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# DEFENCES TO INTERNATIONAL CRIMES

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*in* William A. Schabas and Nadia Bernaz, *Routledge Handbook of International Criminal Law*, Routledge, 2011, 231-245.

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## INTRODUCTION

The label ‘defences’ can be used to describe a range of excusing or justificatory answers to a criminal charge, or as ‘grounds for excluding criminal responsibility’, according to Article 31 of the Rome Statute of the International Criminal Court.<sup>1</sup>

Defences are often categorized as excuses or justifications, with a justification being a challenge as to whether the act was wrongful and an excuse involving acceptance that the act was wrongful but seeking to avoid attribution of criminal responsibility.<sup>2</sup> This chapter addresses defences to international crimes and is structured in two parts; the first considers those defences which have a counterpart in domestic criminal laws, such as duress, self-defence, mistake, or mental incapacity, and the second those

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<sup>1</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 2187 UNTS 90 (1998).

<sup>2</sup> A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford: Oxford University Press, 2009, pp. 318-319. Zahar and Sluiter question the need for such a theoretical distinction in light of practice, contending that ‘[a]ny submission seeking acquittal may be regarded as a kind of defence’, A. Zahar and G. Sluiter, *International Criminal Law*, Oxford: Oxford University Press, 2008, p. 396.

defences which can be considered in some ways unique to international criminal law, such as superior orders and reprisal.

Defences to international crimes are discussed within the framework provided by the Rome Statute in Articles 31-33, as this can be considered an authoritative statement of those defences which are presently accepted in international criminal law. Recourse will be made to the jurisprudence of other relevant international criminal courts, such as the International Military Tribunal at Nuremberg, the *ad hoc* criminal tribunals for Rwanda and the Former Yugoslavia and the Special Court for Sierra Leone. It is worth noting that at times, such jurisprudence has been at odds with the provisions of the Rome Statute.<sup>3</sup> The Rome Statute allows the judges of the International Criminal Court to consider defences not enumerated in the Statute, such as those that may be drawn from the international law of armed conflict or general principles of law derived from national systems.<sup>4</sup> This approach is in keeping with the ICTY precedent whereby the United Nations Secretary General had advocated that silence in the instrument did not mean that other defences could not be considered, ‘drawing upon general principles of law recognised by all nations’.<sup>5</sup> The approach to defences in the Rome Statute is seen as being ‘broad enough to accommodate the different legal traditions’ of civil and common law countries.<sup>6</sup> In raising defences, including those not explicitly enumerated, Defence counsel are required to notify the Prosecutor in advance, specifying ‘the names of witnesses and any other evidence upon which the

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<sup>3</sup> See generally A. Cassese, ‘Justifications and Excuses in International Criminal Law’, in A. Cassese, P. Gaeta and J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, Oxford: Oxford University Press, 2002, 951.

<sup>4</sup> Rome Statute, Art. 31(3), referring to Art. 21.

<sup>5</sup> *Report of the Secretary-General Pursuant to Para. 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993, para. 58.

<sup>6</sup> J. Gilbert, ‘Justice not Revenge: The International Criminal Court and the ‘Grounds to Exclude Criminal Responsibility’: Defences or Negation of Criminality?’, *Journal of Human Rights* 10:2, 2006, 143, p. 144.

accused intends to rely to establish the ground'.<sup>7</sup> The practice before the *ad hoc* international criminal tribunals reveals that defences, as strictly understood, have tended to play a more marginal role for an accused seeking exoneration, than challenges on jurisdictional grounds or to the proof of the legal elements of offences.<sup>8</sup>

## **STANDARD CRIMINAL LAW DEFENCES**

### **Mental incapacity, disease or defect**

The list of defences set out in Article 31 of the Rome Statute begins by stating that a person shall not be criminally responsible for their actions if at the time of their conduct: '[t]he person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law'. The issue of mental incapacity is often addressed prior to the commencement of trial, rather than as a defence during the proceedings, although fitness to stand trial does not automatically exclude a defence of mental incapacity. In April 2006, an ICTY Trial Chamber found that Vladmi Kovačević did not 'have the capacity to enter a plea and to stand trial, without prejudice to any future criminal proceedings against him should his mental condition change'.<sup>9</sup> Prior to his being transferred to the Hague, the accused had been confined to a psychiatric institution in Serbia.<sup>10</sup> An accused capable of standing trial and who seeks to raise a defence of mental incapacity would need to contend with the presumption of sanity. As the ICTY Appeals Chamber observed regarding this ground for excluding criminal responsibility:

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<sup>7</sup> International Criminal Court Rules of Procedure and Evidence, adopted by the Assembly of States Parties, 2002, ICC-ASP/1/3, Rules 79 and 80.

<sup>8</sup> Zahar and Sluiter, *International Criminal Law*, p. 443.

<sup>9</sup> ICTY Chambers, Press Release, 'Vladmir Kovačević declared unfit to stand trial', The Hague, 12 April 2006, OK/MOW/1069e

<sup>10</sup> Zahar and Sluiter, *International Criminal Law*, p. 441.

‘This is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong’.<sup>11</sup>

The Chamber noted that a successful plea is a complete defence leading to an acquittal.<sup>12</sup> At the *ad hoc* tribunals, the burden of proving this defence lies with the accused, with the standard of proof required being ‘on the balance of probabilities’, while at the ICC, it is unclear as yet where the burden of such proof will lie.

