

## TAKING HUMAN LIVES IN EXTREME SITUATIONS OF TERRORIST ATTACKS AND THE DEFENCE OF NECESSITY<sup>1</sup>

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**Abstract:** *The paper focuses on the issue of weighing human lives with a criminal law perspective. It addresses the criminal defence of necessity and its relationship to the most serious crimes of intentional killing occurring in emergency situations. Under extreme conditions, such as terrorist attacks, individuals are often forced to act under great fear and may therefore act differently than usual in order to protect the lives of themselves and others.*

*The purpose of this paper is to provide the legal background on acting under the defence of necessity when human lives are weighed against each other, from the perspectives of Czech, German, French, and English Law.*

**Keywords:** *necessity, murder, criminal defences, terrorism*

### INTRODUCTION

The events of 11<sup>th</sup> September 2001, the January 2015 terrorist attacks at the headquarters of the satirical magazine Charlie Hebdo, the November 2015 bombings in Paris, as well as other terrorist attacks during the summer of 2016, starting with the killings in Nice, France on 14<sup>th</sup> July and several attacks in Germany – all of these events show that the issue of terrorism has reached a new dimension and has become a worldwide phenomenon.

In the last decade, the concept of terrorism has changed significantly.<sup>2</sup> This is seen not only in the fact that “new terrorism” does not respect state borders and has gained a transnational character, but also that the methods employed in terrorist attacks have changed in time. Taking into account the rate of such events, one can only accept the fact that similar tragic events are able to occur at any time and in any place. Consequently, the need for adequate and effective legal tools for combating these new phenomena has naturally increased.

After 11<sup>th</sup> September 2001, on which three hijacked planes were flown into the World Trade Centre and the Pentagon, causing a terrible loss of human life, the question of how governments should deal with such scenarios if they occur in the future has arisen, and whether or not the hijacked planes should have been shot down has been raised and seriously elaborated on in several documents.<sup>3</sup>

Since this time, many states have increased their efforts to enact laws regulating procedure in similar tragic situations in the future. Many newly adopted laws, however, do

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<sup>2</sup> See. RAPOPORT, D. C. Four Waves or Rebel Terror and September 11. *Antropoethics. Journal of Generative Anthropology*. 2002, Vol. 8, No. 1. MAGUIRE, M., MORGAN, R., REINER, R. *The Oxford handbook of criminology*. 5<sup>th</sup> ed. Oxford: Oxford University Press, 2012, pp. 771–782.

<sup>3</sup> BOHLANDER, M. In *Extremis – Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law. The Criminal Law Review*. 2006, p. 589.

not go beyond general issues of national security which broadly proclaim the importance of combating terrorism.<sup>4</sup> Despite the undoubtable importance of implementing guidelines for state responses in such scenarios, particular laws which would cover these situations have only been adopted in a few states.<sup>5</sup> The reason that governments have shown a rather lenient attitude may lie in the nature of the values in question being set. The legal situation is very problematic, as it touches upon a value of the highest importance which is very difficult to handle - the right to life.

This paper will present how the legislation of various states has responded to such extreme situations in which the value of human life has to be considered. The purpose of this paper is not to investigate relevant national provisions authorising the military or other agencies to defend airspace and state territory, but rather deals with the question of whether emergency actions in which human lives are to be sacrificed can be legally justified.

## BASIC PRINCIPLES

Consider the following case:

Terrorists hijack an aircraft with 300 passengers on board with the intent to fly it into a shopping mall in the centre of a highly-populated European capital city. There is no time left for the police to initiate an evacuation of 5000 customers currently inside the building. In the event that the course of the aircraft is not diverted, it will crash into the mall, resulting in the deaths of at least 5000 people inside the building, and the potential loss of human life on the ground in close proximity to the area is even higher. The aircraft has been registered at a distance and its course provides only several minutes for national authorities to decide on armed interception of the out-of-control aircraft. A very difficult question lies before the authorities responsible: should the aircraft be shot down, causing the death of all passengers and crew members on board but saving more than 5000 people on the ground?

