Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes—Taking Human Life and the Defence of Necessity

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Abstract  Necessity is not a defence to murder. This principle has been repeated ever since R v Dudley and Stephens. Behind the arguments put forward in the debate lie the sanctity of life, the idea that one could not weigh one life against another, the question as to who should be the one to make that decision and that life as such was the highest good. But is that really true? Has English law not subscribed already to the idea that it may be permissible to take a human life in situations that are commonly classified as duress, duress of circumstances or necessity? This article traces the development of areas of law where necessity arguments and balancing exercises play a role in the decision about the taking of human life, but which are not usually looked at in depth when arguments about necessity are exchanged.

Introduction

Necessity is not a defence to murder. This principle has been repeated like a mantra ever since the times of R v Dudley and Stephens,1 the famous case of the shipwrecked sailors who cannibalised a young cabin boy because they would allegedly all have died if they had not eaten one of their number. The same, according to R v Howe,2 applied to the defence of duress, which in its more modern guise of ‘duress of circumstances’ tends to be confused and mingled with the concept of necessity. Behind all the arguments that had raged in academic circles3 and sometimes in the courts, lay the sanctity of life, the idea that one could not weigh one life against another, the question as to who should be the one to make

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1 (1884) 14 QBD 273.
that decision and that life as such was the highest good. But is that really true? Has English law not subscribed already to the idea that it may be permissible to take a human life in situations that are commonly classified as duress, duress of circumstances, or necessity?

This article traces the development particularly of areas of law where necessity arguments and balancing exercises play a role in the decision about the taking of human life, but which are not usually looked at in depth when arguments about necessity are exchanged. Owing to the intricacies of the problems involved, this article cannot but scratch the surface, and none of the underlying philosophical issues are new. What this article will do is take a wider look at legal decisions the English legislature and/or courts have already taken, novel situations arising out of recent history, and the consequences that may flow from them for the object of our study. Due to the complexity of the topic, it is not intended here to propose a solution, but merely add a voice to the concert of those who demand a rapid solution from the Government.

We must begin by establishing some common ground so that the discourse in the following exposition will not suffer from conceptual misunderstandings.

1. Taking human life

When we talk about weighing life against other values, we will leave the technical area of criminal black-letter law where there is a difference between unborn and born human beings. This distinction is based on historical reasons of offence classification and is artificial; it cannot hide the fundamental moral truth that in all these cases we talk about a human life that is at stake. Necessity arguments and balancing exercises are based on moral value judgments just as much as on legal grounds, as becomes clear in cases like *Re A*4 that will be looked at below.5 We will not get drawn, either, into the side issue of how we decide when life begins,6 because we will assume situations where life is unmistakably present. Otherwise there would be no weighing exercise because there would be nothing to weigh.

If we reach a certain conclusion for allowing the taking of born or unborn life, then it stands to reason that normally this conclusion should be transferable to the other ‘category’ of human life. In other words, if we are allowed to kill an unborn human being for certain reasons, then we should be allowed to kill an independent human being for the same reasons. If an unborn child can be killed in an abortion because it will have serious defects at birth, it is only logical that a doctor

4 [2001] 2 WLR 480.
5 See, however, Wicks, above n. 3. The author states at IV. (ii): ‘Although the law can never be entirely separated from morality, moral acceptability is only a permissible consideration if it informs the law, not if it is serving to overrule it’. I find that a surprising statement to be made in the year 2003, with the Nazi regime and the dissolution of the GDR behind us. Morality certainly would require each person to overrule the law if the law said that Jews must be killed because they are Jews, or if it required you to shoot at people trying to flee to West Germany.
6 The European Court of Human Rights has stated on this issue that there is no European consensus anyway, see *Vo v France* [2004] 2 FCR 577, 79 BMLR 71.
or mother should also be able to take such a decision 10 minutes after
the child has been born and the serious defects can undoubtedly be
ascertained. In the first case there may be no offence at all, if all the other
requirements of the abortion law have been followed, the second case
would be murder with no possibility of escaping criminal liability and a
mandatory life sentence under the current state of English law. The
instinctive abhorrence we feel at this comparison is exactly that—a
matter of instinct. It is not a logical conclusion. Not to equate unborn life
to independent life is one of the great fallacies which has created so
many problems in the criminal law. If we must not kill a grown man
who is seriously mentally handicapped and a burden to society, why
should we be allowed to kill an unborn child for the same reasons? I
hasten to add that this study is not meant to address the pros and cons
of abortion and euthanasia, but it is necessary to point out this discrep-
ancy in approach to human life at the beginning.

