly argues that a war-like operational mission of the armed forces within the domestic territory with military means is not covered by Article 35.2 of the Basic Law.

64

Moreover, objections exist against § 14.3 of the Aviation Security Act with a view to the principle of clarity and definiteness of the wording of statutes. The provision does not mention precise criteria for the weighing up of lives against lives that is assumed therein. For the soldier who is forced to act, this results in a serious conflict between the duty to obey and the strictly personal moral decision that is to be taken by him or her. What is lacking is a regulation which reliably exempts soldiers also before foreign courts from preliminary investigation proceedings and from civil liability actions.

65

5. The Cockpit Association considers the constitutional complaint well-founded. It submits the following: The suitability and necessity of § 14.3 of the Aviation Security Act, which permits the use of deadly force also against people who are not participants in the crime is doubtful. The terrorist success of a renegade attack depends on numerous imponderabilities. In view of the factual sequence of events in air traffic, it is extremely difficult, and only rarely is it possible with certainty, to even establish the occurrence of a major aerial incident within the meaning of § 13.1 of the Aviation Security Act. Even with ideal weather conditions, the findings gained through the check of aircraft pursuant to § 15.1 of the Aviation Security Act are vague at best. The possible motivation of a hijacker and the objectives of a hijacking remain speculative to the very end. In view of the narrow time slot available, a decision on

a mission pursuant to § 14.3 of the Aviation Security Act which is based on established facts will in all probability be too late. Therefore the concept of §§ 13 to 15 of the Aviation Security Act will work out only where the reaction is excessive from the outset.

66

6. The Independent Flight Attendant Organisation UFO shares the objections raised in the constitutional complaint. It submits the following: Under no legal aspect, the shooting down of a civil aircraft is justified. The Aviation Security Act's objective of increasing the security of air traffic and the protection of the population from terrorist attacks is supported. However, by far not all other possibilities of doing so have been exhausted.

67

There is the additional danger of the situation on board being misjudged from the ground. It is virtually impossible to assess from there whether the prerequisites of § 14.3 of the Aviation Security Act are met. The information which the Federal Minister of Defence needs for his decision to order the shooting down of a plane do not come from the direct danger zone on board the plane. They are only indirect information which the pilot has received from the cabin crew, who is possibly under the command of terrorists. Apart from this, the situation on board can change within seconds, something of which ground control probably cannot be informed fast enough due to the long channels of communication.

IV.

68

In the oral hearing, the complainants, the German Bundestag, the Federal Government, the Government of the Free State of Bavaria and the *Land* government of Hesse, the German Armed Forces Association, the Cockpit Association and the Independent Flight Attendant Organisation UFO complemented, and added detail to, their written submissions. In doing so, the Federal Minister of the Interior and the representatives of the parliamentary parties of the German *Bundestag* explained their partly differing opinions concerning the scope of § 14.3 of the Aviation Security Act. Apart form this, the Deutsche Flugsicherung and the Association of Crews of Jet-Propelled Fighter Aircraft (*Verband der Besatzungen strahlgetriebener Kampfflugzeuge*) of the German Armed Forces have given their opinions on the challenged regulation and above all on factual questions of its application.

B.

69

The constitutional complaint is admissible.

I.

70

What is inadmissible, however, is the claim that the challenged regulation is incompatible with the Basic Law already because the Aviation Security Act would have required the consent of the *Bundesrat*, which had not been given.

71

The complainants base this claim on Article 87d.2 of the Basic Law. Pursuant to this provision, functions of air traffic administration may be transferred to the *Länder* acting as agents of the Federation through federal legislation requiring the consent of the *Bundesrat.* The complainants do not argue that the Aviation Security Act or other provisions contained in the Act on the New Regulation of Aviation Security Functions have resulted in such transfer of functions. Instead, they exclusively assert that this Act amended regulations requiring the consent of the *Bundesrat* by which functions of air traffic administration had been transferred to the *Länder*, and that for this reason the Act itself had required the consent of the *Bundesrat*. The constitutional complaint, however, does not specify which regulations whose contents create the requirement of consent pursuant to Article 87d.2 of the Basic Law are supposed to have been amended by the Act now adopted and to what extent this could have established the requirement of the consent of the *Bundesrat* to the Amending Act pursuant to the Federal Constitutional Court's case-law on this provision (see BVerfGE 97, 198 (226-227)). To this extent, the complaint lodged does therefore not meet the requirements that are to be placed on the substantiation of a constitutional complaint pursuant to § 92 in conjunction with § 23.1 sentence 2 half-sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*) (on this, see BVerfGE 99, 84 (87); 109, 279 (305)).

II.

72

What is admissible, however, is the claim that the complainants' rights under Article 1.1 and Article 2.2 sentence 1 of the Basic Law are violated because § 14.3 of the Aviation Security Act permits the armed forces under the circumstances set forth therein, and subject to the proviso of the other regulations laid down in §§ 13 to 15 of the Aviation Security Act, to use direct armed force against an aircraft also where there are people on board the aircraft who against their will find themselves under the control of those who want to use the aircraft against the lives of other people.

73

1. The complainants' challenges are restricted to this subject of regulation. As regards § 14.1, 14.2 and 14.4 as well as § 15 of the Aviation Security Act and the measures provided therein, the complainants do not assert independent claims. In the complaint submitted, these regulations, as well as the provisions under § 13 of the Aviation Security Act, the contents of which are mainly of a procedural nature, are only mentioned to the extent that pursuant to § 14.3 of the Aviation Security, they mandatorily precede the operation and refer to such operation.

74

2. As regards the regulation challenged in this manner, the complainants are particularly entitled to lodge a constitutional complaint.

75

a) Where, as in this case, a constitutional complaint directly challenges a law, the prerequisite for the entitlement to lodge the complaint is that the complainant is personally, presently and directly affected by the challenged provisions as regards his or her fundamental rights (see BVerfGE 1, 97 (101 et seq.); 109, 279 (305); established case-law). The prerequisite of the complainant's being affected personally and presently is met in principle where the complainant sets forth that his or her fundamental rights will, with some probability, be affected by the measures based on the challenged provisions (see BVerfGE 100, 313 (354); 109, 279 (307-307)). Finally, the complainant is directly affected where the challenged provisions change the complainant's legal position without requiring another act of execution (see BVerfGE 97, 157 (164); 102, 197 (207)). This is to be supposed also where the complainant cannot take action against a conceivable act of execution at all, or cannot do so in a reasonable manner, (see BVerfGE 100, 313 (354); 109, 279 (306-307)).

76

b) Pursuant to these principles, the complainants are entitled to lodge the constitutional complaint. They have credibly stated that they frequently use civil aircraft for private and professional reasons.

77

aa) It is therefore sufficiently probable that they are affected personally and presently by the challenged provision under § 14.3 of the Aviation Security Act as regards their fundamental rights. As results also from a comparison with the operations specified in § 14.1 of the Aviation Security Act and the other measures mentioned in § 15.1 of the Aviation Security Act, direct use of armed force against an aircraft within the meaning of this provision means an impact which has the objective to cause the crash of the aircraft affected by it if necessary.

78

The complainants' being affected is not called into question by the fact that in the constitutional complaint proceedings, the opinion has been advanced that § 14.3 of the Aviation Security Act is not applicable where there are persons on board an aircraft who are not responsible for causing the danger situation within the meaning of this provision, as is the case for its crew and its passengers. The wording of § 14.3 of the Aviation Security Act does not express such a restriction of the area of application of the provision. On the contrary, the reasoning of the Act show that the direct use of armed force pursuant to § 14.3 of the Aviation Security Act can also affect persons who have not caused the danger of an especially grave accident. They explicitly mention the threat also to the lives of the people on board the plane that is caused by the attackers of the aircraft; no difference is made as to whether the people on board the plane are perpetrators or victims (see *Bundestag* document 15/2361, p. 21 on § 14). This shows that an application of § 14.3 of the Aviation Security Act can also affect innocent people on board the aircraft.

79

Besides, this has also been assumed in the deliberations of the German *Bundestag* on the draft bill on the new regulation of aviation security functions (see above all the statements made by deputies Burgbacher (FDP) and Hofmann (SPD) in the 89th session of the 15th German *Bundestag* on 30 January 2004, Minutes of plenary proceedings of the *Bundestag* 15/89, pp. 7887-7888., 7889, and of deputy Pau (not belonging to a parliamentary group) in the 115th session of the 15th German *Bundestag* on 18 June 2004, Minutes of plenary proceedings 15/115, p. 10545; a different view has been advanced, however, by deputy Ströbele (ALLIANCE 90/THE GREENS), Minutes of plenary proceedings 15/89, pp. 7893-7894; on the contributions in the hearing of the *Bundestag* Committee on Internal Affairs see Committee minutes 15/35 on the meeting on 26 April 2004, pp. 11-12., 22, 33, 43, 44, 57-58, 66-67, 85-86, 94-95, 111-112). Consequently, it has been confirmed in the oral hearing before the Federal Constitutional Court by most representatives of the German *Bundestag* that § 14.3 of the Aviation Security Act concerns not only a case in which an aircraft that is only manned with perpetrators is intended to be used against human lives. It has been stated that the provision also covers, at least theoretically, aerial incidents with innocent people on board who did not participate in causing such incident.

81

bb) Under these circumstances, the complainants are also directly affected. It is unreasonable to expect of them to wait until they themselves become the victims of a measure pursuant to § 14.3 of the Aviation Security Act.

C.

82

The constitutional complaint is also well-founded. § 14.3 of the Aviation Security Act is incompatible with Article 2.2 sentence 1 in conjunction with Article 87a.2 and Article 35.2 and 35.3 and in conjunction with Article 1.1 of the Basic Law, and is void.

I.

83

Article 2.2 sentence 1 of the Basic Law guarantees the right to life as a liberty right (see BVerfGE 89, 120 (130)). With this right, the biological and physical existence of every human being is protected against encroachments by the state from the point in time of its coming into being until the human being's death, independently of the individual's circumstances of life and of his or her physical state and state of mind. Every human life as such has the same value (see BVerfGE 39, 1 (59)). Although it constitutes an ultimate value within the order of the Basic Law (see BVerfGE 39, 1 (42); 46, 160 (164); 49, 24 (53)), also this right is nevertheless subject to the constitutional requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law. Also the fundamental right to life can therefore be encroached

upon on the basis of a formal Act of Parliament (see BVerfGE 22, 180 (219)). The precondition for this is, however, that the Act in question meets the requirements of the Basic Law in every respect. It must be adopted in accordance with the legislative competences, it must leave the essence of the fundamental right unaffected pursuant to Article 19.2 of the Basic Law, and it may also not contradict the fundamental decisions of the constitution in any other respect.

