

Réponses à la question 2

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2. a) Question : Are the justifications of Article 31 § 1(c) available in connection with all crimes within the purview of the Statute?

A. Summary Conclusion

It appears that the justifications of 'self-defence', 'defence of another' and 'defence of property which is essential for the survival of the person or another person or property which is essential for the accomplishment of a military mission' are theoretically available as to a narrow range of war crimes, but are implausible as to other crimes within the Court's jurisdiction.

B. Requirements Common to All Claims Under Article 31 § 1(c)

In practice, such justifications could prevail only if :

1) they satisfy the criteria of the rule, itself, that the accused was acting :

- a) reasonably and
- b) proportionately against
- c) an imminent and
- d) unlawful use of force; and

2) they are consistent with « (the ICC) Statute, Elements of Crimes and its Rules of Procedure and Evidence » [Article 21 § 1(a)];

3) they are consistent with « applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict » [Article 21 § 1(b)];

4) where criteria 2 and 3, above, are of no avail, they are consistent with « general principles of law derived by the Court from the national laws of legal systems of the world.. . provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards. » [Article 21 § 1(c)]; and

5) they are consistent with internationally recognised human rights... [Article 21 § 3].

C. *Genocide, Crimes against Humanity and Aggression*

It is difficult to imagine circumstances that would meet the above criteria in justification of genocide, which requires prohibited acts to have been committed with intent to destroy a national, ethnic, racial or religious group; or in justification of crimes against humanity, which appears to require prohibited acts to be a known part of a widespread or systematic attack directed against a civilian population. In other words, where the accused's acts are motivated by circumstances giving rise to a right of self-defence, there is, *a fortiori*, a lack of the requisite mental element for either genocide or crimes against humanity (1). Aggression is like genocide and crimes against humanity in that the existence of a factual basis for self-defence would not merely justify the offence, but rather, would negate the essential mental element of the offence.

In short, it is inconceivable that the several prohibited acts enumerated in the prohibitions against genocide, crimes against humanity, and aggression, when coupled with the requisite intent or knowledge, could be both reasonably and proportionately designed to defend oneself or another. Should the accused nonetheless be able to overcome this hurdle, another substantial one remains. The accused must have been acting against an imminent and unlawful use of force.' The use of the word 'against' (rather than words such as 'in response to') suggests that the unlawful user of force must be the target of, not merely the justification for, the accused's acts. Therefore, the defence could not succeed in the case of innocent victims. Also, the more serious are the acts of the accused, the less likely it is that they are proportionate, and therefore, defensible.

D. *War Crimes*

War crimes do not possess the overarching intent requirements present for genocide and crimes against humanity, and may, theoretically permit a self-defence claim. But even there, the accused's conduct is excusable only if it meets all the criteria mentioned in B, above. Again, no act of an accused may be justified unless it is 'against an imminent and unlawful use of force.' And here too, the proportionality requirement becomes increasingly difficult to satisfy with the increasing seriousness of the accused's acts.

(1) The definition of aggression is not yet settled, so a definitive response to this question will have to wait. I will assume, however, for purposes of illustration, that the definition will not be inconsistent with Article 2(4) of the UN Charter (prohibition of the use of force) or with G.A. Res. 3314 (1974) (definition of aggression) and will be consistent with the expressed intentions of the States that approved ICC jurisdiction over this crime. Presumably, hostilities that are reasonably and proportionately used against an imminent and unlawful use of force would simply not qualify as aggression.

The justification of defence of property is available only in reply to a charge of war crimes, and only for 'property which is essential for the survival of the person or another person or property which is essential for the accomplishment of a military mission.' In addition, all the criteria of B, above, are applicable. This would appear to leave a rather narrow realm in which a successful defence to war crimes charges can be predicated on an alleged need to protect property.

2. b) 1 Question : If the answer to 2. a) is affirmative, can one reasonably commit international aggression, genocide, crimes against humanity or war crimes in the name of self-defence or defence of another ?

