German perspectives on the right to life and human dignity in the "war on terror"

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The purpose of this article is to examine, from a comparative perspective, how security concerns have limited three distinct human rights in Germany and Australia: the right to a fair trial, the right to life and the right to human dignity. Since human rights are rarely absolute, the "war on terror" has required legislatures and courts to determine the reasonable limits and qualifications to these rights. The German approach diverges from Australia in relation to the paramount constitutional status of the right to human dignity. Consequently, this German hierarchy of rights produces different outcomes in relation to the range and scope of permissible counter-terrorism measures. This is apparent in the ruling of the German Constitutional Court which declared void legislative powers authorizing the use of lethal force against hijacked aircraft. Similar powers inserted into the Defence Act 1903 (Cth) would not be amenable to similar challenge on grounds that they violate the right to human dignity. Notwithstanding these legal differences, the German authorities have sought to overcome these constitutional inhibitions by resort to untested doctrines such as the suprastatutory state of emergency, suggesting the difference between the two systems is not as marked as it first appears.

INTRODUCTION

This article will compare and contrast a range of German and Australian legal responses to terrorism. Terrorism laws typically raise the question of the appropriate balance between security and human rights. The problem is particularly acute in relation to the most basic of human rights – the right to life. The right to life is protected in several international conventions binding Germany and Australia: the Universal Declaration on Human Rights (UDHR), the *International Covenant on Civil and Political Rights* (ICCPR) and the *European Convention of Human Rights* (ECHR). Like many international human rights, the right to life is not absolute. The ICCPR contains a right not to be subject to the *arbitrary* deprivation of life, but makes an exception in relation to capital punishment. The ECHR specifically contains a range of exceptions relating to self defence and the use of force in relation to law enforcement, prevention of crime and disorder. The key question in relation to the use

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¹ Lynch A, MacDonald E and Williams G (eds), *Law and Liberty in the War on Terror* (Federation Press, 2007) pp 137-164, "Human Rights and Terrorism: Is a Trade-Off Necessary"; Williams G, "Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism" (2006) 8(1) *Journal of Comparative Policy Analysis* 43; For a critique of balancing approaches, see Bronitt S, "Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?" (2003) 14 PLR 70; Zedner L, "Securing Liberty in the Face of Terror: Reflections from Criminal Justice" (2005) 32(4) *Journal of Law and Society* 507.

² See Art 3 of the *Universal Declaration of Human Rights* (UDHR); Art 6(1) of the *International Covenant on Civil and Political Rights* (ICCPR); Art 2(1) of the *European Convention on Human Rights* (ECHR).

³ Gearty C, *Principles of Human Rights Adjudication* (Oxford University Press, 2004) pp 9-10; Security Legislation Review Committee (SLRC), *Report of the Security Legislation Review Committee* (2006) p 39.

⁴ See Art 6(2) of the International Covenant on Civil and Political Rights.

⁵ See Art 2(2) of the European Convention on Human Rights.

of lethal force is proportionality. Of course state parties are granted a "margin of appreciation" in determining the nature of the threat and what is a necessary and proportionate response in the "war on terror".

The use of lethal force to prevent a terrorist attack similar to that which occurred in 2001 in the United States on 9/11 poses significant challenges for the police and the military, particularly in relation to balancing necessity against the right to life. When examining the protection afforded by the right to life, it is important to note that it extends not only to the lives of the putative "victims" and the "offenders", but also those state officials (which includes the police and military) who are called upon to use force to prevent terrorist attacks and to enforce the law. The right to life inheres within it a right to self defence, which extends to the defence of others. As this article demonstrates, the scope and form of the right to life in the counter-terrorism context differs in Germany and Australia.

This article will not only focus on the right to life and how it applies to different actors – victims, perpetrators and state officials, but will also consider how circumstances of perceived necessity impact upon other fundamental rights: the right to fair trial, the right not to be subject to torture and the right to human dignity. Human rights lawyers typically disclaim any hierarchy of rights. That said, some international human rights are absolute in the sense that these rights are non-derogable and are not subject to any exceptions (eg the right not to be subject to torture). A distinctive German contribution to human rights law is the express articulation in the *Basic Law for the Federal Republic of Germany* (Basic Law or *Grundgesetz* (GG)), that the right to human dignity should be regarded as paramount. Its primacy is reflected in its foundational place in the scheme of rights set out in the Basic Law: Art 1 I. This right is not included in ECHR and ICCPR, and there is no equivalent protection in the Australian federal or State *Constitution*, or even in the recently enacted human rights legislation in the Australian Capital Territory or Victoria.

COMPARING GERMAN AND AUSTRALIAN LEGAL RESPONSES TO 9/11

In Germany, as in Australia, a raft of new anti-terrorism laws was enacted after the terrorist attacks of 9/11. The principal Australian federal criminal laws – namely the *Criminal Code* (Cth) and *Crimes Act 1914* (Cth) – have been regularly amended by Security Legislation Amendment Acts. ¹² New offences and law enforcement powers have been created, including controversial powers to impose preventative detention and control orders. Additional complementary anti-terrorism laws were enacted in the States and Territories. ¹³

The Australian reforms have been subject to extensive criticism on the grounds that they infringe human rights, including the right to a fair trial, freedom of movement, expression, association and

⁶ Michaelsen C, "International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11" (2003) 25(3) Sydney Law Review 275.

⁷ The state has an obligation to protect victims against unlawful violence as, eg set out in Art 2(2) of the ECHR, discussed in Kennison P and Loumansky A, "Shoot to Kill – Understanding Police use of Force in Combating Suicide Terrorism" (2007) 47 *Crime, Law and Social Change* 151 at 152.

⁸ The "right to physical integrity" is protected in the German legal system by Art 2(2)[1] of Basic Law (*Grundgesetz*); the right not to be subject to torture is further granted by Art 104(1)[2] of the Basic Law: "Detainees may not be subjected to mental or physical mistreatment", and Art 1(1): "The dignity of man is inviolable."