In comparison with mental incapacity, an individual who argues they were of diminished mental capacity at the time of the offences might not evade conviction, but could receive a mitigated sentence.<sup>13</sup> While mental incapacity will *destroy* an accused’s ability to appreciate the unlawfulness of their conduct or to control it so as to conform with the law, a diminished mental capacity is seen to *impair* that ability.<sup>14</sup> Before the International Criminal Court, a ‘substantially diminished mental capacity’ is considered to fall short of being a ground for excluding criminal responsibility, but should be taken into account as a mitigating factor in sentencing.<sup>15</sup> The ICTY Rules of Procedure and Evidence, on the other hand, classify diminished mental responsibility as a ‘special defence’,<sup>16</sup> although as practitioners have noted this defence has suffered from definitional difficulties and ‘has enjoyed little or no traction at the tribunals despite repeated defence efforts’.<sup>17</sup>

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<sup>11</sup> Delalic *et al.* (Case No. IT-96-21-A), Appeals Chamber, 20 February 2001, para. 582.

<sup>12</sup> *Ibid.*

<sup>13</sup> W.A. Schabas, *The UN International Criminal Tribunals*, Cambridge: Cambridge University Press, 2006, p. 333.

<sup>14</sup> Vasiljević (IT-98-32-T), 29 November 2002, para. 283.

<sup>15</sup> ICC Rules of Procedure and Evidence, Rule 145(2)(a)(i).

<sup>16</sup> International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, IT/32/Rev.43, 24 July 2009, Rule 67(B)(i)(b).

<sup>17</sup> Zahar and Sluiter, *International Criminal Law*, pp. 437, 440.

## **Intoxication**

In contemporary wars and conflicts, alcohol and drugs have often played a significant role in the commission of the physical acts amounting to genocide, crimes against humanity and war crimes. The Truth and Reconciliation Commission of Liberia reported that '[t]housands of children and youth were forced to take drugs as a means to control and teach them to kill, maim and rape'.<sup>18</sup> A state of intoxication clearly raises the issue as to whether an accused who may have carried out the *actus reus* of a particular international crime, also possessed the necessary *mens rea*. As a general rule, criminal liability under the Rome Statute only arises if the material elements of a crime are committed 'with intent and knowledge', and accordingly, involuntary intoxication is included as a ground for excluding criminal responsibility:

'a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court'.<sup>19</sup>

The limited relevant jurisprudence of the ICTY treated involuntary intoxication, where it was forced or coerced, as a possible mitigating circumstance, but in a situation where an accused had an 'intentionally procured diminished mental state', the Trial Chamber held that 'in contexts where violence is the norm and weapons are carried, intentionally consuming drugs or alcohol constitutes an aggravating rather than a mitigating factor'.<sup>20</sup> This assertion was considered to be overly severe and inconsistent with the Rome Statute, in that the state of intoxication was a factor to be

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<sup>18</sup> *Final Report of the Truth and Reconciliation Commission of Liberia*, Volume I: Findings and Recommendations, 2009 p. 51.

<sup>19</sup> Rome Statute, Art. 31(1)(b).

<sup>20</sup> *Kvočka et al.* (IT-98-30/1/T), 2 November 2001, para. 706.

considered in assessing the extent of an accused's knowledge and intent.<sup>21</sup> In *Vasiljevic*, the ICTY rejected the defence claim that the accused's mental responsibility was diminished as a result of chronic alcoholism.<sup>22</sup>

### **Self-defence, defence of others or defence of property**

That a person acted to defend themselves, their property or other persons is a defence frequently invoked in domestic criminal proceedings.<sup>23</sup> One is not expected to stand idly by while a crime is committed upon their person or property, although there are obvious limits to the extent to which a victim may use force to end or prevent the commission of a crime. Any use of force in self-defence is subject to the objective requirements of necessity, reasonableness and proportionality.<sup>24</sup> These criteria are incorporated in Article 31(1)(c) of the Rome Statute, which includes self-defence as a ground for excluding criminal responsibility where:

‘The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph’.

The Statute adopts the standard requirements of reasonableness and proportionality for the defence of oneself or others against an ‘imminent and unlawful use of force’, although it introduces something of a novel concept with regard to the defence of property in the context of war crimes.

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<sup>21</sup> Schabas, *The UN International Criminal Tribunals*, p. 335.

<sup>22</sup> Vasiljević (IT-98-32-T), 29 November 2002, para. 284.

<sup>23</sup> See F. Leverick, *Killing in Self-Defence*, Oxford: Oxford University Press, 2007; C. Hanly, *An Introduction to Irish Criminal Law*, Dublin: Gill & Macmillan, 1999, pp. 99-109.

<sup>24</sup> See generally A. Ashworth, *Principles of Criminal Law*, 4<sup>th</sup> edn., Oxford: Oxford University Press, 2003 pp. 135-149.

Self-defence as a ground for excluding criminal responsibility in international criminal law needs be distinguished from self-defence in public international law, which is an exception to the prohibition on the use of force by States triggered in the event of an ‘armed attack’ against a State.<sup>25</sup> The latter concept would likely feature in the determination of whether a use of armed force by a State amounts to an act of aggression under the *jus ad bellum*, but that is a separate issue as to whether an individual accused can raise an argument that their actions were in self-defence. To assert that a particular use of armed force is defensive and not contrary to the *jus ad bellum*, and that therefore any measures taken pursuant to such a use of force are not unlawful is not permitted according to the last sentence of Article 31(1)(c) of the Rome Statute. The ICTY noted correctly in *Kordic* that ‘military operations in self-defence do not provide a justification for serious violations of international humanitarian law’.<sup>26</sup> A Trial Chamber of the Special Court for Sierra Leone alluded to the notion of a ‘just war’ in the sentencing stage of the *Civil Defences Force* case:

‘although the commission of these crimes transcends acceptable limits, albeit in defending a cause that is palpably just and defensible, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards the restoration of the ousted democratically elected Government of President Kabbah, it certainly, in such circumstances, constitutes a mitigating circumstance in favour of the two Accused Persons’.<sup>27</sup>

However, the Appeals Chamber ruled that “‘just cause’ as a motive for the purposes of sentencing should not be considered as a defence against criminal liability’ or as a mitigating factor.”<sup>28</sup>

The extent to which force can be used to defend property has proved a controversial issue in domestic jurisdictions,<sup>29</sup> and the inclusion in Article 31 of the defence of

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<sup>25</sup> See Charter of the United Nations, T.S. 993 (1945), Art. 51.

