Utrecht University

Shooting Down Hijacked Civil Aircraft:

Unsolvable Legal and Moral Dilemmas?

Master's Thesis

LL.M. Public International Law – Conflict and Security 2021-2022

Student name:	R. Zanen
Student number:	5633532
Supervised by:	Prof. dr. J.A. Couso Salas
Date of completion:	1 July 2022
Word count:	16.034 (excl. frontpage, tables and bibliography)

Table of Contents

List of Abbreviations

ALI	American Law Institute
BGB	Bügerliches Gesetzbuch [German Civil Code]
BVerfG	Bundesverfassungsgericht [German Federal Constitutional Court]
CoE	Council of Europe
ECHR	European Convention on Human Rights
GG	Grundgesetz [German Basic Law]
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
LuftSiG	Luftsicherheitsgesetz [Aviation Security Act]
StGB	Strafgesetzbuch [German Penal Code]
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council

1. Introduction

In the last years the number of terrorist attacks has increased all over the world, but specifically in Europe.[1] Therefore, counterterrorism has never been as important as it is now. One of the most far-reaching actions discussed is the shooting down of hijacked civil aircraft: a legal and moral dilemma which gained much more attention after 11 September 2001, one of the darkest days in history.

On 11 September 2001, four commercial planes in the United States were hijacked by Al-Qaeda members, an Islamist extremist group, to cause mass casualties and partial or complete destruction of the targeted buildings: the Twin Towers in New York and the Pentagon in Arlington, Virginia. In these attacks, 2.977 people from 93 States were killed, which had a major impact all over the world.[2] After these incidents, people discussed the question why these planes have not been shot down. It turned out that Vice-President Dick Cheney ordered to shoot down the last plane, but this has never been executed.[3] The passengers were able to fight back against the Al-Qaeda members[4] and the plane had already crashed in Pennsylvania,[5] which is about a 20-minute flight from Washington D.C.[6]

This was not the first time that shooting down a civilian plane was ordered or in some instances even executed. This phenomenon has already a long history, but after the attacks on 9/11 counterterrorism received a lot more attention. In addition to the major impact these attacks had on society and the increasing fear of repetition, the incidents also caused different responses from States and raised discussions about whether it should be legally justified to shoot down a hijacked civilian plane.

---

[1] Peter Cluskey, 'Deaths from terrorism in Europe have spiked since 2014' *Irish Times* (16 June 2017) <https://www.irishtimes.com/news/world/europe/deaths-from-terrorism-in-europe-have-spiked-since-2014-1.3122948> accessed 2 May 2022. *See also:* Emmanuel Guerisoli, 'The New-Old Terror Wave in Europe (Part 2) A Comparison of European Terrorism Cycles' (*Public Seminar*, 13 September 2017) <http://publicseminar.org/2017/09/the-new-old-terror-wave-in-europe-part-2/> accessed 2 May 2022.

[2] 9/11 Memorial & Museum, 'What happened on 9/11?' <https://www.911memorial.org/911-faqs> accessed 18 April 2022.

[3] Lukas Frederik Muller, 'Identifying German Legal Approaches to Terror – How the Constitution Shapes Legislation Allowing the Shooting Down of a Hijacked Plane' (2018) 19(1) German Law Journal 114. *See also:* Thomas Kean & Lee Hamilton, *National Commission on Terrorist Attacks upon the United States*, The 9/11 Commission report: Final report of the National Commission on Terrorist Attacks upon the United States (2004) 40-41.

[4] 9/11 Memorial & Museum, 'What happened on 9/11?' <https://www.911memorial.org/911-faqs> accessed 18 April 2022.

[5] Muller 2018 (n 3) 114. *See also:* Kean and Hamilton 2004 (n 3) 40-41.

[6] 9/11 Memorial & Museum, 'What happened on 9/11?' <https://www.911memorial.org/911-faqs> accessed 18 April 2022.

Besides the legal dilemmas this topic raised in different States, moral dilemmas have been an important point of discussion as well. Is it desirable to take into account the number of people on the plane and the number of people on the ground when deciding whether or not to shoot down the plane? How can it be determined that it is certain that the plane will fly into a building or people on the ground? In the next part 'problem(s) identified', the legal shortcomings and moral issues will be shortly set out.

1.1. Problem(s) identified

In 1983, the International Civil Aviation Organization (hereinafter: ICAO) adopted Article 3*bis* to the Convention on International Civil Aviation (hereinafter: Chicago Convention),[7] the most important Article to consider in this thesis. Subparagraph a notes that:

> "The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."[8]

However, it took fourteen years, until October 1998, to get the support of enough States for this Article to be ratified,[9] which shows that States highly value their sovereignty.[10]

A problematic issue regarding Article 3*bis* that will be discussed in this thesis is that this provision is subject to an all-encompassing exception to the prohibition on the use of force,[11] namely Article 51 of the Charter of the United Nations (hereinafter: UN Charter),[12]

---

[7] Brian E Foont, 'Shooting Down Civilian Aircraft: Is There an International Law?' (2007) 72 Journal of AiSr Law & Commerce 708. *See also:* Robin Geiß, 'Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3BIS of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz"' (2005) 27(1) Michigan Journal of International Law 233.

[8] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, art. 3*bis*(a).

[9] Joseph Stuhlmann, 'An Examination of the Legal Question of Shooting Down Hijacked Planes Through an Emphasis on Past Passenger Aircraft Incidents' (2019) 13(2) University of St. Thomas Journal of Law and Public Policy 106. *See also:* Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Spring International Publishing 2014) 68.

[10] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, art. 1.

[11] Alonso Gurmendi Dunkelberg, 'A Forewarned War: The Targeting of Civilian Aircrafts in South-America and the Inter-American Human Rights System' (2017) 48 U 7. Miami Inter-American Law Review 6. *See also:* United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 2(4).

[12] United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 51.

which provides the right to self-defense.[13] Thus, Article 3*bis* does not constitute an absolute prohibition, which leaves many gaps in the law that are not yet solved. The adoption of this Article has also been called an "overhasty response to a once imminently perceived threat."[14]

Relying on international law to justify the shooting down of a hijacked civil aircraft is not easy. Actually, there is currently no clear international law rule regulating this topic. Therefore, States shifted to their domestic law to discuss the legality of shooting down hijacked civil aircraft. To provide a good comparison between the State's responses, this thesis will focus on the United States and Germany. Both States are very important for the creation of new law: the United States for the whole of America and Germany for Europe. They have similarities in approaching this topic but are also very different. The United States, for example, did not ratify multiple human rights treaties[15] and does not have the right to human dignity in its constitutional law.[16] This is completely different than the approach of the German Constitutional Court, when it nullified a provision allowing the German air force to shoot down hijacked civil aircraft,[17] which was particularly focused on the infringement of the right to human dignity.[18]

The foregoing raises multiple questions. Is it acceptable to weigh up the lives of the people on the plane against the lives of the people on the ground? If this would be the case, "the right to life becomes an ambivalent right: [t]he state may only save the lives of some by sacrificing the lives of others."[19] Besides, scholars have argued that both the doctrine of double effect and necessity defense will allow the shooting down of hijacked civil aircraft in order to save a greater number of lives on the ground.[20] However, it must be emphasized that the intent

---

[13] Foont 2007 (n 7) 711. *See also:* United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 51.
[14] Geiß 2005 (n 7) 256.
[15] American Civil Liberties Union, 'Treaty Ratification – What's at Stake?' (*American Civil Liberties Union*) <https://www.aclu.org/issues/human-rights/treaty-ratification> accessed 4 March 2022.
[16] Vicki C Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 Montana Law Review 16.
[17] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05. *See also:* Michael Kowalski, 'Shooting down a hijacked plane to prevent worse' (*leidensecurityandglobalaffairsblog*, 4 January 2016) <https://leidensecurityandglobalaffairs.nl/articles/shooting-down-a-hijacked-plane-to-prevent-worse> accessed 31 January 2022.
[18] Muller 2018 (n 3) 120-125. *See also:* Tatjana Hörnle, 'Hijacked Airplanes: May They Be Shot Down? (2007) 10(4) New Criminal Law Review 583.
[19] Oliver Lepsius, 'Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Airport-Security Act' (2006) 7(9) German Law Journal 772.
[20] Paul Schultz, 'The Necessity Defense Revisited: An Examination Through the Case of *Regina v. Dudley & Stephens* and President Bush's Order to Shoot Down Hijacked Aircraft in the Wake of September 11, 2001' (2001) 3(9) Rutgers Journal of Law & Religion, para. 34. *See also:* Simon Bronitt, 'Chapter Five Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War On Terror'* (ANU E Press 2008) 67.

of the hijackers will be important, and that the certainty that the plane will crash will be one of the most important and difficult factors to consider when proposing a new international law rule.[21]

All issues set out above indicate that further research is necessary, and that contemporary international law raises too many questions regarding the situation where civil aircraft is hijacked. Therefore, this thesis will analyze these issues and discuss different views on this topic to finally propose a new international law rule.

1.2. Research question and sub-questions

What are the constitutional responses of the United States and Germany to shooting down hijacked civil aircraft? And what can those responses contribute to the introduction of a new international law rule about this problem?

To answer this research question, sub-questions are created. The following sub-questions will be answered in this thesis:

1. How is the shooting down of civil aircraft currently regulated in international law and how has this law developed?
2. How did the United States and Germany respond to the 9/11 attacks and what kind of issues are raised in these States with regard to the legality of shooting down hijacked civil aircraft?
3. What are the moral issues in the discussions with regard to shooting down hijacked civil aircraft, particularly in the United States and Germany?
4. How can the moral debates that took place in the above-mentioned countries contribute to elaborate a new international law rule concerning the shooting down of hijacked civil aircraft to counter terrorist attacks?

[21] Schultz 2001 (n 20) para. 39.

1.3. Methodology and structure

This thesis will provide an analysis of the evolution of international law with regard to shooting down civil aircraft before and after 9/11, specifically civil aircraft that is hijacked. It will provide a comparative constitutional study on the issues, based on the responses of the United States and Germany to the 9/11 incidents. It will look into the legal and moral issues in these States and how they can contribute to providing a better international law rule with regard to the shooting down of hijacked civil aircraft. In order to answer the research question, sub-questions are created, as set out in the previous section.

