

## **The Limits of Necessity: Part IIIAAA, *Defence Act 1903* (Cth)**

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This conference falls close to the sixth anniversary of the September 11 2001 attacks on the World Trade Centre and Pentagon. My purpose today is to revisit those awful moments, which fixated and forever changed the world, in order to explore the limits of appropriate defensive action against hijacked aircraft. I also wish to explore the human rights challenge that these scenarios present to liberal democracies struggling to uphold human rights whilst effectively dealing with terrorism. Indeed, this seems highly topical in light of the events during the 2007 APEC Summit, where a light aircraft strayed into a security zone and was at serious risk of being shot down.

I should flag now the European dimension to this paper (which is fitting bearing in mind my role as Director of the National Europe Centre at the ANU). In this respect I will briefly examine how the German Constitutional Court recently reviewed the constitutionality of aviation security legislation that purported to empower the military to use lethal force against hijacked aircraft. The court held the Act to be unconstitutional, as it was inconsistent with the paramount values of the right to human dignity and human life. However, the principal focus of the paper is how the common law approaches the problem, and how and the Australian Federal Parliament has addressed the issue through special powers inserted into the *Defence Act* last year: Part IIIAAA.

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## **The 9/11 Calculus: Self Defence and the Limits of Necessity**

After the first three 9/11 collisions occurred, I am sure many of you speculated whether the US military might take action to shoot down further hijacked aircraft. Indeed, there is a conspiracy theory that the fourth plane, United Airlines Flight 93, was taken down through the use of military force.<sup>2</sup> If it had been shot down, I suspect that it would not have created significant moral or political controversy.

### **Justified or Excuse Action: Does it Really Matter?**

From a legal perspective, the actions of intentionally (or indeed recklessly) shooting down a plane (killing the alleged perpetrators, crew and passengers) to avert further mass casualties and carnage on the ground is *prima facie* murder. There is no scope for playing around with double effect doctrines beloved of philosophers and ethicists to provide ‘wobble room’ for responsibility. The legal and moral question more sharply posed in this scenario is whether the law breaking (the most serious prohibition in the criminal code) is justified or excused. Put simply, the question is whether the defences of self-defence (which extends to defence of others), necessity, or a statutory variant of sudden/extraordinary emergency under the Federal *Criminal Code* might be available.

Justification and excuse are conceptually different – there is an elaborate philosophical debate about which defence should be viewed as a justification (which renders the conduct lawful) or an excuse (which maintains the unlawful nature of the conduct but relieves the actor or their guilt). The out-

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<sup>2</sup> In a Christmas Eve address to US troops in 2004, US Secretary of Defence Donald Rumsfeld made a passing reference to UA93, stating ‘... shot down the plane over Pennsylvania’.

come to both remains the same – the accused is found not guilty. Few if any legal consequences flow from categorisation as a justification or excuse.<sup>3</sup>

## **Human Rights Law: Right to Life**

How does human rights law impinge on this issue? The *UN Declaration of Human Rights* adopted in the shadow of the mass murder of civilians in WWII contains a very strong statement of the right to life.

### **Universal Declaration of Human Rights**

(Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 Dec 1948)

#### Article 3

Everyone has the right to life, liberty and security of person.

In the Australian context, Article 6 of the ICCPR is a starting point. It states that the right to life is not an absolute right. Rather, it is a right not to be subject to the *arbitrary* deprivation of life.

### **International Covenant on Civil and Political Rights (1966)**

#### Article 6

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

This may be contrasted with the European formulation.

### **The European Convention on Human Rights (1950)**

#### Article 2

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<sup>3</sup> See C.M.V. Clarkson, "Necessary Action: A New Defence" [2004] Crim.L.R. 81, where the author reviews the common arguments for maintaining the distinction, concluding that the defences are united by a common rationale, and could conceivably be reformulated as a broader defence of necessary action.

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
  - (a) in defence of any person from unlawful violence;
  - (b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
  - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The ECHR admits possibilities of legitimate use of lethal force in the circumstances outlined above. Of particular relevance is where the use of lethal force is justified in the defence of any person from unlawful violence (Art 2(2)(a)). The ICCPR did not expressly include these exceptions, partly because of concern that specifying exceptions might be too limiting and there were other scenarios that may justify the use of lethal force in the future. Further, the law itself must conform to explicit and implicit standards in the Covenant. The drafters, failing to agree on language which would convey these standards concretely, left their elaboration to the processes of implementation of the Covenant.