2. Prognostic uncertainty
We will not investigate the factual issue of prognostic difficulty, i.e. the
question of how a decision-maker will be able to know with sufficient
certainty the factual foundation based on which a weighing exercise
may become necessary. We are dealing with a problem of substantive
law and thus must assume that the decision-maker and the court called
upon to adjudge his decision have full insight into all the relevant facts.
Otherwise there would merely be a preliminary debate about issues of
prognostic probability and we would have to agree on a certain degree of
certainty, which again would not impact in the end on the substantive
question to be answered.

3. Prosecutorial discretion
This article will not examine the—often too easily adopted—evasive
argument about prosecutorial discretion. As is sometimes put forward in
connection with the Zeebrugge ferry disaster or the mountaineers’
cases, no right-minded prosecutor would ever open an investigation for
murder against any of the people involved, be it the one who pushed the
frightened man off the ladder so that the others could get out of the
sinking ship, or the mountaineer who cut his partner off the rope. It may
be that no prosecutor would charge anybody in these scenarios, but that
again is not the question the answer to which we are after. What needs
to be answered here is: could a prosecutor at all bring charges, or would
he run the risk of flogging a dead horse because the judge might direct
the jury to acquit on a submission of no case to answer under the
Galbraith test? Finally, what would be the guidelines against which a
prosecutor is to exercise his discretion? Would these guidelines not
themselves have to mirror the very questions that are so vexing in the
substantive law?

7 For the reason of crispness of expression, only the male pronoun has been used
throughout and is meant, where appropriate, to include the female counterpart,
too.
8 [1981] 1 WLR 1039.
4. The democracy problem

The democracy problem under its headings of representative democracy and separation of powers vis-à-vis the danger of citizens disobeying the command of the law based on their individual moral choices, as well as judicial law-making in creating a defence of necessity, is in the final analysis not really relevant for the issues discussed here. It is a constitutional quandary the solution of which is of no help to the person who has to make a decision, before a court, government or parliament can reflect upon the matter. It is conceded that it is always preferable to have a clear and considered piece of legislation than to rely on judicial inventions that can by the very nature of the judicial process only occur on a case-by-case basis. It is also in principle undesirable that individuals are left to decide whether the law should apply to their actions or not.9

Yet the situations we are investigating often have the common feature that the written law may impose upon the citizen two opposing duties, without giving him sufficient guidance as to which one he should follow. There will also always be situations where people will face the dilemma to which Radbruch’s10 formula tries to give an answer: when statutory law becomes incompatible with the requirements of natural justice ‘to an intolerable degree’, or where statutory law was obviously designed to negate ‘the equality that is the core of all justice’, then the statutory law must be disregarded in favour of the demands of natural justice. This formula was developed by Radbruch as an answer to the pre-World War II school of positivism in German legal theory, which for many scholars of Germany’s legal history was a major influence in allowing Hitler to attain power by apparently ‘legal’ means. Even if the law is clear, its strict application in all cases regardless of the circumstances of the individual case may lead to intolerable results.