The research question requires a combination of research methods, which will be explained per chapter, together with its content. First, chapter 2 sets out the evolution of international law regulating the shooting down of civil aircraft and its shortcomings, making use of the descriptive method. This chapter will be written mainly based on the law and literature. Thereafter, chapter 3 will provide an analysis on how the United States and Germany responded to the 9/11 incidents. The comparative method will be used to discuss the different constitutional responses of these States to the legality of shooting down hijacked civil aircraft. To analyze how to the United States responded, mainly literature and journal articles of scholars will be used. With regard to Germany, the analysis will be based on important case law and journal articles, in which scholars support and criticize the approach of the German Constitutional Court. Chapter 4 will further consider the responses of the United States and Germany but focuses on the moral issues with regard to the topic. The descriptive and comparative method will be used again to look into respectively the theories of utilitarianism and deontology, and into the moral issues discussed in both States regarding the balance that must be made between the rights of the people on board the plane and the rights of the people on the ground. Furthermore, in chapter 5, this thesis will, based on the legal and moral discussions and using the evaluative method, propose a new international law rule, which is more suited to counter contemporary terrorist attacks in this field. At last, in chapter 6, a clear conclusion will be provided to answer the main research question, based on the main findings in this thesis, and prospects for the future will be considered.

2. The International Legal Framework

This chapter will analyze the international legal framework with regard to shooting down civil aircraft. Section 2.1 will set out the history of the international legal framework. Hereafter, section 2.2 will elaborate on the amendments to the Chicago Convention, specifically the adoption of Article 3*bis*. Furthermore, section 2.3 will discuss the status of Article 3*bis* as a customary international law rule. Finally, section 2.4 will consider the exception to Article 3*bis*, focusing on Article 51 of the UN Charter.

2.1. The history of the international legal framework

During the Second World War there was a large increase of flights used for military and civilian purpose. Therefore, a conference was held in 1944 in Chicago, where the ICAO was created by the Chicago Convention.[22] The ICAO, after it was created on 24 October 1945, became a specialized organization of the United Nations (hereinafter: UN), that aims to promote the safety of flight.[23] In its preamble, the Chicago Convention urges that:

> "[T]he future development of international civil aviation can greatly help to create and preserve friendship and understanding among nations and people of the world, yet its abuse can become a threat to the general security."[24]

The biggest concerns were on the one hand, non-state actors who were posing a threat to civil aviation and on the other hand, interstate incidents. The international legal framework has been created in line with these concerns.[25]

It bears noting that only four out of thirteen Conventions regarding international terrorism are related to civil aviation and terrorism. In 1970, the Hague Convention was adopted, regulating the suppression of unlawful seizure of aircraft. This Convention notes in Article 2 that each party to the Convention "undertakes to make the offense of unlawful seizure of aircraft in flight punishable by severe penalties."[26] One year later, the Montreal Convention

[22] Stuhlmann 2019 (n 9) 104-105. *See also:* Gábor Sulyok, 'An assessment of the destruction of rogue civil aircraft under international law and constitutional law' (2006) FUNDAMENTUM 6-7.
[23] Stuhlmann 2019 (n 9) 105.
[24] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, preamble.
[25] Geiß 2005 (n 7) 230.
[26] International Civil Aviation Organization (ICAO), Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) 16 December 1970, 860 UNTS 105, art. 2.

was adopted, regulating unlawful acts against the safety of civil aviation.[27] The Montreal Convention was supplemented by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation in 1988.[28] At last, after one of the biggest terrorist attacks on planes before 9/11: the Lockerbie incident, where all the 259 passengers and 11 Scots on the ground were killed due to a bomb placed in a radio in the luggage on board the Pan Am 103 plane,[29] the Convention on the Marking of Explosives for the Purpose of Detection was signed by States in 1991.[30]

The above-mentioned legal frameworks were focused on the development of more suitable frameworks and were urging States to cooperate in preventing and discouraging the misuse of civil aircraft by private actors. These frameworks approached these issues from a preventive perspective, or "assuming the violations have already occurred, from a criminal jurisdiction and law enforcement perspective intended to attain an equal security standard globally."[31] Thus, one the one hand, there are Conventions and Protocols regulating the abuse of civil aircraft by non-state actors and on the other hand, there is Article 3*bis*, focusing on the regulation of the use of force against civil aircraft.[32] For this thesis, the latter is most relevant. Therefore, the next sections will elaborate on Article 3*bis* of the Chicago Convention.

2.2. The Chicago Convention

The Chicago Convention has its limitations: "it does not apply to military aircraft"[33] and it urges the importance of territorial sovereignty of States. Until 1983, there was no reference in the Convention to the issue whether it was allowed to shoot down civil aircraft.[34] In 1983, a Boeing 747-200 from Korean Airlines was flying from John F. Kennedy Airport in New York to Gimpo Airport in Seoul. It flew unintended over the Kamchatka region, which was part of the Union of Soviet Socialist Republics. At that time, there were traffic restrictions in this region. Soviet authorities thought that the Korean Airlines Flight 007 was on a spy mission and ordered their

[27] International Civil Aviation Organization (ICAO), Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention) 23 September 1971, 974 UNTS 177.
[28] International Civil Aviation Organization (ICAO), Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 24 February 1988, 1589 UNTS 474.
[29] Federal Bureau of Investigation (FBI), 'Pan Am 103 Bombing' <https://www.fbi.gov/history/famous-cases/pan-am-103-bombing> accessed 3 May 2022. *See also:* Jack H Daniel, 'Reform in Airport Security: Panic or Precaution?' (2002) 53(4) Mercer Law Review 1624.
[30] International Civil Aviation Organization (ICAO), Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1 March 1991, 2122 UNTS 359.
[31] Geiß 2005 (n 7) 232.
[32] Ibid 234.
[33] Stuhlmann 2019 (n 9) 105.
[34] Ibid.

air fighters to shoot down the plane. The plane "plunged into the Sea of Japan"[35] and all the 269 people, passengers and crew on board, were killed.[36] Several sanctions were imposed on the Soviet Union, including by the United States. However, the Soviet Union kept claiming that its air space was violated by the plane suspected to be on a spy mission and did not provide any compensation to the families of the victims. The considered draft Resolution by the UN Security Council, in which it was stated that "such use of armed force is incompatible with international behaviour,"[37] was vetoed by the Soviet Union, so did not affect the situation. Hereafter, the ICAO adopted another Resolution on 17 September 1983 with more success, recognizing the statement of the UN Security Council. One year later, on 10 May 1984, Article 3*bis* to the Chicago Convention was adopted.[38] Subparagraph a of this Article notes that:

> "The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."[39]

However, another incident has had to happen in 1998, to get the support of enough States to ratify this Article.[40] Iran Flight 655 was flying from Bandar Abbas Airport in Iran to Dubai in the United Arab Emirates, when a navy ship sailing under the flag of the United States thought the plane was a F-14 fighter jet and fired two missiles to the plane. All 290 people were killed.[41] The fact that it took so long for this Article to come into force, shows that States highly value their sovereignty.[42]

---

[35] Mateusz Osiecki, 'Shooting Down Civil Aircraft in the Light of Sovereignty in Airspace' (2016) 6(6) Sociology Study 393-394.
[36] Ibid.
[37] United Nations Security Council (UNSC) Consideration (1983) 22 I.L.M. 1109, 1110. *See also:* Foont 2007 (n 7) 708.
[38] International Civil Aviation Organization (ICAO) Consideration (1983) 22 I.L.M. 1149, 1150. *See also:* Foont 2007 (n 7) 708 and Geiß 2005 (n 7) 233.
[39] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, art. 3*bis*(a).
[40] Stuhlmann 2019 (n 9) 106. *See also:* Abeyratne 2014 (n 9) 68.
[41] Stuhlmann 2019 (n 9) 111.
[42] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, art. 1.

2.3. Customary International Law

It can be debated whether Article 3*bis* is a rule of customary international law. For a rule to be of customary nature, two criteria must be satisfied in general: customary international law must be in line with general international practice of States (*State practice*), and it must be accepted by the international community as law (*opinio juris*).[43] During the negotiations that led to the adoption of Article 3*bis*, the majority of the delegations was of the opinion that this Article was "merely declaratory of previously existing customary law"[44] and is only representing a specific aspect of the prohibition on the use of force, as laid down in Article 2(4) of the UN Charter. In addition, it was argued that this Article was needed for clarifying some uncertainties in the law. The former view found its basis in the words: "The contracting States recognize that...,"[45] which, according to the majority, suggests the codification of customary international law.[46]

On the other hand, some delegations found that this Article contained new rules, because it is based on the Austro-French proposal, in which it is stated that: "At present time, there is no specific provision in modern international law which unambiguously prohibits the use of armed force against civil aircraft."[47] The draft Article, proposed in the Austro-French text, indicates as well that there was no existing provision, noting the words: "Each contracting State undertakes…,"[48] implying that it entails a new obligation. Finally, at the Extraordinary ICAO Assembly in 1984, it was determined that "no delegation challenged the fact that the prohibition of use of force against civil aircraft is already part of general international law."[49] Therefore, it is accepted that Article 3*bis* is part of customary international law, so States should adhere to this provision regardless of whether they have ratified this Article.

[43] Foont 2007 (n 7) 703.
[44] Geiß 2005 (n 7) 252.
[45] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, art. 3*bis*(a).
[46] Kimberley Trapp, 'Uses of Force against Civil Aircraft' (*EJIL: Talk!*, 28 June 2011) <https://www.ejiltalk.org/uses-of-force-against-civil-aircraft/> accessed 31 January 2022. *See also:* Lars Schönwald, 'Der Abschuss von Zivilflugzeugen als ultima ratio zur Abwehr von sogenannten Renegades aus völkerrechtlicher Sicht' (2012) 50(1) Archiv des Völkerrechts 98 and Eugene Sochor, 'Icao and Armed Attacks against Civil Aviation' (1988/1989) 44(1) International Journal 162.
[47] International Civil Aviation Organization (ICAO) Assembly 25th Session (Extraordinary), *Executive Committee: Report, Minutes and Documents* (1984) ICAO Doc. 9438, A25-EX/4, 167. *See also:* Geiß 2005 (n 7) 252-253.
[48] Ibid.
[49] Rory Stephen Brown, 'Shooting Down Civilian Aircraft: Illegal, Immoral and Just Plane Stupid' (2007) 20(1) Revue québécoise de droit international 62.

2.4. Article 51 UN Charter

Paragraph a of Article 3*bis* notes the following: "This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."[50] This sentence implies that Article 3*bis* is subject to an all-encompassing exception to the prohibition on the use of force,[51] namely Article 51 of the UN Charter,[52] which provides the right to self-defense.[53] This sentence implies that when there is no right to self-defense, no force can be used against civil aircraft.