This hypothetical case has given rise to a balancing exercise between two protected values resulting in the taking of human life and implies a question of grand importance – is it justifiable to kill an innocent person when it is the only way to prevent many innocent people from dying? Finding an answer is not easy, as this dilemma goes beyond normative systems of law and touches on a perspective of morality in which answers to difficult cases can be found. The moral underpinnings of this uneasy decision to be made by national authorities lies in the situation of a moral dilemma called the “Trolley Prob-

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<sup>4</sup> See the “USA Patriot Act” no. 107–56, 107<sup>th</sup> Congress from 26<sup>th</sup> October 2001 which was adopted immediately after “11/9” attacks or the French law of July 2015 often called “French Patriot Act” which allowed security forces to monitor emails and phone calls of Muslims without court authorization or the immediate reaction of French President Francois Hollande to November terrorist attacks in Paris by declaring a state of emergency in France – see also Goetz, D.: *État d’urgence: l’impact de la loi sur le droit pénal*, Dalloz actualité 26 juillet 2016 – available online at Dalloz.fr – [accessed 20. 9. 2016].

<sup>5</sup> See for example § 4 c Act No. 11/ 2006 Coll. which amended § 4 c of the Act No. 321/2002 Coll., on Armed Forces of the Slovak Republic and Act No. 143/1998 Coll., on Civil Aviation, or § 14 paragraph 3 of The Aviation Security Act in Germany – Gesetz zur Neuregelung von Luftsicherheitsaufgaben vom 11. 1. 2005, BGBl, Teil I, G 5702.

lem.” This was conceived by Philippa Foot, a British professor of philosophy, in her essays on the moral philosophy of abortion, in which she put forward the example of a cave that is flooding, with one person stuck in the only exit, asking if other people stuck in the cave may kill him with dynamite in order to save their own lives.<sup>6</sup> In such hard cases, two solutions are possible. The first relies on utilitarian “lesser of two evils” choice which would justify killing on the grounds that it is better for some people to survive rather than for all of them to die. One may argue that such weighing of human lives is not possible, because even if more human lives are saved, the weighing up of human lives would deny the nature of human beings endowed with human dignity, as it would turn them into objects of “cold profits vs. loss balancing.” The situation becomes more complicated, however, if the person to be sacrificed is not a part of the situation up until that point. What if the only solution to save all of the people in the cave would be to blow up a different part of the cave causing the death of the rescue workers trying to clear the main entrance to the cave and do not have enough time to evacuate?

These examples show that the answer to the question of whether or not it is morally permissible to sacrifice a few people to save more may be dealt with differently from the perspective of morality. Despite the fact that there is no doubt that the law should be more clear, the question of whether the people who performed the act itself of sacrificing one life in order to save more should be criminally responsible for murder is not sufficiently regulated. In those cases, acts of individuals who were saving their own or other peoples’ lives may be justified by criminal defences. The laws of particular European states offer various legislative solutions, but many of them, however, have not succeeded in regulating a similar situation explicitly in their law, which leaves this question up to the interpretation of the courts.

## THE CZECH REPUBLIC

In the Czech legal system, an infringement on the right to life is regulated on the constitutional level in the Charter of Fundamental Rights and Freedoms<sup>7</sup>. Article 6, in its first and second paragraphs, declares that “*every person has the right to life*” and that “*no one shall be deprived of this right.*” At the same time, it sets forth exceptions to this rule in paragraph 4: “*deprivation of life based on an act not punishable by law shall not be considered to be a breach of this article.*” This constitutional principle has been implemented in the current Czech law, particularly in Act No. 40/2009 Coll., the Criminal Code (“Criminal Code”) in provisions relating to criminal defences (§ 28 – 32 of the Criminal Code).

In the event of the scenarios described in the introductory part of this paper, the most general criminal defence should apply – the defence of necessity (§ 28 of the Criminal

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<sup>6</sup> See reprinted FOOT, P. *Virtues and Vices and other essays in moral philosophy*. Berkley and Los Angeles: University of California Press, 1978. From recent literature regarding the Trolley Problem see e.g. KAMM, F. M. *The Trolley Problem Mysteries*. Oxford: Oxford University Press, 2016.

<sup>7</sup> Resolution of Czech National Council no. 2 from 16<sup>th</sup> December 1992 on promulgation of the Bill of Rights into the Constitution as a part of the constitutional order of the Czech Republic (No. 2/1993 Coll.).