5. Necessity and duress of circumstances

Necessity must be clearly distinguished from duress of circumstances.11 The latter is based on circumstantial pressure on the person who has to make a decision and the pressure must be so as to impel him into a certain act. Necessity is based on the problem of choice between values,

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9 Conceptually speaking it is not even certain, whether in a legal system that constitutionally allows the very existence of a common law as a stopgap where there is no legislation, there can be any violation of the principles of democracy—unless one was prepared to argue that democracy as it is understood today excludes by definition any common law. Moreover, even if there are exact provisions—and none of them are ever so exact as not to allow for interpretation—the democracy problem comes back when courts must interpret them, e.g. in accordance with higher-ranking law. In fact, the UK Parliament itself recently imported that virus by passing the Human Rights Act 1998, which in my view is bound to acquire, in the long run, quasi-constitutional rank, and all other legislation, sovereignty of Parliament or not, will be measured against it; in cases of a declaration of incompatibility by the judiciary, the Government and Parliament will de facto be forced to do something about the incompatible provision.

10 Gustav Radbruch was a German law professor, who was born in 1878 and died in 1949.

11 See the seminal case of R v Pommell [1995] 2 Cr App Rep 607, where the Court of Appeal nonetheless used the two concepts interchangeably.

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protected interests, etc., where one of the defining features is that the prospective defendant is free to choose which course to take, whether to obey the letter of the law and do nothing and risk damage to all interests involved in the weighing exercise, or damage one and thus protect the other. Likewise, there may be conflicting duties and one cannot be followed without violating the other—as was the case in Re A. While many of these situations will occur in a state of emergency, emergency is not the defining factor, as becomes clear in the case of Re A. In connection with the democracy problem, courts and legislators will be more prepared to accept necessity-based disobedience to the letter of the law if the decision must be taken quickly. Imminent threat or pressure of any kind is therefore not a definitional element to necessity, but a restrictive criterion based on public policy. Necessity and duress of circumstances can overlap in emergency situations, but only factually, not conceptually. In the example of abortion because of a serious risk for the health of the mother, as will be discussed below, a doctor may have the necessary knowledge of the facts many weeks before the actual danger for the woman materialises. In a merely necessity-based model, he could take the decision to terminate the pregnancy as soon as he has sufficient certainty of the facts justifying that step, long before any imminent danger will have arisen.

The development of necessity as a defence to taking life

Dudley and Stephens

As set out above, in Dudley and Stephens the court rejected the idea of a defence of necessity against a charge of murder outright. Lord Coleridge stated in his judgment:

It is admitted that the deliberate killing of this ... boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called necessity. But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted.

13 The highly interesting and complex question of whether the availability of a necessity defence for the doctors and the parents to have Mary killed in order to save Jodie did not in fact create a duty of the doctors and parents to agree to and perform the separation, as a duty to act vis-à-vis Jodie in the context of liability for omissions, appears to have been seen only by Ward LJ at section IV, 6. of his judgment. The issues came up in a different guise in the follow-up decision on the failure of the Official Solicitor as guardian ad litem to appeal the judgment, in Re A [2001] Fam Law 100. This is a topic for a separate study and would lead too far in this context.
14 It should be added that contrary to the wide jurisdictional powers English courts enjoy, in countries based on the civil law tradition there may not be a basis for obtaining a judge’s ex ante advisory opinion, and thus decisions will have to be taken by the actors alone.
15 (1884) 14 QBD 273 at 286–8.
Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so.

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 and unqualified necessity to preserve one's life. . . . It is not needful to point out the awful danger of admitting 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 in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting was chosen. Was it more necessary to kill him than one of the grown men? The answer must be, No. . . .

It is not suggested that in this particular case the 'deeds' were 'devilish'; but it is quite plain that such a principle, once admitted, might be made the legal cloak for unbridled passion and atrocious crime. There is no path safe for judges to tread but to ascertain the law to the best of their ability, and to declare it according to their judgment, and if in any case the law appears to be too severe on individuals, to leave it to the Sovereign to exercise that prerogative of mercy which the Constitution has entrusted to the hands fittest to dispense it. It must not be supposed that, in refusing to admit temptation to be an excuse for crime, it is forgotten how terrible the temptation was, how awful the suffering, how hard in such trials to keep the judgment straight and the conduct pure. We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime. It is, therefore, our duty to declare that the prisoners' act in this case was wilful murder; that the facts as stated in the verdict are no legal justification of the homicide; and to say that, in our unanimous opinion, they are, upon this special verdict, guilty of murder.