<sup>26</sup> *Kordić and Čerkez* (IT-95-14/2-T), 26 February 2001, para. 452.

<sup>27</sup> *Fofana and Kondewa* (SCSL-04-14-T), Sentencing Judgment, 9 October 2007, para. 86.

<sup>28</sup> *Fofana and Kondewa* (SCSL-04-14-A), 28 May 2008, paras. 523, 534.

using force to protect ‘property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission’ has also been criticized. It has been described as ‘a disturbing compromise’.<sup>30</sup> According to the ICTY, this aspect of self-defence ‘takes into account the principle of military necessity’,<sup>31</sup> although this may not be in line with the meaning of military necessary, as described below. Self-defence may not arise as an issue before the International Criminal Court if practice to date is considered; this the ground for excluding criminal responsibility has not featured prominently in international proceedings,<sup>32</sup> perhaps owing to the nature of the crimes and the seniority of the accused with whom international criminal tribunals are concerned.

### **Duress and Necessity**

International criminal law, like its domestic counterparts, pays heed to the fact that individuals may be forced against their will to commit crimes and accordingly allows for a defence of either duress or necessity in such circumstances. Where a threat of harm is made against an individual by other persons then resort may be made to a defence of duress, and where the harm arises from natural occurrences beyond an individual’s control, then a defence of necessity might arise.<sup>33</sup> Duress has generated much scholarship and little in the way of practice at the international criminal tribunals, with the interest perhaps attributable to the moral quandary which it can give rise to.<sup>34</sup> This dilemma is apparent when one considers ingredients of the defence:

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<sup>29</sup> A. Ashworth, *Principles of Criminal Law*, p. 144.

<sup>30</sup> W.A. Schabas, *An Introduction to the International Criminal Court*, Cambridge: Cambridge University Press, 2007, pp. 228-229.

<sup>31</sup> Kordić and Čerkez (IT-95-14/2-T), 26 February 2001, para. 451.

<sup>32</sup> A. Cassese, *International Criminal Law*, Oxford: Oxford University Press, 2003, pp. 223-224.

<sup>33</sup> A. Ashworth, *Principles of Criminal Law*, pp. 221-231.

<sup>34</sup> See for example L.E. Chiesa, ‘Duress, Demanding Heroism, and Proportionality’, *Vanderbilt Journal of Transnational Law*, 41, 2008, 741; V. Epps, ‘The Soldier’s Obligation to Die when Ordered to Shoot Civilians or Face Death Himself’, *New England Law Review*, 37, 2003, 987; R. Ehrenreich

‘(a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil’.<sup>35</sup>

A person claiming the defence of duress will have been forced to choose between committing crimes or allowing for either themselves or other persons to be harmed.

Although duress and necessity are absent from the statutes of the *ad hoc* international criminal tribunals, Article 31(d) of the Rome Statute considers that criminal responsibility will not arise if:

‘The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control’.

The adoption of the Rome Statute put paid to some of the uncertainty that had existed following the ICTY Appeals Chamber judgment in *Erdemovic*, in which a majority had ruled that ‘duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings’.<sup>36</sup> Nevertheless, judges at the ICC confronted with a defence of duress will be required to consider the defence’s somewhat taxing requirements of necessity, reasonableness and ‘lesser evil’. In their separate opinion in *Erdemović*, Judges McDonald and Vohrah considered that no ‘remedy’ taken by an accused could be

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Brooks, ‘Law in the Heart of Darkness: Atrocity and Duress’, *Virginia Journal of International Law*, 43, 2003, 861.

<sup>35</sup> *Erdemovic* (IT-96-22-A), Appeals Chamber, 7 October 1997, Separate and Dissenting Opinion of Judge Li, para. 5.

<sup>36</sup> *Erdemovic* (IT-96-22-A), Appeals Chamber, 7 October 1997, para. 19.

deemed proportionate 'to a crime directed at the whole of humanity'.<sup>37</sup> Although the majority did accept that duress could be a mitigating factor in sentencing,<sup>38</sup> it is the minority opinion in *Erdemović* that will likely provide guidance for any future considerations of the defence. Judge Cassese set out the following conditions:

- i. the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
- ii. there was no adequate means of averting such evil;
- iii. the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;
- iv. the situation leading to duress must not have been voluntarily brought about by the person coerced'.<sup>39</sup>

The *Erdemović* case also demonstrates that in the context of international crimes, a defence of duress will often arise in connection with superior orders, where an individual soldier, for example, was ordered to commit offences under a threat to their life. Superior orders is a distinct defence and is discussed further below.

### **Mistake of fact and mistake of law**

The Rome Statute allows mistakes of fact or law as defences where the mistakes are such as to prevent the accused from having formulated the necessary *mens rea* for the offence. Article 32 of the instrument specifies that:

'1. A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime.

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<sup>37</sup> *Ibid.*, Joint Separate Opinion of Judges McDonald and Judge Vohrah, para. 37.

<sup>38</sup> *Ibid.*, Joint Separate Opinion of Judges McDonald and Judge Vohrah, para. 66; Separate and Dissenting Opinion of Judge Li, para. 5.

<sup>39</sup> *Ibid.*, Separate and Dissenting Opinion of Judge Cassese, para. 16.

2. A mistake of law as to whether a particular type of conduct is a crime within the jurisdiction of the Court shall not be a ground for excluding criminal responsibility. A mistake of law may, however, be a ground for excluding criminal responsibility if it negates the mental element required by such a crime, or as provided for in article 33’.