Code). Such extreme situations in which third parties are engaged in dangerous acts are covered not by self-defence,<sup>8</sup> but rather are an inherent feature of the defence of necessity, despite the danger emanating from an aggressor. The defence of necessity is based on a balancing exercise of two legally protected values in which the endangered person may be saved only by sacrificing the other. To be excused under this defence, the person acting in a state of necessity does not need to face an imminent threat to himself, but rather it is enough that said person only provides aid to other individuals found in a dangerous situation.<sup>9</sup> Moreover, it is accepted by the law that third parties would suffer harm resulting from defensive action. Therefore, it does not need to be the aggressor whose rights and interest are interfered with, but also any other innocent people. This statutory principle would be unthinkable to accept unless very clear and adequate legal boundaries of what harm inflicted on innocent persons in the course of defensive action might be stipulated by law.

The question of the limit of harm allowed to be caused to third parties relies on the Czech criminal law's test of proportionality. The balancing exercise is based on weighing up possible harms. The condition of proportionality of the defence of necessity excludes from justification such acts which result in "*apparently same or even greater harm than avoided*."<sup>10</sup> The term "apparently" was incorporated due to concerns of too narrow an interpretation of the conditions of the defence of necessity, enabling courts to flexibly interpret the legal conditions of necessity in order to respond to the distinct circumstances of each case.

Acting in a state of necessity must be assessed not only on an objective level, but the subjective state of mind of a perpetrator should also be taken into account,<sup>11</sup> and in this assessment, the hierarchy of values and interests in question (e.g. life, physical integrity, property, etc.) presents very important criteria. This should be interpreted in a way that the person acting under the defence of necessity may not be aware of the harmful result being of the same or even greater value than the harm avoided.<sup>12</sup> The law, however, does not clearly answer the question of whether this rule is applicable to the situation in which the most supreme values, such as human life, are taken into account.

However, weighing one human life against others seems to be acceptable when following old Czechoslovak case law from 1982. The Supreme Court of the former Slovak Socialist Republic came to the legal opinion that sacrificing one life to save more innocent people is acceptable in principle. The situation is changing, however, in cases in which the killing is motivated only by the need to save the individual's own life (i.e. that of the killer). This case was based on a balancing exercise regarding a juvenile girl who was given a choice. Her father threatened to kill her together with her three younger siblings if she did not

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<sup>8</sup> See No. 9/1988 of Collection of Courts Decision in Criminal Cases.

<sup>9</sup> So-called "aid in necessity" – see JELÍNEK, J. *Trestní právo hmotné. Obecná část. Zvláštní část*. 5. vydání. Praha: Leges, 2016, p. 259.

<sup>10</sup> See § 28 of Criminal Code.

<sup>11</sup> SOLNAR, V., FENYK, J., CÍSAŘOVÁ, D. *Základy trestní odpovědnosti*. Praha: Orac, 2003, p. 142. See also VOKOUN, R. *Vybrané aktuální otázky nutné obrany a krajní nouze*. AUC. 1989, Vol. 35, No. 1, pp. 34–50.

<sup>12</sup> ŠÁMAL, P. a kol. *Trestní zákoník. Komentář*. Praha: C. H. Beck, 2012, p. 394.

strangle her grandmother to death.<sup>13</sup> The Supreme Court's decision clearly shows that weighing human lives for the purposes of the proportionality test of necessity is completely acceptable and suggests that the theory of "the lesser evil" should apply even if human life is taken into account.

On the other hand, one fact should not escape our attention. In the event of the defence of necessity, the balancing exercise is based on the proportionality of danger averted and *harm inflicted*. The means used to execute a necessary act in order to reach justifiable levels are not regulated. It appears that regardless of the means used to kill one person, it is sufficient, provided that all other conditions of necessity are fulfilled, that the good effect outweighs the bad. That represents a significant difference from the requirement of proportionate self-defense where the attention is primarily oriented to the way of acting. Such a discrepancy may be considered as one of the greatest problems of the Czech doctrine of necessity. A solution may be found in the requirement of subsidiarity of a necessary act<sup>14</sup> and the doctrine of double effect, under which only such acts in which evil is not intended as a means to the good is morally justifiable.<sup>15</sup> Having looked at the model scenario from the view of Czech law, it appears that according to Czech law, the shooting down of a plane hijacked by terrorists would be justifiable under the defence of necessity. It is not clear, however, whether the prerogative to justification under this defence is also granted to the state and its agents, or whether it is reserved only for private individuals with reference to Article 2, paragraph 2 of the Charter of Fundamental Rights and Freedoms, and Article 3, paragraph 2 of the Czech Constitution.<sup>16,17</sup> There is no particular law which authorises governmental authorities to intercept a hijacked plane with the use of weapons in the Czech legal system.<sup>18</sup> This "renegade" scenario is regulated, however, by subordinate legislation, particularly by administrative rules issued by the Ministry of Defense of the Czech Republic. These rules are based on a classified document adopted by the Czech Government entitled "The use of armed forces with regard to the interception of hijacked plane as a means of terrorist attack." This document suggests that in the case of identification of "renegade" aircraft, the use of armed forces to intercept such a plane is acceptable. The use of armed forces may be operated under the authorisation of the Minister of Defence, who may be substituted by his Deputy Minister or by the Commander-in-Chief of the Army, of the Czech Republic.<sup>19</sup>