II.

84

The challenged provision of § 14.3 of the Aviation Security Act does not live up to these standards.

85

1. It encroaches upon the scope of protection of the fundamental right to life, which is guaranteed by Article 2.2 sentence 1 of the Basic Law, of the crew and of the passengers of an aircraft affected by an operation pursuant to § 14.3 of the Aviation Security Act and also of those who want to use the plane against the lives of people in the sense of this provision. Recourse to the authorisation to use direct armed force against an aircraft pursuant to § 14.3 of the Aviation Security Act will virtually always result in its crash. The consequence of the crash, in turn, will with near certainty be the death, and consequently the destruction of the lives, of all people on board the aircraft.

86

2. No constitutional justification can be adduced for such an encroachment. Under formal aspects already, § 14.3 of the Aviation Security Act cannot be based on a legislative competence of the Federation (a). Apart from this, the provision also infringes Article 2.2 sentence 1 of the Basic Law as regards substance to the extent that it not only affects those who want to abuse the aircraft as a weapon but also persons who are not responsible for causing the major aerial incident presumed under § 14.3 of the Aviation Security Act (b).

87

a) The Federation lacks the legislative competence to enact the challenged regulation.

88

aa) § 14.3 of the Aviation Security Act is part of the provisions in Part 3 of the Aviation Security Act. This part has the title “Support and Administrative Assistance by the Armed Forces” and thereby makes it evident that their deployment as it is regulated in §§ 13 to 15 of the Aviation Security Act does not primarily constitute the performance of an autonomous function of the Federation but assistance, “in the context of the exercise of police power” and of the “support [of] the police forces of the *Länder*” (§ 13.1 of the Aviation Security Act), with a function that is incumbent on the *Länder*. This assistance is rendered, as § 13 of the Aviation Security Act specifies in its subsections 1 to 3, along the lines of Article 35.2 sentence 2 of the Basic Law on the one hand and of Article 35.3 of the Basic Law on the other hand.

Because these Articles incontestably form part of those regulations of the Basic Law which within the meaning of Article 87a.2 of the Basic Law explicitly permit the use of the armed forces outside defence (see *Bundestag* document V/2873, p. 2 under B in conjunction with pp. 9-10; on Article 35.3 of the Basic Law, see also BVerfGE 90, 286 (386-387)), § 14.3 of the Aviation Security Act, just like the other regulations of Part 3 of the Act, is not about defence, also within the meaning of the provision under Article 73 no. 1 of the Basic Law, which establishes the corresponding competences (a different opinion is advanced in the reasoning of the draft bill on the new regulation of aviation security functions, *Bundestag* document 15/2361, p. 14, and also for instance in Federal Administrative Court, *Die Öffentliche Verwaltung – DÖV* 1973, p. 490 (492)). Also the sector of the protection of the civil population, which is included in the competence title "Defence", is therefore not pertinent.

89

§ 14.3 of the Aviation Security Act can also not be based on the legislative competence of the Federation for air traffic pursuant to Article 73 no. 6 of the Basic Law. It need not be decided here whether the Federation could, in the framework of Article 73 no. 6 of the Basic Law, take over functions in the context of police power to a greater extent than it does so far. According to the design of the law, §§ 13 to 15 of the Aviation Security Act are about support of the *Länder* in the context of their police power. It is the objective of the regulation to determine the procedures in the area of the Federation and as regards the cooperation with the *Länder* and to determine the operational equipment of the armed forces for the case of the armed forces being placed at the disposal of the police forces of the *Länder* to support them in the averting of dangers that are caused by a major aerial incident. Consequently, they are implementing regulations for the deployment of the armed forces under the circumstances of Article 35.2 sentences 2 and 3 of the Basic Law. The legislative competence of the Federation for this does not result from Article 73 no. 6 of the Basic Law (stated also in the Federal Government's reasoning for the bill; see *Bundestag* document 15/2361, p. 14). Instead, the competence for regulations of the Federation which determine details concerning the deployment of its armed forces, in cooperation with the *Länder* involved, to deal with a regional or interregional emergency situation, directly follows from Article 35.2 sentences 2 and 3 of the Basic Law itself.

90

bb) However, § 14.3 of the Aviation Security Act is not covered by this area of competence of the Federation because the provision cannot be reconciled with the framework provided by the Basic Law of constitutional law relating to the armed forces.

91

aaa) The armed forces, whose deployment is regulated by §§ 13 to 15 of the Aviation Security Act, are established by the Federation for defence purposes pursuant to Article 87a.1 sentence 1 of the Basic Law. Pursuant to Article 87a.2 of the Basic Law, they may only be

employed for other purposes ("Apart from defence") to the extent explicitly permitted by the Basic Law. This regulation, which has been created in the course of the incorporation of the emergency constitution into the Basic Law by the Seventeenth Act to Amend the Basic Law of 24 June 1968 (*Gesetz zur Änderung des Grundgesetzes*, Federal Law Gazette I p. 709) is intended to prevent that for the deployment of the armed forces as a means of the executive power, "unwritten … competences" are derived "from the nature of things" (statement by the *Bundestag* Committee on Legal Affairs in its Written report on the draft of an emergency constitution, *Bundestag* document V/2873, p. 13). What is decisive for the interpretation and application of Article 87a.2 of the Basic Law is therefore the objective to limit the possibilities for an deployment of the Federal Armed Forces within the domestic territory by the precept of strict faithfulness to the wording of the statute (see BVerfGE 90, 286 (356-357)).

92

bbb) This objective also determines the interpretation and application of the regulations by which, within the meaning of Article 87a.2 of the Basic Law, the deployment of the armed forces for purposes other than defence is explicitly provided in the Basic Law. They comprise, as has already been mentioned, the authorisations in Article 35.2 sentences 2 and 3 of the Basic Law, on the basis of which §§ 13 to 15 of the Aviation Security Act are intended to serve the control of major aerial incidents and of the dangers connected with them. In the case of a regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law, the *Land* affected can, *inter alia*, request the assistance of forces and facilities of the armed forces to deal with the natural disaster or the especially grave accident. In the case of an interregional emergency situation, which endangers an area larger than a *Land*, no such request is necessary pursuant to Article 35.3 sentence 1 of the Basic Law. Instead, the Federal Government can in this case employ units of the armed forces of its own accord to support the police forces of the *Länder*, apart from units of the Federal Border Guard, which by an Act of 21 June 2005 (Federal Law Gazette I p. 1818) has been renamed Federal Police, to the extent that this is necessary for effectively dealing with the emergency situation.

93

ccc) The authorisation of the armed forces under § 14.3 of the Aviation Security Act to use direct armed force against an aircraft is not in harmony with these regulations.

94

(1) Article 35.2 sentence 2 of the Basic Law rules out the use of direct armed force in the case of a regional emergency situation.

95

(a) It is not constitutionally objectionable, however, that § 14.3 of the Aviation Security Act, as results from the connection of the provision with § 13.1 und § 14.1 of the Aviation Security Act, pursues the objective

to prevent, by the use of police force, the occurrence of an especially grave accident pursuant to Article 35.2 sentence 2 of the Basic Law which is imminent as a present danger as a consequence of a major aerial incident.

96

(aa) What is understood as an especially grave accident within the meaning of Article 35.2 sentence 2 of the Basic Law – and with this, also within the meaning of §§ 13 to 15 of the Aviation Security Act – is, in general, the occurrence of a damage of major extent which – such as a grave air or railway accident, a power failure with effects on essential sectors of the services of general interest, or an accident in a nuclear power plant – especially affects the public due to its significance and which is caused by human wrongdoing or technical deficiencies (along this line, see already Part A no. 3 of the Guideline of the Federal Minister of Defence for Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance (*Richtlinie des Bundesministers der Verteidigung über Hilfeleistungen der Bundeswehr bei Naturkatastrophen oder besonders schweren Unglücksfällen und im Rahmen der dringenden Nothilfe*) of 8 November 1988, *Ministerialblatt des Bundesministers für Verteidigung – VMBl* p. 279). This understanding of the concept [of an especially grave accident], which is constitutionally unobjectionable, also comprises events such as the ones that are at issue here.

97

(bb) The fact that the crash of the aircraft against which the measure pursuant to § 14.3 of the Aviation Security Act is directed is meant to be caused intentionally does not run counter to the application of Article 35.2 sentence 2 of the Basic Law.

98

According to general usage, also an event whose occurrence is due to human intention can easily be understood as being an accident. Grounds to suppose that Article 35.2 sentence 2 of the Basic Law, in derogation of this, is intended to be restricted to accidents that have been caused unintentionally or negligently, so that it is not meant to include incidents that are based on intention, can be inferred neither from the wording of the provision nor from the materials relating to the Act (see *Bundestag* document V/1879, pp. 22 et seq.; V/2873, pp. 9-10). The meaning and purpose of Article 35.2 sentence 2 of the Basic Law, which is to make effective disaster control possible also through the deployment of the armed forces (see *Bundestag* document V/1879, pp. 23-24) also speak in favour of interpreting the concept of “accident” broadly. For a long time state practice therefore has been rightly assuming that also occurrences of damages that are caused intentionally by third parties are to be regarded as especially grave accidents (see, respectively, nos. 3 of the Order of the Federal Minister of Defence on Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance (*Erlass des Bundesministers der Verteidigung über Hilfeleistungen der*

Bundeswehr bei Naturkatastrophen bzw. besonders schweren Unglücksfällen und dringende Nothilfe) of 22 May 1973, *Ministerialblatt des Bundesministers für Verteidigung* p. 313, and of the corresponding guideline of 17 December 1977, *Ministerialblatt des Bundesministers für Verteidigung* 1978 p. 86).

99

(cc) It is also constitutionally unobjectionable that the operation pursuant to § 14.3 of the Aviation Security Act is intended to be ordered and carried out at a point in time in which a major aerial incident within the meaning of § 13.1 of the Aviation Security Act has already happened, its consequence, however, the especially grave accident itself which is supposed to be prevented by the direct use of armed force (see § 14.1 of the Aviation Security Act), has not yet occurred. Article 35.2 sentence 2 of the Basic Law does not require the especially grave accident, for the control of which the armed forces are intended to be employed, to have already happened. By contrast, the concept of an emergency situation also comprises events in which a disaster can be expected to happen with near certainty.

