Defences to Criminal Liability

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(1) **What role have defences played in international criminal law? What role should they play?**

Traditionally, defences have played a very limited role in the existing jurisprudence of the contemporary international criminal courts and tribunals. One reason for this may lie in prosecutorial selectivity. The existing international criminal courts and tribunals prosecute only a small number of potential perpetrators. The selectivity exercised by the prosecutor limits the cases pursued to those individuals who are most responsible and against whom the prosecutors have the strongest case. This likely excludes those cases where there may be a strong defence which would exclude criminal culpability. It has also been suggested that the lack of attention may also be due to “a lack of sympathy” to accused charged with such atrocities.\(^1\) Regardless of the severity of the crimes within the jurisdiction of the African Court of Justice and Human and Peoples’ Rights (“African Court”), all criminal trials must be conducted in full accordance with general principles of criminal law including all accepted grounds for excluding criminal responsibility.

(2) **What does the Malabo Protocol tell us about defences? What does it not tell us?**

The *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* ("Malabo Protocol") does not include a provision defining which defences will be applicable before the African Court. This is not unusual. Other contemporary international criminal institutions are similarly predominantly silent on the question of defences, including the statutes of the ICTY and the ICTR. This silence, of course, does not infer the irrelevance of defences. However, Article 46B(4) explicitly excludes the defence of superior orders.

(3) **What issues is the African Court likely to face with respect to defences?**

The question of defences to criminal responsibility will provide many challenges to the Court, in particular given the silence on this issue in the *Malabo Protocol*. Additionally, there is limited guidance that can be taken from prior international criminal courts and tribunals given the limited role that defences have played at these institutions thus far. General principles of law can be difficult to define and the contradictory approaches taken amongst the different legal systems of the world make it challenging to discern a general principle of law in relation to some of the questions that arise surrounding defences. The Court will have to identify and to define which defences are applicable. In doing so, the Court will face a number of issues.

First, the Court will have to determine what **sources of law** it will consider. In particular, will the Court turn to domestic law as a default if no general principle of law can be found?

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The Court will face **substantive issues** with respect to the recognition and definition of certain defences. Will intoxication be accepted as a defence to serious crimes within the Court’s jurisdiction? Are any crimes excluded from the application of the defences of duress or necessity? Is defence of property recognized as a ground for excluding criminal responsibility?

Finally, the Court will also face many **procedural and evidentiary issues**. For instance, what burden, if any, lies on the accused to establish certain defences? For example, the ICTY Trial Chamber recognized a presumption of sanity for all individuals charged with criminal acts. Accordingly, it is suggested that the onus lies on the accused to rebut this presumption. However, the ICC will likely take a different approach given the guarantee provided for in the *Rome Statute* that the accused has the right “[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal” (Article 67(1)(i)). Additionally, what evidentiary disclosure obligations lie upon the defence should it seek to raise an affirmative defence? And what procedures are available if an individual is found not criminally responsible due to mental disorder but poses a threat to safety of themselves or others?

(4) **What sources may the Court rely upon to determine questions relating to defences?**

Article 31 of the *Protocol on the Statute of the African Court of Justice and Human Rights* defines the Applicable Law before the African Court. Pursuant to this Article, the Court may turn to a wide range of relevant sources. General principles of law, as referred to in Article 31(1)(d), is of particular importance in discerning applicable defences given the absence of codification on this issue in the *Malabo Protocol*. However, it is difficult to discern a general principle in relation to some questions relating to defences due to the different approaches taken in the various legal systems of the world. Accordingly, the question remains of how these lacunae are to be filled. Article 31(1)(f) permits the Court to turn to “[a]ny other law relevant to the determination of the case.” This arguably opens the door to consideration of domestic law. However, this has been a contentious issue in international criminal law. As a practical matter, the domestic law of a state which would otherwise have had jurisdiction may be a sensible source to turn to if no general principle can be discerned. This may also be justified as a question of fairness to the accused who would be expected to be aware of these laws. On the other hand, resort to national law has been criticized for the potential unequal treatment of accused and the lack of consistency in the jurisprudence of the court that would result.

(5) **What can existing international criminal law tell us about defences?**

Despite the fact that defences have played a limited role to date in international criminal law, there are still a number of international criminal law sources that the Court can turn to for guidance, including:

- United Nations War Crimes Commission (UNWCC) report on post-World War II cases
- International Law Commission’s (ILC) consideration of the Draft Code of Crimes against the Peace and Security of Mankind
- Jurisprudence of the *ad hoc* international criminal tribunals
- Articles 31 and 32 of the *Rome Statute*

The *Rome Statute* includes the first codification of defences for an international criminal court or tribunal. With 124 states parties to the *Rome Statute*, these provisions are a good starting point,
in particular because they reflect some hard fought compromises in relation to some of the divergent approaches reflected amongst the different national legal systems.