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<sup>13</sup> See No. 20/1982 of Collection of Courts Decision in Criminal Cases, in particular the decision of the Supreme Court of SSR from 11<sup>th</sup> December 1980, No. 3 To 72/80.

<sup>14</sup> See § 28 of Criminal Code.

<sup>15</sup> See e.g. WOODWARD, A. P. *The doctrine of double effect: philosophers debate a controversial moral principle*. University of Notre Dame Press, 2001; McINTYRE, A. "Doctrine of Double Effect", *The Stanford Encyclopedia of Philosophy* (Winter 2014 Edition), ZALTA, E. N. (ed.) – available online – [accessed 20. 9. 2016] – <http://plato.stanford.edu/archives/win2014/entries/double-effect/>.

<sup>16</sup> Act No. 1/1993 Coll., the Constitutions of the Czech Republic.

<sup>17</sup> See BÍLKOVÁ, V., GRÍVNA, T., HERCZEG, J. *Scénář Renegade, aneb sestřelení civilního letadla z pohledu práva. Trestněprávní revue*. 2008, No. 11, pp. 328–335.

<sup>18</sup> Different approach was adopted in the Slovak Republic where after 11<sup>th</sup> September 2001 precise legal regulation was incorporated by Act No. 11/ 2006 Coll. which amended § 4 c of the Act No. 321/2002 Coll., on Armed Forces of the Slovak Republic and Act No. 143/1998 Coll., on Civil Aviation – see BÍLKOVÁ, V., GRÍVNA, T., HERCZEG, J. *Scénář Renegade, aneb sestřelení civilního letadla z pohledu práva. Trestněprávní revue*. 2008, No. 11, pp. 328–335.

<sup>19</sup> The Ministry of Defence of the Czech Republic, information available online – [accessed 20. 9. 2016] – <http://www.mocr.army.cz/scripts/detail.php?id=52419>.

## FRANCE

Similar to the Czech law, French law recognizes the defence of necessity (“état de nécessité”)<sup>20</sup> which covers extreme situations in which the present danger can be only averted by causing harm to an interest protected by law. The requirements of this defence in the French Criminal Code are comparable to those of the Czech law, but there are slight differences. One of them is that the condition of proportionality is based on weighing the means used to execute a necessary act and the severity of the present threat. According to the French law, the proportionality of the defence of necessity is satisfied unless there is “*a disproportion between the means used and the threat.*”<sup>21</sup> According to case law<sup>22</sup> and part of the doctrine, the proportionality condition is satisfied also in the case of the same value interest, but opinion on this is divided.<sup>23</sup> There are opinions suggesting that causing a result of the same severity, such as killing one person to save one’s own life, could be justified on the basis of “moral duress” (“*contrainte morale*”).<sup>24</sup> Regardless of what the opinion on causing a result of the same severity by a necessary act is, however, it appears that the doctrine accepts the balancing exercise with human lives, and admits that there might be a justificatory defence to killing a few people to prevent others from dying.

This proposition is doubtful, however, following the key decision<sup>25</sup> of the French Supreme Court in the matter of the former Vichy regime member Paul Touvier on 21<sup>st</sup> October 1993, who was accused of complicity in crimes against humanity in connection with the killing of 7 prisoners, at least 6 of whom were Jews, in a small suburb of Lyon, France in 1944. As a justification for the mass killing, Touvier pled the defence of necessity and alleged that he had done only what was “inevitable”, because he had acted with the intention of saving a much greater number of lives (23 prisoners) from the same fate. The Supreme Court refused to allow his acts to be justified on the basis of a state of necessity and argued that with regard to human life, it is not possible to decide that “*lives saved would present any superior value*”<sup>26</sup> than those sacrificed.