Article 51 applies in principle to interstate contexts,[54] but it has been argued that Article 3*bis* goes further than this, noting that the Article is also violated when force is used against civil aircraft that is registered in the State that is using force.[55] The principle of sovereignty, as mentioned in Article 2 of the UN Charter,[56] "preserves the right to domestic use of force subject merely to a state's international human rights and humanitarian obligations."[57] From this, it can be argued that Article 3*bis* in combination with the UN Charter entails a wider interpretation and more options for countermeasures, as long as international human rights and humanitarian law are not violated.[58] This reasoning is also in line with the object and purpose of the Convention, which is to "promote the safety of all international civil aviation."[59] On the other hand, considering the original purpose of Article 51 of the UN Charter, to provide in the option for self-defense in interstate contexts, Article 3*bis* should be read in consistency with this. To substantiate this, it has been argued that nothing in the original purpose of Article 51 implies that it should also apply to purely domestic contexts. Supporters of this view are of the opinion that these purely domestic contexts should be regulated by domestic law, international human

[50] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295, art. 3*bis*(a).
[51] Gurmendi Dunkelberg 2017 (n 11) 6. *See also:* United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 2(4) and Sean D Murphy, 'Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter (2002) 43(1) Harvard International Law Journal 44.
[52] United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 51.
[53] Ibid. *See also:* Foont 2007 (n 7) 711.
[54] United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 51.
[55] Geiß 2005 (n 7) 250-251.
[56] United Nations, Charter of the United Nations (UN Charter) (adopted 26 June 1945, entered into force 24 October 1945) 892 UNTS 119, art. 2.
[57] Geiß 2005 (n 7) 250.
[58] Ibid.
[59] International Civil Aviation Organization (ICAO), Convention on Civil Aviation (Chicago Convention) 7 December 1944, 15 UNTS 295 art. 44(h). *See also:* Kimberley Trapp, 'Uses of Force against Civil Aircraft' (*EJIL: Talk!*, 28 June 2011) <https://www.ejiltalk.org/uses-of-force-against-civil-aircraft/> accessed 31 January 2022.

rights law and humanitarian law.[60] It can thus be debated whether Article 3*bis* applies to shooting down aircraft of a State's own registration.

It is uncontested that, if civil aircraft is posing a threat to security, Article 3*bis* notes the possibility to apply the rules of self-defense, as laid down in Article 51 UN Charter. If Article 51 can be applied, proportionality and necessity will play a role.[61] In the *Nuclear Weapons Case*, the International Court of Justice has determined that:

> "The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. [...] This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[62]

The application of the principles of proportionality and necessity raises multiple issues. To know whether it is necessary to shoot down hijacked civil aircraft posing a threat to security, Ground Control must be sure that the shooting down will prevent an attack. In addition, it can be debated if it is possible for Ground Control to be sure of this at all. Besides, and relevant for further chapters of this thesis, it is questionable how we should measure proportionality in this case. For example, is it acceptable to weigh up the lives of people on board the plane against the lives of people on the ground? The issues with regard to certainty and how to measure proportionality are not yet covered in the law and in addition, there is not much case law about this topic. This leaves many questions unanswered with regard to countering the contemporary terrorist threats.

2.5. Sub-conclusion

Considering the above-mentioned issues, Article 3*bis* does not constitute an absolute prohibition, which leaves many gaps in the law that are not yet solved. Article 3*bis* has also been called an "overhasty response to a once imminently perceived threat."[63] Threats have changed in the last years and the law should do the same, as it is not a useful system anymore to counter the current terrorist attacks.

Thus, Article 3*bis* does not give clear guidance to States on how they should act when an attack, as happened on 9/11, takes place. Therefore, after the 9/11 attacks, States shifted to

[60] Geiß 2005 (n 7) 251.
[61] Ibid.
[62] *Legality of the Threat or Use of Nuclear Weapons Case* (Advisory Opinion) [1996] ICJ Rep. 226, para. 41.
[63] Geiß 2005 (n 7) 256.

their domestic law. In multiple states, discussions have taken place about whether it should be legal to shoot down hijacked civil aircraft in order to save the lives of the people on the ground. The next chapter will provide a comparison between the responses of different States, focusing on the United States and Germany.

3. The Responses of the United States and Germany to the 9/11 Attacks

This chapter will analyze the different responses of the United States and Germany to the 9/11 attacks. After the attacks took place, there were States that were considering adopting national laws in order to make shooting down hijacked civil aircraft legal. Some States were of the opinion that it should be possible to shoot down hijacked civil aircraft in order to save the lives of people on the ground. This raised debates about the acceptability to shoot down the innocent passengers and crew on board. To analyze and discuss the differences between the responses of the two States, section 3.1 will look into the response of the United States and section 3.2 will look into Germany's response. With regard to Germany, section 3.2.1 will first elaborate on the protection of human rights specifically in this country. Second, section 3.2.2 will analyze the *Aviation Security Case* and at last, section 3.2.3 will go into the critiques given on this case. This thesis is focusing on these two States, because they have similarities but are also very different in approaching people's rights.

3.1. The United States

Before 9/11, the United States had countermeasures that were used against 'traditional hijacking'. There were no measures focusing on suicide hijacking, in which a civilian plane is used as a weapon. After 9/11, policymakers in different States started to focus on making defense measures stricter to seek a certain security standard. Some States agreed on shooting down hijacked civil aircraft as a countermeasure when there are no other options left. To justify the shooting down, they were arguing that the small amount of people on board the plane that would be killed by the shooting down, will be less bad than killing the greater amount of people on the ground.[64]

During the attacks taking place on 9/11, former Vice President of the United States, Dick Cheney, authorized the shooting down of other hijacked planes that were posing a threat. In line with the foregoing, the United States implemented new rules authorizing the North American Aerospace Defense Command to shoot down civil aircraft that is hijacked and used as a weapon, although there is no official policy for this.[65] It bears noting that there is little

[64] Sandra Song, 'Aircraft Hijackings: Balancing State Security Vs. Human Dignity' (*NATO Association*, 25 June 2013) <https://natoassociation.ca/aircraft-hijackings-balancing-state-security-vs-human-dignity/> accessed 18 February 2022.
[65] Ibid.

scholarly debate about these new rules that allow the Executive Branch of the Government of the United States to order the shooting down of hijacked planes.[66]

Air Force General Ralph Eberhart made a statement in which he said that "shooting down a suspicious civilian airline would be the last resort,"[67] but "if we don't do this, innocent people on the ground are going to die."[68] This reasoning reflects the Model Penal Code, from which it can be inferred that "someone who kills one person (especially one who was about to die anyway) in order to save thousands of others is obviously entitled to a justification defense."[69] The commentaries to the Model Penal Code state that:

> "The life of every individual must be taken in such a case to be of equal value and the numerical preponderance in the lives saved compared to those sacrificed surely should establish legal justification for the act."[70]

It is noteworthy that the United States mentions 'numerical preponderance' in the commentaries to the Model Penal Code, which shows that they take into account the 'greater number' of people on the ground that will be saved when the hijacked plane is shot down. The foregoing differs from the German view, where the justification defense of necessity, provided in section 34 of the German Penal Code (*Strafgesetzbuch*),[71] does not extend to the killing of innocent people. In Germany, it is the prevailing opinion that:

> "The legal interest of human life is neither to be graded by its quality - each life holds the same rank - nor can it be subject to a consideration with regard to the number of human lives opposing each other; nobody shall kill a human being in order to save several others."[72]

---

[66] Steven H Resnicoff, 'Shooting Down Suicide Airplanes – What's Law Got to Do With It?' (2011) 10 Issues Aviation Law and Policy 293.
[67] BBC, 'US pilots train shooting civilian planes' *BBC* (3 October 2003) <http://news.bbc.co.uk/2/hi/americas/3161354.stm> accessed 8 February 2022.
[68] Ibid.
[69] Malcolm Thorburn, 'The Constitution of Criminal Law: Justifications, Policing and the State's Fiduciary Duties' (2011) 5(3) Criminal Law and Philosophy 261.
[70] Ibid. *See also:* American Law Institute (ALI), Model Penal Code and Commentaries: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985) Part I, Vol. 3, para. 3.02.
[71] Penal Code for the Federal Republic of Germany [Strafgesetzbuch] (StGB) 15 May 1871, § 34.
[72] Thorburn 2011 (n 69) 261.

This shows that Germany, in contrast to the United States, takes a different path and does not take into account the probably greater number of people on the ground that would be saved by shooting down the hijacked plane.

One of the important factors that can declare the differences in responses of Germany and the United States, is that the latter did not ratify multiple human rights treaties.[73] This may explain why the United States gives itself more freedom in the 'interpretation' of human rights. Moreover, where the German Constitutional Court focuses specifically on the violation of the right to human dignity,[74] which will be discussed in the next section, this right is not mentioned in the constitutional law of the United States.[75] In addition, where Germany states that there are no exceptions to the right to life and the right to human dignity, the United States does provide in exceptions to all fundamental rights, as long as the restriction to these fundamental rights is for the promotion of a compelling State interest.[76] The foregoing may explain why the United States allows the shooting down of hijacked civil aircraft, given that the United States values the State's best interest and that a terrorist attack poses a threat to the national security of the State. It is however questionable if such a comparison, between the State's interest and individual rights, should be made, because it can be debated whether human rights must give way to the national interest of the State.[77]

The new rules adopted in the United States have not been criticized by many scholars, but there is one American Law journal that did criticize them.[78] However, it ignored the fact that there is a distinction between the justification of "an action ex post facto and announcing it ex ante,"[79] which refers to the discussion about anticipatory self-defense.[80] Besides, necessity defense may only be invoked when a person itself is at risk. It can thus not be used as an excuse by a third-party rescuer. Another problematic issue following from this, is that there are no clear rules on responsibility. What if a pilot is acting on its own and shoots down the hijacked plane? Who is responsible for this?[81] It is clear that there is too little scholarly debate in the United States on this topic, which is interesting because it is a far-reaching statement to state that hijacked civil aircraft will be shot down in the future. The shooting down of hijacked civil

[73] American Civil Liberties Union, 'Treaty Ratification – What's at Stake?' (*American Civil Liberties Union*) <https://www.aclu.org/issues/human-rights/treaty-ratification> accessed 4 March 2022.
[74] Muller 2018 (n 3) 120-125.
[75] Jackson 2004 (n 16) 16.
[76] Resnicoff 2011 (n 66) 297.
[77] Ibid.
[78] Schultz 2001 (n 20).
[79] Resnicoff 2011 (n 66) 298.
[80] Louis-Philippe Rouillard, 'The Caroline Case: Anticipatory Self-Defence in Contemporary International Law' (2004) 1(2) Miskolc Journal of International Law 105.
[81] Resnicoff 2011 (n 66) 299.

aircraft has led to more discussion in other States, such as Germany, which will be discussed in the next part.