100

It cannot be inferred from Article 35.2 sentence 2 of the Basic Law that the armed forces' deployment for assistance is intended to be different in the case of natural disasters and especially grave accidents as regards the beginning of the deployment. As regards natural disasters, however, it is generally assumed in conformity with the Federal Minister of Defence's guideline for assistance (see Part A no. 2 of the Guideline of 8 November 1988) that this concept also comprises situations of imminent danger (see for example Bauer, in: Dreier, *Grundgesetz*, vol. II, 1998, *Art. 35*, marginal no. 24; Gubelt, in: von Münch/Kunig, *Grundgesetz-Kommentar*, vol. 2, 4th/5th ed. 2001, *Art. 35*, marginal no. 25; von Danwitz, in: v. Mangoldt/Klein/Starck, *Kommentar zum Grundgesetz*, 5th ed., vol. 2, 2005, *Art. 35*, marginal no. 70), which means that it also covers situations of danger in which the damaging event that is imminent in the respective case can be expected to occur with near certainty if the situations of danger are not counteracted in time. For especially grave accidents, nothing different can apply for the sole reason that there cannot always be a clear-cut dividing line between them and natural disasters and because also here, the transition between a danger that is still imminent and the occurrence of the damage which has already happened can be fluid in the individual case. The meaning and purpose of Article 35.2 sentence 2 of the Basic Law, which is to enable the Federation to render effective assistance in the sphere of activity of the *Länder*, speaks in favour of treating both causes of disasters in the same manner as regards the aspect of time, i.e. not to wait, in both cases, until the development of the danger that results in the occurrence of the damage has come to a close.

101

The fact that pursuant to Article 35.2 sentence 2 of the Basic Law the request for armed forces and their deployment is made "to render

assistance" "in the case of" a natural disaster and "in the case of" an especially grave accident, does not forcibly suggest the assumption that the occurrence of the respective damage must have already occurred. The sense of the wording of the regulation equally admits of an interpretation to the effect that assistance can already be requested and rendered when it becomes apparent that in all probability, a case of damage will occur soon, i.e. if a present danger within the meaning of police law exists. This is perceptibly the assumption made under Article 35.3 sentence 1 of the Basic Law, which, going back to Article 35.2 sentence 2 of the Basic Law, extends the Federal Government's competences for the case that the natural disaster or the accident "endangers" the area of more than one *Land*. As is the case here with an interregional emergency situation, the existence of a present danger is to be regarded as sufficient for the deployment of the armed forces also in a regional emergency situation pursuant to Article 35.2 sentence 2 of the Basic Law.

102

The Guidelines of the Federal Minister of Defence for Assistance by the German Armed Forces in the Case of Natural Disasters or Especially Grave Accidents and in the Context of Emergency Assistance have therefore rightly been assuming for a long time already that the armed forces may be employed not only "in cases of interregional endangerment" pursuant to Article 35.3 of the Basic Law, but also "in cases of regional endangerment" pursuant to Article 35.2 sentence 2 of the Basic Law (thus most recently Part A no. 4 of the Guideline of 8 November 1988). This necessarily rules out the assumption that the especially grave accident must have already happened.

103

(b) The reason why an operation involving the direct use of armed force against an aircraft does not respect the boundaries of Article 35.2 sentence 2 of the Basic Law is, however, that this provision does not permit an operational mission of the armed forces with specifically military weapons for the control of natural disasters or in the case of especially grave accidents.

104

(aa) The "assistance" referred to in Article 35.2 sentence 2 of the Basic Law is rendered to the *Länder* to enable them to effectively fulfil the function, which is incumbent on them, to deal with natural disasters or especially grave accidents. This is correctly assumed also by § 13.1 of the Aviation Security Act, pursuant to which the deployment of the armed forces is intended to support the *Länder*, in the context of the exercise of police power, in preventing the occurrence of an especially grave accident to the extent that this is necessary for effectively dealing with such danger. Because the assistance is oriented towards this function which falls under the area of competence of the police authorities of the *Länder*, which according to the reasoning of the Act is not supposed to be encroached upon by §§ 13 to 15 of the Aviation Security Act (see *Bundestag* document 15/2361, p. 20 on § 13), this also necessarily

determines the kind of resources that can be used where the armed forces are employed for rendering assistance. They cannot be of a kind which is completely different, with regard to its quality, from those which are originally at the disposal of the *Länder* police forces for performing their duties. This means that when the armed forces are employed "to render assistance" upon the request of a *Land* pursuant to Article 35.2 sentence 2 of the Basic Law, they can use the weapons that the law of the respective *Land* provides for its police forces. In contrast to this, military implements of combat, for instance the on-board weapons of a fighter aircraft which are required for measures pursuant to § 14.3 of the Aviation Security Act, may not be used.

105

(bb) This understanding of the provision, which is imposed by the wording and by the meaning and purpose of Article 35.2 sentence 2 of the Basic Law, is confirmed by the place of this provision in the legal system and by its legislative history. Pursuant to the draft of an emergency constitution presented by the Federal Government, the regional emergency situation within the meaning of Article 35.2 sentence 2 of the Basic Law was originally intended to be regulated in Article 91 of the Basic Law together with the so-called domestic state of emergency (see *Bundestag* document V/1879, p. 3). It was the objective of the proposal to constitutionally legitimise the deployment of the armed forces within the domestic territory vis-à-vis the citizens and in view of the Basic Law's allocation of competences also for the case of regional disaster response (see *Bundestag* document V/1879, p. 23 on Article 91.1). What was intended pursuant to the explicit wording of the intended regulation was, however, that the armed forces can only be made available "as police forces". Thus, the Federal Government intended to ensure that the armed forces can be employed for police functions alone, and only with the competences provided under police law vis-à-vis the citizens (see *Bundestag* document V/1879, p. 23 on Article 91.2). This includes the statement that the use of specifically military weapons should be ruled out where the armed forces are employed in the sphere of activity of the *Länder*.

106

Admittedly, the restrictive wording of an deployment of the armed forces "as police forces" has not been incorporated into the subsequent text of the constitution; it has been left out on the suggestion of the *Bundestag*'s Committee on Legal Affairs to regulate assistance for the benefit of the *Länder* in the case of an emergency situation due to a disaster in Article 35.2 and 35.3 of the Basic Law and the assistance of the *Länder* in dealing with domestic states of emergency in Article 87a.4 and Article 91 of the Basic Law, i.e. in different factual contexts (on this, see *Bundestag* document V/2873, p. 2 under B, p. 9 on § 1 no. 2c). This, however, did not pursue the objective to extend the objects regarded as admissible equipment of the armed forces to include weapons that are typical of the military (see also Cl. Arndt, *Deutsches Verwaltungsblatt – DVBl* 1968, p. 729 (730)).

107

On the contrary: With the provision proposed by it, which the constitution-amending legislature has later on made its own to this extent, the Committee intended to raise the threshold of the deployment of the military as an armed force in comparison with the draft presented by the government and to permit the armed deployment of the Federal Armed Forces only for combating militarily armed insurgents pursuant to Article 87a.4 of the Basic Law (see *Bundestag* document V/2873, p. 2 under B). This finds its visible expression in the fact that the provision on the deployment of the armed forces in a regional emergency situation has been incorporated into Part II of the Basic Law, which concerns the Federation and the *Länder*, and not into Part VIII, which also regulates the deployment of the armed forces in a war. According to the ideas of the constitution-creating legislature, their deployment for "assistance" pursuant to Article 35.2 sentence 2 of the Basic Law was explicitly intended to be restricted to enabling the Federal Armed Forces to perform the police functions, and to exercise their authorisation to take coercive police measures, which arise in the context of a regional emergency situation, for instance to block off endangered property and to perform traffic control (see *Bundestag* document V/2873, p. 10 on Article 35.2; on the constitutional-policy background of the North German flood disaster in 1962 see also the statements made by Senator Ruhnau (Hamburg, SPD) in the 3rd public information meeting of the Committees on Legal Affairs and on Internal Affairs of the 5th German *Bundestag* on 30 November 1967, Minutes, p. 8, and by Deputy Schmidt (Hamburg, SPD) in the 175th Session of the 5th German *Bundestag* on 16 Mai 1968, Stenographic Record, p. 9444).

108

(2) § 14.3 of the Aviation Security Act is also incompatible with the regulation about interregional emergency situations under Article 35.3 sentence 1 of the Basic Law.

109

(a) In this context, however, the fact that the direct use of armed force against an aircraft pursuant to § 14.3 in conjunction with § 13.1 of the Aviation Security Act occurs as a consequence of an action which has been started intentionally by those who want to use the aircraft against human lives is also constitutionally unobjectionable. For the reasons given with regard to Article 35.2 sentence 2 of the Basic Law (see above under C II 2 a bb ccc (1) (a)), such an incident, which has been caused intentionally, can be regarded as an especially grave accident within the meaning of Article 35.3 sentence 1 of the Basic Law. As results from the element "endangered", the fact that not all of its consequences have occurred yet, but that instead, events are still moving towards disaster, does also not rule out the application of Article 35.3 sentence 1 of the Basic Law. Where it is that the endangerment occurs, and whether consequently the requirement of an interregional endangerment has been met, is the question in each individual case. That such endangerment concerns more than one *Land* if the requirements

of § 14.3 of the Aviation Security Act are met is at any rate possible; according to the legislature's assessment of the situation (see *Bundestag* document 15/2361, pp. 20, 21, on § 13 respectively) and according to the opinions submitted by the *Bundestag* and the Federal Government this is rather the rule.

110

(b) However, § 14.3 of the Aviation Security Act meets with constitutional objections already because the deployment of the armed forces which is admissible pursuant to this provision does, in accordance with § 13.3 of the Aviation Security Act, not always require a decision about the mission which is taken by the Federal Government before the mission.

111

Pursuant to Article 35.3 sentence 1 of the Basic Law, only the Federal Government is explicitly authorised to order the deployment of the armed forces in the case of an interregional emergency situation. Pursuant to Article 62 of the Basic Law, the Federal Government consists of the Federal Chancellor and the Federal Ministers. It is a collegial body. If the competence for deciding about the deployment of the armed forces for the purpose of interregional disaster response is reserved to the Federal Government, Article 35.3 sentence 1 of the Basic Law consequently requires a decision of the collegial body (see – on Article 80.1 sentence 1 of the Basic Law – BVerfGE 91, 148 (165-166)). The competence for taking decisions that rests with the Federal Government as a whole is also a more powerful safeguard of the interests of the *Länder*, which are deeply affected by the deployment of the armed forces in their sphere of competence without this having been previously requested by the endangered *Länder* (see BVerfGE 26, 338 (397-397)).