This case does not elaborately explain the dilemma of weighing human lives against others, but it suggests that the balancing exercise with people’s lives is not acceptable in some cases.

The French legal system seems to leave unanswered the question of possibly sacrificing several human lives to save more in the aforementioned hijacked plane scenario. Furthermore, not even the law dealing with air defence, the Act on Air Defence of 10<sup>th</sup> October

<sup>20</sup> See article 122-7 Code pénal from 22<sup>nd</sup> July 1992.

<sup>21</sup> In original wording: “*sauf s’il y a une disproportion entre les moyens employés et la gravité de la menace.*” – see article 122-7 Code pénal.

<sup>22</sup> Crim. 25 juin 1985, Bull. crim. n° 499.

<sup>23</sup> BOULOC, B. *Droit pénal général*. Paris: Dalloz, 2013, pp. 362–363.

<sup>24</sup> For differences between necessity and duress by threats in French law see FORIERS, P. *De l’état de nécessité en droit pénal*. Bruxelles, Bruylant, 1951, pp. 27–45.

<sup>25</sup> Cour de cassation, Crim. 21. 10. 1993, Bull. crim. n° 307.

<sup>26</sup> In original wording: “*s’agissant du sacrifice de vies humaines, il n’est pas possible de décider si les vies sauvegardées représentaient un intérêt supérieur.*”

1975,<sup>27</sup> contains any relevant provisions for such emergency situations. It only provides basic air defence guidelines when it states in Article 1 that the ultimate aim of air defence is, among others, to protect the national airspace from unexpected attacks. According to Article 2 of this Act, the person legally responsible for performing such defensive acts is the Prime Minister, who appears to be also authorised, under certain circumstances, to order the interception of the hijacked plane, including the use of weapons when it is reasonably necessary for meeting the goals declared in the Act on Air Defence.<sup>28</sup>

## GERMANY

The most well-known example of dealing with the difficulties of adopting a law which would regulate emergency situations arising out of terrorist attacks on planes is that of Germany. In 2005, the German Parliament (*Bundestag*) passed a bill which covered so-called “renegade” scenarios. The Aviation Security Act (“*Luftsicherheitsgesetz*”)<sup>29</sup> gave rise to controversy and was subject to broad debate even before it was passed, mainly with regard to Article 14, paragraph 3 of the Air Security Act, which authorised, under certain conditions, the Chancellor of Germany to issue an order to shoot down a plane hijacked by terrorists. Such a procedure could only be launched and the direct use of weapons against the aircraft was only be permissible in the event that “*circumstances suggest that the aircraft is intended to be used against human life and this is the only mean of averting the current threat.*”<sup>30</sup> The law has been challenged before the German Constitutional Court with respect to its compliance with German constitutional law. In a judgment issued on 15<sup>th</sup> February 2006,<sup>31</sup> the Constitutional Court abrogated this provision and declared such a procedure unconstitutional. The basis of the judgment lies in the following arguments. Firstly, a human being is guaranteed the right to recognition of human dignity, and this right is violated when a person is treated as a mere object used to complete somebody else’s life-saving operation by governmental authorities. It is therefore inadmissible to set one life against another in this situation, because it would literally mean that “*people on board are not treated as subjects of law with the right of life and indefeasible human rights. They would be, on the contrary, deprived of their human nature and vested rights, and their death would be merely an object for the fulfillment of saving other peoples lives.*”<sup>32</sup> In light of the Constitutional Court’s ruling, human life is seen to be of the highest value regardless of the duration of the individual person’s physical existence, and shooting down the plane as a causal

<sup>27</sup> Décret n°75-930 du 10 octobre 1975 relatif à la défense aérienne et aux opérations aériennes classiques menées au-dessus et à partir du territoire métropolitain.

<sup>28</sup> See BOHLANDER, M. In *Extremis - Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law. The Criminal Law Review*. 2006, p. 589.

<sup>29</sup> Gesetz zur Neuregelung von Luftsicherheitsaufgaben vom 11. 1. 2005, BGBl, Teil I, G 5702.

<sup>30</sup> See § 14 Luftsicherheitsgesetz that states: “*Die unmittelbare Einwirkung mit Waffengewalt ist nur zulässig, wenn nach den Umständen davon auszugehen ist, dass das Luftfahrzeug gegen das Leben von Menschen eingesetzt werden soll, und sie das einzige Mittel zur Abwehr dieser gegenwärtigen Gefahr ist.*”

<sup>31</sup> Decision of German Constitutional Court from 15<sup>th</sup> February 2006, No. 1 BvR 357/05 – available online – [accessed 20. 9. 2016] – <http://www.bundesverfassungsgericht.de>.