3.2. Germany

After a pilot in a small plane was flying above Frankfurt and threatened to fly into the European Central Bank skyscraper in 2003, "the German legislature enacted § 14 Aviation Security Act *(Luftsicherheitsgesetz – LuftSiG)* […] to deal with suicide hijackings"[82] in 2004, which was supposed to be a "last resort clause."[83] In this provision, it was stated that:

> "(1) To avoid a particularly grave disaster, Armed Forces can intervene in the airspace diverting airplanes, forcing them to land, and opening with warning fire.
> (2) The Armed Forces must choose, among the possible measures, the least detrimental measure for individuals and for the people in general. Its scope and duration will not exceed the strict necessity for achieving its objective. The measure cannot bring a disproportionate damage with regard to its objective.
> (3) The direct use of weapons is only allowed if it can be assumed under the specific circumstances that the airplane is going to be used against the lives of individuals and that the shooting is the only means of defense against this imminent danger.
> (4) Only the Federal Minister of Defense or, in his place, an expressly authorized member of the Government can order the measure in number 3. The Federal Minister of Defense can authorize the Air Force Commander to adopt the measures in number 1."[84]

After this rule was adopted, a discussion was raised about its constitutionality, particularly about the third paragraph of § 14. The then German President, Horst Köhler, expressed his doubts as well about the constitutionality of the provision and soon after this, a couple of pilots brought the case before the Federal German Constitutional Court (*Bundesverfassungsgericht*) (hereinafter: Constitutional Court).[85] First, to provide an analysis of the constitutionality of this provision, section 3.2.1 will look into the protection of human rights in the German Constitution. Second, section 3.2.2 will discuss the case brought before the Constitutional Court and section 3.2.3 will discuss the criticism of the Constitutional Court's decision.

[82] Muller 2018 (n 3) 115.
[83] Geiß 2005 (n 7) 235.
[84] Aviation Security Act [Luftsicherheitsgesetz] (LuftSiG) 11 January 2005, BGBI. I at 78, § 14. *See also:* Muller 2018 (n 3) 115.
[85] Muller 2018 (n 3) 117.

3.2.1. The German Constitution and the protection of human rights

The Constitutional Court was of the opinion that law allowing the shooting down of a civilian plane violates the right to human dignity and the right to life of all passengers, which will be further discussed in the next section. First, it is important to note that special attention is given to the right to human dignity in the German Constitution. The new humanism in Germany, which came with the enactment of the Constitution in 1949, shows that the right to human dignity is a basic principle.[86] It is placed in the beginning of the Constitution, namely in Article 1, paragraph 1, and is the only right in the Constitution that is inviolable.[87] An important aspect of the right to human dignity is the protection of human rights in general. The right to human dignity influences the constitutional order as a whole and obligates the State "both to protect and realize it."[88] Besides the right to human dignity, the Constitutional Court also focused on the right to life. The right to life is noted in Article 2, paragraph 2, of the German Constitution: "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."[89] However, the decision of the Constitutional Court focuses more on the violation of the right to human dignity, which is also more relevant for the analysis that this thesis is making.

From a German Constitutional Law perspective, there must be a balance between the protection of individual liberty and national security, as also reflected in the approach of the United States. The German Constitution "protects the physical integrity of every human being, including the people on the ground, the passengers, the crew members, and the terrorists – irrespective of their nationalities."[90] Interference with this right is possible, but there has to be a balance between the conflicting rights. The issue raised is, if one of these rights, either the rights of the people on board the plane or the rights of the people on the ground, obtain a "higher level of protection."[91] This raises the question: is it possible to weigh up the lives of the innocent people on board the plane against the lives of the innocent people on the ground? This will be elaborated in the next section, based on the *Aviation Security Case* brought before the Constitutional Court.

---

[86] Ibid 119.
[87] Basic Law for the Federal Republic of Germany [Grundgesetz] (GG) 23 May 1949, art. 1(1). *See also:* Hörnle 2007 (n 18) 583.
[88] Edward J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' (1997) Utah Law Review 972. *See also:* Manuel Ladiges, '*Comment* – Oliver Lepsius's *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*' (2007) 8(3) German Law Journal 309.
[89] Basic Law for the Federal Republic of Germany [Grundgesetz] (GG) 23 May 1949, art. 2(2).
[90] Muller 2018 (n 3) 117.
[91] Ibid.

3.2.2. The *Aviation Security Case*

The Constitutional Court determined that it should not be allowed to balance the number of lives of people on board the plane against the number of lives of the people on the ground and therefore, it is not allowed to shoot down a hijacked civilian plane.[92] One of the reasons provided by the Constitutional Court is that the people on board, particularly the crew and the passengers, could not exert any influence on the situation described under § 14(3).[93] Besides, the Constitutional Court has determined that this rule treats the people on board the plane as mere objects of the State. The deaths of these people cannot be considered as unavoidable harm in favor of saving the people on the ground. The reason for this given by the Constitutional Court, is that the Federal Minister of Defense is able to decide whether to shoot down the plane, based on the information provided to him or her. The argument that the lives of the people on board will not be long in any case compared to the lives of the people on the ground, implies that the lives of the people on board are of less value, which is not acceptable according to the Constitutional Court.[94] Finally, the Constitutional Court determined that § 14(3) of the Aviation Security Act was unconstitutional[95] and nullified the provision.[96]

Referring back to the balance made between the protection of individual liberty and national security, and thereby the choice for individual liberty by the Constitutional Court, it bears noting that in other cases before the Constitutional Court, the protection of the individual liberty was also considered more important. Some anti-terrorist provisions that were adopted were struck down by the Constitutional Court, because human rights were violated.[97] So, there is a clear pattern in cases before the Constitutional Court in which the protection of the individual liberty is of high priority.

---

[92] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 122. *See also:* Muller 2018 (n 3) 120-125.
[93] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 122.
[94] Ibid para. 37.
[95] Geiß 2005 (n 7) 235.
[96] Michael Kowalski, 'Shooting down a hijacked plane to prevent worse' (*leidensecurityandglobalaffairsblog*, 4 January 2016) <https://leidensecurityandglobalaffairs.nl/articles/shooting-down-a-hijacked-plane-to-prevent-worse> accessed 31 January 2022.
[97] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 121. *See also:* Miguel Beltrán de Felipe and José María Rodríquez de Santiago, 'Shooting Down Hijacked Aeroplanes? Sorry, We're Humanists' (2008) 14(4) European Public Law 578.

3.2.3. Critiques on the *Aviation Security Case*

The decision of the Constitutional Court that § 14(3) violates the right to human dignity in conjunction with the right to life can be criticized. The Constitutional Court has applied a restrictive interpretation of the right to human dignity in stating that the innocent people on board are being used as mere objects of the State.[98] It has been argued that this absolute right was intended "to prevent the new German State specifically from the intentional use of extreme humiliating force after World War II – like torture."[99] However, Germany is not the only State that values human dignity more than national security. The Constitutional Tribunal in Poland also rejected similar legislation on the basis of a violation of the right to human dignity.[100] Nevertheless, with regard to the decision made by the Constitutional Court in the *Aviation Security Case,* it could be argued that the Constitutional Court goes beyond the purpose of the law.

Muller has made a comparison between the 'object' reasoning of the Court in this case and the loss of innocent civilians during wartime. The argument made by the Constitutional Court in which it stated that the innocent people on board the plane are in this situation completely without their own fault and are not able to exert any influence on the situation, implies that shooting down the plane could be justified if there were only hijackers on board.[101] The hijackers have put themselves in this situation with fault and therefore, renounced their right to human dignity. As a consequence, according to the Constitutional Court, it is allowed to treat them as objects of the State.[102]

If the killing of innocent people on board the plane is compared to the killing of innocent civilians during wartime, it can be argued that the Constitutional Court has provided a questionable argument. These two situations are actually the same. Both the people on board the hijacked plane and civilians in wartime are innocent people who cannot change the situation they find themselves in. The German Constitution makes it clear that the right to human dignity applies in both peace- and wartime. Therefore, the fact that the situation in which innocent

---

[98] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 134. *See also:* Kai Möller, 'The Right to Life Between Absolute and Proportional Protection' in Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds), *Shooting to kill: socio-legal perspectives on the lethal use of force* (Bloomsbury Publishing 2012) 50.
[99] Muller 2018 (n 3) 124.
[100] *Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened,* Sądu Najwyższego [Polish Supreme Court] Judgment of 30 September 2008, K 44/07.
[101] Raymond Youngs, 'Germany: Shooting down aircraft and analyzing computer data' (2018) 6(2) International Journal of Constitutional Law 334. *See also:* Luis Ernesto Chiesa Aponte, 'Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing' (2007) 10(1) New Criminal Law Review 120.
[102] Muller 2018 (n 3) 121.

civilians are killed takes place in wartime does not change anything, because the right to human dignity should still be respected. Besides, with regard to the killing of innocent civilians in wartime, in consistency with Articles 8(2)(b)(iv) of the Rome Statute,[103] 52(3) of Protocol 1 to the Geneva Conventions,[104] and Article 15(2) of the European Convention on Human Rights,[105] the German Constitution acknowledges that the killing of these innocent civilians may be necessary, but it must be proportional.[106]

Drawing a parallel to the issue analyzed in this thesis, the same comparison could be made. The innocent people on the ground are also in that place without them being able to do anything about it. It can be argued that their right to human dignity is also violated when the State decides *not* to shoot down the plane. However, the Constitutional Court decided that the rights of both the people on board the plane and the people on the ground are two absolute rights that cannot be weighed up against each other. Therefore, the question is why the passengers and crew on board the plane cannot be classified as collateral damage, since they also did not choose to be "defenselessly at the mercy of the [S]tate."[107] When they can be seen as collateral damage, it could be argued that the killing of these people cannot be classified as an intended consequence and therefore they can no longer be seen as mere objects of the State. In that case, the deaths of the passengers and the crew could be considered "the result of a valuation of the contrasting rights."[108]

[103] United Nations General Assembly, The United Nations Rome Statute of the International Criminal Court (Rome Statute) (adopted 17 July 1998, entered into force 1 July 2002) United Nations Treaty Series, vol. 2187, No. 38544, art. 8(2)(b)(iv): "Other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law, namely, any of the following acts: […] Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated."
[104] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art. 52(3): "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, is shall be presumed not to be so used."
[105] Council of Europe, European Convention on Human Rights (ECHR) (adopted 4 November 1950, entered into force 3 September 1953) Council of Europe Treaty Series, vol. 005, art. 15(2): "No derogation from Article 2 [Right to Life], except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision."
[106] Muller 2018 (n 3) 121-122.
[107] Ibid 124.
[108] Ibid.

3.3. Sub-conclusion

As can be concluded from the sections above, there are differences between the United States and Germany in approaching the issue regarding the shooting down of hijacked civil aircraft. One of the reasons for this is the importance of the right to human dignity in Germany. However, the Constitutional Court has put forward arguments in the *Aviation Security Case* that can be criticized. It is obvious that both States have switched to their domestic law to discuss the legality of the shooting down of hijacked civil aircraft, which is not desirable as it creates a lot of divergence in approaching the issue, as can be concluded from the analysis made in this chapter. Purely based on these responses, it is not possible to propose a new international law rule. Therefore, it is also important to discuss the moral debates in the United States and Germany, in order to consider how these moral debates could mean something for the 'lex ferenda': the law how it should be.