112

§ 13.3 of the Aviation Security Act lives up to this only in its sentence 1, pursuant to which the decision about a mission pursuant to Article 35.3 of the Basic Law shall be taken by the Federal Government in consultation with the *Länder* affected. Sentences 2 and 3, however, provide that the Federal Minister of Defence, or in the event of the Minister of Defence having to be represented, the member of the Federal Government who is authorised to represent the Minister, shall decide if a decision of the Federal Government is not possible in time; in such case, which, in the opinion of the legislature, will be the rule (see *Bundestag* document 15/2361, p. 21 on § 13), the decision of the Federal Government is to be brought about subsequently without delay. Pursuant to this provision, the Federal Government will not only in exceptional cases but regularly be substituted by individual government ministers when it comes to deciding on the deployment of the armed forces in interregional emergency situations. In view of Article 35.3 sentence 1 of the Basic Law, this can also not be justified by the special urgency of the decision. Instead, the fact that generally, the time available in the area of application of § 13.3 of the Aviation Security Act

will only be very short shows particularly clearly that as a general rule, it will not be possible to deal with measures of the kind regulated in § 14.3 of the Aviation Security Act in the manner that is provided under Article 35.3 sentence 1 of the Basic Law.

113

(c) Moreover, the boundaries of constitutional law relating to the armed forces under Article 35.3 sentence 1 of the Basic Law have been overstepped above all because also in the case of an interregional emergency situation, a mission of the armed forces with typically military weapons is constitutionally impermissible.

114

Article 35.3 sentence 1 of the Basic Law differs from Article 35.2 sentence 2 of the Basic Law only in two aspects. Firstly, Article 35.3 sentence 1 of the Basic Law requires the existence of a danger which threatens the territory of more than one *Land*. Secondly, regarding the interregional nature of the emergency situation, the initiative for effectively dealing with this situation is shifted to the Federal Government, and its competences to support the police forces of the *Länder* are extended; the Federal Government can, *inter alia*, employ units of the armed forces of its own accord. What is not provided, however, is that in such a mission, the armed forces can use specifically military weapons which are needed for an operation pursuant to § 14.3 of the Aviation Security Act. Instead, the wording of Article 35.3 sentence 1 of the Basic Law, which permits the deployment of the armed forces only "to support" the police forces of the *Länder*, i.e. again only to perform a *Land* function, and the purpose of the regulation of mere support of the *Länder* by the Federation, which becomes apparent from this, rule out a mission with weapons that are typical of the military in the light of Article 87a.2 of the Basic Law also when it comes to dealing with interregional emergency situations.

115

This is confirmed by the legislative history of Article 35.3 sentence 1 of the Basic Law to the extent that as regards this provision, the constitution-amending legislature did not see any reason for regulating the deployment of the armed forces and their equipment in a different manner than in Article 35.2 sentence 2 of the Basic Law. After it had been expressed with regard to this provision that in the context of an deployment for assistance in favour of the *Länder* also the performance of police functions that arise in such a mission is intended to be permitted, the corresponding statement concerning Article 35.3 sentence 1 of the Basic Law obviously was so much a matter of course that the materials relating to the Act could do without any remarks on this (see *Bundestag* document V/2873, p. 10 on Article 35.2 and 35.3). This is understandable regarding the purposes of deployment "to render assistance" in Article 35.2 sentence 2 of the Basic Law and "to support" in Article 35.3 sentence 1 of the Basic Law, which in general usage are essentially equal in meaning (on this, see also Cl. Arndt, loc. cit.). Also the Federal Minister of Defence's assistance guidelines of 8 November 1988 assume quite

naturally in Part A no. 5 in conjunction with no. 4 and in Part C no. 16 that the powers as well as the nature and the extent of the Federal Armed Forces' assistance in the cases regulated by Article 35.2 sentence 2 and those regulated by Article 35.3 sentence 1 of the Basic Law do not differ from each other. The Guidelines also do not provide missions of the armed forces with specifically military weapons of the kind assumed in § 14.3 of the Aviation Security Act for the support of the police forces of the *Länder* pursuant to Article 35.3 sentence 1 of the Basic Law.

116

b) Regarding the guarantee of human dignity enshrined in Article 1.1. of the Basic Law (aa), over and above this, § 14.3 of the Aviation Security Act is not in harmony with Article 2.2 sentence 1 of the Basic Law also as regards substance to the extent that it permits the armed forces to shoot down aircraft with human beings on board who have become victims of an attack on the security of air traffic pursuant to § 1 of the Aviation Security Act (bb). The provision is constitutionally unobjectionable as concerns substance (cc) only to the extent that the operation provided by § 14.3 of the Aviation Security Act is aimed at a pilotless aircraft or exclusively against the person or persons to whom such an attack can be attributed.

117

aa) The fundamental right to life guaranteed by Article 2.2 sentence 1 of the Basic Law is subject to the requirement of the specific enactment of a statute pursuant to Article 2.2 sentence 3 of the Basic Law (see also above under C I). The Act, however, that restricts the fundamental right must in its turn be regarded in the light of the fundamental right and of the guarantee of human dignity under Article 1.1 of the Basic Law, which is closely linked with it. Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution (see BVerfGE 39, 1 (42); 72, 105 (115); 109, 279 (311)). All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status (see BVerfGE 87, 209 (228); 96, 375 (399)). It cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it (see BVerfGE 87, 209 (228)). This applies irrespective, *inter alia*, of the probable duration of the individual human life (see BVerfGE 30, 173 (194) on the human being's claim to respect of his or her dignity even after death).

118

In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third parties (see BVerfGE 39, 1 (42);

46, 160 (164); 56, 54 (73)). Also this duty of protection has its foundations in Article 1.1 sentence 2 of the Basic Law, which explicitly obliges the state to respect and protect human dignity (see BVerfGE 46, 160 (164); 49, 89 (142); 88, 203 (251)).

119

What this obligation means in concrete terms for state action cannot be definitely determined once and for all (see BVerfGE 45, 187 (229); 96, 375 (399-400)). Article 1.1 of the Basic Law protects the individual human being not only against humiliation, branding, persecution, outlawing and similar actions by third parties or by the state itself (see BVerfGE 1, 97 (104); 107, 275 (284); 109, 279 (312)). Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognised in society as a member with equal rights and with a value of his or her own (see BVerfGE 45, 187 (227-228)), the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state (see BVerfGE 27, 1 (6)); 45, 187 (228); 96, 375 (399)). What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity (see BVerfGE 30, 1 (26); 87, 209 (228); 96, 375 (399)) by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person (see BVerfGE 30, 1 (26); 109, 279 (312-313)). When it is that such a treatment occurs must be stated in concrete terms in the individual case in view of the specific situation in which a conflict can arise (see BVerfGE 30, 1 (25); 109, 279 (311)).

120

bb) According to these standards, § 14.3 of the Aviation Security Act is also incompatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the shooting down of an aircraft affects people who, as its crew and passengers, have not exerted any influence on the occurrence of the non-warlike aerial incident assumed under § 14.3 of the Aviation Security Act.

121

aaa) In the situation in which these persons are at the moment in which the order to use direct armed force against the aircraft involved in the aerial incident pursuant to § 14.4 sentence 1 of the Aviation Security Act is made, it must be possible, pursuant to § 14.3 of the Aviation Security Act, to assume with certainty that the aircraft is intended to be used against human lives. As has been stated in the reasoning for the Act, the aircraft must have been converted into an assault weapon by those who have brought it under their command (see *Bundestag* document 15/2361, p. 20 on § 13.1); the aircraft itself must be used by the perpetrators in a targeted manner as a weapon for the crime, not merely as an auxiliary means for committing the crime, against the lives of people who stay in the area in which the aircraft is

intended to crash (see *Bundestag* document 15/2361, p. 21 on § 14.3), In such an extreme situation, which is, moreover, characterised by the cramped conditions of an aircraft in flight, the passengers and the crew are typically in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner.

122

This makes them objects not only of the perpetrators of the crime. Also the state which in such a situation resorts to the measure provided by § 14.3 of the Aviation Security Act treats them as mere objects of its rescue operation for the protection of others. The desperateness and inescapability which characterise the situation of the people on board the aircraft who are affected as victims also exist vis-à-vis those who order and execute the shooting down of the aircraft. Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape this state action but are helpless and defenceless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.

123

bbb) In addition, this happens under circumstances in which it cannot be expected that at the moment in which pursuant to § 14.4 sentence 1 of the Aviation Security Act a decision concerning an operation under § 14.3 of the Aviation Security Act is taken, there is always a complete picture of the factual situation and that the factual situation can always be assessed correctly. One also cannot rule out the possibility that the course of events will be such that it is no longer required to carry out the operation. According to the findings that the Senate has gained from the written opinions submitted in the proceedings and from the statements made in the oral hearing, it cannot be assumed that the factual prerequisites for ordering and carrying out such an operation can always be established with the certainty required for this.

124

(1) In particular the Cockpit Association has pointed out that depending on the circumstances, establishing that a major aerial incident within the meaning of § 13.1 of the Aviation Security Act has occurred and that such incident constitutes the danger of an especially grave accident is already fraught with great uncertainties. According to the Cockpit Association, such establishment can only rarely be made with certainty. The critical point in the assessment of the situation was said to be to what extent the possibly affected crew of the plane was still

able to communicate the attempt at, or the success of, hijacking an aircraft to the decision-makers on the ground. If this was not possible, the factual basis was said to be tainted with the stigma of a misinterpretation from the very beginning.

125

Also the findings that are supposed to be gained from reconnaissance measures and checks pursuant to § 15.1 of the Aviation Security Act are, in the opinion of the Cockpit Association, vague at best, even with ideal weather conditions. In the opinion of the Cockpit Association, there are limits to the approach of interceptors to an aircraft that has become conspicuous in view of the dangers involved. For this reason, the possibility of making out the situation and the events on board of such an aircraft is, according to the Cockpit Association, limited even if there is visual contact, which, moreover, is often difficult to establish. Under these circumstances, the assessment of the motivation and the objectives of the hijackers of an aircraft that is made on the basis of the facts ascertained were said to probably remain, as a general rule, speculative to the very end. Consequently, the danger concerning the application of § 14.3 of the Aviation Security Act was said to be that the order to shoot down the aircraft was made too early on an uncertain factual basis if, within the time slot available, which as a general rule is extremely narrow, armed force was at all supposed to be used in a timely manner with prospects of success and without disproportionately endangering people who are not participants in the crime. For such a mission to be effective, it was said to have to be accepted from the very beginning that the operation was possibly not required at all. In other words, reactions would probably often have to be excessive.