Answer :

A. International Aggression, Genocide and Crimes Against Humanity

One cannot reasonably commit aggression, genocide or crimes against humanity in self-defence — — not because 'self-defence' is unavailable to one so charged, but rather, because facts constituting a basis for self-defence will also negate an element of the crime. Thus, one never actually reaches the question of reasonableness (2).

B. War Crimes

Yes. It is conceivable that acts otherwise constituting war crimes could be reasonable, i.e., their commission could be rationally related to, and calculated to repel, the kinds of harm that trigger a right to self-defence. But the accused's acts must meet whatever standard the Court sets for determination of reasonableness. There are four possibilities :

- 1) a subjective standard (reasonable in the mind of the accused),
- 2) an objective standard (reasonable to the reasonably prudent person in the accused's position at the place and time of the alleged offence),

(2) It is important to distinguish between reasonableness, which demands a rational relationship between the accused's acts and the threat against which he/she is acting, and proportionality (ascribing at least as much weight to the need to defend as is ascribed to the alleged crime). For example, wilfully wounding a protected person [Article 8 § 2.(a)(i)] may be reasonable in the face of a threat of imminent and unlawful deadly force by someone using the protected person as a human shield. But unlawful deportation of the protected person [Article 8 § 2.(a)(vii)], while probably proportionate because it is less onerous than the accused's putative death [see 2.c)1, Answer ii, *infra*], would not be reasonable, unless it bears a rational relationship to the threat with which the accused was faced. (Although it is not a topic of this subsection, I have used a war crime as an example, since it is the only category of crimes within the Court's jurisdiction to which I believe Article 31 can apply.)

3) both subjective and objective ('the accused reasonably believed...') (3).

4) the most restrictive standard : to require both a subjective belief and the actual existence of conditions that render the accused's conduct reasonable (not merely the accused's reasonable belief thereof).

The insufficiency of a subjective belief, alone, is suggested by application of Article 32 § 1, which provides : « A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime. » An element of a defence is not necessarily also a 'mental element required by the crime.' Therefore, a mistake of fact as to an element of a defence will not exclude criminal responsibility, unless that mistake also negates the mental element required by the crime. For this reason, one scholar's claim that « a person who is not actually attacked or endangered but merely believes this to be the case, may resort to mistake of fact according to Article 32 for excluding criminal responsibility » appears to be correct only to the extent that the person's belief also negates the mental element of the crime (4).

2. b) 2 Question : If the answer to 2. a) is affirmative,

- i) can one reasonably commit a war crime to defend property essential for the survival of the person or another person or which is for the accomplishment of a military mission; and
- ii) what is the meaning of 'property which is essential for the survival of the person or another person' and 'property which is essential for accomplishing a military mission'?

Answer :

i) Theoretically, yes, if there is a rational relationship between the accused's acts and the threat against which he/she is acting. But a plausible defence would also require the accused's conduct to have been a proportionate response to an imminent and unlawful use of force, and to be consistent with all pre-existing limitations imposed by international humanitarian law. In addition, the conduct of the accused will need to meet whatever standard for 'reasonableness' is established by the Court (5).

As international humanitarian law already recognises the concept of permissible 'collateral damage,' the worst that can be said of this provision is

(3) The concept of « reasonable belief » does not require the perceived threat to in fact, exist. It only requires that circumstances reasonably lead the accused to believe in their existence. This is the general rule in US jurisprudence. WAYNE R., LA FAVE & AUSTIN W. SCOTT, JR., *Handbook on Criminal Law*, St. Paul, Minn., West Publishing Co. (1972), p. 391.]

(4) A. ESER, in : O. TRIPFTRERER (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), Article 31, page 549, margin No. 31.]

(5) See analysis under section 2. b)1)B, *supra*.]

that it is narrower than such law, in which the permissibility of collateral damage does not depend upon another's use of unlawful force. In addition, if a protected person unlawfully uses force, that person loses his or her immunity from attack. The inquiry would never reach the question of applicability of Article 31, as the case-in-chief would be missing an essential element.

ii) I cannot predict what property and circumstances would constitute 'property which is essential for the survival of the person or another person' and 'property which is essential for accomplishing a military mission.' However, acts that would otherwise constitute war crimes would only be excusable if they are reasonably and proportionately related to survival of a person or accomplishment of a military mission and, as in the case of genocide and crimes against humanity, only if undertaken against an imminent and unlawful use of force. These criteria negate the availability of the defence in relation to acts perpetrated against innocent victims, and would make the defence decreasingly plausible with the increasing severity of the accused's conduct.