⁹ See, eg von Boven T, "Distinguishing Criteria of Human Rights" in Steiner HJ and Alston P, *International Human Rights in Context – Law, Politics, Morals* (2nd ed, Oxford University Press, 2000) pp 154-157.

¹⁰ Article 2(2) of the *United Nations Convention Against Torture*, opened for signature 10 December 1984, GARes 39/46 (entered into force 26 June 1987).

¹¹ Human Rights Act 2004 (ACT. See also Charter of Human Rights and Responsibilities Act 2006 (Vic) (the charter), which was passed by Parliament in July 2006.

¹² Security Legislation Amendment (Terrorism) Act 2002 (Cth); Criminal Code Amendment (Offences Against Australians) Act 2002 (Cth); Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002 (Cth); Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Act (No 2) 2004 (Cth); Anti-Terrorism Act (No 2) 2004 (Cth), the Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth); Anti-Terrorism Act (No 2) 2005 (Cth).

¹³ See, eg the Terrorism (Police Powers) Act 2002 (NSW) and the Terrorism (Community Protection) Act 2003 (Vic).

assembly.¹⁴ In Germany, security concerns responding to 9/11 led to a wide-ranging package of laws impacting upon civil liberties. Amendments were made to 17 existing laws and five regulations, with consequential changes to more than 100 German laws.¹⁵ As in Australia, these laws have attracted criticism from a human rights perspective.

In Germany, derogation from fundamental rights protected in the Basic Law has been justified by reference to the defence of "justifying necessity" under the Penal Code. This defence has limitations, and where it ceases to be available, state officials have invoked the broader necessity doctrine of "suprastatutory state of emergency". This supplementary concept had initially been developed by the *Reichsgericht* (German Imperial Court) in 1927 to provide a legal basis for performing otherwise unlawful abortions on the grounds of medical necessity. In this respect, the doctrinal development of suprastatutory state of emergency parallels the application of the common law defence of necessity to legalise abortions in Australia. In Germany, however, the "suprastatutory state of emergency" defence was excessively pleaded during the 1970s to justify breaches of human rights in relation to the treatment of terrorists of the Red Army Fraction (RAF). As explored below, the doctrine continues to operate to temper and qualify the protection which the Basic Law purports to confer upon the right to human dignity and right to life.

FAIR TRIAL LIMITATIONS: BANNING ACCESS TO LEGAL COUNSEL

The new laws emerging after 9/11 in Germany and Australia bear many similarities. One example is the German "contact ban" which prohibits detainees from contacting a lawyer if there is a risk that the lawyer would conceal evidence from the investigators. The practice of imposing contact bans developed in Germany between 1975-1976, when meetings between terrorist suspects and their lawyers were covertly recorded in the gaols of Stuttgart-Stammheim by the German Federal Intelligence Service (*Bundesnachrichtendienst*). Neither the competent supervising judicial officer nor the Director of Public Prosecutions had been informed of this covert recording. When the practice became public, the responsible state (Land) officials claimed the defence of necessity (§ 34 of the *Strafgesetzbuch*). This defence was accepted by the court.

To regularise this practice and clarify its legal basis, §§ 31-38 of the *Einfuehrungsgesetz zum Gerichtsverfassungsgesetz* (EGGVG) were enacted in 1977. These laws provided that, in circumstances where there is an imminent threat to life, physical integrity or liberty of a person, and there is a reasonable suspicion that this threat is made by a terrorist organisation, a contact ban can be ordered.²² This administrative order may be obtained from the federal state government, a designated high federal state authority or, if more than one federal state was affected by the offence, the Federal

¹⁴ Lynch A and Williams G, *What Price Security?: Taking Stock of Australia's Anti-Terror Laws* (UNSW Press, 2006) p 14; Bronitt S and McSherry B, *Principles of Criminal Law* (2nd ed, Lawbook Co., 2005) pp 871-885. For a contrary view, see Rose GL and Nestorovska D, "Australian Counter-Terrorism Offences: Necessity and Clarity in Federal Criminal Law Reforms" (2007) 31(20) Crim LJ 20.

¹⁵ Bundesgesetzblatt, Gesetz zur Bekaempfung des internationalen Terrorismus (Terrorismusbekaempfungsgesetz) (2002) 1:3, pp 361-95, http://www.elektronische-demokratie.de viewed 26 March 2008.

 $^{^{16}}$ George Fletcher has translated this defence as "extrastatutory justification" in Fletcher G, *The Grammar of Criminal Law* (Oxford University Press, 2007) p 147.

¹⁷ German Imperial Court decision RGSt 61, 242 (1927).

¹⁸ R v Davidson [1969] VR 667 discussed in Bronitt and McSherry, n 14, p 328.

 ¹⁹ See, eg Böckenförde EW, "Der Verdrängte Ausnahmezustand – Zum Handeln der Staatsgewalt in auergewöhnlichen Lagen"
 (1978) 38 Neue Juristische Wochenschrift 1881; Ostendorf H, "§ 34 StGB – der neue Notstandsartikel des Grundgesetzes"
 (1978) 14 Recht und Politik 137 at 138.

 $^{^{20}}$ Contact ban (Kontaktsperregesetz), first considered to be justified under § 34 of the Strafgesetzbuch (StGB) (German Criminal Code).

²¹ Ostendorf, n 19, pp 137-140.

²² See Einfuehrungsgesetz zum Gerichtsverfassungsgesetz, § 31.

Minister of Justice.²³ The Act contains provisions for judicial review of these orders.²⁴ The order can stipulate that the detained person may be held incommunicado for up to 30 days. This restriction encompasses all contact with other detained persons, the "outside world" (friends and family) and with lawyers.²⁵ Section 138a of the German Criminal Procedural Code (*Strafprozessordnung*) furthermore determines that a lawyer can be banned from contacting his or her client if there is reasonable suspicion that the lawyer participated in the terrorist offence or a related offence, or that the lawyer is being used to suppress relevant information or to distribute information between detainees. The breadth of these laws raises concern that they infringe the right to a fair trial under the ECHR, Art 6(3)(c) which stipulates that everyone has the right "to defend himself in person or through legal assistance of his own choosing". The importance of legal representation is also reflected in Art 14(3)(b) of the ICCPR, which guarantees to the accused the right to "communicate with counsel of his own choosing".