The second paragraph gives expression to the general position that ‘ignorance of the law is no excuse’, with the exceptions being where the mistake negates the crime’s mental element, or with regard to the defence of ‘superior orders’, discussed further below. It has been noted that Article 30 of the Rome Statute requires that offences be committed with intent and knowledge, while crimes such as genocide and the crime of humanity of persecution require additional special intent. The ICC has asserted that ‘the defence of mistake of law can succeed under Article 32 of the Statute only if [an accused] was unaware of a normative objective element of the crime as a result of not realising its social significance (its everyday meaning)’.<sup>40</sup> The specialized and at times technical nature of international humanitarian law, as evidenced by the concept of reprisals, for example, should see a more flexible approach to this defence.<sup>41</sup>

The Hartmann contempt trial before the ICTY was one of the rare occasions when mistake was raised as a defence before international criminal tribunals, although of course the accused in that instance was not charged with an international crime. Defence argued that the accused was not aware of the illegality of her conduct and that she acted under a reasonable belief that the information she disclosed was public.<sup>42</sup> The Chamber did not accept that the accused was reasonably mistaken in fact regarding the confidential material and as regards the mistake of law defence, it noted ‘that a person’s misunderstanding of the law does not, in itself, excuse a

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<sup>40</sup> Lubanga (ICC-01/04-01/06), Decision on the Confirmation of Charges, 29 January 2007, para. 316. See T. Weigend, ‘Intent, Mistake of Law and Co-perpetration in the Lubanga Decision on Confirmation of Charges’, *Journal of International Criminal Justice* 6, 2008, 471, p. 476.

<sup>41</sup> Schabas, *An Introduction to the International Criminal Court*, p. 230.

<sup>42</sup> Hartman (IT-02-54-R77.5), Special Appointed Chamber, Judgment, 14 September 2009, paras. 63-64.

violation of it'.<sup>43</sup> In dismissing the claim, the Chamber found that the accused had demonstrated knowledge, rather than ignorance of the law.<sup>44</sup>

### **Alibi**

Although not considered as a defence 'in its true sense',<sup>45</sup> hence its omission from the defences listed in Article 31 of the Rome Statute, alibi is a defensive argument that is nonetheless relied upon by defence lawyers where it is claimed that an accused was not present when the offence in question was committed. The argument of alibi is envisaged in proceedings before the International Criminal Court, as Rule 79 of the Rules of Procedure and Evidence requires the Defence to disclose to the Prosecutor if they intend to:

'Raise the existence of an alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names of witnesses and any other evidence upon which the accused intends to rely to establish the alibi'.<sup>46</sup>

The possible existence of an alibi is an issue of fact that will need to be disproved by the Prosecution in order to establish the presence of an accused at the location of the offence's commission. Alibi is more relevant for those persons accused of directly participating in the commission of crimes, as military or civilian superiors or those who may have ordered, induced or aided and abetted in the carrying out of an offence need not be present at the scene for criminal liability to arise. That being said, alibi may be raised with regard to presence at particular meeting where an agreement was made to pursue a course of action involving aggression, genocide, crimes against humanity or war crimes.

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<sup>43</sup> *Ibid.*, paras. 64-65.

<sup>44</sup> *Ibid.*, para. 66.

<sup>45</sup> *Delalic et al.* (IT-96-21-A), Appeals Chamber, 20 February 2001, para. 581.

<sup>46</sup> ICC Rules of Procedure and Evidence, Rule 79(1)(a). See also ICTY Rules of Procedure and Evidence, Rule 67.

Commentators have observed that alibi may be ‘the wrong *kind* of defence for most cases before the tribunals’, and it has succeeded in only one case to date.<sup>47</sup> In *Rwamakuba*, the Prosecution failed to rebut the significant alibi evidence presented, and an ICTR Trial Chamber found that this was ‘sufficient to cast reasonable doubt upon the allegations regarding the Accused’s participation in public meetings and gatherings’.<sup>48</sup> On the other hand, the ICTY rejected the defence of alibi in *Tadic*, ‘in view of the overwhelming credible testimony to the contrary’.<sup>49</sup> Therefore, in raising an alibi for an accused, there is an evidentiary burden for the defence to the extent that they must ‘indicate proof to raise a reasonable doubt’, although the burden of proof overall clearly remains with the Prosecution.<sup>50</sup> As the ICTR observed, ‘the Prosecution’s burden is to prove the accused’s guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi’.<sup>51</sup>

### **Provocation**

Provocation has not been explicitly included as a defence in the Rome Statute and although it may be difficult to envisage the so-called ‘heat of the moment’ defence being relevant for high-ranking accused charged with international crimes, such as war crimes ‘committed as part of a plan or policy’, or crimes against humanity involving a ‘widespread or systematic attack against any population’, it cannot with certainty be fully excluded from international criminal law.<sup>52</sup> Carla Del Ponte, in the Prosecution’s opening statement in the *Bagosora* trial before the ICTR, contended that ‘[t]he abhorrent nature of the crime of genocide necessarily negates the idea of

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<sup>47</sup> A. Zahar and G. Sluiter, *International Criminal Law*, pp. 423-424.

<sup>48</sup> *Rwamakuba* (ICTR-98-44C-T), 20 September 2006, paras. 82-83.

<sup>49</sup> *Tadic* (IT-94-1-T), 7 May 1997, para. 434.

<sup>50</sup> Schabas, *The UN International Criminal Tribunals*, p. 340.

<sup>51</sup> *Kajelijeli* (ICTR-98-44A-A), Appeals Chamber, 23 May 2005, para. 43.