**So when might it be necessary or justified to kill in the prescribed circumstances?**

Where a deprivation of life purports to be justified under the international standards, certain principles can be invoked to assess such a claim. These principles can be sourced in a series of cases on Art 2 including, most significantly, *McCann and Others v. the United Kingdom* 18984/91 [1995] ECHR 31, which involved a military operation against suspected IRA bombers.

- The deprivation of life must have a legal basis under national law.
- The deprivation of life must be a proportionate response in the circumstances, a concept which is inherent in the idea of necessity.
  - The use of force by agents of the State may be justified where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.
  - It is also a requirement that it be evident that greater damage or harm will result unless the purpose is achieved.
- The question of justification of a deprivation must be subject to an independent judicial process. If the killing was not justified, the person should be punished.
  - The function of prosecution is not revenge but to fulfil the requirements of Art 6 that the killing be demonstrated to an independent court to have been strictly necessary.
- Deprivation of life may be justified only in defence of life.

## **Domestic Criminal Law: The Legal and Moral Limits of Necessity**

The rationale for why necessity is not available at common law for an intentional killing and a charge of murder can be found in the 19<sup>th</sup> century case of *R v Dudley and Stephens* (1884) 14 QBD 273. Dudley, Stephens, Brooks and a 17-year-old boy, Parker were cast adrift in an open boat 1600 miles from land. On the 20<sup>th</sup> day, after nine days without food and seven without water, Dudley and Stephens agreed to kill Parker who was the weakest of the four and eat his flesh. Brooks refused to take part in the killing. Dudley then killed Parker and the three men survived by eating the boy's flesh. When they were subsequently rescued, Dudley and Stephens admitted what had happened and were charged with murder. The jurors declined to give their view as to whether the facts amounted to murder and asked for the advice of the Court of Queen's Bench. Lord Coleridge CJ in delivering the judgement of the Court held that the accused were guilty of murder and sentenced them to death. This mandatory penalty was later commuted by the Executive to six months' imprisonment.

In holding that the defence of necessity was not available to a charge of murder, Lord Coleridge CJ stated (at 287-288):

To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die ... It is not correct, therefore, to say that there is any absolute or unqualified necessity to preserve one's life ... **It is not needful to point out the awful danger of the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what?** It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him deliberately taking another's life to save his

own ... it is quite plain that such a principle once admitted might be made the legal cloak for unbridled passion and atrocious crime.

For an engaging legal historical analysis of this case see A Simpson, *Cannibalism and the Common Law* (Chicago: University of Chicago Press, 1984).

A significant question has been whether the *Dudley and Stephens* ruling should still apply. There is a sound argument that such a blanket rule may be harsh in certain cases, and overlooks the State's duty to protect its citizens from unlawful criminal acts. Indeed, some scholars have argued that it should not apply.<sup>4</sup> The necessity plea requires consideration of the threat, its imminence and proportionality (and to that extent is consistent with the human right law).

But the problem in the hijacked aircraft scenario is that the person exercising the lethal force is not the person *in extremis* – but is another person calculating the least *worst* outcome. Weighing the numbers in this context can be challenging. The difficulty is that in the real world, the full extent of the likely harm involved and the respective death tolls in these situations is unknowable. Further, the human dignity point is very strong – as the *Dudley* case admits. Even where we can calculate the risks clearly, the principle of weighing harms remains problematic: does the status of the group matter – sacrificing a larger number of citizens to preserve the life of a much small number of elected representatives. What about the royal family? How many would we be prepared to sacrifice to save them!

Some academics, such as Bohlander, neatly dispose of the human dignity and autonomy interests of those on the planes by saying that they have, in effect, ceased to be human beings; either having become part of the terrorist's weapon, or a plane of putative corpses.

A harsh--but in my view ultimately correct--approach to that sort of case [the plight of passengers and crew on hijacked airplanes] would suggest that their doomed lives cannot be used as one side to the balancing exercise, when trying to decide whether necessity could

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<sup>4</sup> See M Bohlander, "In Extremis - Hijacked Airplanes, 'Collateral Damage' and the Limits of Criminal Law" [2006] *Crim. L.R.* 579.

be applied as a means of justification or excuse. The outwardly cynical but logically proper approach is that necessity does not enter into it at all because there is no balancing exercise; *they are, to put it bluntly, already dead*. If the lives of the passengers will be lost in any case, then it would be a mere academic exercise to weigh the relatively minor shortening of those lives by shooting down the plane against the possibility of saving the otherwise unendangered lives of the people on the ground.<sup>5</sup>

I am uneasy with this analogy – *alive but dead*. Further, with the current security processes in place on board planes (including sky marshals) it may be premature to write off the hijacked passengers entirely.