4. The Moral Debates in the United States and Germany

In order to finally propose a new international law rule, it is necessary, besides analyzing the (more legal) responses of the United States and Germany, to also analyze the moral debates that took place in these countries with regard to the shooting down of hijacked civil aircraft. The arguments put forward in the moral debates could be of relevance for the elaboration of a new international law rule. First, section 4.1 of this chapter will consider the principles of utilitarianism and deontology; both principles can be used for analyzing moral dilemmas. Second, section 4.2 will consider two moral dilemmas with regard to shooting down hijacked civil aircraft. Section 4.2.1 will discuss, referring to calculating the number of persons, the doctrine of double effect and necessity defense, mostly used in American law. Furthermore, section 4.2.2 will further discuss the balancing of the two lesser evils and at last, section 4.2.3 will analyze the (un)certain intent of the hijackers.

4.1. The principles of utilitarianism and deontology

This section will start with a prominent example regarding the acceptability of calculating the number of survivors that has been illustrated in the German literature since around 1951 and in the American literature for already a couple of decades. This example will help to show how one can respond differently to the same issue.

A train, which is out of control, "threatens to kill a great number of persons (either on the same track or in a passenger train with which it will soon collide)."[109] It is possible for a person to switch the train to another track, but then it will certainly kill a man working on that track. Could the throwing of the switch by the man be justified, although he knew that the train would certainly kill that one person?

The first approach one can take to react to such an issue, is taking into account the principle of utilitarianism, which "implies that the morality of an action is determined by its consequences (e.g., harming others is acceptable if it increases the well-being of a greater number of people)."[110] This first approach is thus result-oriented, where "one would compare the number of expected deaths in both possible courses of events."[111] Following this principle, one would say that throwing the switch is justified, because only one person will be killed and the killing of a greater number of people is prevented by this action. Drawing a parallel to the

[109] Hörnle 2007 (n 18) 590-591.
[110] Paul Conway and Bertram Gawronski, 'Deontological and Utilitarian Inclinations in Moral Decision Making: A Process Dissociation Approach' (2013) 104(2) Journal of Personality and Social Psychology 216.
[111] Hörnle 2007 (n 18) 589.

issue discussed in this thesis, this approach will lead to the comparison between the number of persons on board the plane and the number of persons on the ground. Thus, if the principle of utilitarianism is considered, this will suggest that it is morally justified to shoot down the hijacked plane, including the innocent passengers and crew, in order to save the greater number of people on the ground.

The other way one could react to this case is considering the principle of deontology. This principle implies that "the morality of an action depends on the intrinsic nature of the action (e.g., harming others is wrong regardless of its consequences)."[112] If this approach is applied to the example given in the beginning of this section, one would argue that killing the one man by throwing the switch cannot be justified in order to save a greater number of people. Drawing a parallel to the issue discussed in this thesis again, considering the principle of deontology, one would argue that killing the innocent passengers and crew on board can never be justified, because in principle, harming others is wrong.

However, besides the two main approaches mentioned earlier, there is another option which would lead to similar results as the utilitarian approach and thus would allow the shooting down of hijacked planes, namely, to enter into a contract. In that case, it could be argued that:

> "A group of persons under the veil of ignorance (that is, ignorant about their individual position should the drama later become real) might agree beforehand that such action should be allowed as it is statistically more likely that they would be at the airport than in the plane."[113]

It could thus also be possible to let the passengers and crew 'sign' a contract beforehand and let them agree that they will be shot down if the plane would be hijacked and fly into a group of people on the ground. Hörnle argues that in this situation, the people on board the plane and the people on the ground are actually part of a larger group consisting of people that are travelling and people who are working for an airline. Shooting down a hijacked plane would then be in the interest of all the people that are part of this large group, because they are statistically more likely to benefit from this rule.[114] This last option could be a solution to the issue discussed in this thesis, because one would avoid the discussion about balancing the number of people in the law. However, probably many States will have a different reaction to

[112] Conway and Gawronski 2013 (n 110) 216.
[113] Hörnle 2007 (n 18) 589.
[114] Ibid 589-590.

this and will adopt their own policies. So, this does not solve the problem in this thesis, because in that situation there would still not be a clear guideline in general.

The result-oriented theory discussed in this section is the theory that have been criticized the most. Therefore, the next section will elaborate mostly on this issue.

4.2. Two moral dilemmas discussed in the United States and Germany

Scholars have different opinions on the application of the principles of utilitarianism and deontology, but in general, German scholars are of the opinion that arithmetic arguments are prohibited,[115] and American scholars, on the other hand, are of the opinion that calculating the number of persons should be allowed in order to save a greater number of people.[116] This section will first discuss the desirability of calculating the number of people from an American and German view and will then elaborate on the intent of the hijackers.

4.2.1. The doctrine of double effect and necessity defense

In relation to calculating the number of deaths, as discussed above, Schultz mentions the doctrine of double effect. Thomas Aquinas was the first formulating this doctrine, which has influenced American law.[117] It "focuses on the actor's motive from a moral standpoint"[118] and not primarily, like utilitarianism, on weighing up the number of persons involved against each other. According to this doctrine,

> "a person may engage in acts that result in the death of another in order to save a greater number of people if the death is not intended and provided that the acts are not themselves a means of saving lives of others."[119]

In the United States, this doctrine has influenced general law and the legal view on necessity defense.[120] American Courts require the following criteria to be met to invoke necessity defense:

---

[115] Claus Roxin, *Strafrecht Allgemeiner Teil, Band 1* (4th edn.) (2006) 739. *See also:* Harro Otto, *Grundkurs Strafrecht: allgemeine Strafrechtslehre* (De Gruyter 2004) 144.
[116] Frances Kamm, 'Harming some to save others' (1989) 57(3) Philosophical Studies 227-228. *See also:* Philippa Foot, 'The Problem of Abortion and the Doctrine of the Double Effect' (1967) 5 Oxford Review 23.
[117] Edward C Lyons, 'In Incognito – The Principle of Double Effect in American Constitutional Law' (2005) 57(3) Florida Law Review 478. *See also:* John Kleinig and Tziporah Kasachkoff, 'Civil Emergencies and the Claims of Innocence' in Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds), *Shooting to kill: socio-legal perspectives on the lethal use of force* (Bloomsbury Publishing 2012) 26.
[118] Schultz 2001 (n 20) para. 3.
[119] Ibid.
[120] Ibid para. 12.

"1) the harm to be avoided is greater than the harm caused by the defendant's illegal activities;
2) there is no legal alternative to breaking the law;
3) the harm to be prevented is imminent;
4) it is reasonable to believe that the defendant's actions will be effective in abating the harm."[121]

The first requirement does reflect in a way the principle of utilitarianism, because the harm to be avoided is weighed up against the harm caused by the illegal activity. The second requirement implies that first other alternatives than breaking the law should be considered, before necessity defense can be invoked, so it must be seen as a last resort. Furthermore, the third requirement implies that the actor is in a situation of emergency. Finally, the fourth requirement implies that it must be likely that the harm that otherwise would be caused, is now prevented, because necessity defense is invoked.[122]

Necessity defense can be best explained on the basis of the American Model Penal Code, as discussed earlier in the foregoing chapter. The requirements for invoking necessity defense that have to be fulfilled according to the Model Penal Code are:

"a) the harm or evil sough to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear."[123]

In consistency with the doctrine of double effect and necessity defense, it can be argued that, in the United States, it is overall morally justified to shoot down hijacked planes in comparable situations to those that took place on 9/11, when a greater number of lives on the ground are saved. Shooting down hijacked civil aircraft will meet the above-mentioned conditions. First, shooting down the hijacked plane and killing the people on board that plane is a less severe harm than when the plane would kill the greater number of people on the ground. Second, it seems that there is no other defense available because the plane will crash otherwise, if it is certain that this is the case. Third, the defense is not foreclosed by any statute. In addition,

[121] Ibid para. 25.
[122] Ibid.
[123] American Law Institute (ALI), Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962 (1985) § 3.02. *See also:* Schultz 2001 (n 20) para. 27.

relating to the order from the President to shoot down the last plane that would crash on 9/11, Schultz has argued that the President would not issue such an order if he was not sure that the plane would cause more deaths had it not been shot down.[124]

Based on both the doctrine of double effect and necessity defense, it would be justified to shoot down hijacked civil aircraft. However, both are mostly used in American law and not as much discussed in Germany. Therefore, the next section will consider the balancing of the two lesser evils also from the German moral perspective.

4.2.2. Balancing the two lesser evils

Not only debates have been held about what is morally justified in the United States on these issues, but they have also been held regarding the decision of the German Constitutional Court. The German scholar Lepsius points out that on the one hand, the Airport Security Act in Germany "sacrifices the lives of the innocent on board, but it does so, on the other hand, with the goal of rescuing an unknown number of victims on the ground."[125] Thus, when the larger evil is balanced against the lesser evil, it could be constitutional to shoot down the plane in order to rescue the people on the ground. He argued that "in this view, the right to life becomes an ambivalent right: The state may only save the lives of some by sacrificing the lives of others."[126] However, the Constitutional Court did not give the option to the parliament to make such a choice, so when the choice between the two lesser evils must be made, one can currently not rely on the law for the act to be authorized. The law as it exists now does not provide in the option to balance the possible number of deaths and "also signals the authorities that collective goods may not, under any circumstances, outstrip individual rights."[127] One of the reasons the Court did not want to consider a utilitarian approach is probably because implementing such an approach would open a Pandora's box. If the lives of people would be weighed up against each other and the final decision would depend on the number of lives, the human rights of people will no longer be subjective rights, but collective rights.[128] However, it has been argued by Häubler that the utilitarian approach could be a solution to the issue, but only when the passengers and crew do not have a "reasonable prospect of survival."[129] The reasonable prospect of survival will only be zero percent, if it is certain that the plane will crash, which

[124] Schultz 2001 (n 20) para. 34-37.
[125] Lepsius 2006 (n 19) 772.
[126] Ibid.
[127] Ibid.
[128] Ulf Häubler, 'Air Policing and Counter-Renegade Action: Options beyond the German Aviation Security Act' (2009) 48(1-2) Military Law and Law of War Review 60.
[129] Ibid.

will be further discussed in the next section. Jahn doubts whether there is an option at all to not violate the right to human dignity and approaches the issue as follows: "The compulsion to live until the terrorists have achieved their main goal, mass murder, can be understood as an intolerable violation of the human dignity of the hostages."[130] Arguing this way, this would imply that letting the people suffer for a couple of minutes longer than necessary, is also a violation of the right to human dignity of the passengers and the crew. It is further argued that:

> "With such a legal position, the Federal Constitutional Court would do justice to a tragic situation in which there is no way out without violating the human dignity of hostages. The human dignity of the hostages is not preserved by allowing them to live for 3 [minutes] longer so that they can be used as instruments to violate human dignity and kill a large number of other people, who have the chance of being saved."[131]

With this reasoning, a relevant point is made. The few extra minutes the people on board would live, if the plane *is not* shot down, does not outweigh saving a larger group of people on the ground, if the plane *is* shot down. The State has a duty to protect its citizens against attacks by other people, so when State officials need to decide whether to shoot down the hijacked plane, it is no longer possible to argue why the group of people on board the plane is chosen for protection instead of the group of people on the ground. Consequentialist thinking must be definitely seen as a last resort,[132] but it is a relevant point to take into consideration when proposing a new international law rule. Brown has agreed with this reasoning as well and states that it is the role of the State to intervene when people's lives are threatened by other people, even if that includes that the State must eliminate (perhaps) its own citizens.[133] However, there is a big difference between the view of the United States and Germany on this issue. The majority view in Germany puts more weight on the individual rights of the passengers and crew, regardless of the fact that there is little chance that these people will survive, but in the United States the collective security is more important instead of people's individual rights.[134]

It is clear that the Constitutional Court has given priority to the individual rights of the persons rather than the collective security of the State and thus in a way chooses the individual rights of the passengers on the plane above the individual rights of the people on the ground.