This commitment to access to legal representation, which extends beyond the trial itself, is well established in domestic legal systems. The common law in Australia has conferred a high degree of protection for communications between clients and their lawyers, recognised as a legal professional privilege, which has been enacted into statutory form in some jurisdictions. In Germany, the right to communicate with legal counsel has been implied from a number of constitutional provisions including Arts 3(1) (equality before the law), 2(1) (personal freedom) and 20(1), 28(1) (*Rechtsstaatsprinzip*) of the GG. Subsequent cases before the German Supreme Court have referred to Art 6 of the ECHR, which has extended the right further to guarantee "representation by counsel in every stage of the procedure". 29

In German law, the right to counsel is not absolute and can be limited where another right is paramount, eg the right to life. That said, it is well established that the legal protection (or privilege in the common law terminology) does not attach to communications which are aimed at the furtherance of the commission of crime. Outside these cases, however, contact bans on nebulous grounds of "national security" should be rejected.

From a German law perspective, it may be argued that denying contact to lawyers in counter-terrorism investigations is incompatible with the Basic Law. German courts have given some consideration to the restrictions imposed on lawyer-client communications, and whether a contact ban may be permitted to protect the paramount right to life of potential victims of the lawyers' client. The legality of a contact ban was considered by the German Constitutional Court in 1978. The government claimed that infringement of the fair trial right under the Basic Law could be justified under the doctrine of suprastatutory state of emergency and also the defence of justifying necessity (see Appendix). The court held that the rights of the defendant can be limited in order to protect the rights of life and human dignity of potential victims:

Within the order of the Basic Law human life represents the highest value of all. It follows from Article 2II(1) in conjunction with Article 1I(2) that in respect to the high value attached to life, the most serious duty of the state is to protect all human life from the unlawful deprivation by others.³¹

²³ See Einfuehrungsgesetz zum Gerichtsverfassungsgesetz, § 32.

²⁴ See Einfuehrungsgesetz zum Gerichtsverfassungsgesetz, § 37.

²⁵ See Einfuehrungsgesetz zum Gerichtsverfassungsgesetz, § 31.

²⁶ Carter v Northmore Hale Davy & Leake (1995) 183 CLR 121; General Mediterranean Holdings SA v Patel [2000] 1 WLR 272 at 279C-288E (Toulson J). See also Evidence Act 1995 (Cth), s 118.

²⁷ German Constitutional Court decision BVerfGE 65, 171 (1965); see also German Constitutional Court decision in *Neue Strafrechts Zeitung* NStZ 1984, 176.

 $^{^{28}\,}Bundesgerichtshof~(BGH).$

²⁹ BGH 1 StR 474/06-9 (2006) (LG Landshut) (HRRS 2007 Nr 37).

³⁰ See also § 138a of the Strafprozeordnung.

³¹ German Constitutional Court decision BVerfGE 49, 24 (53).

It therefore upheld the bans on RAF terrorists from contacting their lawyers. The German Constitutional Court decision, though now 30 years old, remains unchallenged, though a referral to the European Court of Human Rights may well re-ignite debate about the proper limits of the contact ban.

In sum, following the hierarchy of rights in the Basic Law, and the paramount value attached to the rights to human dignity and life, some limitations on the scope of the right to a fair trial are permissible provided that they comply with the principle of proportionality.

Similar limitations on access to lawyers have been introduced in Australia post 9/11. The *Anti-Terrorism Act (No 2) 2005* (Cth) introduced preventative detention orders and control orders into the *Criminal Code* (Cth).³² Preventative detention may be ordered where a terrorist act is imminent (14 days) and making the order would substantially assist in preventing the attack, or where an attack has occurred for the purpose of preserving related evidence if it is necessary to detain the person to do so.³³ It also introduced "prohibited contact orders" which are ancillary orders to prevent the detainee from contacting a family member, parent or lawyer,³⁴ which is otherwise permitted during preventative detention.³⁵ Clearly, the Australian legislation could be challenged before the United Nations Human Rights Committee as being inconsistent with Art 14(3)(b) of the ICCPR.³⁶

Access to a lawyer, particularly during preventative detention, is of fundamental importance. Indeed, the protection of human rights often rests upon the presence of lawyers willing to assert such rights on the behalf of their clients, particularly the privilege against self incrimination and the right not to be subject to torture, inhuman or degrading treatment.³⁷ Through this examination of the right to a fair trial and access to legal counsel, it is clear that the doctrine of necessity has shaped the law (both legislative and case law) in Germany. In Australia, by contrast, the restriction is motivated by a broader national security concern, rather than the importance of protecting the right to life of others. The danger in Australia, which lacks a federal bill of rights, is that the limitations on human rights are determined through a political process or judicial reasoning which simply balances interests of security and liberty, an equation in which security concerns typically win the day.³⁸

TORTURE: THE RIGHTS TO PHYSICAL INTEGRITY, PERSONAL FREEDOM AND NOT TO BE SUBJECT TO MENTAL OR PHYSICAL MISTREATMENT UNDER THE BASIC LAW

In both Germany and Australia, the "torture debate" has acquired new force in the post-9/11 context. In Australia, the discussion has been largely academic, dominated by legal scholars, philosophers and ethicists debating the issues through abstract hypotheticals.³⁹ These debates have prompted some criminal law scholars in the United States and Australia to sketch out proposal for reform.⁴⁰

³² See Criminal Code (Cth), ss 104-105.

³³ See McDonald G, "Control Orders and Preventative Detention" in Lynch et al, n 1.

³⁴ Criminal Code (Cth), s 105.14A.

³⁵ Criminal Code (Cth), s 105.19(8).

³⁶ A control order is not a criminal charge under Australian law. Due to its punitive character, the relevant proceedings (though civil in character) would likely fall with the autonomous interpretation of "criminal charge" under international human rights law, enlivening the minimum fair trial guarantees provided in the ICCPR, see further: Emmerson B, Ashworth A and Macdonald A, *Human Rights and Criminal Justice* (2nd ed, Sweet & Maxwell, 2007) pp 231-235.