In so many words, there are the problems of the sanctity of life, of weighing identical values and the issue of the democracy problem, in the shape of the reference to the 'legal definition of the crime' and the possibility of a royal pardon—which was, in the end, given to the accused whose death sentences were commuted to six months' imprisonment. The ruling in *Dudley and Stephens* was affirmed in principle in 1987 in *R v Howe*, although that case strictly dealt with the defence of duress.

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Infant Life (Preservation) Act 1929

However, things were not to remain as simple as they may have looked in 1884. In 1929, the Infant Life (Preservation) Act was passed. Section 1 reads as follows:

1. Punishment for child destruction

(1) Subject as hereinafter in this subsection provided, any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of felony, to wit, of child destruction, and shall be liable on conviction thereof on indictment to penal servitude for life:

Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

(2) For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of twenty-eight weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive.

This law authorises the taking of the life of a child up to the birth, when it will have an existence independent of the mother, if until that time the killing is done in good faith with the intention of saving the life of the mother. A necessity argument if ever there was one, and what is more the law itself gives more weight to one life than to another. Even if the child is capable of being born alive, i.e. has reached the necessary age in utero and does not suffer from clearly lethal defects, then killing it will not incur criminal liability if that is done to for the purpose of saving the mother’s life. The law thus fully includes perfectly healthy children as long as they are in their mother’s womb. In fact, on the face of it, the Act only requires the defendant to act in good faith ‘for the purpose’ of saving the life of the mother, i.e. even if the life was not actually in danger, a situation which would appear to fall in the category of honest mistake of fact.

To repeat it, the argument that unborn children are not regarded as fully developed human beings within the meaning of the law of murder and that accordingly these laws cannot be brought into the equation, is a mere technical diversion and does not detract from the underlying fact that we are talking about taking a human life in order to save another; the act even speaks of ‘destroying the life of a child’. Especially under the 1929 Act, the equivalence becomes clear, in that the punishment for child destruction is mandatory life imprisonment, the same as for murder.

Abortion Act 1967

Yet the law did not stop there. In 1967, Parliament passed the Abortion Act, which in its present form states in ss 1 and 5:

1. Medical termination of pregnancy

(1) Subject to the provisions of this section, a person shall not be guilty of an offence under the law relating to abortion when a pregnancy is
terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith—

(a) that the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family; or

(b) that the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or

(c) that the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or

(d) that there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped.

(2) In determining whether the continuance of a pregnancy would involve such risk of injury to health as is mentioned in paragraph (a) or (b) of subsection (1) of this section, account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) Subsection (3) of this section, and so much of subsection (1) as relates to the opinion of two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of the opinion, formed in good faith, that the termination is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman.

5. Supplementary provisions

(1) No offence under the Infant Life (Preservation) Act 1929 shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act.

(2) For the purposes of the law relating to abortion, anything done with intent to procure a woman's miscarriage (or, in the case of a woman carrying more than one foetus, her miscarriage of any foetus) is unlawfully done unless authorised by section 1 of this Act and, in the case of a woman carrying more than one foetus, anything done with intent to procure her miscarriage of any foetus is authorised by that section if—

(a) the ground for termination of the pregnancy specified in subsection (1)(d) of that section applies in relation to any foetus and the thing is done for the purpose of procuring the miscarriage of that foetus, or

(b) any of the other grounds for termination of the pregnancy specified in that section applies.