[130] Egbert Jahn, 'On the Impossibility of Remaining Innocent When an Aeroplane Is Hijacked by Terrorists' in *War and Compromise Between Nations and States* (Springer 2020) 37.
[131] Ibid.
[132] Hörnle 2007 (n 18) 128.
[133] Brown 2007 (n 49) 99.
[134] Ibid.

This seems controversial, because they do not consider the right to human dignity and right to life of the people that are in danger on the ground. However, the balance made by the Constitutional Court, as mentioned earlier, is not surprising. It is in line with other decisions made by the Constitutional Court in which it also stressed the importance of the individual rights of people when the issue is about an 'action', in this case the deliberate killing of the people on the plane.[135]

Another significant factor already mentioned and of much relevancy, on which the Aviation Security Act was nullified by the Constitutional Court, was the uncertain intent of the hijackers, which will be considered in the next part.

4.2.3. The (un)certain intent of the hijackers

Schultz makes an interesting argument with regard to the intent of the hijackers. This will be one of the most important factors to take into consideration but will also be very difficult to determine. It will be very hard to be a hundred percent sure that the plane is going to crash when it will not be shot down. However, Schultz is arguing that the decision, if the terrorists did not have the intent to crash the plane, is still correct. The decision is then made on the basis of all information provided, and the action would not be an overhasty response to the threat because it has been made on the standard of reasonable certainty.[136] In contrast to this American 'reasonableness' in which it is allowed, based on uncertainties, to shoot down the hijacked plane,[137] there have been argued differently in Germany. In the case before the Constitutional Court, a proportionality test was suggested containing the requirements that has to be met by the rule regulating the shooting down of hijacked civil aircraft. It has to be: "suitable (*geeignet*); necessary (*erforderlich*); and appropriate or reasonably fair (*angemessen*)."[138] These requirements can be compared to the requirements for the test of the American 'reasonableness'. However, finally, the Constitutional Court did not actually apply this test. The case was already resolved because the Constitutional Court determined that there was a violation of the right to human dignity, which is disappointing, because it could have led to more necessary discussions about this dilemma, also in other States.

When the Aviation Security Act was adopted, the German parliament was of the opinion that shooting down a hijacked plane would increase the security level in the State. However,

[135] Ibid.
[136] Schultz 2001 (n 20) para. 39.
[137] Ibid para. 3.
[138] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 68. *See also:* Lepsius 2006 (n 19) 774.

the Constitutional Court thought that the shooting down of the plane would be based on uncertainties and the unclear intent of the terrorists and therefore should not be allowed. There would not be enough information at the time the plane will be shot down and terrorists will not give away their intentions. Therefore, an order to shoot down the plane will be given based on unclear and uncertain information, and therefore on mere presumptions. The Court notes that: "Conjecture, however, does not suffice as a rationale for the most severe infringement of civil rights, namely death."[139] The uncertainty in relation to the aircraft industry is not something uncommon. There are planes that sometimes loose radio contact or do not have contact with the tower controlling all the flights. If these uncertainties will be accepted as a justification for shooting down civil aircraft, there is a chance that this will constitute a danger to the aircraft industry.[140]

Lepsius argues that one thing is definitely clear and that is that shooting down hijacked aircraft will kill all the passengers, crew and terrorists on board the plane. However, the purpose for what this is done remains unclear instead. The argument that the shooting down is for the purpose of saving a greater number of people on the ground remains a conjecture. According to Lepsius, the Aviation Security Act thus draws a situation which will actually never happen and fails to meet the requirement of suitableness and therefore fails the proportionality test.[141] However, the argument that the Aviation Security Act draws a situation which will actually never happen can be criticized. The Aviation Security Act namely requires that 'it can be assumed' that "the airplane is going to be used against the lives of individuals."[142] The term 'assumed' does not imply that it has to be hundred percent sure that the plane is going to crash. So, it can be argued that the Aviation Security Act also created a gap in any case, because 'assumed' is a vague term. This shows that there should be a clear guideline in international law, rather than letting States adopt their own laws, leading to diversity and ambiguity in these laws.

4.3. Sub-conclusion

As can be concluded from the foregoing sections, the moral debate around this issue shows different perspectives on the balance between the rights of the passengers and the crew on the one hand and the rights of the people on the ground on the other hand. One of the most disputed

[139] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 37. *See also:* Lepsius 2006 (n 19) 775.
[140] Lepsius 2006 (n 19) 775.
[141] Ibid.
[142] Aviation Security Act [Luftsicherheitsgesetz] (LuftSiG) 11 January 2005, BGBI. I at 78, § 14(3).

approaches by scholars is the utilitarian approach. As analyzed, the Constitutional Court was not in favor of this approach, like most of the German scholars. However, considering the moral debates in the United States, the utilitarian approach has been argued to potentially being a solution to the issue discussed in this thesis. One of the biggest uncertainties left is the intent of the hijackers. The certainty that the plane will crash is almost impossible to determine. Based on the responses of the United States and Germany and these moral debates, this thesis will propose a new international law rule in the next chapter to solve the ambiguity and uncertainties States have to face now.

5. The Elaboration of a New International Law Rule

Now that the responses of the United States and Germany to the 9/11 incidents have been analyzed and the moral debates in the same countries have been discussed, this thesis will express the need for a new international law rule and will defend that the German approach should be followed when elaborating this new international law rule. Three important points need to be discussed in this chapter. First, section 5.1 will consider the general need for a new international law rule regulating the shooting down of hijacked civil aircraft. Second, section 5.2 will discuss the proposal of a new international law rule and at last, section 5.3 will shortly consider the issues regarding the implementation of a new international law rule.

5.1. The need for a new international law rule

Before the new international law rule regarding the shooting down of hijacked civil aircraft will be elaborated, it bears noting that not every scholar has argued in favor of having a law regulating these kinds of emergency situations. Posner is one of the supporters of not having any law regulating these issues. He argues that:

> "In conditions of great danger legalistic limitations fall by the wayside; officials act, leaving the legal consequences to be sorted out later … Many soldiers and other security personnel live for such emergencies, and they are selected for their courage."[143]

Posner is further of the opinion that law is not able to "rationalize and regulate emergency powers, and therefore those are, and should be […] a-legal."[144] Posner is not alone in arguing that some moral dilemmas, such as balancing the rights of the people on board the plane and the rights of the people on the ground, cannot be solved by the law. Schmitt argues that the issue of balancing is not even the main issue. The main issue is whether law "can regulate and foresee emergency situations"[145] and besides, if a legal framework for these kinds of situations should be established.[146]

The usefulness of the law in emergency situations has been a much-discussed topic. First, it bears noting that this thesis does not aim to regulate the calculation of the number of people in the law, but opts for an absolute prohibition, so that calculating the number of people

[143] Richard A Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press 2006) 4.
[144] Beltrán de Felipe and Rodríquez de Santiago 2008 (n 97) 580.
[145] Ibid 584.
[146] Ibid.

is not necessary, further elaborated in the next section. Besides, as Brown notes, law is useful in emergency situations. The fact that the law is sometimes broken in emergency situations, does not indicate that the law is not needed to regulate these kinds of situations. It is better to have a clear law rule regulating the emergency situation and provide a clear guideline to, in this case, States. The risk must then be taken that this law rule will sometimes be transgressed and that the State or people breaking the law will be subsequently punished. This will be a better solution than having no law and not providing guidance to States at all.[147] Posner's argumentation, in which he states that the law should not regulate emergency situations, seems the consequence of an unclear existing legal framework regarding emergency situations and this could be solved or prevented by introducing a clear law rule as guideline.

Now that is has been argued that there is a need for an international law rule regulating emergency situations, this thesis wants to express that the current Article 3*bis* is not enough, because it does not provide a clear guidance to States on how to act when a hijacked civilian plane will potentially be used as a weapon. It is clear that the first sentence of Article 3*bis* currently contains a prohibition on the use of force against civil aircraft. However, as already analyzed in this thesis, this prohibition is actually void because of the exception this international law rule is subjected to, namely Article 51 of the UN Charter.[148] There are too many discussions about the application of Article 51 in the situation of shooting down hijacked civil aircraft, which makes Article 3*bis* flawed. If Article 51 does apply, there is no clarity with regard to the application of the principles of proportionality and necessity, which creates an uncertain situation for States. Therefore, there is a need for an international law rule not only regulating the use of force against civil aircraft, but specifically the shooting down of hijacked civil aircraft.