³⁷ As Deane J, notes in *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at [27]: "the suggested curtailment of legal professional privilege would inevitably, to some extent, also reduce the efficacy of the principle against self incrimination."

³⁸ "Balancing [of security and liberty] is presented as a zero-sum game in which more of one necessarily means less of the other ... Although beloved of constitutional lawyers and political theorists, the experience of criminal justice is that balancing is a politically dangerous metaphor unless careful regard is given to what is at stake": Zedner, n 1 at 510-511; Bronitt and McSherry, n 14, pp 871-876.

³⁹ See Kleinig J, "Ticking Bombs and Torture Warrants" (2005) 10(2) *Deakin Law Review* 614; James N, "Torture: What is it, Will it Work and can it be Justified?" in Lynch et al, n 1, p 153.

⁴⁰ In America, torture warrants have been proposed by Harvard law professor, Alan Dershowitz, in Dershowitz A, Why Terrorism Works: Understanding the Threat, Responding to the Challenge (Yale University Press, 2002). A similarly

In the modern law, torture is strictly prohibited, subject to an absolute ban under international human rights law and humanitarian law. In Australia, these prohibitions are also reflected in domestic extraterritorial offences contained in the *Criminal Code* (Cth). ⁴²

In Germany, torture under the Basic Law is prohibited under Art 2 (right to physical integrity), in conjunction with Art 14 (prohibition on coercive interrogation methods) and Art 1 (right to human dignity) of the GG. As reflected in the decisions of the Constitutional Court, legal opinion in Germany largely favours the view that torture is an infringement of human dignity under the Basic Law. The philosophy of Immanuel Kant has been influential in supporting this view: in his writings, Kant argues that the right to human dignity means that "no-one shall be made the object of state action". If a person is subject to torture, the state exercises (unlawful) power over him/her and the person becomes an "object" of this state action. This implies that even the human dignity of lawbreakers should be respected.

The right to physical integrity contained under Art 2 can be subject to "limitations pursuant to law". This opens an avenue for legal argument that interference with physical integrity might be justified on grounds of necessity. In Germany, the issue of torture and scope of necessity transcended the realm of the philosopher's hypothetical in the *Daschner* case.⁴⁵ In this case, a senior police officer slapped and threatened a suspect in a child-abduction investigation in order to find out where the child had been hidden. The German District Court held that the senior police officer was liable for assault causing bodily harm committed by him and a subordinate.⁴⁶ Although the senior police officer had raised the statutory criminal defence of "justifying necessity",⁴⁷ as well as broader doctrine of suprastatutory state of emergency, the District Court held that it was illegitimate to weigh basic values against each other and concluded that the right not to be subject to torture or degrading treatment was more important than potentially saving the life of the child. The court indicated that torture could under no circumstances be justified, reflecting the position in international law.⁴⁸ That said, the circumstances of pressing need might justify some mitigation of sentence, as occurred in *Daschner*.⁴⁹

In *Daschner*, the right of the lawbreaker not to be subject to torture had to be weighed up against the right of the kidnap victim and *his* right to life and human dignity. Not all legal opinion would agree with this interpretation of the Basic Law. Before *Daschner*, Brugger considered the Basic Law applicable to a "ticking bomb" torture hypothetical. He identified that the right to human dignity in Art 1 of the GG has two dimensions: the *negative* command, which limits action which infringes upon human dignity; and the *positive* command, which imposes a duty to take protective steps to uphold

controversial view was proposed by Bagaric M and Clarke J, "Not Enough Official Torture in the World? The Circumstances in which Torture is Morally Justifiable" (2005) 39(3) *University of San Francisco Law Review* 1; Gross O, "Are Torture Warrants Warranted?" (2004) 88 *Minnesota Law Review* 1481; Manderson D, "Another Modest Proposal" (2005) 10(2) *Deakin Law Review* 640.

⁴¹ Australia and Germany are signatories to the four Geneva Conventions of 1949, and their two additional protocols of 1977. Australia ratified the *Convention Against Torture* in 1989.

⁴² Criminal Code (Cth), ss 268.13 (crime against humanity – torture), 268.25 (war crime – torture (war crimes that are grave breaches of the Geneva Conventions)), 268.73 (war crime – torture (committed in the course of an armed conflict that is not an international armed conflict)).

⁴³ For an opposing argument claiming torture would be permitted under the Basic Law, see Brugger W, "May Government ever Use Torture? Two Responses from German Law" (2000) 48 *The American Journal of Comparative Law* 671.

⁴⁴ Kant I, Grundlegung zur Methaphysik der Sitten, Werkausgabe VII (VW Weischedel, Darmstadt, 1963-1964) p 61.

⁴⁵ District Court decision of the Landgericht Frankfurt am Main decision Az. 5/27 Kls - 7570 Js 203814/03 (2004).

⁴⁶ See § 223 of the Strafgesetzbuch.

⁴⁷ Under German Criminal Law (§§ 34-35 StGB) there is a distinction between justifying and excusing necessity (see Appendix).

⁴⁸ See, eg *United Nations Convention Against Torture*, opened for signature 10 December 1984, GA Res 39/46 (entered into force 26 June 1987).

⁴⁹ In the *Daschner* decision, the defendants were only convicted for minor assault, which meant that they could retain their positions as police officers.

human dignity.⁵⁰ He concludes that in relation to the hypothetical, the negative and positive dimensions are in conflict. He argues that the limitation clause attached to the right to life in Art 2II(3) allows for an exception to the absolute prohibition. According to the rationale of the Basic Law, the rights to life and human dignity could in "exceptional cases" outweigh the rights to physical integrity, protection from coercive interviewing and human dignity.

As will be explored below, in the *Aviation Security Act* decision, the Constitutional Court has supported the approach of the District Court in *Daschner* in that it prohibited the restrictions upon the right to human dignity in necessity situations, leading to a declaration of invalidity of the Act which had purported to authorise the use of lethal force against innocent persons on hijacked aircraft.