126

(2) In the proceedings, no indications have arisen for assuming that this assessment could be based on unrealistic, and thus unfounded, assumptions. On the contrary, also the Independent Flight Attendant Organisation UFO has plausibly stated that the decision to be taken by the Federal Minister of Defence or by the Minister's deputy pursuant to § 14.4 sentence 1 in conjunction with § 14.3 of the Aviation Security Act must be made on the basis of information most of which is uncertain. Due to the complicated and error-prone channels of communication between the cabin crew and the cockpit on board an aircraft that is involved in an aerial incident on the one hand and between the cockpit and the decision-makers on the ground on the other hand, and with a view to the fact that the situation on board the aircraft can change within minutes or even seconds, it was said to be virtually impossible for those on the ground who must decide under extreme time pressure to reliably assess whether the requirements of § 14.3 of the Aviation Security Act are met. It was put forward that as a general rule, the decision would have to be taken on the basis of a suspicion only and not on the basis of established facts.

127

This appraisal appears convincing to the Senate not least because the complicated, multiple-tiered decision-making system, which depends

on a large number of decision-makers and persons concerned, that must have been gone through pursuant to §§ 13 to 15 of the Aviation Security Act until an operation pursuant to § 14.3 of the Aviation Security can be carried out, will require considerable time in the case of an emergency. In view of the fact that the overflight area of the Federal Republic of Germany is relatively small, this means that there is not only enormous time pressure on decision-making but also the danger of premature decisions.

128

ccc) Even if in the area of police power, insecurities concerning forecasts often cannot be completely avoided, it is absolutely inconceivable under the applicability of Article 1.1 of the Basic Law to intentionally kill persons such as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorisation which even accepts such imponderabilities if necessary. It need not be decided here how a shooting down that is performed all the same, and an order relating to it, would have to be assessed under criminal law (on this, and on cases with comparable combinations of circumstances see, for instance, Decisions of the Supreme Court of Justice for the British Zone in Criminal Matters (*Entscheidungen des Obersten Gerichtshofs für die Britische Zone in Strafsachen* – OGHSt) 1, 321 (331 et seq., 335 et seq.); 2, 117 (120 et seq.); Roxin, *Strafrecht, Allgemeiner Teil*, vol. I, 3rd ed. 1997, pp. 888-889; Erb, in: *Münchener Kommentar zum Strafgesetzbuch*, vol. 1, 2003, *§ 34*, marginal nos. 117 et seq.; Rudolphi, in: *Systematischer Kommentar zum Strafgesetzbuch*, vol. I, *Allgemeiner Teil, Vor § 19*, marginal no. 8 (as at April 2003); Kühl, *Strafgesetzbuch*, 25th ed. 2004, *Vor § 32*, marginal no. 31; Tröndle/Fischer, *Strafgesetzbuch*, 52nd ed. 2004, *Vor § 32*, marginal no. 15, *§ 34*, marginal no. 23; Hilgendorf, in: Blaschke/Förster/Lumpp/Schmidt, *Sicherheit statt Freiheit?*, 2005, p. 107 (130)). What is solely decisive for the constitutional appraisal is that the legislature may not, by establishing a statutory authorisation for intervention, give authority to perform operations of the nature regulated in § 14.3 of the Aviation Security Act vis-à-vis people who are not participants in the crime and may not in this manner qualify such operations as legal and thus permit them. As missions of the armed forces of a non-warlike nature, they are incompatible with the right to life and the obligation of the state to respect and protect human dignity.

129

(1) Therefore it cannot be assumed – differently from arguments that are advanced sometimes – that someone boarding an aircraft as a crew member or as a passenger will presumably consent to its being shot down, and thus to his or her own killing, in the case of the aircraft becoming involved in an aerial incident within the meaning of § 13.1 of the Aviation Security Act which results in a measure averting the danger pursuant to § 14.3 of the Aviation Security Act. Such an assumption lacks any realistic grounds and is no more than an unrealistic fiction.

130

(2) Also the assessment that the persons who are on board a plane that is intended to be used against other people's lives within the

meaning of § 14.3 of the Aviation Security Act are doomed anyway cannot remove its nature of an infringement of their right to dignity from the killing of innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves. Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being (see above under C I, II 2 b aa). Whoever denies this or calls this into question denies those who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity (see above under C II 2 b aa, bb aaa).

131

In addition, uncertainties as regards the factual situation exist here as well. These uncertainties, which characterise the assessment of the situation in the area of application of §§ 13 to 15 of the Aviation Security Act in general (see above under C II 2 b bb bbb), necessarily also influence a prediction of how long people who are on board a plane which has been converted into an assault weapon will live and whether there is still a chance of rescuing them. As a general rule, it will therefore not be possible to make a reliable statement about these people's lives being "lost anyway already".

132

(3) The assumption that anyone who is held on board an aircraft under the command of persons who intend to use the aircraft as a weapon of a crime against other people's lives within the meaning of § 14.3 of the Aviation Security Act has become part of a weapon and must bear being treated as such also does not justify a different assessment. This opinion expresses in a virtually undisguised manner that the victims of such an incident are no longer perceived as human beings but as part of an object, a view by which they themselves become objects. This cannot be reconciled with the Basic Law's concept of the human being and with the idea of the human being as a creature whose nature it is to exercise self-determination in freedom (see BVerfGE 45, 187 (227)), and who therefore may not be made a mere object of state action.

133

(4) The idea that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction (for instance Enders, in: *Berliner Kommentar zum Grundgesetz*, vol. 1, *Artikel 1*, marginal no. 93 (as of July 2005)) also does not lead to a different result. In this context, the Senate need not decide whether, and should the occasion arise, under which circumstances such a duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution can be derived from the Basic Law. For in the area of application of § 14.3 of the Aviation Security Act the issue is not averting attacks aimed at abolishing the body politic and at eliminating the state's legal and constitutional system.

134

§§ 13 to 15 of the Aviation Security Act serve to prevent, in the context of police power, the occurrence of especially grave accidents within the meaning of Article 35.2 sentences 2 and 3 of the Basic Law. As appears from the reasoning of the Act, such accidents can be politically motivated but can also be caused by criminals or by mentally confused persons acting on their own (see *Bundestag* document 15/2361, p. 14). As the incorporation of §§ 13 et seq. of the Aviation Security Act into the system of disaster control pursuant to Article 35.2 sentences 2 and 3 of the Basic Law shows, incidents are assumed which are not aimed at calling into question the state and its continued existence even where they are caused by political motives in the individual case. Under these circumstances, there is no room to assume a duty to intervene within the meaning that has been explained.

135

(5) Finally, § 14.3 of the Aviation Security Act also cannot be justified by invoking the state's duty to protect those against whose lives the aircraft that is abused as a weapon for a crime within the meaning of § 14.3 of the Aviation Security Act is intended to be used.

136

In complying with such duties of protection, the state and its bodies have a broad margin of assessment, valuation and organisation (see BVerfGE 77, 170 (214); 79, 174 (202); 92, 26 (46)). Unlike the fundamental rights in their function as subjective rights of defence [against the state], the state's duties to protect which result from the objective contents of the fundamental rights are, in principle, not defined (see BVerfGE 96, 56 (64)). How the state bodies comply with such duties of protection is to be decided, as a matter of principle, by themselves on their own responsibility (see BVerfGE 46, 160 (164); 96, 56 (64)). This also applies to their duty to protect human life. It is true that especially as regards this protected interest, in cases with a particular combination of circumstances, if effective protection of life cannot be achieved otherwise, the possibilities of choosing the means of complying with the duty of protection can be restricted to the choice of one particular means (see BVerfGE 46, 160 (164-165)). The choice, however, can only be between means the use of which is in harmony with the constitution.

137

This is not the case with § 14.3 of the Aviation Security Act. What the ordering and the carrying out of the direct use of force against an aircraft pursuant to this provision leaves out of account is that also the victims of an attack who are held in the aircraft are entitled to their lives being protected by the state. Not only are they denied this protection by the state, the state itself even encroaches on the lives of these defenceless people. Thus any procedure pursuant to § 14.3 of the Aviation Security Act disregards, as has been explained, these people's positions as subjects in a manner that is incompatible with Article 1.1 of the Basic Law and disregards the ban on killing that results from it for the state.

The fact that this procedure is intended to serve to protect and preserve other people's lives does not alter this.

138

cc) § 14.3 of the Aviation Security Act is, however, compatible with Article 2.2 sentence 1 in conjunction with Article 1.1 of the Basic Law to the extent that the direct use of armed force is aimed at a pilotless aircraft or exclusively at persons who want to use the aircraft as a weapon of a crime against the lives of people on the ground.

139

aaa) To this extent the guarantee of human dignity under Article 1.1 of the Basic Law is not contrary to the ordering and carrying out of an operation pursuant to § 14.3 of the Aviation Security Act. This goes without saying in operations against pilotless aircraft but also applies in the other case. Whoever, such as those who want to abuse an aircraft as a weapon to destroy human lives, unlawfully attacks the legal interests of others is not fundamentally called into question as regards his or her quality as a subject by being made the mere object of state action (see above under C II 2 b aa) where the state, complying with its duty of protection, defends itself against the unlawful attack and tries to avert it, complying with its duty of protection vis-à-vis those whose lives are intended to be annihilated. On the contrary, it exactly corresponds to the attacker's position as a subject if the consequences of his or her self-determined conduct are attributed to him or her personally, and if the attacker is held responsible for the events that he or she started. The attacker's right to respect of the dignity that is inherent also to him or her is therefore not impaired.

140

This is also not altered by the uncertainties which can arise in the examination of whether the prerequisites for ordering and carrying out of an operation pursuant to § 14.3 of the Aviation Security Act are actually met (see above under C II 2 b bb bbb). In cases of the nature discussed here, these insecurities are not comparable to those that will have to be assumed, as a general rule, where there are, apart from the offenders also crew members and passengers on board the aircraft. If those who have the aircraft under their command do not intend to use it as a weapon, if therefore the corresponding suspicion is unfounded, they can, on the occasion of the early measures carried out pursuant to § 15.1 and § 14.1 of the Aviation Security Act, for instance on account of the threat to use armed force or on account of a warning shot, easily show by cooperating, for instance by changing course or by landing the aircraft, that no danger emanates from them. The specific difficulties that can arise as regards communication between the cabin crew, which is possibly threatened by offenders, and the cockpit, and between the cockpit and the decision-makers on the ground, do not exist here. In such cases, it is therefore easier to ascertain with sufficient reliability and also in a timely manner that an aircraft is intended to be abused as a weapon for a targeted crash.