2. c) 1 Question : What is the meant by i) 'against an imminent and unlawful use of force,' and by ii) 'in a manner proportionate to the degree of danger to the person or the other person or the property protected.'

Answer :

i) As previously stated, the use of the word 'against' (rather than words such as 'in response to') suggests that the unlawful user of force must be the target of, not merely the justification for, the accused's acts. The terms 'imminent' and 'unlawful' raise the same question concerning what standard the Court will apply, as does the term 'reasonable (6). Eser suggests that the intent of Article 31(c)'s drafters was to require the actual existence of imminent and unlawful use of force (option 4, rather than option 3, described in section 2. b)1)B, above) (7)

ii) 'In a manner proportionate to the degree of danger to the person or the other person or the property protected' refers to the relative severity between the threat to the accused (or to the other person or the property he/she is seeking to protect) on the one hand, and the act(s) of the accused alleged to be war crimes, on the other hand (8). Proportionality, too, must be analysed in accordance with a standard established by the Court (9).

(6) *Id.*

(7) « Although various proposals were prepared to admit self-defence even in the case that the person merely 'reasonably believes' that there is a threat to the person concerned (fn.), this expansion of self-defence, as known particularly in common law countries, was not adopted in the end. » ESER, *supra*, fn. 4, page 549, margin No. 31.

(8) See, *supra*, fn. 2.

(9) See analysis under section 2. b)1)B., *supra*.

2. c) 2 Question : Do the conditions 'against an imminent and unlawful use of force,' and 'in a manner proportionate to the degree of danger to the person or the other person or the property protected' apply to all violations under the Statute, or only to war crimes?

Answer :

At the December 1999 International Criminal Court Preparatory Commission meeting, I spoke at length about this question to Mr. Per Saaland of Sweden, the Chairman of the Working Group on Article 31; to Mr. William Leitzau of the US, who drafted the language; and to Mr. Charles Garroway, a member of the UK delegation. They all agreed that the intent of the drafters was to apply these conditions to all violations. Pursuant to the general rules of legislative construction, the drafters' intent will influence the result only in the event the language of the rule, itself, is deemed capable of two (or more) equally plausible interpretations and legislative history is both available and dispositive of which of two or more interpretations was intended. Assuming that multiple interpretations of are equally plausible, the interpretation of legislative history must await the adoption of the Elements of Crimes, now under consideration by the Preparatory Commission (10).

But I believe the better argument is that the two interpretations are not equally plausible, but rather, that the more reasonable interpretation is the one that applies the conditions to all offences within the Court's jurisdiction. This is the result suggested by application of another rule of statutory construction, that absent contrary evidence, new law is deemed to be consistent with pre-existing law. Pre-existing law, in this case, consists of the well established common law and civil law standards ruling out self defence in reply to non-imminent or lawful use of force, and the proportionality requirement of international humanitarian law. That these standards apply to all ICC crimes also follows from application of the Article 21 hierarchy of authority to be used by the Court. See § B, Answer to Question 2.a.

2. d) 1 Question : Assuming that aggression, genocide and crimes against humanity could never be considered « reasonable » in self-defence or defence of another, can these acts be justified when committed 'against an imminent and unlawful use of force' and 'in a manner proportionate to the degree of danger, etc.?'

Answer :

No. The accused's acts must meet the reasonableness requirement, as well.

(10) The draft text of the document « Elements of Crimes » was finalised by the Preparation Commission of the ICC on 6 July 2000.

2. d) 2 Question : Assuming that war crimes could never be considered « reasonable » in self-defence or defence of another, or to defend 'property which is essential for the survival of the person or another person or which is for the accomplishment of a military mission', can these acts be justified when committed 'against an imminent and unlawful use of force' and 'in a manner proportionate to the degree of danger, etc.?'

Answer :

No. Here too, the accused's acts must also be reasonable.