The impact of this provision on the debate of the scope of the defence of necessity against a charge of murder cannot be overestimated. The law clearly allows killing an unborn child who is free of defects of any kind and capable of being born alive\(^\text{17}\) if the killing takes place before the end of the 24th week of the pregnancy for subs. (a) of

\(^\text{17}\) The 28 weeks in s. 1 of the 1929 Act are only a rebuttable presumption for the criterion of being capable of being born alive.
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s. 1 or up to the point of birth for s. 1(b)-(d). But most importantly the killing is allowed for reasons that would normally not stand up to the value of a human life, namely the mere risk, albeit severe, of an impact on the physical or mental health of the woman or other children of her family, if that risk is greater on continuation of the pregnancy, or if the child were to be born with a serious handicap. In all these cases, killing is allowed for the protection of values that clearly rank below that of the value about to be destroyed.

Re A

But the imagination of lawyers with respect to whether unborn life ranks on the same level as that of born human beings need not be employed, because real life provides for harder cases, where the above-mentioned argument that an unborn child is not a human being within the meaning of the law of murder will not wash any more: Along came cases like Re A, the case of the conjoined twins Mary and Jodie, where the Court of Appeal allowed the killing of the one twin who was not capable of surviving on her own but whose organism would eventually kill both twins, so that her sister could survive. The court based its decision on a narrow application of necessity in medical cases, while one of the judges tried to raise—unconvincingly—an argument for a 'quasi-self-defence' justification.

Brooke LJ held at the end of his speech:

I have considered very carefully the policy reasons for the decision in R v Dudley and Stephens, supported as it was by the House of Lords in R v Howe. These are, in short, that there were two insuperable objections to the proposition that necessity might be available as a defence for the Mignonette sailors. The first objection was evident in the court's questions: who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? The second objection was that to permit such a defence would mark an absolute divorce of law from morality.

In my judgment, neither of these objections are dispositive of the present case. Mary is, sadly, self-designated for a very early death. Nobody can extend her life beyond a very short span. . . . It is true that there are those who believe most sincerely . . . that it would be an immoral act to save Jodie, if by saving Jodie one must end Mary’s life before its brief allotted span is complete. For those who share this philosophy, the law, recently approved by Parliament, which permits abortion at any time up to the time of birth if the conditions set out in s 1(1)(d) of the Abortion Act 1967 . . . are satisfied, is equally repugnant. But there are also those who believe with equal sincerity that it would be immoral not to assist Jodie if there is a good prospect that she might live a happy and fulfilled life if this operation is performed. The court is not equipped to choose between these competing philosophies. All that a court can say is that it is not at all obvious that this is the sort of clear-cut case, marking an absolute divorce

18 Oddly enough not the health of her husband.
from law and morality, which was of such concern to Lord Coleridge and his fellow judges.

There are sound reasons for holding that the existence of an emergency in the normal sense of the word is not an essential prerequisite for the application of the doctrine of necessity. The principle is one of necessity, not emergency . . .

There are also sound reasons for holding that the threat which constitutes the harm to be avoided does not have to be equated with 'unjust aggression' . . . None of the formulations of the doctrine of necessity which I have noted in this judgment make any such requirement: in this respect it is different from the doctrine of private defence.

If a sacrificial separation operation on conjoined twins were to be permitted in circumstances like these, there need be no room for the concern felt by Sir James Stephen that people would be too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases (at the risk of other people's lives). Such an operation is, and is always likely to be, an exceptionally rare event, and because the medical literature shows that it is an operation to be avoided at all costs in the neonatal stage, there will be in practically every case the opportunity for the doctors to place the relevant facts before a court for approval (or otherwise) before the operation is attempted.

According to Sir James Stephen, there are three necessary requirements for the application of the doctrine of necessity: (i) the act is needed to avoid inevitable and irreparable evil; (ii) no more should be done than is reasonably necessary for the purpose to be achieved; and (iii) the evil inflicted must not be disproportionate to the evil avoided.