141

If no indications exist that there are people on board an aircraft that has become conspicuous who are not participants in the crime, remaining uncertainties – for example as regards the underlying motives of the aerial incident – refer to a course of events that has been started, and can be averted, by those against whom the measure averting danger pursuant to § 14.3 of the Aviation Security Act is exclusively directed. Imponderabilities in this context are therefore attributable to the offenders' sphere of responsibility.

142

bbb) To the extent that it is only applied vis-à-vis persons on board an aircraft who want to use it as a weapon against human lives, the regulation under § 14.3 of the Aviation Security Act also lives up to the requirements of the principle of proportionality.

143

(1) The provision serves the objective of saving human lives. With regard to the ultimate value that human life has in the Basic Law's constitutional order (see above under C I), this is a regulatory purpose of such weight that it can justify the serious encroachment upon the right to life of the offenders on board the aircraft.

144

(2) § 14.3 of the Aviation Security Act is not absolutely unsuitable for achieving this purpose of protection because it cannot be ruled out that this purpose is promoted in an individual case by a measure pursuant to § 14.3 of the Aviation Security Act (see BVerfGE 30, 292 (316); 90, 145 (172); 110, 141 (164)). Regardless of the uncertainties concerning the assessment and prediction of the situation that have been described (see above under C II 2 b bb bbb) situations are conceivable in which it can be reliably ascertained that the only people on board an aircraft which is involved in an aerial incident are offenders participating in such incident, and in which it can also be assumed with sufficient certainty that a mission pursuant to § 14.3 of the Aviation Security Act will not have consequences that are detrimental to the lives of people on the ground. Whether such a factual situation exists depends on the assessment of the situation in the individual case. If such assessment results in the safe judgment that there are only offenders on board the aircraft and in the prediction that the shooting down of the aircraft can avert the danger from the people on the ground who are threatened by the plane, the success that is intended to be achieved by § 14.3 of the Aviation Security Act is furthered. Therefore the suitability of this provision for the purpose that is intended with it cannot be generally denied.

145

(3) In such a case, also the requirement of the necessity of the provision for achieving the objective is met because no equally effective means is apparent that does not impair the offenders' right to life at all, or impairs it less (see BVerfGE 30, 292 (316); 90, 145 (172); 110, 141 (164)).

146

Especially in §§ 5 to 12 of the Aviation Security Act, the legislature has taken a whole package of measures, all of which are intended to serve protection from attacks on the security of air traffic, in particular from hijackings, acts of sabotage and terrorist attacks within the meaning of § 1 of the Aviation Security Act (for further details, see above under A I 2 b bb aaa (1)). In spite of this, the legislature has regarded it as necessary to enact, with §§ 13 to 15 of the Aviation Security Act, regulations with special authorisations for intervention and protective measures for the case that on account of a major aerial incident, the occurrence of an especially grave accident within the meaning of Article 35.2 sentence 2 or 35.3 of the Basic Law must be feared, regulations that even include the authorisation to use, as the *ultima ratio*, direct armed force against an aircraft under the conditions specified in § 14.3 of the Aviation Security Act. This is based on the irrefutable assessment that experience has shown that also the extensive precautions pursuant to §§ 5 to 11 of the Aviation Security Act, as well as the extension of the pilots' functions and competences by § 12 of the Aviation Security Act cannot provide absolutely reliable protection against the misuse of aircraft for criminal purposes. Nothing different can apply to other conceivable protective measures.

147

(4) Finally, the authorisation to use direct armed force against an aircraft on board of which there are only people who want to abuse it within the meaning of § 14.3 of the Aviation Security Act, is also proportional in the narrower sense. According to the result of the overall weighing up between the seriousness of the encroachment upon fundamental rights that it involves and the weight of the legal interests that are to be protected (see on this BVerfGE 90, 145 (173); 104, 337 (349); 110, 141 (165)), the shooting down of such an aircraft is an appropriate measure of averting danger which is reasonable for the persons affected if there is certainty about the elements of the offence.

148

(a) However, the encroachment upon fundamental rights carries much weight because the execution of the operation pursuant to § 14.3 of the Aviation Security Act will with near certainty result in the death of the people on board the plane. But under the combination of circumstances that is assumed here, it is these people themselves who, as offenders, have brought about the necessity of state intervention, and that they can avert such intervention at any time by refraining from realising their criminal plan. It is the people who have the aircraft under their command who determine the course of events on board, but also on the ground in a decisive manner. Their killing can only take place if it can be established with certainty that they will use the aircraft that is under their control to kill people, and if they keep to their plan even though they are aware of the danger to their lives that this involves for them. This reduces the gravity of the encroachment upon their fundamental rights.

149

On the other hand, those in the target area of the intended plane crash whose lives are intended to be protected by the measure of intervention under § 14.3 of the Aviation Security Act by which the state complies with its duty of protection, as a general rule do not have the possibility of averting the attack that is planned against them and in particular, of escaping it.

150

(b) What must also be kept in mind, however, is that the application of § 14.3 of the Aviation Security Act will possibly affect not only extremely dangerous installations on the ground but will possibly also kill people who are staying in areas in which, in all probability, the wreckage of the aircraft that is shot down by the use of armed force will come down. The state is constitutionally obliged to protect also the lives – and the health– of these people. In a decision pursuant to § 14.4 sentence 1 of the Aviation Security Act, this cannot be left out of account.

151

This aspect, however, does not concern the continued existence in law of the regulation under § 14.3 of the Aviation Security Act, but its application in the individual case. Pursuant to the opinions submitted in the proceedings, the application is intended to be refrained from anyway if it must be assumed with certainty that people on the ground would suffer damage or even lose their lives by plane wreckage falling down on densely populated areas. Concerning the question whether the provision meets also the proportionality requirements of constitutional law, it is sufficient to establish that combinations of circumstances are conceivable in which the direct use of armed force against an aircraft which only has attackers on air traffic on board can avert the danger to the lives of those against whom the aircraft is intended to be used as the weapon for the crime without the shooting down of the aircraft encroaching at the same time upon the lives of others. As has been set out (see above under C II 2 b cc bbb (2)), this is the case. This makes § 14.3 of the Aviation Security Act also proportional in the narrower sense to the extent that it permits the direct use of armed force against a pilotless aircraft or against an aircraft which only has attackers on board.

152

ccc) The ban under Article 19.2 of the Basic Law on affecting the essence of a fundamental right does also not rule out such a measure against this group of persons. In view of the extremely exceptional situation that is assumed by § 14.3 of the Aviation Security Act, the essence of the fundamental right to life remains unaffected in the case assumed here by the encroachment upon the fundamental right that this provision involves as long as important interests of protection of third parties legitimise the encroachment and as long as the principle of proportionality is respected (see BVerfGE 22, 180 (219-220); 109, 133 (156)). According to the statements made above, both conditions are met (see under C II 2 b cc bbb).

III.

153

Because the Federation lacks legislative competence for § 14.3 of the Aviation Security Act in the first place, the regulation does not continue in force also to the extent that the direct use of armed force against an aircraft can be justified under substantive constitutional law. The regulation is completely unconstitutional and consequently, it is void pursuant to § 95.3 sentence 1 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). Under the circumstances, there is no room for merely stating the incompatibility of the challenged regulation with the Basic Law.

D.

154

The decision about the costs is based on § 34a.2 of the Federal Constitutional Court Act. **Judges:** Papier, Haas, Hömig, Steiner, Hohmann-Dennhardt, Hoffmann-Riem, Bryde, Gaier

A decisão é essencialmente baseada nas seguintes considerações:

A autorização das Forças Armadas para abater uma aeronave, disposição que está contida no §14.3 do Ato de Segurança da Aviação, não está em harmonia com a Lei Fundamental Alemã. Esta disposição autoriza apenas o Governo Federal a ordenar o emprego das forças armadas, no caso de uma situação de emergência. A Lei de Segurança da Aviação prevê que o Ministro da Defesa, de acordo com o Ministro Federal do Interior, deve decidir, nos casos em que a decisão do Governo Federal não for possível (delegação implícita). Assim, o Governo Federal, nos termos da *Luftsig*, será substituído não só em casos excepcionais, mas, regularmente, por ministros do governo, o que, segundo *der Bundesverfassungsgericht*, não é proporcional.

O §14.3 do Ato de Segurança da Aviação também não é compatível com o direito à vida (artigo 2.2 parágrafo 1º da Lei Fundamental), em conjugação com a garantia da dignidade humana (artigo 1.1 da Lei Fundamental), na medida em que o uso da violência armada afeta pessoas a bordo da aeronave que não são participantes do crime. Os passageiros e tripulantes tornam-se objetos, são equiparados aos autores do crime. O estatuto das pessoas afetadas, como sujeitos dotados de dignidade e direitos inalienáveis, é violado. A morte de uns, como um meio para salvar outros, nega o valor que é devido a um ser humano.

De acordo com a aplicabilidade do artigo 1.1 da Lei Fundamental (**garantia da dignidade humana**) é absolutamente inconcebível matar **intencionalmente** as pessoas que estão nessa situação indefesa, em função de uma autorização legal. A presunção de que os tripulantes e passageiros (inocentes), ao embarcarem em uma aeronave, estariam cientes de que, caso sequestrada, poderiam ser mortos, acarreta uma violação do direito dessas pessoas à dignidade.

Vai adiante *der Bundesverfassungsgericht*. A pretensão de que as pessoas que são mantidas a bordo tornam-se parte de uma arma e devem ser tratadas como tal, e a idéia de que o indivíduo é obrigado a sacrificar sua vida em nome do Estado, não é um argumento capaz de validar a lei.

Não obstante, *der Bundesverfassungsgericht* considerou válida a disposição do §14.3 do Ato de Segurança da Aviação, pois compatível com o artigo 2.2 1 frase, em conjugação com o artigo 1.1 da Lei Fundamental, quando o uso direto da força armada é destinada a um avião sem piloto ou **exclusivamente** a pessoas que querem usar o avião como arma de um crime contra a vida das pessoas. Nesse caso, a autodeterminação do indivíduo ao usar o avião como arma, autoriza o Estado a abatê-lo, haja vista o respeito ao princípio da proporcionalidade nesse tocante.

Encerra *der Bundesverfassungsgericht* afirmando que o objetivo de salvar vidas humanas, que é perseguido pelo §14.3 do Ato de Segurança da Aviação, é de tal peso que pode justificar uma grave invasão do direito fundamental à vida e à dignidade da pessoa humana.