It is perhaps no coincidence that, shortly after *Daschner*, the United Nations (UN) attempted to promote greater awareness of human rights among police through "soft law" measures including the *United Nations Code of Conduct for Law Enforcement Officials (1979)* (the UN Code of Conduct). Article 2 of the UN Code of Conduct recognises that "[i]n the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons".⁵¹

In the Australian context, reflecting these obligations, s 23Q of the *Crimes Act 1914* (Cth) provides that suspects in police custody "must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment". While resonant with the UN Code of Conduct, the provision does not impose specific legal obligations on officials to uphold these rights or specify effective remedies for any breach.⁵² Remedies, such as they are, would be available indirectly through a criminal prosecution for assault of the perpetrator or by exclusion of any evidence obtained. Under s 84(1) of the *Evidence Act 1995* (Cth), an admission is not admissible unless the court is satisfied that the admission and the making of the admission, were not influenced by:

- (a) violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person; or
- (b) a threat of conduct of that kind.

More broadly, in determining whether illegally or improperly obtained evidence should be excluded under s 138 of the *Evidence Act 1995* (Cth), the court must consider "whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the *International Covenant on Civil and Political Rights*". The court may also consider, in determining whether evidence has been gathered unlawfully or improperly, whether the police had complied with s 23Q and, more generally, with the UN Code of Conduct. Through these indirect evidential and procedural remedies, the judicial process places some limits on investigative practices and advances the protection of human rights of suspects. However, where the exclusion of evidence rests on a judicial discretion, there is empirical evidence suggesting that the perceived necessity and evidential value to the officials may well favour its admission rather than rejection on public policy grounds.⁵³

It has been argued in torture cases that recognising necessity as a defence denies the autonomy and moral existence of the subject as a human being.⁵⁴ Even if the torture is "regulated" so as to avoid the risk of death, the victim of torture is not only subjected to serious pain but also experiences a form

⁵⁰ See discussion in Brugger, n 44 at 672.

⁵¹ Adopted by the UN General Assembly on 17 December 1979.

⁵² See for comparison very similar German (State/Land) Police Laws, eg § 35I of the *Police Law of the Land Baden-Wuerttemberg*.

⁵³ Presser B, "Public Policy, Police Interest: A Re-evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence" (2001) 25(3) *Melbourne University Law Review* 757. An Australian case where the interviewing of a terrorist suspect was held to be "coercive" and thus involuntary is *R v Thomas* (2006) 14 VR 475, 163 A Crim R 567; [2006] VSCA 165; *R v Thomas* (No 2) [2006] VSCA 166, discussed in McCulloch J, "Australia's Anti-terrorism Legislation and the Jack Thomas case" (2006) 18(2) *Current Issues in Criminal Justice* 357.

⁵⁴ Manderson, n 41 at 651.

of "moral death".⁵⁵ This position is reflected in the Basic Law, which protects not only the right to life (which is subject to limitations) but also the right to human dignity, which is inviolable. Laws which permitted torture even under circumstances of perceived necessity would be invalid as inconsistent with these paramount legal and constitutional values.

RIGHT TO LIFE AND NECESSITY DEFENCES

The final part of this article engages with the legal and moral dilemmas relating to necessity. In determining the "lesser evils", can the law balance the value of one life against another? In both Germany and Australia, self-defence and necessity are well-recognised legal concepts. This means that the right to life, consistent with the ECHR and ICCPR, can be limited in "special circumstances". That said, the scope of these exceptions to the right to life have developed differently in both countries.

The German Federal Court and the German Constitutional Court have consistently held that the weighing of life against life is impermissible.⁵⁶ The importance attached to the sanctity of life resonates with the common law position adopted in *R v Dudley and Stephens* (1884) 14 QBD 273. In this case, four sailors were shipwrecked on the high seas, and following the old maritime custom of cannibalism, decided to kill one of their number in order to avoid starvation. Two of the survivors were charged with the murder of the cabin boy. The Court of Queen's Bench held that necessity could not be pleaded as a defence to homicide. Lord Coleridge CJ emphasised the moral and practical difficulties in weighing competing interests involved if the defence was recognised:

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 in deliberately taking another's life to save his own.

Although convicted and sentenced to death, the penalty of the two survivors was later commuted to six months imprisonment.⁵⁷

The common law and German approach to limiting necessity is distinguishable. *Daschner* held that the state (acting through its representatives) cannot violate human rights (in that case, the right not to be subjected to torture) in order to save the life of another person. Read narrowly, *Dudley* only held that individuals cannot sacrifice the life of another in order to save their own. This decision does not cast doubt on the availability of self defence. It is not beyond argument that state officials (as opposed to persons placed in the circumstances of extremis) could nevertheless be justified in taking such a decision for the greater good. Indeed, some academics have argued that necessity should be available as a justification for shooting down a hijacked aircraft to avert its use in a suicide attack.⁵⁸

In preference to testing the vagaries of judge-made doctrines based on suprastatutory state of emergency or necessity, the legislatures in Germany and Australia have drafted specific legislation authorising the use of pre-emptive force against hijacked aircraft. In Germany, the law authorising police to shoot down hijacked aircraft was inserted into § 14III of the German *Luftsicherheitsgesetz* (*Aviation Security Act*) of 11 January 2005. In Australia, amendments were made to Pt IIIAAA of the *Defence Act 1903* (Cth).⁵⁹

(2008) 32 Crim LJ 100

⁵⁵ As Manderson points out "our societies have, at least since the Enlightenment, feared pain more than death, believed that human dignity requires absolute protection under all circumstances, and thought torture a more serious act than execution": Manderson, n 41 at 649.

⁵⁶ BGH 35, 350; NJW 53, 513; Roxin 16, 29; NK-Neumann 74, 132.

⁵⁷ R v Dudley and Stephens (1884) 14 QBD 273 at 287-288.

⁵⁸ See Smith JC and Hogan B, *Criminal Law* (10th ed, Butterworths, London, 2002) pp 273-274; Smith JC, Hogan B and Ormerod D, *Criminal Law* (11th ed, Oxford University Press, 2005) p 322; Bohlander M, "In Extremis – Hijacked Airplanes, 'Collateral Damage' and the Limits of Criminal Law" (2006) *Criminal Law Review* 579.