<sup>52</sup> Rome Statute, Arts. 7 and 8.

provocation as an acceptable defence to that crime'.<sup>53</sup> Nonetheless, the possibility of provocation as a defence is alluded to by the *ad hoc* international criminal tribunals, and an ICTY Trial Chamber in *Milutinović* referred to numerous killings as being 'unprovoked and without legal justification'.<sup>54</sup>

In national jurisdictions, a successful plea that a killing was provoked by the words or deeds of the victim would usually see a charge of murder reduced to manslaughter.<sup>55</sup>

International criminal law does not allow for such gradations in offences, and defence counsel before the ICTY sought to use such an argument to have a killing that was allegedly provoked considered as manslaughter and thus outside the Tribunal's jurisdiction.<sup>56</sup> The judgment reads:

'The Trial Chamber does not accept that Gojko Vujičić's curses constituted provocation such as to exclude the required *mens rea* for murder on the part of the Mujahedin who killed him. Apart from the fact that Gojko Vujičić's curses seem to have been themselves a reaction to the conditions of his detention and his injury, firing a shot into Vujičić's temple would be completely out of proportion to the alleged provocation'.<sup>57</sup>

In the trial of Dragomir Milošević, the Trial Chamber took the view that the Defence argument of provocation was a challenge to the intent element of the crime of unlawful attacks against civilians:

'In this respect, the Trial Chamber recalls that in prohibiting attacks against civilians and civilian objects, Article 49 of Additional Protocol I defines "attacks" as meaning "acts of violence against the adversary, *whether in offence or defence*". There is an unconditional and

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<sup>53</sup> Bagosora *et. al.* (ICTR-98-41), Prosecution Opening Statement, 2 April 2002, available at: <http://www.ictt.org/ENGLISH/PRESSREL/2002/312chile&delponte.htm>

<sup>54</sup> *Milutinović* (IT-05-87-T), 26 February 2009, paras. 538-540, 543.

<sup>55</sup> See K.J. Heller, 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases', *American Journal of Criminal Law* 26, 1998, 1.

<sup>56</sup> *Delić* (IT-04-83-T), 15 September 2008, para. 262.

<sup>57</sup> *Ibid.*, para. 263. See also *Orić* (IT-03-68-T), 30 June 2006, para. 384.

absolute prohibition on the targeting of civilians in customary international law: *Any attack directed at the civilian population is prohibited, regardless of the military motive*.<sup>58</sup>

## **Consent**

The absence of consent by a victim is generally considered as an element of certain crimes, although the claimed presence of consent might sometimes be raised as a defence. Lack of consent is a specific element for the war crimes of pillage, enforced sterilization, rape, sexual violence and enforced prostitution in the Rome Statute.<sup>59</sup> Particular attention is paid to the issue of consent with regard to crimes of sexual violence in the jurisprudence and Rules of Procedure and Evidence of the various contemporary international tribunals.<sup>60</sup> Rule 96 of the ICTY and ICTR Rules of Procedure and Evidence sets out that ‘consent shall not be allowed as a defence’ in cases where the victim:

‘(a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or

(b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear’.<sup>61</sup>

This approach to the issue of consent is seen as ‘just the mirror image of the definition of rape’.<sup>62</sup> Moreover, it has been contended that ‘sexual violence that qualifies as genocide, a crime against humanity, or a war crime, occurs under circumstances that are inherently coercive and negate any possibility of genuine consent’.<sup>63</sup> Consent, of course, can never be a defence to murder and would not be relevant for many

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<sup>58</sup> Milošević (IT-98-29/1-T), 12 December 2007, para. 906. See also *ibid*, paras. 775-780.

<sup>59</sup> International Criminal Court Elements of Crimes, ICC-ASP/1/3(part II-B) (2002), Art. 8(2)(b)(xvi); Art. 8(2)(b)(xxii)-5; Art. 8(2)(b)(xxii)-6; Art. 8(2)(e)(vi)-3.

<sup>60</sup> See generally W. Schomburg and I. Peterson, ‘Genuine Consent to Sexual Violence under International Criminal Law’, *American Journal of International Law* 101: 1, 2007, 121.

<sup>61</sup> ICTY Rules of Procedure and Evidence, Rule 96(ii). See also ICC Rules of Procedure and Evidence, Rule 70.

<sup>62</sup> Schabas, *The UN International Criminal Tribunals*, p. 341.

<sup>63</sup> Schomburg and Peterson, ‘Genuine Consent to Sexual Violence’, p. 124.

international crimes, although where it might arise, its classification as either a defence or an element of the crime would impact on the burden of proof.<sup>64</sup>

## **INTERNATIONAL CRIMINAL LAW DEFENCES**

### **Superior Orders**

The highly regimented structure of military forces, where lawful orders should be met with 'prompt, immediate, and unhesitating obedience',<sup>65</sup> has given rise to a defence of superior orders, whereby an accused claims that they acted on the basis of orders from a superior which as a subordinate they were bound to follow. International criminal law has evolved in its treatment of the defence, from its rejection as an absolute defence at Nuremberg, to a more nuanced approach under the Rome Statute of the International Criminal Court.<sup>66</sup> Article 8 of Nuremberg Charter established the standard approach:

'The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires'.

This approach ruled out superior orders as a defence, and rendered it relevant only at the sentencing stage, although in finding Keitel guilty on all four counts, the Nuremberg Tribunal concluded that the defence of superior orders 'cannot be considered in mitigation where crimes as shocking and extensive have been committed consciously, ruthlessly and without military excuse or justification'.<sup>67</sup>

Other tribunals operating in the post-Second World War period considered the

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<sup>64</sup> Schabas, *The UN International Criminal Tribunals*, pp. 342-343.

<sup>65</sup> United Kingdom War Office, *Manual of Military Law*, London: H.M. Stationery Office, 1907, p. 18.

<sup>66</sup> See J.N. Maogoto, 'The Defence of Superior Orders', in Olaoluwa Olusanya, *Rethinking International Criminal Law: The Substantive Part*, Groningen: Europe Law Publishing, 2007, 89.