II. DEFININDO O TERRORISMO

Não existe uma definição legal do termo terrorismo ou terrorista, nem é o terrorismo listado como um motivo de exclusão separado na Convenção dos Refugiados. Artigo 1F da Convenção de 1951[1] exclui da protecção internacional indivíduos que tenham cometido crimes contra a paz ou a humanidade, crimes de guerra, um crime grave de direito comum, ou um ato contrário aos propósitos e princípios das Nações Unidas. Os atos cometidos em Londres, Madri, Nova York e Washington são considerados por especialistas como crimes que são abrangidos pelos fundamentos de exclusão da Convenção.

A alta dose de imprecisão do termo terrorismo fez com que os países atingidos por atentados contra a humanidade determinassem quais as organizações são consideradas como os terroristas.

Após o ataque terrorista em Madrid, em 11 de marco de 2004, o Parlamento alemão aprovou a Lei de Habitação de 2004, o que tornou ainda mais fácil para o governo de negar a entrada ou uma autorização de residência e de expulsão de todos aqueles que participam ou apoiam grupos terroristas. Além disso, a lei de 2004 deu a mais alta autoridade da Lander (do alemão "estados", cujos policiais exercem geralmente as deportações) o poder de ordenar a remoção de um não-cidadão, sem uma ordem de deportação, se, com base em uma avaliação discricionária, a remoção parece ser necessária para conter uma possível ameaça à segurança do país.[2]

---

[1] Convenção das Nações Unidas relativa ao Estatuto dos Refugiados, também conhecida como Convenção de Genebra de 1951, foi promulgada no Brasil por meio do Decreto nº 50.215, de 28 de janeiro de 1961.

[2] http://www.socialsciences.manchester.ac.uk/disciplines/politics/researchgroups/epru/publishing/documents/EPRUDiss.pdf.

Na sequência de quatro ataques no sistema de transportes de Londres, em 07 de julho de 2005, e outra série de incidents graves de segurança, o primeiro-ministro Tony Blair anunciou um "quadro global de acção para lidar com a ameaça terrorista na Grã-Bretanha."

O plano incluía a deportação de pessoas para países onde a tortura ou outros maus-tratos são praticados por meio do uso de "garantias diplomáticas"; novos motivos para a expulsão e exclusão, bem como a recusa automática de asilo a pessoas que se considerem estar associadas ao terrorismo.[3]

Como visto, o temor inerente aos países já assolados pelos atentados terroristas faz com que as medidas contrárias a esses ataques sejam muito das vezes desproporcionais e, por via de consequência, a legislação que lhes dá suporte eivada de inconstitucionalidade, e a vagueza do termo terrorismo, frente ao temor que ele espalha, alimenta a propagação de leis maculadas de inconstitucionalidades.

III. O PERMANENTE ESTADO DE EXCEÇÃO E A LEI ALEMÃ SOBRE SEGURANÇA AÉREA – *LUFTSIG*: ADMITE-SE A MORTE DE UM INOCENTE (MAL MENOR), EM PROL DA VIDA DE OUTROS INÚMEROS INOCENTES (BEM MAIOR)?

O *estado de exceção* ou, na expressão em língua inglesa, *estado de emergência*, afigura-se como um momento em que parcelas da ordem jurídica, especialmente aquelas destinadas à proteção de direitos fundamentais, são suspensas em razão de medidas, emanadas do Estado, com o fim de atender a necessidades especificas. É importante frisar que tais medidas são revestidas de força normativa – apresentadas, portanto, como Direito – em que pese representarem um momento de suspensão da própria ordem jurídica.

Impulsionados pelas ameaças do terrorismo, do narcotráfico, e outros ataques à humanidade vários países vêm, de forma crescente, apelando para medidas excepcionais, ***francamente*** restritivas de direitos fundamentais. Sempre empunhando o discurso da necessidade de fazer frente a algum mal iminente, buscam os governos e os parlamentos justificar a adoção de atos normativos claramente contrários à ordem constitucional, especialmente na parcela que pertine às garantias fundamentais.

---

http://www.germanlawjournal.com/article.php?id=425.
http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_dec-2005clause52.htm.
http://www.refugeecouncil.org.uk/NR/rdonlyres/B440F513-2B46-4B83AABCBDA403342618/0/IAN_BillCounter_Terror.pdf.
http://www.refugee-action.org.uk/information/asylumandterrorism.aspx#health1.

[3] http://www.socialsciences.manchester.ac.uk/disciplines/politics/researchgroups/epru/publishing/documents/EPRUDiss.pdf.
http://www.germanlawjournal.com/article.php?id=425.
http://www.unhcr.org.uk/legal/positions/UNHCR%20Comments/comments_dec-2005clause52.htm.
http://www.refugeecouncil.org.uk/NR/rdonlyres/B440F513-2B46-4B83AABCBDA403342618/0/IAN_BillCounter_Terror.pdf.
http://www.refugee-action.org.uk/information/asylumandterrorism.aspx#health1.

Após os acontecimentos de 11 de setembro de 2001, nos Estados Unidos da América, e também os atentados de Madri e Londres, que àquele sucederam, exsurge um estado de exceção ***permanente***. O medo assola os países que acuados reagem, mediante instrumentos legislativos, duramente contra seus "inimigos", na maioria das vezes, violando claramente os direitos fundamentais mais básico, como no caso em apreço, a vida.

Contudo, o próprio *Bundesverfassungsgericht* entendeu ser proporcional e, portanto, constitucional o abate de aeronaves pilotadas unicamente por terroristas, tendo em vista que, nessa exclusiva situação, o princípio da proporcionalidade penderia na balança para a proteção da segurança nacional. Ou seja, o direito à vida e à dignidade humana seriam afastados em prol de um interesse, no caso, maior, a segurança da nação. Deixa-se claro, porém, que o direito à vida e à dignidade da pessoa humana é afastado, pois os próprios terroristas abrem mão desses bens jurídicos. A autodeterminação autoriza o Estado a tirar a vida em nome da segurança.

A questão é complexa! A decisão do *Bundesverfassungsgericht* é correta? O vivo exemplo das Torres Gêmeas não autorizaria o abate das aeronaves? Quantas vidas teriam sido salvas, se as Forças Armadas impedissem a colisão? Tenho dúvidas do acerto da decisão do Tribunal Constitucional Alemão. **Há uma colisão de direitos fundamentais!** Há colisão de direitos à vida e à dignidade humana. A proporcionalidade devereria ter sido melhor trabalhada pelo *Bundesverfassungsgericht*. Matar um ser humano para salvar 100 (cem) seres humanos, ao meu ver, equivaleria a uma excludente de ilicitude, a um **estado de necessidade de terceiro**, que independeria de lei regulamentadora.

O *Bundesverfassungsgericht*, *apesar* de julgar inconstitucional a legislação do abate de aeronaves, quando nela haja tripulantes e passageiros inocentes, relativizou o direito fundamental à vida e à dignidade da pessoa humana, ao autorizar o suicídio do terrorista (autodeterminação). Caso o terrorista pretenda se suicidar, o Estado pode retirar-lhe a vida, em nome de um bem jurídico maior (segurança nacional).

IV. BREVES COMENTÁRIOS SOBRE A LEI Nº 7.565, DE 19 DE DEZEMBRO DE 1986

Cabe-nos transcrever o Decreto que regulamentou a Lei 7.565/86, para melhor concatenarmos os raciocínio:

> **DECRETO Nº 5.144, DE 16 DE JULHO DE 2004.**
>
> Regulamenta os §§ 1º, 2º e 3º do art. 303 da Lei nº 7.565, de 19 de dezembro de 1986, que dispõe sobre o Código Brasileiro de Aeronáutica, no que concerne às aeronaves hostis ou suspeitas de tráfico de substâncias entorpecentes e drogas afins.
>
> ***O PRESIDENTE DA REPÚBLICA****, no uso da atribuição que lhe confere o art. 84, inciso IV, da Constituição, e tendo em vista o disposto nos* ***§§ 1º, 2º e 3º do art. 303 da Lei nº 7.565, de 19 de dezembro de 1986****,*

DECRETA:

Art. 1º Este Decreto estabelece os procedimentos a serem seguidos com relação a aeronaves hostis ou suspeitas de tráfico de substâncias entorpecentes e drogas afins, levando em conta que estas podem apresentar ameaça à segurança pública.

Art. 2º Para fins deste Decreto, é considerada aeronave suspeita de tráfico de substâncias entorpecentes e drogas afins aquela que se enquadre em uma das seguintes situações:

I - adentrar o território nacional, sem Plano de Vôo aprovado, oriunda de regiões reconhecidamente fontes de produção ou distribuição de drogas ilícitas; ou

II - omitir aos órgãos de controle de tráfego aéreo informações necessárias à sua identificação, ou não cumprir determinações destes mesmos órgãos, se estiver cumprindo rota presumivelmente utilizada para distribuição de drogas ilícitas.

Art. 3º As aeronaves enquadradas no art. 2º estarão sujeitas às medidas coercitivas de averiguação, intervenção e persuasão, de forma progressiva e sempre que a medida anterior não obtiver êxito, executadas por aeronaves de interceptação, com o objetivo de compelir a aeronave suspeita a efetuar o pouso em aeródromo que lhe for indicado e ser submetida a medidas de controle no solo pelas autoridades policiais federais ou estaduais.

§ 1º As medidas de averiguação visam a determinar ou a confirmar a identidade de uma aeronave, ou, ainda, a vigiar o seu comportamento, consistindo na aproximação ostensiva da aeronave de interceptação à aeronave interceptada, com a finalidade de interrogá-la, por intermédio de comunicação via rádio ou sinais visuais, de acordo com as regras de tráfego aéreo, de conhecimento obrigatório dos aeronavegantes.

§ 2º As medidas de intervenção seguem-se às medidas de averiguação e consistem na determinação à aeronave interceptada para que modifique sua rota com o objetivo de forçar o seu pouso em aeródromo que lhe for determinado, para ser submetida a medidas de controle no solo.

§ 3º As medidas de persuasão seguem-se às medidas de intervenção e consistem no disparo de tiros de aviso, com munição traçante, pela aeronave interceptadora, de maneira que possam ser observados pela tripulação da aeronave interceptada, com o objetivo de persuadi-la a obedecer às ordens transmitidas.

Art. 4º A aeronave suspeita de tráfico de substâncias entorpecentes e drogas afins que não atenda aos procedimentos coercitivos descritos no art. 3º será classificada como aeronave hostil e estará sujeita à medida de destruição.

Art. 5º A medida de destruição consiste no disparo de tiros, feitos pela aeronave de interceptação, com a finalidade de provocar danos e impedir o prosseguimento do vôo da aeronave hostil e somente poderá ser utilizada como último recurso e após o cumprimento de todos os procedimentos que previnam a perda de vidas inocentes, no ar ou em terra.