The problem with applying necessity or self-defence in these cases is that the risks involved are very hard to calculate - indeed they may well be incalculable. The best available information about the threat may be incomplete or indeed inaccurate. An excuse based on sudden or extraordinary emergency might be more palatable, reflecting the highly pressured and immediate, perhaps even instinctual reaction – this form of deliberation may excuse wrongful action, and I feel happier accepting this normative characterisation – I think it is also more psychologically accurate from an explanatory perspective.

## **The German Position**

The Aviation Security Act (11<sup>th</sup> of January 2005) purported to authorise the direct use of force with a military weapon where it is expected in the special circumstances that the aircraft is intended to be used to destroy the lives of human beings and if military force is the only means to prevent that imminent danger. The constitutionality of the provision was attacked successfully on two grounds. First, whilst the military in Germany can be called in aid of the police, they can only exercise powers that are consistent with civilian police powers. Since the weapons required to shoot down planes

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<sup>5</sup> Ibid, 580 (emphasis added).

are not available to police, they cannot be used by the military. More relevantly, the law was contradictory to the paramount rights in German Constitution: Article 2 II 1 GG (which guarantees the right to life), and Article 1 I GG (which guarantees the right to human dignity).

The German Constitutional Court distinguished two different cases:

- a) The aircraft in question was occupied only by terrorists/criminals
- b) The aircraft also contained innocent passengers

**a)** In the first case the Constitutional Court found the regulations of the *Aviation Security Act* were *not* contrary to Articles 1 and 2 of the German Basic Law. The Constitutional Court found that terrorists/criminals lose their right to life by acting illegally and threatening the life of innocent people (this is a normal application of self-defence which extends to the right to defend others). The loss of their right to life was considered a foreseeable consequence of their deed. They provoked the taken action by the State and could have stopped the action by not realising their plan.<sup>6</sup>

**b)** However, if there were independent civilian passengers onboard, the Constitutional Court found shooting the plane would be contrary to both Articles 1 and 2 GG. Unlike terrorists, civilians are in a situation they did not choose. Despite the fact that the passengers are likely to die anyway, sacrificing their lives to save the lives of people on ground would deprive the passengers of their guaranteed fundamental rights. The State has the obligation to protect every human being living within it. By choosing one group of people to die for another the State would not fulfil this obligation.<sup>7</sup> Furthermore, the State would have to decide to take defensive action without absolute certainty of what will happen – Flight 93 being an example that these plans do not always come to fruition and the hijackers may have been overcome. This point was made in various submissions to the Constitutional Court, not least by the German Airline Pilots Association!<sup>8</sup>

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<sup>6</sup> see German Constitutional Court Decision of 15<sup>th</sup> of February 2006 - 1 BvR 357/05 -

<sup>7</sup> see German Constitutional Court Decision of 15<sup>th</sup> of February 2006 - 1 BvR 357/05 -

<sup>8</sup> See the arguments of the pilot associations commenting on the Aviation Security Act in Paragraphs 68 and 69 of the judgment.

This view is consistent with the traditional interpretation of ‘human dignity’ used by the Court. Although the term is not defined in legislation, the Constitutional Court has in several decisions<sup>9</sup> used the interpretation of Immanuel Kant in its judgments.<sup>10</sup> Kant’s definition of human dignity states that no human being should be made an object of State action, and that the right is indivisible. The right to human dignity and the right to life form the basis of the German Basic Law and cannot be restricted under any circumstances.

In the German system necessity is determined in very similar ways. The German High Court decided that in cases where a greater number of people could be saved by sacrificing a smaller number of people - the different interests can under no circumstances be weighed up against each other.<sup>11</sup> However, a person who killed in this situation would be partially excused of murder and found guilty of manslaughter<sup>12</sup> on the ground of ‘necessity overriding legality’.<sup>13</sup> For this excuse to apply special circumstances have to be given.<sup>14</sup>

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<sup>9</sup> See for example: Decision of the BverfG 1975 – 1 BvF 1/74 – in relation to reproductive cloning.

<sup>10</sup> Kant, I. (1785/86), *Grundlegung zur Methaphysik der Sitten*, Werkausgabe VII., hg. V.W. Weischedel, Darmstadt 1963-1964,61.

<sup>11</sup> BGH 35, 350; NJW 53, 513; Roxin AT §16, 29; NK-Neumann 74, 132

<sup>12</sup> Under the German system a person killing to save another would not be charged with murder.