Given that the principles of modern family law point irresistibly to the conclusion that the interests of Jodie must be preferred to the conflicting interests of Mary, I consider that all three of these requirements are satisfied in this case.20

Brooke LJ placed great emphasis on the fact that Mary was 'self-designated' for death. This is, of course, not true as she did not designate herself for death at all, but was born with a condition that would not allow her to live long. If at all, she had been designated by her creator or the genetic qualities of her parents to bear this burden, but to follow that up would carry the debate into deep theological, biological and philosophical waters. Although the court was at pains not to enter into a weighing exercise and studiously avoided the definition of which of the two lives was less or more worth living, there is no hiding the stark fact that for all the words to the contrary that is what they had to do and did.

In the end, Mary was going to die anyway, and therefore on balance her claim to a short and unhappy life as a conjoined twin was outweighed by the chance of Jodie to a long and happy life as a separated twin. Mary's life was thus less worth protecting than Jodie's chance of a healthy life. The general rule on the law of murder remains, however, that even shortening a life that is going to end soon will be sufficiently causal for a charge of murder.

But the court also recognised explicitly that necessity and emergency are two different things, and that while a case of necessity may arise in a

situations of emergency, it need not be the case. Thus the court espoused the clear distinction between necessity as a choice based on well-reasoned arguments to support a balancing exercise, and duress of circumstances as an exclusion of the chance for well-reasoned decisions.

What I hope this short foray into just a few historical developments has shown is that necessity may after all be a full defence to taking a human life under English law. Whether we call it murder or child destruction or abortion is more of a terminological than of a substantive nature. But modern history has presented us with even more difficult scenarios, to which a satisfactory answer is still outstanding—those of terrorism-related responses involving the killing of human beings.

**New threats: 9/11 scenarios and problems of state intervention**

Almost to the day a year after *Re A*, the Twin Towers in New York City were destroyed by terrorists using two hijacked airplanes as flying bombs, apart from two others aimed at the Pentagon and possibly the Capitol or the White House. The US Air Force never got a chance to shoot any of the four planes down; indeed the fighters which had been scrambled over Washington were instructed that they had no clearance to shoot down an aircraft over the capital. This introduces a new facet to the problem, namely the parameters of state intervention in killing out of circumstances of necessity.

Any order to shoot would have had to come, under normal wartime procedures, from the National Command Authority, i.e. the President and the Secretary of Defence. There appears to be no specific provision in the UK authorising such an act of internal defence against what is strictly speaking a criminal act of terrorism, not a military attack. There are likely to be standing orders, for example, to the Royal Air Force now, but these are not published. As far as the terrorists are concerned, had this taken place over English soil, shooting down the plane and thereby killing the terrorists would be a case of s. 3 of the Criminal Justice Act 1967, under the heading of the use of reasonable force for the prevention of crime. Given that s. 3 is a full defence to murder, killing the terrorists may in certain circumstances be reasonable.

Not so for the passengers. They are not attacking or threatening anyone and are not breaking the law, so the only way their deaths could

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22 See the Report of the 9/11 Commission, above n. 21 at 17 and 37.

23 It would have made no difference if on 11 September 2001 the 19 hijackers had not stolen four civilian planes but 19 military aircraft and executed a military style attack with them. They were criminals, not military or even ‘unlawful’ enemy combatants. As such, had they been caught, they would not have been subject to the Geneva Conventions, but to the human rights protections guaranteed to all defendants in criminal cases. See on this the persuasive account by Philippe Sands, *Lawless World, America and the Making and Breaking of Global Rules* (Penguin: 2005) chs 7 and 9.

24 The destruction of the plane would surely have been justified by necessity or even as a collateral issue to the use of reasonable force against an instrument of attack.
be ‘justified’ or ‘excused’ would be through a defence of necessity. Yet no one would seriously doubt that shooting down a plane with 50 passengers would be the right thing to do, if the plane was aimed at a busy shopping mall where thousands of people were going about their business, or indeed an office block with tens of thousands of employees, and if there was no chance of getting those people out in time or even warning them. However, the spirit of Dudley and Stephens comes back to haunt us: does it make a difference if the plane with 50 passengers was aimed at a hotel where 50 heads of state are holding a conference on globalisation? Who is to make that decision? Whose lives are worth more?