⁵⁹ Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth), Revised Explanatory Memorandum.

In relation to the limitations of necessity, § 14III of the *Aviation Security Act* provided that the direct use of force by a military weapon is only allowed in "special circumstances", namely where the aircraft is intended to be used to destroy the lives of human beings, and if that force is the only means to prevent that imminent danger.

The constitutionality of this broadening of the concept of necessity was immediately challenged as being incompatible with the Basic Law. In November 2005, four lawyers, a patent lawyer and a pilot filed a complaint to the Constitutional Court claiming that their rights as passengers of civilian aircrafts were infringed by § 14III of the *Aviation Security Act*. In the following decision, the Constitutional Court declared § 14III of the Act void. The Constitutional Court pointed out that § 14III of the *Aviation Security Act* is contrary to four provisions of the Basic Law. This article will focus on the Act's compatibility with Art 2II1 of the GG in conjunction with Art 1I of the GG. As noted above, Art 1I guarantees the right to human dignity and Art 2II1 the right to life. The Constitutional Court held that these two fundamental freedoms were infringed by the *Aviation Security Act*. The court distinguished between two different situations, where:

- (a) the aircraft in question is occupied only by terrorists/criminals; and
- (b) the aircraft in question is occupied as well by innocent passengers.

In relation to (a), the court found that the provisions of the *Aviation Security Act* were *not* contrary to Arts 1 and 2 of the Basic Law. This is consistent with other German jurisprudence establishing the legality of the "final life-saving shot", ⁶¹ which permits police officers to use lethal force as a matter of last resort against a criminal in circumstances where their own lives or the life of a hostage is threatened. The justification under German Criminal law would therefore be self-defence. ⁶² In Australia, the common law permits the use of lethal force in comparable situations, though this is framed in terms of the powers of individuals to use "reasonable force" to effect an arrest. ⁶³

In relation to the "final life-saving shot",⁶⁴ the German Supreme Court has further broadened the defence to cover cases where the suspect was already fleeing and therefore could no longer be characterised as an "aggressor" presenting an imminent threat.⁶⁵ Although in relation to a fleeing suspect, the use of force is only allowed to stop the suspect's escape (eg authorising the police to shoot him/her in the leg), the scope was broadened in relation to suspects of terrorist offences. This jurisprudence was developed especially in the 1970s in relation to the *Baader-Meinhof-Ensslin* group/gang, where the Supreme Court held that a terrorist is a "general, continuous threat" to society and therefore can be eliminated even if he/she is not at the time immediately threatening a person or a group of people.⁶⁶ Since the actual threat has ceased in those cases, the use of lethal force moved beyond the traditional boundaries of self-defence under German criminal law. Consequently, the Supreme Court applied the broader justifying necessity defence in this case.

Returning to the *Aviation Security Act*, the Constitutional Court held that terrorists similarly forfeited their right to life when acting illegally and threatening innocent lives. ⁶⁷ Diverging from the approach in *Daschner*, where the court recognised that the right to human dignity applied to the lawbreaker, in the *Aviation Security Act* decision, the court held that the right to human dignity under the Basic Law did not extend to the terrorists in the hijack situation. This difference in approach was justified on the grounds that the response of the police/military would be a foreseeable consequence of the terrorists' action. Additionally, because the terrorists constitute a threat to the right to life of

⁶⁰ German Constitutional Court Decision 1 BvR 357/05 (2006).

⁶¹ See, eg Neue Juristische Wochenschrift (1975) at 1231-1232.

⁶² See § 32 of the Strafgesetzbuch, ss I-II.

⁶³ See discussion in Meagher D, "Excessive Force Used in Making an Arrest: Does it Make the Arrest Ipso Facto Unlawful" (2004) 28 CrimLJ 237 at 241, fn 25, discussing *R v Turner* [1962] VR 30.

⁶⁴ Formerly also called the "final death shot", but the courts preferred the positive description.

⁶⁵ Neue Juristische Wochenschrift (1975) at 1231 ff.

⁶⁶ Neue Juristische Wochenschrift (1975) at 1231 ff.

⁶⁷ German Constitutional Court Decision of 1 BvR 357/05 (2006) at 118, 122.

innocent people, shooting down the plane would not breach their right to life. The terrorists had provoked the taken action by the state and could always have stopped this action by abandoning their plans. The ordinary criminal law governing self-defence would justify the shooting down of the aircraft and killing the terrorists.⁶⁸

As Kai Moller⁶⁹ has pointed out in a recent article on this decision, the court gave inadequate consideration to the human dignity of the terrorist lawbreakers. The court did not address arguments on this point or consider the implications of the earlier *Daschner case*. Although generally agreeing with the views of Moller, it has to be pointed out that it is possible to distinguish *Daschner* from the hijacking scenario: as the use of force by the police is only justified against an *imminent* and *direct* terrorist act of aggression, the police may rely on the ordinary doctrine of self-defence and the recognised exception to the right to life. In *Daschner*, self defence was not available because the threat to life was not imminent and direct. Neither was the "justifying necessity" defence available in this case since the interests of human dignity relating to the victim and the lawbreaker could not be weighed against each other. The defence of "excusing necessity" was not available because this defence is limited to excusing breaches of the law where necessary to protect oneself and persons in a relationship of close proximity (eg family members). See Appendix for further analysis of these defences

In relation to (b) – where the plane is occupied by civilian passengers who are not connected to the terrorist hijackers – § 14III of the *Aviation Security Act* represents a breach of Arts 2 and 1 of the GG. The civilians on board would become the object of state action if the government could order the destruction of the hijacked plane. The civilians (unlike the terrorists) are in a situation that they did not choose and do not have the power to change. If they could be sacrificed to save the lives of the people on the ground the state would strip them of their guaranteed fundamental rights under the Basic Law. The state would not regard them as human beings anymore. Furthermore, the state would be required to make a decision to use lethal force at a stage where it could not be absolutely assured that the attack could be averted by less extreme means. Passengers would be deprived of the last chance to act, even though the plane is destined to crash.