Art. 6º A medida de destruição terá que obedecer às seguintes condições:

I - emprego dos meios sob controle operacional do Comando de Defesa Aeroespacial Brasileiro - COMDABRA;

II - registro em gravação das comunicações ou imagens da aplicação dos procedimentos;

III - execução por pilotos e controladores de Defesa Aérea qualificados, segundo os padrões estabelecidos pelo COMDABRA;

IV - execução sobre áreas não densamente povoadas e relacionadas com rotas presumivelmente utilizadas para o tráfico de substâncias entorpecentes e drogas afins; e

V - autorização do Presidente da República ou da autoridade por ele delegada.

Art. 7º O teor deste Decreto deverá ser divulgado, antes de sua vigência, por meio da Publicação de Informação Aeronáutica (AIP Brasil), destinada aos aeronavegantes e de conhecimento obrigatório para o exercício da atividade aérea no espaço aéreo brasileiro.

Art. 8º As autoridades responsáveis pelos procedimentos relativos à execução da medida de destruição responderão, cada qual nos limites de suas atribuições, pelos seus atos, quando agirem com excesso ou abuso de poder.

Art. 9º Os procedimentos previstos neste Decreto deverão ser objeto de avaliação periódica, com vistas ao seu aprimoramento.

Art. 10. Fica delegada ao Comandante da Aeronáutica a competência para autorizar a aplicação da medida de destruição.

Art. 11. O Ministério da Defesa, por intermédio do Comando da Aeronáutica, deverá adequar toda documentação interna ao disposto neste Decreto.

Art. 12. Este Decreto entra em vigor noventa dias após a data de sua publicação.

Brasília, 16 de julho de 2004; 183º da Independência e 116º da República.

LUIZ INÁCIO LULA DA SILVA

Márcio Thomaz Bastos

José Viegas Filho

Celso Luiz Nunes Amorim

Jorge Armando Felix

Como visto, a nossa legislação de abate, da maneira como foi editada, *aparentemente*, sugere uma possível inconstitucionalidade já que acaba por instituir uma pena de morte – proibida pela Constituição[4] aos ocupantes de

[4] CF, art. 5º, inciso XLVII, letra 'a'. Decreto Federal nº 2.754, de 27.08.1998, que promulga o Protocolo Adicional à Convenção Americana sobre Direitos Humanos Referente à Abolição da Pena de Morte, adotado em Assunção, em 08.06.1990 e, assinado pelo Brasil em 07.06.1994.

uma aeronave que eventualmente seja alvo do chamado “tiro de destruição”.

A Lei de Abate Brasileira difere pouco da Lei de Abate Alemã. A brasileira restringe-se a traficantes, e a alemã a terroristas. Os argumentos lançados pelo Tribunal Constitucional Federal Alemão, tranquilamente, podem ser transportados para cá e a legislação brasileira ser declarada inconstitucional por violar o direito fundamental à vida e à dignidade da pessoa humana. Tem um porém, a lei brasileira não se preocupa com quem está dentro do avião. Se estiverem tripulantes e/ou passageiros, porventura, inocentes, o avião será derrubado da mesma forma. Caberá a Suprema Corte Brasileira decidir os contornos de tão complexa legilação.

CONSIDERAÇÕES FINAIS

The whole legislation lacks a structure complying with the principle of proportionality (toda legislação carece de uma estrutura em conformidade com o princípio da proporcionalidade). Ou seja, o legislador não pode se afastar do dever de proporcionalidade. Não pode esquecer que as normas, por mais altos que sejam os reclamos sociais, devem espraiar segurança jurídica e respeito à norma constitucional que lhes serve de suporte de validade.

A segurança nacional é um dever do Estado e um direito do cidadão. O Estado para proteger seu povo, diante do terrorismo e outras formas de atentados à segurança pública, deve utilizar proporcionalmente os meios de defesa. Qualquer ataque a direitos fundamentais deve ser adequado, necessário e proporcional em sentido estrito. Qualquer avanço próximo ao núcleo essencial de um direito fundamental deve ser criteriosamente conduzido pelo princípio da proporcionalidade, “na sua função como critério de controle da legitimidade constitucional de medidas restritivas do âmbito de proteção dos direitos fundamentais”[5].

Assim, a opção do *Bundesverfassungsgericht* de declarar inconstitucional o Ato de Segurança da Aviação não levou em consideração o exame da proporcionalidade. Não cotejou os direitos fundamentais colidentes (vida/dignidade humana & vida/dignidade humana). Preocupou-se com as vítimas que estariam dentro da aeronave, mas não se preocupou com as vítimas do possível atentado terrorista, que **sempre** são em número maior. O World Trade Center é um exemplo vivo de destruição em massa que poderia ser evitado.

Não advogo a constitucionalidade da norma declarada inconstitucional pela Suprema Corte Alemã. Apenas, critico a fraqueza dos argumentos e a falta de uma utilização adequada do princípio da proporcionalidade, levando em consideração não só a segurança nacional, mas o direitos fundamental à vida e à dignidade das pessoas em solo. A preocupação maior do Tribunal Constitucional Alemão foi com os passageiros sequestrados (reféns), e não

[5] SARLET, Ingo Wolfgang. *A Eficácia dos Direitos Fundamentais.* 10. ed., Porto Alegre: Livraria do Advogado, 2009, p. 397.

com as “vítimas” em solo. Este é o principal fundamento para considerar a lei inconstitucional, pois não cabe ao Parlamento o direito de fazer escolhas trágicas. Uma lei não pode estabelecer qual vida vale mais, se a de um indivíduo em solo ou a de um indivíduo no ar vítima de terroristas. A legislação não poderia, mas a Corte **deveria** traçar um norte, em caso emergenciais.

REFERÊNCIAS BIBLIOGRÁFICAS

ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Tradução de: Virgílio Afonso da Silva, São Paulo: Malheiros, 2008.

ÁVILA, Humberto. A distinção entre princípios e regras e a redefinição do dever de proporcionalidade. *Revista de Direito Administrativo*. Rio de Janeiro: Renovar, v. 215, jan./mar. 1999, p. 163/164.

_____. *Teoria dos princípios: da definição à aplicação dos princípios jurídicos*. 9. ed., São Paulo: Malheiros, 2009.

BARROS, Suzana de Toledo. *O Princípio da Proporcionalidade e o Controle de Constitucionalidade das Leis Restritivas de Direitos Fundamentais*. Brasília: Brasília Jurídica, 2000.

BARROSO, Luís Roberto (Org.). *A Nova Interpretação Constitucional: ponderação, direitos fundamentais e relações privadas*. 2. ed. Rio de Janeiro: Renovar, 2006.

_____. *Interpretação e aplicação da constituição: Fundamentos de uma dogmática constitucional transformadora*. 5. ed., São Paulo: Saraiva, 2003.

BONAVIDES, Paulo. *Ciência Política*. 16. ed., São Paulo: Malheiros, 2009.

_____. *Curso de Direito Constitucional*. 24. ed., São Paulo: Malheiros, 2009.

_____. *Do Estado Liberal ao Estado Social*. 7. ed., São Paulo: Malheiros, 2004.

CANOTILHO, J. J. Gomes. *Direito Constitucional e Teoria da Constituição*. 7. ed., Coimbra: Almedina, 2008.

COELHO, Inocêncio Mártines; MENDES, Gilmar Ferreira; BRANCO, Paulo Gustavo Gonet. *Curso de Direito Constitucional*. 4. ed., rev. e atual. São Paulo: Saraiva, 2009.

CORDEIRO, Ana Paula Leal Lauande. Lei do abate: necessidade ou terrorismo? *Revista do Curso de Direito/Associação de Ensino Unificado do Distrito Federal (AEUDF)*, v. 4, n. 2, jul./dez. 2003, p. 17-25.

FERRAJOLI, Luigi. *A soberania no mundo moderno: nascimento e crise do estado nacional*. São Paulo: Martins Fontes, 2002.

FERREIRA FILHO, Manoel Gonçalves. *Direitos Humanos Fundamentais*. 8. ed., São Paulo: Saraiva, 2006.

FREITAS, Ricardo de Brito A. P. Aspectos jurídicos das forças armadas na interceptação e no abate de aeronaves: a lei do tiro de destruição. *Revista do Ministério Público Militar*, n. 20, nov. 2007, p. 71-91.

GRAU, Eros Roberto. *A ordem econômica na constituição de 1988: interpretação e crítica*. 12 ed., São Paulo: Malheiros, 2007.

GUIMARÃES, Ana Lúcia Ceolotto. A quem interessa a "Lei do Abate"? *Boletim Ibccrim*, v. 13, n. 156, nov. 2005, p. 16-17.

JUDT, Tony. *Pós-guerra: uma história da Europa desde 1943*. Trad.: José Roberto O´Shea. Rio de Janeiro: Objetiva, 2008.

LIMBERGER, Têmis. Direito e informática: o desafio de proteger os direitos do cidadão. In: *Direitos fundamentais, informática e comunicação: algumas aproximações*. Org.: SARLET, Ingo Wolfgang. Porto Alegre: Livraria do Advogado, 2007.

_____. Proteção dos dados pessoais e comércio eletrônico: os desafios do século XXI. *Revista de Direito do Consumidor*, São Paulo, ano 17, n. 67, jul./set. 2008.

MORO, Sérgio Fernando. *Jurisdição Constitucional como Democracia*. São Paulo: Revista dos Tribunais, 2004.

SARLET, Ingo Wolfgang; FIGUEREDO, Mariana Filchtiner. *Reserva do possível, mínimo existencial e direito à saúde: algumas aproximações*, in *Direitos fundamentais*: orçamento e reserva do possível. Porto Alegre: Livraria do Advogado, 2008.

SARLET, Ingo Wolfgang. *A Eficácia dos Direitos Fundamentais*. 10 ed., Porto Alegre: Livraria do Advogado, 2009.

_____. *Dignidade da Pessoa Humana e Direitos Fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado Ed., 2007.

_____. (Org.). *Dimensões da dignidade* – Ensaios de Filosofia do Direito e Direito Constitucional. Porto Alegre: Livraria do Advogado, 2005.

_____. Valor de Alçada e Limitação do Acesso ao Duplo Grau de Jurisdição. *Revista da Ajuris* 66, 1996.

SARMENTO, Daniel. *A Ponderação de Interesses na Constituição*. Rio de Janeiro: Lumen Juris, 2000.

SILVEIRA, Paulo Antônio Caliendo Velloso da. *Direito tributário e análise econômica do direito: uma visão crítica*. Rio de Janeiro: Elsevier, 2009.