<sup>67</sup> International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, reprinted in *American Journal of International Law* 41: 1, 1947, 172, p. 283.

defence of superior orders beyond the context of mitigation.<sup>68</sup> The statutes of the contemporary *ad hoc* international criminal tribunals have included a provision on superior orders largely replicating the approach taken at Nuremberg.<sup>69</sup> However, according to Zahar and Sluiter, the practice is that despite the considerable academic commentary on superior orders, it is ‘almost by definition not a live defence at the tribunals’ given the seriousness of crimes charged and the seniority of the accused.<sup>70</sup> The limited consideration of the defence of superior orders at the *ad hoc* tribunals has taken place at the sentencing stage, and has usually been unsuccessful, as was the case in *Erdemovic*.<sup>71</sup>

The Rome Statute dedicates a separate article to the defence of ‘superior orders and prescription of law’. Article 33 reads:

‘1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

- (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful’.

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<sup>68</sup> C. Garraway, ‘Superior Orders and the International Criminal Court: Justice delivered, or justice denied’, *International Review of the Red Cross*, No. 836, 1999, 785.

<sup>69</sup> Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc S/25704 at 36, Annex (1993) and S/25704/Add.1, (1993) U.N. Doc S/RES/827, Art. 7, para. 4, Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, U.N. Doc. S/Res/955 (1994), Art. 6, para. 4; Statute of the Special Court for Sierra Leone, having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council Resolution 1315 (2000) of 14 August 2000, Art. 6, para. 4.

<sup>70</sup> Zahar and Sluiter, *International Criminal Law*, p. 425.

<sup>71</sup> *Erdemovic* (IT-96-22-T), Sentencing Judgment, 29 November 1996, paras. 13-20.

This is a departure from the approach taken at Nuremberg and by the *ad hoc* tribunals, in that the defence is allowed in limited circumstances: only those under a duty to obey orders can raise the defence, it is limited to war crimes charges, and will succeed where it is proved that the individual did not know that the order was unlawful and the order itself was not manifestly unlawful. Antonio Cassese has contended that the provision is out of step with customary international law by treating war crimes differently from genocide and crimes against humanity in terms of manifest unlawfulness.<sup>72</sup>

### **Reprisals**

The concept of reciprocity often cast a dark shadow over observance of the laws of armed conflict,<sup>73</sup> although according to the International Criminal for the Former Yugoslavia, '[t]he defining characteristic of modern international humanitarian law is...the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants'.<sup>74</sup> Persons accused of international crimes have occasionally sought to raise a defence of *tu quoque*, claiming that similar acts were also carried out by their opponents, although such an argument has invariably been rejected and often serves more as a political denunciation of the relevant tribunal, rather than a genuine defence to criminal charges.<sup>75</sup> Until such a time as international criminal justice is applied evenly to all international crimes, then such claims of justification will continue to be made.<sup>76</sup> Defence arguments seeking to rely on reciprocity may gain some traction by resort to the doctrine of reprisals.

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<sup>72</sup> Cassese, *International Criminal Law*, p. 241.

<sup>73</sup> F. Kalshoven and L. Zegveld, *Constraints on the Waging of War*, 3<sup>rd</sup> edn., Geneva: International Committee of the Red Cross, 2001, pp. 75-76.

<sup>74</sup> Kupreškić *et al.* (IT-95-16-T), 14 January 2000, para. 511.

<sup>75</sup> *Ibid.*, paras. 511, 515. See also Kunarac *et al.* (IT-96-23 & IT-96-23/1-A), Appeals Chamber, 12 June 2002, para. 87; S. Yee, 'The Tu Quoque Argument as a Defence to International Crimes, Prosecution or Punishment', *Chinese Journal of International Law* 3, 2004, 87.

<sup>76</sup> See generally R. Cryer, *Prosecuting International Crimes; Selectivity and the International Criminal Law Regime*, Cambridge: Cambridge University Press, 2005.

Reprisals are a somewhat anachronistic international law enforcement mechanism, and although largely of academic interest in the present day, with little actual reliance on the doctrine, reprisals have been invoked as a defence before the international tribunals recently<sup>77</sup> and cannot with certainty be ruled out as a defence to war crimes or even perhaps to the crime of aggression. The defence of reprisals was used frequently in the trials conducted after the Second World War as an attempt to justify conduct which would otherwise be viewed as being contrary to the laws of war.<sup>78</sup> The appeal of the defence is obvious, when one considers that belligerent reprisals are deliberate violations of the laws of war by a party to an armed conflict in response to the prior violation of those same laws by the opposing party, and for the purpose of forcing a return to observance of the law.<sup>79</sup> The concept of reprisal also exists outside the context of armed conflict, in the form of so-called peacetime reprisals. Such countermeasures involve a use of force falling short of war, by one State in response to a prior violation of the *jus ad bellum* by another State – a forcible means of self-help.<sup>80</sup>

Belligerent reprisals have historically served as a blunt instrument of law enforcement during times of war, although not without limitation, as customary international law

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<sup>77</sup> See Martić (IT-95-11-T), 12 June 2007, paras. 464-468; Martić (IT-95-11-A), Appeals Chamber, 8 October 2008, paras. 263-267.

<sup>78</sup> See for example *United States of America v. Wilhelm List et al.*, Judgment, 19 February 1948, Case No. 7, XI *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 757, pp. 1252-1253; *United States of America v. Wilhelm von Leeb et al.*, Judgment, 27 October 1948, Case No. 12, XI *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 462, p. 528; *United States of America v. Otto Ohlendorf et al.*, Judgment, 8-9 April 1948, Case No. 9, IV *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10* 1, pp. 493-494; *In re Rauter*, Holland, Special Criminal Court, 4 May 1948, Special Court of Cassation, 12 January 1949, Case No. 193, 16 *Annual Digest and Reports of Public International Law Cases* (1949) 526, p. 539; *Trial of General von Mackensen and General Maelzer*, British Military Court, Rome, 18-30 November 1945, Case No. 43, VIII *Law Reports of Trials of War Criminals* 1, pp. 3-7.

<sup>79</sup> See generally F. Kalshoven, *Belligerent Reprisals*, Leyden: A.W. Sijthoff, 1971.