One might even argue that no matter what happens on the ground, the lives of the passengers are already lost, because they will die in any event. They are, to borrow from Brooke LJ, ‘self-designated’ for death. They do no longer enter into the equation, there is nothing to weigh. Strictly speaking, there would not even be a case of necessity, although under the prevailing opinion shooting them down 10 minutes before the plane crashes would be a causal contribution to their death and could thus in theory be murder.

Yet there is no end to complicating matters: what if the plane was already over densely inhabited territory, so that shooting it down would cause the death of the 50 passengers and necessarily the death of an unknown, but presumably much higher, number of other people on the ground? Let us assume, for argument’s sake, that the number of victims at the target destination and at the place of shooting down the plane would be identical. Suddenly the lives of the passengers, if one did not want to take them out of the equation anyway, are not the only factor to be considered.

But we can also construct examples, where the passengers remain in the equation: suppose the terrorists have kidnapped a plane from which they intend to drop a biological bomb on a big city, then fly away and land on an airport in a friendly country, where they will let the passengers go. They merely intend to use them as shields to prevent their plane from being attacked, and they tell the authorities precisely that. Here shooting down the plane would be the only cause of death for the passengers and a clear necessity judgment would have to be made.

Or assume that terrorists are holding a high-ranking politician or other public figure hostage and demand the release from prison of a number of accomplices, or they will kill the hostage. Is the state under a duty to release the prisoners in order to save the life of the hostage, or is it justified to risk the life of the hostage because there are overriding interests to be considered? This question was, for example, answered in the second sense by the German Federal Constitutional Court in the famous Schleyer case in 1977. The court, which had been seised of an application for the equivalent of an interim mandatory order to the

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25 Yet, do we doubt even for a moment that even if there were only the heads of state of the G8 present the plane would be shot down?
26 See Amtliche Sammlung der Entscheidungen des Bundesverfassungsgerichts (BVerfGE) vol. 46, 160.
German Government to release the imprisoned terrorists, argued that although there was a constitutional duty of the state to protect life, it regarded human life as only one of an array of supreme values, not the supreme value as such. The court held that the Government also had a duty to the other citizens to protect them from harm, and that releasing hardened terrorists entailed the risk of them re-offending, as had happened before in the case of the Lorenz affair,\textsuperscript{27} and would make the behaviour of the Government predictable. After that affair, the German Government adopted a tough line in abduction cases, and its action in the Schleyer case and the hijacking of the Landshut plane to Mogadishu at the same time showed that new resolve, where the lives of the hostages were deliberately risked. The court accorded the Government a wide margin of appreciation, while at the same time maintaining that there might be cases, where that margin would be reduced to zero.

All these scenarios become even more vexing when we insert private individuals in the equation. What if it is not the Government who is acting to avert a catastrophe? Imagine the soldier who is on a training exercise in the field with live Stinger anti-aircraft missiles, but has no orders to shoot or maybe, much as the fighter pilots over Washington, has strict orders not to shoot, but sees the plane in question flying overhead within the reach of his missile. He is not threatened and may even be violating direct orders—may he shoot nevertheless on his own decision?

Examples like these show that there are limits to what the criminal law, and more to the point, the courts can do to help in setting up guidelines for human behaviour. What is necessary is a line that is as bright as possible in order to allow the citizen and the state to prepare for such ethical emergencies and guide their actions without the risk of becoming criminally liable. Leaving this to the courts can be equivalent to an abdication of responsibility\textsuperscript{28} and damage the public's trust in the clarity of the law. In this context, it may be helpful to look at other jurisdictions.

