

Réponses à la question 2

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PRELIMINARY OBSERVATIONS

(1) War crimes law is criminal law. The criminal law is used as an enforcement system for the maintenance of the laws of war. In war crimes law, rules and principles of humanitarian law are enforced through the repression of violations through the criminal liability of individuals. This does not imply that the rules and principles of criminal law are identical to the rules and principles of war. The laws of war refer to warring entities, such as states or insurgent forces. Criminal law, in contrast, deals with individuals. Even if it is true that, in the words of the Nuremberg Tribunal, « crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced », a distinction is still to be made between the laws of war, on the one hand, and the criminal liability of individuals because of the violations of those laws, on the other. Criminal law has rules and principles of its own.

That also goes for the law of self-defence. The ground for the plea of self-defence of an individual, as we all know, is that it would be inhuman to ask people to abstain from such action when it is necessary, because defending oneself against an illegal attack is the most natural thing to do. In more abstract terms : what is legal does not have to give way to what is illegal (1). The right of self-defence, of course within certain limits, is therefore an inherent right of a human being. As a rule, assaulting someone is a criminal offence. Under exceptional circumstances, however, viz., in case of defence against an unlawful attack, assault and even homicide are not illegal, provided certain limits are not exceeded. (Those limits are not the same in every national legal system : some systems e.g. allow for the defence of property (2), others do not (3).) If those limits have been exceeded, but the defensive act was under the circumstances reasonable, it is still conceivable that the accused will be excused.

If an individual who stands trial is exonerated under Art. 31-(1)-(c) of the Statute, this does not imply that the rule of war which he has trans-

(1) H.-H. JESCHECK, *Lehrbuch des Strafrechts, Allgemeiner Teil*, Berlin, 4th ed., 1988, pp. 301-303.

(2) E.g. the law of France (Art. 122-5 *Code Pénal*) and the law of The Netherlands (Art. 41 *Wetboek van Strafrecht*).

(3) E.g. the law of Germany (§ 33 *Strafgesetzbuch*) and the law of Belgium (Art. 416 *Strafwetboek*).

gressed is no longer valid. In the first place, having acted reasonably does not necessarily imply that one has acted lawfully. Art. 31-(1)-(c) makes no distinction between justification and excuse. Secondly, even if an individual is acquitted because he has acted in legitimate self-defence, this does not necessarily erode the rule which has been transgressed. Exceptions, if not too numerous, do not weaken rules, but rather confirm them.

(2) Military necessity is an interest of a state or of a similar warring entity. It is an interest of an individual military person only in his capacity as an instrument of such an entity. Military necessity is not an inherent interest of a human being, such as his life, or property which is essential for his survival. Consequently, there is no inherent right of an individual to defend it. If military necessity can be a justification for an accused, this will have to be derived from a justification of the state of which he is an instrument. When it comes to a war crimes trial, an individual who has committed a violation of the laws of war because of military necessity can therefore only be justified as far as his state is justified in committing that violation. If there is no such justification, the only possible basis for his acquittal can be that, under the circumstances of the case, no other conduct could reasonably have been demanded from him, for which reason he would be excused.

ANSWERS TO THE QUESTIONNAIRE

Question 2-a) :

Taking into account the wording of that provision and its position within Part III which concerns General Principles of Criminal Law, there is no doubt in my mind that Art. 31-(1)-(c) refers to genocide, crimes against humanity and war crimes, with one exception, however : As far as it regards the defence of property, Art. 31-(1)-(c) only refers to war crimes, as meant in Art. 8. The drafting history of this provision, as pictured by Per Saland in Roy S. Lee (ed.) *The International Criminal Court; The Making of the Rome Statute; Issues, Negotiations, Results*, p. 207/208, supports this view.

Question 2-b)-1° :

Of course, the crimes which have been mentioned in Arts. 6, 7 and 8 of the Statute are, at least *in abstracto*, so serious, that it is hard to imagine exceptional situations in which an individual act that amounts to such a crime can be committed reasonably. It is not very wise, however, to presume that in reality nothing can happen which our minds cannot predict. (It must *inter alia* be taken into account that the amount of case

law on genocide is as yet very limited.) On the other hand, precisely because the exoneration which has been laid down in Art. 31-(1)-(c) only refers to a person who acts reasonably, and in a manner proportionate to the degree of danger, this Article, as a whole, is not unreasonable and does not open floodgates.

Question 2-b)-2° :

Although the ICC will have to deal with serious war crimes, committed as a part of a plan or policy or as a part of a large-scale commission of such crimes, it cannot be ruled out in advance that exceptional circumstances may occur under which a particular act, which fulfils the description of such a crime, should still be considered reasonable and justified or the individual perpetrator should be excused.

The realities of war, I am afraid, are more creative than lawyers' fantasies. But property which is essential for the survival of the person or another person could e.g. be a unit's last stock of potable water (being under an imminent threat e.g. of being poisoned by the enemy).

The clause « property which is essential for accomplishing a military mission » is the most problematic one of this Article. It seems to refer to the necessary equipment for fulfilling one's mission, e.g. the explosives, necessary for the demolition of a bridge, as well as to property a certain unit has been ordered to defend, e.g. the State's President's palace.