<sup>80</sup> See generally Y. Dinstein, *War, Aggression and Self-Defence*, 2nd edn., Cambridge: Cambridge University Press, 1994, pp. 215-226; Derek Bowett, 'Reprisals involving Recourse to Armed Force', 66 *American Journal of International Law* 1 (1972); Jason S. Wrachford, 'The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defence of Reprisal gone bad?', *Air Force Law Review* 60, 2007, 29.

prescribed certain rules governing their use. Reprisals could only be in response to a breach of the laws of war, any resort to the doctrine required observance of the principle of proportionality and reprisals could only be used in an attempt to force compliance with the law, if other means would not prove effective.<sup>81</sup> Positive international humanitarian law began progressively protecting certain categories of persons from reprisals when such a rule was introduced for prisoners of war in 1929,<sup>82</sup> and this was followed by similar protections for various categories of persons and property protected by the Geneva Conventions of 1949, such as the wounded, sick and shipwrecked members of armed forces and civilians in occupied territory.<sup>83</sup> Additional Protocol I added to this growing list by including, for example, the civilian population, objects indispensable to the survival of the civilian population and the natural environment,<sup>84</sup> although the attempt to include reprisal prohibitions applicable to non-international armed conflicts in Additional Protocol II proved unsuccessful.<sup>85</sup> A complete ban of belligerent reprisals has not yet been brought about, and while no State disputes the reprisal prohibitions in the Geneva Conventions, the rules in Additional Protocol I have not been agreed to by all States and doubts exist over the customary international law status of some of those provisions.<sup>86</sup> The laws applicable

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<sup>81</sup> S. Darcy, 'The Evolution of the Law of Belligerent Reprisals', *Military Law Review*, 175, 2003, 184, pp. 189-196.

<sup>82</sup> Convention Relative to the Treatment of Prisoners of War (1929), Art. 2, para. 3.

<sup>83</sup> See for example Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (1949), Art. 46; Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (1949), Art. 47; Geneva Convention III Relative to the Treatment of Prisoners of War, 75 UNTS 135 (1949), Art. 13, para. 3; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (1949), Art. 33, para. 3. See also Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240 (1954), Art. 4, para. 4.

<sup>84</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (1977), Art. 20, Art. 51, para. 6, Art. 52, para. 1, Art. 53, para. c, Art. 54, para. 4, Art. 55, para. 2, Art. 56, paras. 1 and 4.

<sup>85</sup> See S. Darcy, *Collective Responsibility and Accountability under International Law*, Ardsley, New York: Transnational Publishers, 2006, pp. 152-154.

<sup>86</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I – Rules*, Cambridge: Cambridge University Press, 2005, pp. 519-526; S. Darcy, *Collective Responsibility and Accountability*, pp. 154-156.

to internal armed conflicts are silent on the question of belligerent reprisals, although it is arguable that this concept does not apply outside of the context of inter-State conflict.<sup>87</sup>

The defence of belligerent reprisal in the Allied trials after the Second World War yielded little if any success for those accused who sought to raise it, often because of the excessively disproportionate nature of the reprisals taken; in the notorious 'Ardeatine Cave' incident, ten prisoners were killed for each German policeman that had been killed in a partisan bomb attack.<sup>88</sup> The ICTY has discussed belligerent reprisals as a possible defence in its jurisprudence, holding somewhat controversially that the rule that protects civilians from being the target of reprisal action applies in all armed conflicts and that the rule in Additional Protocol I prohibiting reprisals against the civilian population is a rule of customary international law.<sup>89</sup>

Where the law relating to belligerent reprisals is either contested or permissive, as is the case with reprisals against active combatants and military objects, recourse to the reprisal argument may act as a possible legitimate defence to a charge of war crimes.<sup>90</sup> The issue of reprisals as a defence had been addressed with some concern in the preparatory work leading to the adoption of the Rome Statute,<sup>91</sup> and the instrument itself does not include reprisals in Article 31. It is likely that some reprisals, particularly those against military forces or objects or involving the use of

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<sup>87</sup> See S. Darcy, *Collective Responsibility and Accountability*, pp. 166-175.

<sup>88</sup> *In re Kappler*, Italy, Military Tribunal of Rome, 20 July 1948, Case No. 151, 15 *Annual Digest and Reports of Public International Law Cases* (1948) 471, pp. 472-476.

<sup>89</sup> See respectively Martić (IT-95-11-R61), Decision, 8 March 1996, 39, p. 47; Kupreškić *et al.* (IT-95-16-T), 14 January 2000, paras. 527-535. The Martić Trial Chamber seems to have softened its approach in its final judgment, see Martić (IT-95-11-T), 12 June 2007, paras. 464-468.

<sup>90</sup> M. Bothe, 'War Crimes' in Cassese, Gaeta and Jones (eds.), *The Rome Statute of the International Criminal Court*, 379, p. 387; Cassese, 'Justifications and Excuses in International Criminal Law', pp. 951-952; E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague: T.M.C. Asser Press, 2003, pp. 291-294.

<sup>91</sup> *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, G.A. O.R. 51st session, Supp. no. 22, U.N. Doc. A/51/22, Vol. I, (1996), para. 209; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. Doc. A/51/22, Vol. II, (1996), p. 103.

prohibited weapons, could be in accordance with ‘the established principles of the international law of armed conflict’,<sup>92</sup> and depending on the circumstance, admissible as a defence to war crimes contained in the Rome Statute.

The question of reprisals as a defence to a charge of aggression may also be an unresolved one, although interestingly the answer was perhaps clearer when international criminal law was in its infancy. Peacetime reprisals consist of ‘modes of putting stress upon an offending state which are of a violent nature, although they fall short of actual war’,<sup>93</sup> and in 1946, the Nuremberg Charter defined a crime against peace as a ‘war of aggression, or a war in violation of international treaties, agreements or assurances’.<sup>94</sup> The United Nations Declaration of Aggression distinguished between acts of aggression, which give rise to international responsibility, and wars of aggression, which amount to crimes against international peace.<sup>95</sup> Reprisals would constitute *prima facie* aggressive acts, and the International Law Commission, in its 1996 Draft Code of Crimes Against the Peace and Security of Mankind, omitted the reference to ‘wars’ and referred only to ‘aggression’.<sup>96</sup> The ICC Special Working Group on the Crime of Aggression recently proposed the following definition of the offence:

‘the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of

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<sup>92</sup> Rome Statute, Art. 21, para. (b).