<sup>13</sup> see Tröndle/Fischer 2001, § 34 StGB, Rn. 10

<sup>14</sup> see Tröndle/Fischer 2001, vor § 32 StGB, Rn. 15

## **Australian law: Civil Defence Powers and Protecting Critical Infrastructure**

The relationship between defences, self-defence, necessity and duress are complex. In this next section I will focus on the recent statutory developments concerning the powers military forces may exercise in aid of civil law security or law enforcement tasks. I will focus on Part III AAA *Defence Act* 1903, which was inserted into the Act in 2000, amended last year and came into force shortly before the 2007 APEC Summit.

First I would like to contextualise these new powers in relation to broader trends in law enforcement. The classic rule of law statement, reiterated in many leading judgements, is that law enforcement officials are subject to the law like anyone else – a proposition which applies equally to the military. That said, there are many ways in which we treat these State officials differently from ordinary citizens. One such way is the development of special defences (‘superior orders’ being a specialised military lawful authority defence). Another way is the prospective granting of immunities. There is no power in the Executive to grant prospective immunities – they can pardon after the event, but cannot provide this prospectively. Parliament however can do this – and there is a template in civilian law enforcement under controlled operations legislation. Under these certificates, law enforcement officials and civilians can obtain criminal and civil immunity to engage in a range of specified acts (which would otherwise be unlawful) – ranging from importing drugs to bribery, computer offences and corruption.

The recent amendments to Part IIIAAA of the *Defence Act* 1903 create a legislative framework for prospective authorisation of force by the military in aid of civil power. It inter alia provides for ‘the use of reasonable and necessary force when protecting critical infrastructure designated by the authorising Ministers’<sup>15</sup> and enables a ‘call out’ of the ADF to respond to incidents or threats to Commonwealth incidents in the air environment<sup>16</sup> as well as ensuring that ‘powers conferred on

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<sup>15</sup> see Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 – Revised Explanatory Memorandum

<sup>16</sup> *ibid*

the ADF under Part IIIAAA can be accorded to the ADF in the course of dealing with a mobile terrorist incident and a range of threats to Australia's security'. Prior to these amendments, there was no legislative framework that provided specific powers to the ADF in protecting the State against domestic violence, nor was there any provision regarding the use of the ADF by the Commonwealth in protecting its own interests. A review in 2004 noted that this was too reactive (modelled around a siege situation) and there needed to be a more proactive model – hence the 2006 amendments.

The scheme is different from the controlled operation scheme – rather than a blanket criminal and civil immunity, Part IIIAAA gives a non-exhaustive list of powers given to defence personnel to do certain things. Section 51SE allows ADF members operating under orders given by the Chief of the Defence Force to do destroy a vessel or aircraft. The ADF member must conform to the requirements of s 51SE(2) or (3). Amongst other things, key requirements are:

- the order was not manifestly unlawful;
- the member has no reason to believe that circumstances have changed in a material way since the relevant order was given;
- the member has no reason to believe that the order was based on a mistake as to a material fact, and;
- taking the measures was reasonable and necessary to give effect to the order.

In addition, any action, or giving of orders, must have been authorised by a Minister beforehand (s51SE(4)), unless the ADF member believes on reasonable grounds that there is insufficient time to obtain the authorisation because a sudden and extraordinary emergency exists: s 51SE(5). The purpose of these provisions is to ensure that Defence personnel are under strict control, through a chain of command, when they are receiving orders. Subsections 51SE(2) and (3) draw heavily, according

to the EM, on the principles of the defence of acting under lawful authority (EM para 37). However, it is probably best described as a hybrid between law authority and necessity.

Defence of superior orders will always be contentious with its association and connotation with the ‘Nuremburg’ defence. That said, most military law systems have allowed some version of the defence with qualifications to prevent its application in cases where an order is manifestly unlawful on its face. Importantly in this context there may be significant pressure applied by the chain of command to shoot down the aircraft. The concession here reflects that defence are in a different position to police (discretion in how they go about their task) and that obedience to orders is critical to military effectiveness. As the EM notes, this is really a form of defence already recognised under the DFDA – acting under lawful authority – this is simply one application of where the defence person is acting under a superior order (and contains some safeguards).