5.2. The proposal of a new international law rule

This section will argue that the new international law rule must follow the German approach and that the new law rule must contain an absolute prohibition on shooting down hijacked civil aircraft. First, it bears noting that there is a difference between law and morality. As this thesis has argued, morality can justify the shooting down of hijacked civil aircraft in order to save the people on the ground. However, Brown argues that this does not imply that the legal prohibition on shooting down hijacked civil aircraft existing now should be amended.[149] Where law focuses

[147] Brown 2007 (n 49) 104.
[148] Geiß 2005 (n 7) 243
[149] Beltrán de Felipe and Rodríquez de Santiago 2008 (n 97) 584.

more on the individual liberty of a person, morality focuses more on the collective ideas of what is good and what is wrong.[150] Therefore, it is understandable that, in principle, Article 3*bis* of the Chicago Convention contains a prohibition on the use of force against civil aircraft, to protect the individual rights of the people on board the plane. However, as stated in the previous section, the exception to this international law rule makes the prohibition flawed. Therefore, this thesis agrees with Brown who argues that the fact that it is morally justified to balance people's rights does not mean that it is also legally justified. It must be urged that the new law rule regulating the shooting down of hijacked civil aircraft should contain an absolute prohibition on this. It should be taken into account that Article 3*bis* was adopted before there was the 'war on terror' we know now. As Geiβ noted: "Law is a product of social reality, and this reality is subject to change."[151] Besides, security concerns on international level have changed, since Article 3*bis* was adopted, from conflicts between States to confrontations between on the one hand, a State and on the other hand, a non-State actor. The law shall have to anticipate as well on these new threats, and it must be clear to States how to act in these kinds of situations.[152]

As this thesis has analyzed, the principle of proportionality raised many legal and moral debates, and it can be concluded that it is impossible for Ground Control to know whether there is an emergency situation on board the plane in general. The Cockpit Association (*Vereinigung Cockpit*) has also stated to the German Constitutional Court that determining a hijacker's intent will "remain speculative until the very end."[153] This association consists of pilots and other members of the crew and is committed to making aviation safe and influences the law in doing so.[154] In addition, it bears noting that the situation on board the plane can change every second, making it impossible for Ground Control to determine the exact situation at that time.[155] The decisive factor of '(un)certainty' shows that it should not be allowed to legally justify the killing of the passengers on board the plane, because this decision would be made on uncertain factors. If the law were to take this uncertainty into account, it would leave the same gaps as it already does. For example, if the law states that shooting down hijacked civil aircraft is allowed when

[150] George P Fletcher, 'Law and Morality: A Kantian Perspective' (1987) 87(3) Columbia Law Review 542-543.
[151] Geiß 2005 (n 7) 255.
[152] Ibid.
[153] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 68.
[154] Vereinigung Cockpit, 'Allgemein' (*Vereinigung Cockpit*) <https://www.vcockpit.de/die-vc/verband/allgemein.html> accessed 22 June 2022.
[155] *Aviation Security Case*, Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG] Judgment of the First Senate of 15 February 2006, 1 BvR 357/05, para. 68, 126-128. *See also:* Brown 2007 (n 49) 71.

it is 'certain' that the plane is being used as a weapon, practical discussions will arise as to how this certainty must be determined.

Besides, it is not desirable that States will adopt their own policies when there is no clear international law rule, as explained before. Currently, accepted international law would be violated in countries as the United States when they decide to just act and shoot down hijacked civil aircraft. This will adversely affect the international peace even more. It has been argued that in line with this, "a profound discussion and reconsideration of existing laws is preferable to tacit ignorance of accepted legal standards justified by a perceived divergence of social reality and legal restrictions."[156] The different responses of States will cause more uncertainty and diversity between States when they have to decide whether to shoot down hijacked civil aircraft.

Based on the foregoing, it can be concluded that a new international law rule regulating the shooting down of hijacked civil aircraft should follow the German approach and should thus contain an absolute prohibition on the use of force against hijacked civil aircraft. Although it could be morally acceptable to balance the lives of the people on board the plane against the lives of the people on the ground, it is not acceptable to legally justify this. The subjective rights of the people will then become collective rights, while the law must focus on the individual rights of the people.

5.3. Issues regarding the implementation of a new international law rule

One of the issues concerned regarding the implementation of a new international law rule to the Chicago Convention, is that international law is based on consent.[157] Considering the responses of the United States, countries with the same view would probably not sign the new international law rule but analyzing Germany's response and the moral debates in this country, it will definitely consent to the new international law rule that prohibits the shooting down of hijacked civil aircraft. It is questionable whether a new international law rule would have any influence on States with the same general view as the United States. However, it is important to set a clear standard in international law stating that it is prohibited to shoot down hijacked civil aircraft, and this should be promoted in all States.

[156] Geiß 2005 (n 7) 256.
[157] Matthew J Lister, 'The legitimating role of consent in international law' (2010) 11 Chicago Journal of International Law 663.

5.4. Sub-conclusion

In consistency with the previous sections, this thesis emphasizes that it is time for a clear guideline for States at the international level, in the form of a new international law rule containing an absolute prohibition on the shooting down of hijacked civil aircraft.

Based on this chapter, it can be concluded that the new international law rule should follow the German approach. The main reason for this is that it is not acceptable to take into account the uncertain intent of the hijackers in the law. Besides, the American approach, overall allowing the balancing between people's rights, has been criticized for putting too much emphasis on the collective good, while the law should focus on the individual rights of people. Of course, the proposal for an absolute prohibition on shooting down civil aircraft can be criticized, but the aim of this thesis is to emphasize that a new international law rule is needed. Based on the analysis of the issue, it can be concluded that the current law is no longer appropriate for today's terrorist threats and States are left to their own domestic law, which creates a lot of divergence and insecurity in the responses of States.

6. Conclusion

This thesis has researched what the constitutional responses of the United States and Germany are to shooting down hijacked civil aircraft and how these responses can contribute to the introduction of a new international law rule regulating the shooting down of hijacked civil aircraft.

6.1. Main findings

In this thesis, it became clear that counterterrorism with regard to shooting down hijacked civil aircraft has been a much-discussed topic, especially after the 9/11 incidents. The incidents that happened on 9/11 received a lot of attention from different States and raised legal and moral discussions regarding the shooting down of hijacked civil aircraft.

First, this thesis has analyzed the contemporary international legal framework with regard to the shooting down of hijacked civil aircraft. It has been concluded that Article 3*bis* of the Chicago Convention, that was adopted in 1984, is the only international law rule regulating the use of force against civil aircraft in general. However, this international law rule leaves many gaps, because it is subjected to an exception: Article 51 of the UN Charter. This exception leaves a lot of questions unanswered, mainly with regard to the principle of proportionality, which creates big uncertainty about whether it, in the end, is allowed to shoot down hijacked civil aircraft. Therefore, especially after the 9/11 attacks, States shifted to their domestic law, because they could not rely on Article 3*bis* when the decision must be made whether to shoot down a hijacked civilian plane. Several States responded differently to this issue. This thesis analyzed the responses of the United States and Germany, because these States were very different in approaching the protection of human rights and both are also important for the development of the law in respectively the whole of America and Europe.

Second, this thesis analyzed the legal responses of the United States and Germany to the 9/11 incidents. It can be concluded that the United States made a far-reaching statement, in which it allows the shooting down of hijacked civil aircraft, without an official policy for this. Besides, the questions of responsibility were left unanswered. However, this unofficial policy has not been criticized much by scholars, which is interesting because it is a far-reaching statement to make. The view of the United States reflects its Model Penal Code, in which the 'numerical preponderance' is of relevance and could be taken into account. This view totally differs from the view taken in Germany. Germany stated that the right to human dignity is of high value because it forms the core right of the German Constitution. However, the right to

human dignity is not mentioned in the Constitution of the United States. The German Penal Code, in contrast to the commentaries on the American Model Penal Code, emphasizes that it is not allowed to kill a group of people in order to save other people. However, in 2004, the last resort clause § 14 in the Aviation Security Act was enacted, which allowed the German Armed Forces to shoot down hijacked civil aircraft if it could be assumed that a plane was going to be used as a weapon to kill people on the ground. A few years later, a case was brought before the German Constitutional Court and the provision was nullified because it was not in consistency with the German Constitution. The decision of the Constitutional Court was focused on the violation of the right to human dignity in conjunction with the right to life and has been criticized for putting too much emphasis on the violation of the right to human dignity. In this chapter it has been concluded that the elaboration of a new international law rule cannot only be based on the legal responses of the United States and Germany, because they both have a very different approach to human rights. Therefore, the moral debates must also be taken into account.

Third, based on the moral debates, chapter 4 concluded that the United States opts for the utilitarian approach as a solution to the issue discussed in this thesis. However, Germany follows the deontological approach and is overall stating that it is about whether the act is right or wrong and not about the consequences. Where the moral debate in the United States focuses mostly on the doctrine of double effect and necessity defense, in which is it allowed to weigh up the lives of people on board the plane against the lives of people on the ground, Germany emphasizes that this approach will open a Pandora's box. According to Germany, in this case, people's lives will become collective rights instead of subjective rights, which is not acceptable. Germany rightly notes the distinction between law and morality. Although it could be morally acceptable to shoot down hijacked civil aircraft, it is not acceptable to legally justify this. At last, the (un)certain intent of the hijackers is discussed and came out as one of the most important factors to take in consideration when proposing a new international law rule. It has been concluded that it is simply impossible to know for sure that the plane will crash and therefore, shooting down hijacked civil aircraft should not be legally justified.

Fourth, chapter 5 analyzed the need for a new international law rule en argued that the German approach should be followed when elaborating this new rule. In this chapter, Posner's argumentation has been criticized and it can be concluded that there is a need of a clear legal framework, even when it comes to emergency situations. The risk needs to be taken that the law regulating the emergency situation will be sometimes transgressed and the State or the people will be punished for this, but there should be a clear guideline for States. The main

reason the German approach has to be taken into account when proposing a new international law rule, is the discussion about the uncertain intent of the hijackers. The intent will be uncertain until the last moment of the hijack. It is not desirable to take the uncertainty of the intent into account when proposing a new international law. This will create more gaps in the law, because if shooting down is allowed when the intent of the hijackers is 'certain', at what moment does Ground Control know for sure that the plane will crash? Besides, the situation on board the plane can change every second, which risks that wrong decisions are made.

In conclusion, the responses of the United States and Germany have definitely contributed to the elaboration of a new international law rule. Based on the analysis made in this thesis, the proposal for a new international law rule must follow the German approach and should thus contain an absolute prohibition on the shooting down of hijacked civil aircraft. This new international law rule will solve the uncertainties States are facing know and the ambiguity existing in the current law 'regulating' this issue, namely Article 3*bis* of the Chicago Convention.

6.2. Future research

This thesis wants to emphasize that it is necessary that there will be more debates among scholars about this issue in the future and action must be undertaken. The need for a new international law rule is big, because if a situation comparable to the 9/11 attacks will occur, States do not know how to act and will make decisions that will be heavily criticized afterwards. The first step is that the current law must be criticized and finally that a clear international guideline to States is provided that emphasizes that is not allowed to shoot down hijacked civil aircraft when countering terrorism.