The court found that the state cannot authorise the deliberate killing of innocent people, and that this action would always constitute a breach of Art 1 of the GG. The argument that the hijacked passengers would die anyway did not detract from the fact that such state action would strip of the passengers of their human dignity. They would be sacrificed in the hope that other people would survive because of their sacrifice. The state has the obligation to protect every human being living within its jurisdiction. By choosing one group of people to die, so that others may survive, the state would not fulfil this obligation.⁷³

Art 1 states that human dignity is "inviolable". This represents the basis of the German Basic Law and can therefore not be restricted under *any* circumstances (exceptions under the law include self-defence). The Constitutional Court propounded a clear view as to where the doctrine of necessity ends. Even in the "special circumstances" envisaged in the *Aviation Security Act*, in relation to innocent passengers, the right to life cannot be infringed.

The Constitutional Court's decision did not end political debate on the issue. In 2007, the German Minister of Defence (Franz Josef Jung) publicly stated that a hijacked plane would be shot down notwithstanding the court's ruling and that state action would be justified under suprastatutory state of

(2008) 32 Crim LJ 100

⁶⁸ German Constitutional Court Decision of 1 BvR 357/05 (2006) at 141, 150.

⁶⁹ See Moller K, "On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the German Federal Constitutional Court" (2007) *International Journal of Constitutional Law* 457.

⁷⁰ German Constitutional Court Decision of 1 BvR 357/05 (2006) at 137-139.

⁷¹ The *Bundestag* (German Parliament) put forward the argument that the passengers became part of a weapon by being on the plane and therefore lost their rights to life as they could not be regarded human beings anymore.

⁷² See the arguments of the pilot associations commenting on the Aviation Security Act at [68]-[69] of the judgment.

⁷³ German Constitutional Court Decision of 1 BvR 357/05 (2006) at 142-143.

emergency.⁷⁴ This can be seen as the continuation of the German attitude towards terrorism in the 1970s and the Executive condoning human rights abuse under the untested legal doctrine of suprastatutory state of emergency, a concept which has never found recognition in the German Criminal Code. The "law in the books" and the "law in action" seem to diverge significantly, with *Realpolitik* and political pragmatism circumscribing the fundamental right to human dignity and life. It seems contradictory that the right not to be subject to torture *cannot* be limited by suprastatutory state of emergency, but that the right to life may be limited by reliance upon this broad and constitutionally untested doctrine.

Unlike the public debate in Germany surrounding powers to shoot down civilian aircraft, the amendments to Pt IIIAAA of the *Defence Act 1903* (Cth) attracted little attention or adverse comment. The provisions have not thus far been tested in the courts. Part IIIAAA powers provide a legislative framework governing the call out of the Australian Defence Force (ADF) in aid of civil authorities, and the amendments in 2006 were enacted specifically to empower the ADF to respond to mobile terrorist threats. At the heart of these provisions is the power to use "reasonable and necessary force" in discharging the powers under the Act. The Act envisages use of force by the ADF against aircraft, "up to and including destroying the aircraft". The use of force likely to cause death or serious injury is precluded unless the ADF 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.

These powers clearly extend beyond self defence and defence of others, to include powers to protect "designated critical infrastructure". The Indeed, this power to use lethal force to protect property against destruction or mere disruption contrasts with the position under federal criminal law, where the intentional use of lethal or grievous force to protect property or prevent trespass is expressly forbidden under the self-defence provisions of the *Criminal Code*: s 10.4(3).

In light of the novelty of using lethal force against civilian aircraft and the moral concerns arising, it is surprising that these laws did not trigger wider debate about the right to life, and whether the lives of innocent passengers and crew should be sacrificed in order to protect infrastructure.

Part IIIAAA goes much further in extending the doctrine of necessity than even the German Minister of Defence would contemplate. A decision to use force against innocent civilians in order to protect property (however valuable) could not be compatible with the Basic Law. In Australia, however, without such constitutional human rights limitations, federal Parliament is competent to prioritise critical infrastructure over innocent lives, and significantly encroach upon the right to human dignity and the right to life.

CONCLUSION

The legal systems of Germany and Australia have been struggling with many of the same challenges in the aftermath of the attacks of 9/11. While some scholars have argued that 9/11 represents a watershed in the criminal law, in many senses, there is high degree of continuity in state responses to terrorism. Indeed, this is apparent in Europe where Germany's response began with the enactment of special laws to fight terrorism in the 1970s that modified rights which were ordinarily available to

⁷⁴ Hefty GP, "Uebergesetzlicher Notstand – Jenseits von Gesetz und Verfassung", Frankfurter Allgemeine Zeitung NET (19 November 2007).

⁷⁵ Head M, "Australia's Expanded Military Call-Out Powers: Causes For Concern" (2006) 3 *University of New England Law Journal* 125 at 125, noting that the Bill attracted only six hours of debate in federal parliament.

⁷⁶ See Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006 (Cth), Revised Explanatory Memorandum (Introduction).

⁷⁷ Section 51ST of the *Defence Act 1903* (Cth).

⁷⁸ Section 51IB of the *Defence Act 1903* (Cth): see *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2006* (Cth), Revised Explanatory Memorandum (Introduction).

suspects, and the United Kingdom adopted a range of extraordinary legal measures to deal with terrorism in Northern Ireland. Also, in Australia, the history of special measures has a pedigree that predates 9/11, with some drawing attention to the colonial police powers enacted to deal with the moral panic about bush-ranging in the 19th century. Extraordinary threats demand extraordinary measures, and infringement of basic human rights seems to have been one of the first casualties.

From a German perspective, some basic human rights may be legitimately restricted when balanced against paramount rights. The legal challenge is defining the boundaries of these fundamental rights, which may themselves come into conflict. As pointed out in this article, the right to legal counsel can be limited where a reasonable suspicion exists that this right could be abused by the suspect of a terrorist offence (eg by using the lawyer to pass on information). It nevertheless remains questionable whether the blanket contact ban is a proportionate measure to prevent this occurring. An alternate, proportionate response would be to apply the existing power to prohibit a legal representative from passing information that would aid, or be likely to aid, a terrorist offence.