The problem is that the international laws of war do, apart from certain special provisions, not allow for exceptions on the basis of military necessity. The rules of war have been inspired by the desire to diminish the evils of war so far as military requirements permit. This has been expressly stated in the Preamble of the IVth Convention of The Hague (1907) establishing the Regulations respecting the Laws and Customs of War on Land. Those rules can therefore be seen as the result of a process of balancing the wish to reduce human suffering, on the one hand, and the wish not to exclude the possibility of effectively exerting military power, on the other; or, more briefly : the balance between humanity, on the one hand and military necessity, on the other.

The drafters of those rules have not in every aspect succeeded in striking such a balance in advance. In some respects they had to refer to the special circumstances of the particular case. Art. 23-(g) Hague Rules of Land Warfare, Art. 4-2 Cultural Property Convention and Articles 54-5 and 62-1 of Protocol I prohibit certain types of conduct, unless imperatively demanded by the necessities of war. Art. 51-5-b and Art. 57-2-b, Protocol I prohibit certain conduct if the damage caused by it would be excessive in relation to the concrete and direct military advantage anticipated.

Apart from those provisions, however, the laws of armed conflict make no explicit exception for the requirements of military necessity. The conclusion can be drawn that, as a *general* rule (and apart from the law of belligerent reprisals), no violations of the laws of war are justified by military necessity. This leads to the subsequent conclusion that, *as a general rule*, no war crime can be justified by the defence of property which is essential for accomplishing a military mission, against an imminent and unlawful use of force.

The possibility should not be ruled out, however, that exceptional circumstances occur in which an act which fulfils the description of a war crime can still be considered reasonable when committed in defence of certain property which is essential for accomplishing a military mission against an imminent and unlawful use of force, taking into account the seriousness of that crime on the one hand and the exceptional value of the property at issue on the other. It would be wrong to make categorically impossible that in such a situation the perpetrator be excused.

The following hypothetical example can perhaps be of some help for our discussion. Suppose a lightly armed unit is charged with the protection of a village, which harbours an important historic monument, e.g., a medieval church. The enemy attacks this village by heavy mortar fire, especially aimed at the monument. Air support, in order to put the mortars out of action, is not available. Then, not seeing any other way to save the church, the commander of the unit decides to send saboteurs, wearing enemy military uniforms, in order to destroy the enemy ammunition. The saboteurs do succeed in penetrating the enemy lines and in blowing up an important ammunition depot, which results in the mortar fire dying out. After the war, one commander has to stand trial for attacking a historic monument in violation of Art. 4-1 Cultural Property Convention, the other is charged with having violated Art. 23-(f) Rules of Land Warfare and Art. 39-2, Protocol I, which latter provisions prohibit the use of the uniforms of the adverse party while engaging in attack (4).

The latter commander can, in my view, fairly plead that, taken into account the values at stake, he was justified in what he did, or, if not justified, he should at least be excused, because the choice he made was reasonable and the violation of the rules cannot reasonably be blamed on him.

(4) Art. 8-(2)-(b)-(vii) of the Statute provides for jurisdiction of the ICC, if casualties have resulted.

Question 2-c)-1° :

« An imminent and unlawful use of force » can be construed as encompassing any imminent violation of the *ius in bello* (5). Whether such an unlawful use of force is in fact imminent will have to be determined on the spot by the commander of the defending forces by his best possible means, and if he is later prosecuted, the reasonableness of his judgement will have to be checked by the court.

« In a manner proportionate to the degree of danger » : the seriousness of the crime of the defendant must not be disproportionate to the values which are endangered by the crime which is about to be committed by the enemy.

Question 2-c)-2° :

The requirement that the unlawful act by the enemy must be imminent, and the requirement that the seriousness of the crime of the defendant must not be disproportionate to the values which are endangered by the crime which is about to be committed by the enemy, both obviously refer to each of the crimes under the jurisdiction of the ICC, not only to war crimes. Admittedly, it is hard to imagine in advance that an act of genocide or a crime against humanity can in fact be proportionate to any imminent unlawful use of force. But who knows what kind of unlawful use of force, and on what scale, may once become imminent ?

Question 2-d) :

In Art. 31-(1)-(c), the requirement of reasonableness is cumulative to the requirement of imminence of an unlawful use of force and the requirement of proportionality. No perpetrator is exonerated by this provision for an act which cannot be considered reasonable.

FINAL OBSERVATION

The foregoing is not meant as an approval of the inclusion, in Art. 31-(1)-(c), of the clause concerning property which is essential for accomplishing a military mission. Art. 31-(1)-(c) allows a court to hold an individual, who has acted reasonably and proportionately, to be not criminally responsible if his acquittal is justified by the special circumstances of the case. Legally, the possibility of such exceptional acquittals does not detract from the binding force of the general rules of the law of war. The wording of Art. 31-(1)-(c) tends to give the false impression, however, especially to non-

(5) A broad view on « force » is also taken by A. ESER in : O. TRIFFTERER (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Baden-Baden, 1999, p. 549 (§ 29).

lawyers, that military necessity from now on prevails over those rules. For this reason, the inclusion of the element of 'property essential for accomplishing a military mission' has, in my view, been an error.

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