<sup>32</sup> See paragraph 124 of German Constitutional Court decision from 15<sup>th</sup> February 2006, No. 1 BvR 357/05.

contribution to the passengers' death would violate the right to dignity and the right to life guaranteed by Article 1, paragraph 1, and Article 2, paragraph 2 of the Constitution of the Federal Republic of Germany to the extent that it affects persons on board the aircraft who are not participants in the crime.<sup>33</sup>

German criminal law recognizes the defence of necessity in § 34 of the Criminal Code (*Strafgesetzbuch*, "StGB").<sup>34</sup> As in other countries, one of the requirements prescribed by law for a necessary act to be justified is the fulfilment of the condition of proportionality. In German criminal law, proportionality is based on weighing conflicting interests and the degree of danger threatening a person. In particular, to successfully plead the defence of necessity, "the protected interest shall not substantially outweigh the one interfered with."<sup>35</sup> Moreover, the act committed must be an adequate means to averting the danger. In the light of both the German Constitutional Court ruling and the prevailing opinion of the doctrine,<sup>36</sup> there is one exception to that balancing rule – weighing human lives against others is not accepted. There are some opinions, however, that killing people in such extreme situations might be excused on a so-called "supra-legal excusatory necessity" (§ 35 StGB).<sup>37</sup>

## ENGLISH LAW

Looking briefly at the common law system, the question of taking human life for the greater good is essentially left to the courts' own law-making function. It is not surprising that case law in the English common law system shows great interest in deciding such situations.

In one of the most famous English legal decisions, *R v Dudley and Stephens*,<sup>38</sup> the court created a legal precedent that killing one person in order to save more is absolutely unacceptable under English law. The court dealt with a case of the intentional killing of a young man who was, together with his two companions, cast away in a storm on high seas in an open boat. They had no water or food on this boat, and after 7 days without food and 5 days without water, they would soon have all died of starvation. The only way for the crew to survive was for one of them to be killed; the one who was chosen was the youngest man aged seventeen or eighteen. The court expressed its fundamental opinion that necessity is not a defence against a murder charged, as there is no defence for deliberately taking another person's life to save one's own. It is unacceptable to excuse Dudley and Stephens for killing the youngest man on board as, under certain circumstances, they could all have survived and their death was not inevitable, even if the probability of their rescue was extremely low. Moreover, the choice of person to be put to death to save the rest was not performed fairly. Assuming that there had been any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.

<sup>33</sup> Grundgesetz für die Bundesrepublik Deutschland vom 23. 5. 1949, BGBl, s. 1.

<sup>34</sup> Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322).

<sup>35</sup> See § 34 StGB.

<sup>36</sup> JOECKS, W., MIEBACH, K. (eds.). *Münchener Kommentar zum Strafgesetzbuch*. Bd. I. München: C. H. Beck, 2003, § 34, marg. 116; HIRSCH, H. J. (ed.). *Liepziger Kommentar zum Strafgesetzbuch*. Bd. II. München, C. H. Beck, 2003, marg. 65.

<sup>37</sup> See SCHONKE, A., SCHRODER, H. *Strafgesetzbuch. Kommentar*. 27<sup>th</sup> ed. München: C. H. Beck, 2006, § 34, marg. 24.

<sup>38</sup> *R v Dudley and Stephens* [1884] 14 QBD 273.

This principle was subject to further discussion and judicial interpretation. In *R v Howe*,<sup>39</sup> the House of Lords regarded the *R v Dudley and Stephens* case as one setting down a general rule that necessity is not a defence to deliberate killing of another person.

In other cases, however, the court has come to a slightly different view of the rule that there is no defence of necessity for murder. In the case *Re A*,<sup>40</sup> the Court of Appeal admitted that even the intentional killing of another person may be justified under certain circumstances. Jodie and Mary were born conjoined twins. Mary, the weaker twin, could survive only through a supply of oxygenated blood from her sister. There was a difficult question before the doctors concerning whether they may perform life-saving surgery so that at least the stronger twin, Jodie, could live. If the twins were left as they were, Mary would eventually be too much of a strain on the stronger twin, Jodie, and they would both die. The Court of Appeal allowed the operation and accepted the killing of Mary, who was not capable of surviving on her own, as the proposed operation would be in the best interests of each of the twins.