Some human rights – such as not to be subject to torture – are absolute; others like the right to life are subject to specific limitation. In relation to the interpretation of other rights, like the right to fair trial, courts must give consideration to how conflicting interests and rights must be accommodated. Unlike the position in international human rights law and the common law, the right to a fair trial is subject to "limitations by law". 80 Here, the German and the Australian approach diverge significantly.

The German legal system and its superior courts seek to maintain a high standard of human rights protection, as prescribed by the Basic Law. There are some limits, and the Constitutional Court has thus far been prepared to qualify access to legal counsel – a fundamental attribute of a fair trial – to be qualified in circumstances of necessity. The decisions in *Daschner* and the *Aviation Security Act* draw the contours of necessity differently in relation to torture and "shoot to kill" scenarios, suggesting that the right to human dignity cannot to be balanced or qualified in this way.

As soon as human dignity is involved on both sides of the equation in necessity cases, the state is banned from action. This applies even when it is the right to human dignity of a hostage being balanced against the human right to dignity of the terrorist or law-breaker. The same applies when balancing the rights of human dignity of the hijacked passengers and that of other victims on the ground. In the case of Germany, human rights are not absolute; they can be balanced against each other. The fair trial right versus the right to life scenario discussed here is just one of many examples.⁸¹ The only "absolute" right in the German legal system is the right to human dignity.

While the right to human dignity is paramount in legal doctrine and judicial rhetoric in Germany, setting a "bright line" in relation to the acceptable limits of necessity, this formal legal position has not been accepted by members of the Executive. In this respect, the "law in action" in Germany is similar to Australia's "law in the books", where a broader national security paradigm governing use of force is emerging. This paradigm shift extends the use of lethal force beyond the traditional boundaries of self-defence doctrines. When the official laws are understood in light of these extralegal practices, both Germany and Australia achieve similar outcomes, albeit using significantly different legal conceptual tools. The challenges in both systems are the same: to preserve a strong commitment to legality and human rights in the face of serious security threats. In both countries, the responses of the

⁷⁹ See *The Bushranging Act 1830* (NSW) (11 Geo 4 No 10) discussed in Bronitt and McSherry, n 14, p 894.

⁸⁰ Steiner and Alston, n 9, pp 154-157.

⁸¹ For example, the contact ban also infringes Art 6 of the GG because contact with the family is prohibited.

⁸² For a discussion of the emerging national security paradigm see Bronitt S and Stephens D, "'Flying Under the Radar' – the Use of Lethal Force against Hijacked Aircraft: Recent Australian Developments" (2007) Oxford University Commonwealth Law Journal 265.

state may have trespassed too far upon fundamental human rights. It is vital that the liberal democratic states remain vigilant not to play into the hands of terrorists by being provoked to "show their fascist faces". 83

APPENDIX 1

German Chart of Criminal Law Defences

Self-Defence and Necessity are regulated in §§ 32-35 of the German Penal Code (Strafgesetzbuch).84

Translation of the Paragraphs of the German Penal Code (Strafgesetzbuch):	Summary of doctrine from cases and scholarly commentary:	Limitations:
§ 32 – self defence: (1) Whoever commits an act in self defence does not act unlawfully. (2) Necessary defence is the defence which is required to avert an imminent unlawful attack from oneself or another.	The threat has to be direct and imminent from the aggressor towards the defendant or another person. In relation to police and military personnel this means that if either their life or the life of another threatened person is in danger they are justified if they defend it. As self-defence justifies only acts against the aggressor, the shooting down of a plane occupied by innocent civilians would not be justified under § 32.	This is a legal limitation to Art 2 of the Basic Law (<i>Grundgesetz</i>) which qualifies the right to life.
§ 34 – justifying necessity: Whoever commits an act in order to avert an imminent and not otherwise avoidable danger to the life, limb, liberty, honour, property or other legally protected interest directed against himself or another does not act unlawfully if, taking into consideration all the conflicting interests, in particular the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest which he harms. This rule applies only if the act is a proportionate means to avert the danger.	The threat does not have to be direct or imminent. The situation of the defendant must be such that he/she does not see any other way to prevent the ongoing threat. Another important difference to self-defence is that the "attack" does not have to be illegal. Therefore, this defence is used today to justify the medical practitioner in cases of abortion. The main principle here is proportionality. One object of legal protection has to be weighed against another. As the human dignity of the people on the plane would not be paramount to that of the people in the building, § 34 is not applicable in these cases.	This is a legal limitation to Art 2 of the Basic Law (<i>Grundgesetz</i>) which qualifies the right to life.

⁸³ See Funke M, "Terrorismus – Ermittlungsversuch zu einer Herausforderung", Terrorismus – Untersuchungen zur Struktur und Strategie revolutionaerer Gewaltpolitik (1977) p 10.

⁸⁴ There is no authorised translation of German Statutes into English.

Translation of the Paragraphs of the German Penal Code (Strafgesetzbuch):	Summary of doctrine from cases and scholarly commentary:	Limitations:
§ 35 – excusing necessity: (1) Whoever, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply if the perpetrator could be expected under the circumstances, in particular in cases where he himself has caused the danger or where he was in a special legal relationship with the victim, to accept the danger without resistance. The punishment may be mitigated pursuant to s 49(1), if the perpetrator was not required to assume the risk with respect to a special legal relationship. (2) If upon commission of the act the perpetrator mistakenly assumed that circumstances existed which would excuse him under subs (1), he will only be punished, if he could have avoided the mistake. The punishment may be mitigated pursuant to s 49(1).	The elimination of guilt rather than a justification can be given under the excusing necessity defence. The cases falling under this defence are the cases in which to equal rights have to be weighed up: for example life against life. However, as this only justifies the protection of oneself or a family member or very close person, this excuse is not available for the military and police in the plane scenario.	This is a legal limitation to Art 2 of the Basic Law (Grundgesetz) which qualifies the right to life.