DEFENCES

Mental disease or defect
The defence of mental disease or defect is generally accepted in national jurisdictions. The formulation of the defence included in Article 31(1)(a) of the Rome Statute has been described as “a fairly uncontroversial formulation of the defence.”\(^2\) The ICTY Appeals Chamber also recognized the existence of the defence of lack of mental capacity in the Ćelebić case (Prosecutor v. Delalić et al.) although it was not applied to any accused in that case.

While mental disease or defect which amounts to lack of mental capacity has been accepted as a full defence in international criminal law, the defence of diminished mental capacity, recognized in some domestic jurisdictions, has been rejected. However, diminished mental capacity has been recognized as a factor which may be relevant to mitigation of sentence. (ICTY, Ćelebić Appeal Judgment).

Intoxication
The availability of the defence of intoxication in international law is a more controversial issue. Intoxication is a challenging defence even in those domestic jurisdictions which do recognize it in some form. The perceived culpability in voluntarily becoming intoxicated and then committing a serious crime, combined with the concern that intoxication is too often present in the commission of many serious offences like sexual assault, suggests that the defence of intoxication should be limited. On the international level this debate is further complicated because some countries not only reject intoxication as a defence but treat it as an aggravating factor in the commission of a crime. A limited intoxication defence was included in Article 31(1)(b) of the Rome Statute which could provide a starting point for consideration of these issues by the African Court. Article 31(1)(b) contemplates only a restrictive intoxication defence which only applies if the intoxication “destroys that person’s capacity.” Accordingly, it is not sufficient to demonstrate that an accused’s capacity is simply impaired. This is an extremely high threshold and will exclude the vast majority of individuals who commit crimes while intoxicated. Additionally, the distinction between voluntary versus involuntary intoxication has been noted by the ICTY and in the drafting of the Rome Statute.

Defence of person or property
Defence of the person, including self-defence and defence of others, is one of the most universally accepted criminal defences. One ICTY Trial Chamber recognized self-defence as a rule of customary international law (Kordić and Ćerkez Trial Judgment). Article 31(1)(c) of the Rome Statute includes both self-defence and defence of others. In addition to its codification in the Rome Statute, self-defence has been recognized as an accepted defence by the UNWCC, the ILC, and the ICTY.

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\(^2\) Cryer et al., An Introduction to International Criminal Law and Procedure, 3\(^{rd}\) ed. (Cambridge: Cambridge University Press, 2014) at 401.
Defence of property, particularly in relation to serious allegations of international or transnational crimes, is more controversial. The question of whether defence of property should be included in the ICC’s statute as a ground for excluding criminal responsibility proved to be one of the most difficult issues in negotiations on this subject. The approach taken in Article 31(1)(c) limits defence of property to the category of war crimes and is only applicable in two situations. First, acts may be taken in relation to “property which is essential for the survival of the person or another person.” The inclusion of this category of property seems justifiable given that a threat to property essential to the survival of persons indirectly amounts to a threat to those persons. However, the second category is far more controversial. It permits acts to be taken in defence of “property which is essential for accomplishing a military mission.” This part of the provision has been highly criticized.

Duress
Throughout the history of international criminal law, duress has also been referred to as necessity, extreme necessity, compulsion, force and compulsion, coercion, and coercion and compulsory duress. Here, duress and necessity will be distinguished. The term duress will be used to refer to cases in which such threat emanates from another person or persons and necessity will be used in relation to situations in which such threat results from “objective circumstances”.

Duress is one defence which has received judicial consideration in the existing war crimes jurisprudence. However, the jurisprudence does little to resolve some of the most challenging questions about the limits of the law of duress. Can duress be raised as a defence to a charge of murder? Does the nature of genocide or crimes against humanity alter our assessment of the applicability of the defence of duress? What if the individual faces the choice of killing civilians or being killed alongside them? The tension in the international criminal jurisprudence derives from the diverging approaches taken by national jurisdictions on these questions. This makes it difficult to discern a clear general principle on the law on duress. Duress was considered extensively by the ICTY in the case of Prosecutor v. Dražen Erdemović. However, as a result of the silence in the Tribunal’s Statute on defences, the diverging perspectives on duress in national law, and the lack of consensus in the post-World War II war crimes jurisprudence, the judges of the ICTY also diverged in their views and four separate appellate decisions were authored in this case, demonstrating significant disagreement on the law on the defence of duress. A bare majority of the ICTY Appeals Chamber concluded that duress is not a complete defence in relation to charges of war crimes and crimes against humanity involving killing innocent persons. On the other hand, Article 31(1)(d) of the Rome Statute makes no such explicit exclusion for murder or any other crime.