The legislation could be a trap for unwary ADF members. The Explanatory Memoranda suggests that the purpose of the amendments is to provide clear immunities to Defence to act lawfully against threats to the security of the Commonwealth. Yet it does not state expressly that defence personnel are immune from criminal and civil law, or prosecution under DFDA offences. Rather the immunity is from the application of State and Territory criminal laws (it is questionable whether civil immunity applies). The CDPP has been given powers to prosecute for criminal acts committed under the Act. The CDPP is expected to exercise ‘common sense’ in prosecution decision-making, and give consideration to the Rules of Engagement, etc, but I think when this extraordinary action happens, the political and public pressure if a mistake is made will be intense!

## **Specific Powers to Deal with Aviation Security Incidents**

The purpose of the new provisions in relation to aviation security incidents is to provide clear legal authority for the military to act (rather than engage in the deliberative exercise of weighing interests in necessity, stretch self-defence, or resort to the vagaries of Executive powers or the Defence head of power in the constitution!). The provisions seek to structure the decision making process – and

also to move beyond the reactive call out model, to designate a set of circumstances where the Chief of Defence is already pre-authorised or prospectively authorised to act (whether in Australia or offshore) – in these cases, the military can act without ministerial authorisation or Governor General order.

As noted above Section 51ST authorises the use of necessary force including the destruction of the aircraft. There are two types of involvement under this section – the person who engages the aircraft and also the person who orders the taking of such measures. This action may be taken whether the aircraft is airborne or not. Defence personnel must be acting within a command structure, giving/receiving orders: s 51 S T (1), and the equivalent requirements in subsections (2) and (3). These requirements perhaps reflect the concern of excessive force (stemming from cases such as the Northern Irish experience discussed above). In relation to action under Div 3B, the action must be reasonable and necessary, but the further limitations are more relaxed than other powers:

**Section 51T**

(2B) Despite subsection (1), in exercising powers under subparagraph 51SE(1)(a)(i) or (ii) or **Division 3B [action against aircraft]**, a member of the Defence Force must not, in using force against a person or thing, do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the member believes on reasonable grounds that:

- (a) doing that thing is necessary to protect the life of, or to prevent serious injury to, another person (including the member); or
- (b) doing that thing is **necessary to protect designated critical infrastructure against a threat of damage or disruption to its operation**; or
- (c) doing that thing is necessary and reasonable to give effect to the order under which, or under the authority of which, the member is acting.

The new legislation goes even further as it provides for ‘the use of reasonable and necessary force when protecting critical infrastructure designated by the authorising Ministers’<sup>17</sup>. This means that the right to life has not only to be weighed up against the life of people in the building at threat or on the ground, but also against the importance of an infrastructure that could be destroyed. It can be concluded that even if the plane threatens to crash into a nearly empty building (eg parliament at night) the plane could be shot down, killing people on the plane although a greater number of people is not saved or even killing more people on the ground where the plane crashes.

## **Conclusion**

The new powers relating to hijacked aircraft are a departure from the traditional approach of self-defence (which extends to defence of others), necessity or sudden or extraordinary emergency. Unlike Germany, there is no basis to impugn the law in our constitution related to the right to life or human dignity – unless the High Court starts to imply a few more constitutional rights, perhaps drawing inspiration from the right to life under Art. 6 of the International Covenant on Civil and Political Rights. This is a highly unlikely prospect under the current bench!

The reforms to Part IIIAAA are designed to provide a structured decision making process governing the use of lethal force (in what will be a high pressured environment) and provide some measure of legal reassurance for the ADF members – they create a chain of command scenario where the ultimate driver may be the responsible Minister, rather than the ADF personnel either in the form of the CDF or the service personnel on the ground. The legislation contains some safeguards and limitations – as the EM notes ‘civil power remains paramount’ during the operation and the military ‘can only use force that is reasonable and necessary in the circumstances’. Nevertheless it moves beyond a preventative model to a precautionary model – not really weighing up harms (lesser of evils) but rather authorising action where we don’t know that life is in danger. The new legislation goes even further by providing for ‘the use of reasonable and necessary force when protecting critical infra-

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<sup>17</sup> see Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 – Revised Explanatory Memorandum

structure designated by the authorising Ministers'.<sup>18</sup> This means that the right to life has not only to be weighed up against the life of people in the building at threat or on the ground, but also against the importance of an infrastructure that could be destroyed. It can be concluded that even if the plane threatens to crash into a nearly empty building (such as a power station) the plane could nevertheless be shot down, killing people on the plane. This will be justifiable even though there is no prospect that this action would save a greater number of people, and may even foreseeably involve the killing of a significant number of people on the ground where the plane crashes. It is this particular scenario that presents the most serious challenge for human rights law and the right to human life and dignity, which is protected under the ICCPR.

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<sup>18</sup> see Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 – Revised Explanatory Memorandum