Germany, for example, has tried to find an answer to such scenarios. On 15 January 2005 the German Luftsicherheitsgesetz, the Air Traffic Security Act, came into force as a response to situations that might require using the army or air force to shoot down attacking airliners.\textsuperscript{29} The German Home Secretary, Otto Schily, apparently was of the opinion that shooting down an airplane was only allowed if it was absolutely

\textsuperscript{27} Peter Lorenz had been the conservative candidate for the office of the Mayor of Berlin in 1975; three days before the elections he was abducted by the so-called 'Movement of the 2nd of June', who wanted to achieve the release of the imprisoned terrorists Horst Mahler, Verena Becker, Gabriele Kröcher-Tiedemann, Ingrid Siepmann, Rolf Heißler and Rolf Pohle. Apart from Horst Mahler, who refused to be released in that exchange, all other prisoners were flown to Aden in the Yemen on 2 March 1975, and Lorenz was subsequently released on 4 March.

\textsuperscript{28} As was the case in the Law Commission's Draft Criminal Code, Law Com No. 177, vol. 2 (1989) 234.

clear the passengers would die in any event, which means he had taken them out of the equation.\textsuperscript{30} The reason for the Minister's statement was that the German Federal President had signed his assent to the Act but advised the delegates of the Bundestag to seek a ruling from the Constitutional Court in Karlsruhe because he thought that the law allowed the Government to weigh life against life. The wording of the law itself in s. 14(3) is unclear on the issue and would allow the Home Secretary to order the shooting down of a plane in both cases.\textsuperscript{31}

(3) The direct use of weapons is only allowed if under the circumstances it must be assumed that the airplane will be used against the lives of human beings and that such use is the only means of averting that present danger.\textsuperscript{32}

The law has been challenged before the Constitutional Court, the decision is outstanding at the time of writing; however, there is a wealth of literature on the topic.\textsuperscript{33}

\textsuperscript{30} See the report at \url{www.bundestag.de/dasparlament/2005/04/themaderwoche/001.html}, accessed 13 January 2006.

\textsuperscript{31} The full German text reads:

\begin{tabular}{l}
\textbf{§ 14}  \\
\textbf{Einsatzmaßnahmen, Anordnungsbeufugnis}  \\
(1) Zur Verhinderung des Eintritts eines besonders schweren Unglücksfalles \\
dürfen die Streitkräfte im Lufteraum Luftfahrzeuge abdrängen, zur Landung \\
zwingen, den Einsatz von Waffengewalt androhen oder Warnschüsse abgeben. \\
(2) Von mehreren möglichen Maßnahmen ist diejenige auszuwählen, die den \\
Einzelnen und die Allgemeinheit voraussichtlich am wenigsten beeinträchtigt. \\
Die Maßnahme darf nur so lange und so weit durchgeführt werden, wie ihr \\
Zweck es erfordert. Sie darf nicht zu einem Nachteil führen, der zu dem \\
erstrebten Erfolg erkennbar außer Verhältnis steht. \\
(3) 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. \\
(4) Die Maßnahme nach Absatz 3 kann nur der Bundesminister der \\
Verteidigung oder im Vertretungsfall das zu seiner Vertretung berechtigte \\
Mitglied der Bundesregierung anordnen. Im Übrigen kann der Bundesminister \\
der Verteidigung den Inspekteur der Luftwaffe generell ermächtigen, \\
Maßnahmen nach Absatz 1 anzuordnen. \\
\end{tabular}

\textsuperscript{32} Translation by the author.

Conclusion

What I hope this brief article has shown is that the general maxim that necessity is not a defence to murder can no longer be regarded as sacrosanct. It jars with common conceptions of balancing the lives of persons in distinct scenarios, as described above. Indeed, reduced to the underlying moral problem of necessity and the taking of human life, the law has already accepted that human life may have to yield to other, even lower-ranking interests and values. The dangers of modern terrorism and the use of innocent bystanders as shields or hostages, or the utter disregard for human life displayed by those who hijack passenger planes for suicide runs, make it imperative that the Government give directions to the police, the armed forces or the individual citizens as to what are the boundaries within which reactions to such threats may take place. In the course of such a policy review, it would be useful to revisit the law of murder and the defence of necessity under a broader remit.