Table of Cases

Name	Court	Year	Nr.
Legality of the Threat or Use of Nuclear Weapons Case	International Court of Justice [ICJ] (Advisory Opinion)	1996	ICJ Rep. 226
Aviation Security Case	Bundesverfassungsgericht [Federal Constitutional Court] [BVerfG]	2006	1 BvR 357/05
Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened	Sądu Najwyższego [Polish Supreme Court]	2008	K 44/07

Table of Legislation

Institution	Name	Date	Nr.
International legislation			
International Civil Aviation Organization (ICAO)	Convention on Civil Aviation (Chicago Convention)	7 December 1944	15 UNTS 295
United Nations (UN)	Charter of the United Nations (UN Charter)	Adopted 26 June 1945, entered into force 24 October 1945	892 UNTS 119
Council of Europe (CoE)	European Convention on Human Rights (ECHR)	Adopted 4 November 1950, entered into force 3 September 1953	Council of Europe Treaty Series, vol. 005
International Civil Aviation Organization (ICAO)	Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention)	16 December 1970	860 UNTS 105
International Civil Aviation Organization (ICAO)	Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention)	23 September 1971	974 UNTS 177
International Committee of the Red Cross (ICRC)	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)	Adopted 8 June 1977, entered into	1125 UNTS 3

		force 7 December 1978	
International Civil Aviation Organization (ICAO)	Protocol on the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation	24 February 1988	1589 UNTS 474
International Civil Aviation Organization (ICAO)	Convention on the Marking of Plastic Explosives for the Purpose of Detection	1 March 1991	2122 UNTS 359
United Nations General Assembly (UNGA)	The United Nations Rome Statute of the International Criminal Court (Rome Statute)	Adopted 17 July 1998, entered into force 1 July 2002	United Nations Treaty Series, vol. 2187, No. 38544.
American legislation			
American Law Institute (ALI)	Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962	1985	
American Law Institute (ALI)	Model Penal Code and Commentaries: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962	1985	Part I, Vol. 3
German legislation			
	Penal Code for the Federal Republic of Germany [Strafgesetzbuch] (StGB)	15 May 1871	

	Basic Law for the Federal Republic of Germany [Grundgesetz] (GG)	23 May 1949	
	Aviation Security Act [Luftsicherheitsgesetz] (LuftSiG)	11 January 2005	BGBI. I at 78

Bibliography

Books

Abeyratne R, *Convention on International Civil Aviation: A Commentary* (Springer International Publishing 2014).

Bronitt S, 'Chapter Five Balancing Security and Liberty: Critical Perspectives on Terrorism Law Reform' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War On Terror'* (ANU E Press 2008).

Jahn E, 'On the Impossibility of Remaining Innocent When an Aeroplane Is Hijacked by Terrorists' in *War and Compromise Between Nations and States* (Springer 2020).

Kleinig J and Kasachkoff T, 'Civil Emergencies and the Claims of Innocence' in Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds), *Shooting to kill: socio-legal perspectives on the lethal use of force* (Bloomsbury Publishing 2012).

Möller K, 'The Right to Life Between Absolute and Proportional Protection' in Simon Bronitt, Miriam Gani and Saskia Hufnagel (eds), *Shooting to kill: socio-legal perspectives on the lethal use of force* (Bloomsbury Publishing 2012).

Otto H, *Grundkurs Strafrecht: allgemeine Strafrechtslehre* (De Gruyter 2004).

Posner RA, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford University Press 2006).

Roxin C, *Strafrecht Allgemeiner Teil, Band 1* (4th edn) (2006).

Journal articles

Aponte LEC, 'Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing' (2007) 10(1) New Criminal Law Review.

Beltrán de Felipe M and Rodríquez de Santiago JM, ‘Shooting Down Hijacked Aeroplanes? Sorry, We’re Humanists’ (2008) 14(4) European Public Law.

Brown RS, ‘Shooting Down Civilian Aircraft: Illegal, Immoral and Just Plane Stupid’ (2007) 20(1) Revue québécoise de droit international.

Conway P and Gawronski B, ‘Deontological and Utilitarian Inclinations in Moral Decision Making: A Process Dissociation Approach (2013) 104(2) Journal of Personality and Social Psychology.

Daniel JH, ‘Reform in Airport Security: Panic or Precaution?’ (2002) 53(4) Mercer Law Review.

Eberle EJ, ‘Human Dignity, Privacy, and Personality in German and American Constitutional Law’ (1997) Utah Law Review.

Fletcher GP, ‘Law and Morality: A Kantian Perspective’ (1987) 87(3) Columbia Law Review.

Foont BE, 'Shooting Down Civilian Aircraft: Is There an International Law?' (2007) 72 Journal of Air Law & Commerce.

Foot P, ‘The Problem of Abortion and the Doctrine of the Double Effect’ (1967) 5 Oxford Review.

Geiß R, ‘Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3BIS of the Chicago Convention, and the Newly Adopted German “Luftsicherheitsgesetz”’ (2005) 27(1) Michigan Journal of International Law.

Gurmendi Dunkelberg A, ‘A Forewarned War: The Targeting of Civilian Aircrafts in South-America and the Inter-American Human Rights System’ (2017) 48 U. Miami Inter-American Law Review.

Häubler U, ‘Air Policing and Counter-Renegade Action: Options beyond the German Aviation Security Act’ (2009) 48(1-2) Military Law and Law of War Review.

Hörnle T, ‘Hijacked Airplanes: May They Be Shot Down? (2007) 10(4) New Criminal Law Review.

Jackson VC, ‘Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse’ (2004) 65 Montana Law Review.

Kamm F, ‘Harming some to save others’ (1989) 57(3) Philosophical Studies.

Ladiges M, ‘*Comment* – Oliver Lepsius’s *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Air-transport Security Act*’ (2007) 8(3) German Law Journal.

Lepsius O, ‘Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision in the New Airport-Security Act’ (2006) 7(9) German Law Journal.

Lister M, ‘The legitimating role of consent in international law’ (2010) 11 Chicago Journal of International Law.

Lyons EC, ‘In Incognito – The Principle of Double Effect in American Constitutional Law’ (2005) 57(3) Florida Law Review.

Muller LF, ‘Identifying German Legal Approaches to Terror – How the Constitution Shapes Legislation Allowing the Shooting Down of a Hijacked Plane’ (2018) 19(1) German Law Journal.

Murphy SD, ‘Terrorism and the Concept of “Armed Attack” in Article 51 of the U.N. Charter (2002) 43(1) Harvard International Law Journal.

Osiecki M, ‘Shooting Down Civil Aircraft in the Light of Sovereignty in Airspace’ (2016) 6(6) Sociology Study.

Resnicoff SH, ‘Shooting Down Suicide Airplanes – What’s Law Got to Do With It?’ (2011) 10 Issues Aviation Law and Policy.

Rouillard L, ‘The Caroline Case: Anticipatory Self-Defence in Contemporary International Law’ (2004) 1(2) Miskolc Journal of International Law.

Schönwald L, ‘Der Abschuss von Zivilflugzeugen als ultima ratio zur Abwehr von sogenannten Renegades aus völkerrechtlicher Sicht’ (2012) 50(1) Archiv des Völkerrechts.

Schultz P, ‘The Necessity Defense Revisited: An Examination Through the Case of *Regina v. Dudley & Stephens* and President Bush’s Order to Shoot Down Hijacked Aircraft in the Wake of September 11, 2001’ (2001) 3(9) Rutgers Journal of Law Religion.

Sochor E, ‘Icao and Armed Attacks against Civil Aviation’ (1988/1989) 44(1) International Journal.

Stuhlmann J, ‘An Examination of the Legal Question of Shooting Down Hijacked Planes Through an Emphasis on Past Passenger Aircraft Incidents’ (2019) 13(2) University of St. Thomas Journal of Law and Public Policy.

Sulyok G, ‘An assessment of the destruction of rogue civil aircraft under international law and constitutional law’ (2006) FUNDAMENTUM.

Thorburn M, ‘The Constitution of Criminal Law: Justifications, Policing and the State’s Fiduciary Duties’ (2011) 5(3) Criminal Law and Philosophy.

Youngs R, ‘Germany: Shooting down aircraft and analyzing computer data’ (2018) 6(2) International Journal of Constitutional Law.

Reports

International Civil Aviation Organization (ICAO) Consideration (1983) 22 I.L.M. 1149, 1150.

International Civil Aviation Organization (ICAO) Assembly 25th Session (Extraordinary), *Executive Committee: Report, Minutes and Documents* (1984) ICAO Doc. 9438, A25-EX/4.

Kean T and Hamilton L, *National Commission on Terrorist Attacks upon the United States*, The 9/11 Commission report: Final report of the National Commission on Terrorist Attacks upon the United States (2004).

United Nations Security Council (UNSC) Consideration (1983) 22 I.L.M. 1109, 1110.

Newspaper articles

BBC, 'US pilots train shooting civilian planes' *BBC* (3 October 2003) <http://news.bbc.co.uk/2/hi/americas/3161354.stm> accessed 8 February 2022.

Cluskey P, 'Deaths from terrorism in Europe have spiked since 2014' *Irish Times* (16 June 2017) <https://www.irishtimes.com/news/world/europe/deaths-from-terrorism-in-europe-have-spiked-since-2014-1.3122948> accessed 2 May 2022.

Web documents

9/11 Memorial & Museum, 'What happened on 9/11?' (*9/11 Memorial)* <https://www.911memorial.org/911-faqs> accessed 18 April 2022.

American Civil Liberties Union, 'Treaty Ratification – What's at Stake?' (*American Civil Liberties Union*) <https://www.aclu.org/issues/human-rights/treaty-ratification> accessed 4 March 2022.

Federal Bureau of Investigation (FBI), 'Pan Am 103 Bombing' (*Federal Bureau of Investigation*) <https://www.fbi.gov/history/famous-cases/pan-am-103-bombing> accessed 3 May 2022.

Song S, ‘Aircraft Hijackings: Balancing State Security Vs. Human Dignity’ (*NATO Association,* 25 June 2013) <https://natoassociation.ca/aircraft-hijackings-balancing-state-security-vs-human-dignity/> accessed 18 February 2022.

Vereinigung Cockpit, ‘Allgemein’ (*Vereinigung Cockpit*) <https://www.vcockpit.de/die-vc/verband/allgemein.html> accessed 22 June 2022.

Blogs

Guerisoli E, ‘The New-Old Terror Wave in Europe (Part 2) A Comparison of European Terrorism Cycles’ (*Public Seminar,* 13 September 2017) <http://publicseminar.org/2017/09/the-new-old-terror-wave-in-europe-part-2/> accessed 2 May 2022.

Kowalski M, ‘Shooting down a hijacked plane to prevent worse’ (*leidensecurityandglobalaffairsblog,* 4 January 2016) <https://leidensecurityandglobalaffairs.nl/articles/shooting-down-a-hijacked-plane-to-prevent-worse> accessed 31 January 2022.

Trapp K, ‘Uses of Force against Civil Aircraft’ (*EJIL: Talk!,* 28 June 2011) <https://www.ejiltalk.org/uses-of-force-against-civil-aircraft/> accessed 31 January 2022.