<sup>93</sup> T.J. Lawrence, *The Principles of International Law*, 6th edn., Boston/New York/Chicago: D.C Heath & Co., 1917, p. 334.

<sup>94</sup> Charter of the International Military Tribunal at Nuremberg (1945), Art. 6.

<sup>95</sup> United Nations General Assembly Resolution 3314 (XXIX), 14 December 1974, Art. 5(2).

<sup>96</sup> Draft Code of Crimes against the Peace and Security of Mankind, *Report of the Commission on the work of its forty-eighth session* (1996), Volume II, Part 2, *Yearbook of the International Law Commission*, U.N. Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), Art. 16.

aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations'.<sup>97</sup>

Yoram Dinstein contends that it is an open question as to whether 'the practice of States, and the future definition to be incorporated in the revised Statute of the ICC, will confirm the broadening of criminal liability in this sphere'.<sup>98</sup> This more expansive approach to aggression would seem to encompass unlawful reprisals, and it may be the case that under contemporary international law all armed reprisals are now unlawful following the adoption of the rules limiting resort to the use of force in the Charter of the United Nations and as interpreted in the 1970 General Assembly 'Declaration on Principles of International Law Concerning Friendly Relations'.<sup>99</sup>

### **Military necessity**

The concept of military necessity plays an important role in the assessment of the legality of wartime conduct under the laws of armed conflict. In planning military actions, forces 'are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning'.<sup>100</sup> Certain rules of international humanitarian law are subject to an exception of military necessity, such as Article 53 of the Fourth Geneva Convention, which states that:

'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations'.

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<sup>97</sup> *Report of the Special Working Group on the Crime of Aggression*, ICC-ASP-6/20/Add.1/Annex 2, 6 June 2008, p. 12.

<sup>98</sup> Dinstein, *War, Aggression and Self-Defence*, p. 126.

<sup>99</sup> 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations', UNGA Res. 2625 (1970). See, however, Dinstein, *War, Aggression and Self-Defence*, pp. 221-231; M. Shaw, *International Law*, 6<sup>th</sup> edn., Cambridge: Cambridge University Press, 2008, pp. 1129-1130.

<sup>100</sup> F. Hampson, 'Military Necessity', in R. Gutman and D. Rieff (eds.), *Crimes of War: What the Public Should Know*, New York/London: W.W. Norton & Company, 1999, p. 251.

The concept of military necessity appears in various war crimes under international criminal law, including the list in Article 6 of the Nuremberg Charter, which considered criminal ‘wanton destruction of cities, towns or villages, or devastation not justified by military necessity’. In the Rome Statute, a similar war crime appears, defined as ‘[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’.<sup>101</sup> The Statute also includes a war crime of ‘[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand’.<sup>102</sup> Military necessity, or more accurately, the lack of a justification of military necessity, is an inherent element of the crime, rather than a defence *per se* to criminal conduct. That being said, it is worth considering it in this context of defences, as the concept invariably gives rise to subjective assessments as to whether a particular course of action was justified by military necessity and, accordingly, there is some room for debate regarding the concept amongst the parties in criminal proceedings.

The application of the concept of military necessity is not without limitations. It can only be raised in the context of attacks aimed at the military defeat of the enemy and, moreover, such attacks must respect the principle of proportionality, that is to say, they ‘must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated’.<sup>103</sup> As the concept of military necessity is an explicit aspect of several humanitarian law rules, it cannot be relied upon to breach other rules where no such reference exists. A United States Military Tribunal sitting after the Second World War correctly noted that ‘[m]ilitary

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<sup>101</sup> Rome Statute, Art. 8(2)(a)(iv). See Kordić and Čerkez (IT-95-14/2-T), 26 February 2001, paras. 329-347.

<sup>102</sup> Rome Statute, Art. 8(2)(e)(xiii).

<sup>103</sup> Hampson, ‘Military Necessity’, p. 251.

necessity or expediency do not justify a violation of positive rules'.<sup>104</sup> An ICTY Trial Chamber interpreted the concept incorrectly in the *Blaškić* case, when it asserted that 'targeting civilians is an offence when not justified by military necessity'.<sup>105</sup> The Appeals Chamber made a correction and reiterated that there is an absolute prohibition of the targeting of civilians in customary international law.<sup>106</sup> Military necessity may be raised to an accused's defence with regard to charges of property destruction, displacement and detention of civilians, for example, and in the context either war crimes or crimes against humanity,<sup>107</sup> although such arguments are viewed as 'controversial because of their potential to subvert the legal regulation of armed conflict'.<sup>108</sup> Such an argument was rejected by the *Krstić* Trial Chamber in relation to the transfer of civilians at Srebrenica, as the evacuation of civilians 'was itself the goal and neither the protection of the civilians nor imperative military necessity justified the action'.<sup>109</sup>

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<sup>104</sup> *United States of America v. Wilhelm List et al.*, p. 1256.

<sup>105</sup> *Blaškić* (IT-95-14-T), 3 March 2000, para. 180.

<sup>106</sup> *Blaškić* (IT-95-14-A), Appeals Chamber, 29 July 2004, para. 109. See also *Galić* (IT-98-29-T), 5 December 2003, para. 44.

<sup>107</sup> Schabas, *The UN International Criminal Tribunals*, p. 347.

<sup>108</sup> Zahar and Sluiter, *International Criminal Law*, p. 430.

<sup>109</sup> *Krstić* (IT-98-33-T), 2 August 2001, para. 527.