Necessity
Necessity is a less commonly recognized and less well defined concept than duress. Necessity can be conceptualized in two different ways, as an excuse and as a justification. Necessity as a justification includes a situation where an accused acts and causes harm, but does so in order to avoid a greater harm. Necessity as an excuse resembles the defence of duress when the accused is compelled to commit an act which is criminal to avoid a serious threat emerging from external circumstances. In some national jurisdictions, both versions of the defence are recognized; whereas others recognize only one version and not the other. Necessity is recognized in Article
31(1)(d)(ii) of the *Rome Statute* in the form of the “duress of circumstances.” The ICTY found that the defence of necessity existed in customary international law (*Prosecutor v. Naser Orić*) and concluded that the defence of necessity was available in relation to charges of plunder involving the theft of cattle in the situation of a city under siege and a starving population. Similar to the defence of duress, the question of whether any crimes, such as murder, should be excluded from the application of the defence of necessity is often considered. In the context of the defence of necessity, the scholarly debate often focuses on whether or not it may be a defence to the crime of torture. The version of necessity codified in the *Rome Statute* is the more restrictive excuse of necessity, in the sense of an accused acting under compulsion from ‘duress of circumstances’. The African Court could follow this lead and take a similarly restrictive approach. Additionally, even if no crimes are explicitly excluded, the requirements that the act be necessary, reasonable and proportionate would likely prevent the success of the defence in all but the most exceptional cases. This is demonstrated by the limited relevance of the defence thus far in the international criminal jurisprudence.

Potential defences relating to war crimes

- **Military necessity.** Military necessity may not be invoked as a defence as such and is only relevant when explicitly contemplated within the definition of the war crime itself. (ICC, *Katanga* Trial Judgment) In the Malabo Protocol, reference to the concept of military necessity can be found in three provisions of Article 28D on war crimes relating to the appropriation or destruction of property (Article 28(D)(a)(iv), (b)(xiv), and (e)(xii)).
- **Tu Quoque.** The defence of *tu quoque*, “namely the defence of one Party to an armed conflict, or member thereof, to an allegation of the commission of atrocities, that the other Party has committed similar atrocities”, has been consistently rejected in contemporary international criminal law (ICTY, *Kupreškić* and *Martić*).
- **Reprisals.** Reprisals have not been widely used since World War II and are not considered to be particularly effective as a means of enforcing the other party to abide by the law. Reprisals derive from a time when there were limited other forms of deterrence for violations of international humanitarian law. Given the recent proliferation of institutions for prosecutions of war crimes, the original purpose behind reprisals is arguably less relevant today. Thus, the ICTY has suggested that reprisals can “no longer be justified” as a mechanism for enforcing the laws of armed conflict (*Kupreškić* Trial Judgment). However, there is no indication that states are willing to close the door on the long-standing doctrine of reprisals. Regardless, pleas of reprisal as a defence have rarely been successful and are unlikely to be successful in most future cases given the very strict conditions that must be met and the long list of prohibited targets which may not be subjects of reprisals. The ICTY in *Martić* delineated the cumulative conditions under which reprisals may be considered lawful, noting that such conditions are “well-established under customary international law”.
- **Defensive Operations.** The fact that an individual committed crimes while their troops were conducting a defensive military operation is not a defence for individual criminal responsibility. (*Rome Statute*, Article 31(1)(c); ICTY, *Kordić and Čerkez*). Similarly, other potential ‘justifications’ for the overall military operations have been rejected as

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defences. As stated by the Appeals Chamber of the Special Court for Sierra Leone: “International humanitarian law specifically removes a party’s political motive and the ‘justness’ of a party’s cause from consideration” (CDF Case).

Other defences

- **Mistake of fact and mistake of law.** These defences are generally accepted when they negate the *mens rea* required. Ignorance of the law is not, however, generally recognized as a defence. (*Rome Statute*, Article 32)

- **Consent.** Both the ICC and SCSL have explicitly rejected that consent is a defence to the recruitment of a child under the age of 15. Consent may also be framed as a potential “defence” to allegations of rape but, as noted by the ICTY Appeals Chamber, “the circumstances … that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible” (*Kunarac*).