This case shows us that the rule of necessity not being a defence against a murder charge may be interpreted narrowly. The inconsistent approach of English courts on the topic may be based on one factual question. If we have a look at the aforementioned cases of both *R v Dudley and Stephens* and *Re A*, we may argue that in the latter, the weaker twin, Mary, who was deliberately killed, would have died in either case. In the words of Brooke LJ, she was “self-designated”<sup>41</sup> to death. It makes a clear difference now, that in the former decision denying that necessity should be a defence to a murder charge, the boy who was killed was not in such a situation, as he was chosen to die by the two surviving crew members in a scenario in which there was at least some level of probability that all of the crew would be rescued.<sup>42</sup>

It appears that under common law, necessity might, under certain circumstances, represent an excuse for the killing of an innocent person to save more lives, but the situation is able to be disputed even in English statutory law.<sup>43</sup>

## CONCLUSION

The same solution as in the *Re A* case may be applicable to the situation of the hijacked planes in which a vast number of human lives on the ground are at stake. If one can imagine the case of a weaker twin, Mary, whose inevitable fate was to die, the situation of the passengers on board the plane hijacked by terrorists can be understood in light of this. We may claim that all of the passengers on board were *designated to death*, just as Mary was, and their fate was none other than to die regardless of what decision was made by

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<sup>39</sup> *R v Howe* [1987] 1 AC 417.

<sup>40</sup> *Re A (Conjoined Twins)* [2001] Fam 147 (CA).

<sup>41</sup> *Re A (Conjoined Twins)* [2001] Fam 147 (CA) [Brooke LJ].

<sup>42</sup> *R v Dudley and Stephens* [1884] 14 QBD 273.

<sup>43</sup> See HERRING, J. *Criminal law: text, cases, and materials*. 6<sup>th</sup> ed. Oxford: Oxford University Press, 2014, pp. 650–651.

the government concerning shooting down the plane. This sorrowful position of the passengers on board was also highlighted by the German Constitutional Court, which in its ground-breaking decision spoke about passengers as “*objects of death*,”<sup>44</sup> but expressly denied that they may be regarded likewise by governmental authorities.

Pursuant to the law of the other countries (the United Kingdom, the Czech Republic), it appears that this approach of killing people who are “basically dead” may be justified and the defence of necessity may be applicable even in cases of deliberate killing of innocent people. Even if French law leaves this question unanswered, one may strike this approach down on the basis of the French Supreme Court’s decision in the Touvier case.

The range of possible courses may significantly differ, however, and this demands a more comprehensive legal perspective. Imagine that terrorist hijacked the aircraft only to transfer a biological agent to be released into the water supply of a major city, and the passengers were taken as hostages and were promised release after the terrorists have been transferred to their designated location along with the biological agent.<sup>45</sup> This should ensure that the aircraft is not shot down by armed forces before completing its “lethal goal.” The passengers surely cannot be regarded as *designated to death* in this case, but the question remains concerning whether or not the aircraft should be shot down in this case.

In all of these extreme situations, it seems to be very difficult to decide what the morally correct course of action might be. The laws of different countries deal with such scenarios differently and it appears that many laws would either justify or excuse killing innocent people in order to save more.

There is nothing to do but to conclude that it is provably desirable that, pursuant to the principle of certainty of law, states ought to make an effort to regulate these situations as precisely as possible. Considering the severity of harm taken into account, it is clear that the law should provide guidance for resolving such situations, which are moreover usually connected with extreme pressure regarding time. At the same time, however, this pressure could potentially result in cases of poor judgement, leading to loss of life which could otherwise have been spared. It is therefore understandable that lawmakers are hesitant to specifically implement such regulations into their legislations as demonstrated by the decision of the German Constitutional Court.

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<sup>44</sup> In original wording: “*Objekt der Täter*” – see paragraph 124 of German Constitutional Court decision from 15<sup>th</sup> February 2006, No. 1 BvR 357/05.

<sup>45</sup> Similar example is mentioned by Bohlander – see BOHLANDER, M. In *Extremis - Hijacked Airplanes, “Collateral Damage” and the Limits of Criminal Law*. *The Criminal Law Review*. 2006, p. 581.