Defending Necessity – A Critical Issue for the Military

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Introduction

The issue of torture has once again become a prominent issue owing to the recent disclosure by former U.S. President George W. Bush, who indicated in an interview with an English newspaper that he had authorised the use of 'waterboarding' during the interrogation of suspected terrorists.[1] The question as to whether or not coercive interrogational techniques should be used has several different dimensions,[2] the legal aspects of which are the least straightforward when explored. In international law, the prohibition against torture is clear and unambiguous: the ban is absolute,[3] and under no circumstances, even in the context of military operations, can its use ever be defended.[4] In the context of military operations, torture is also classified as both a crime against humanity[5] and a war crime.[6] Torture as a crime against humanity can be committed during times of peace or during war, whereas war crimes are only committed where there is a link to armed conflict.[7] However, the common thread which binds the two in respect of military personnel is that either can be committed by officials acting in official capacities.'[8] In spite of this there

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1 B MacIntyre, *George W. Bush: Waterboarding saved London from attacks,* The Times, 8 November 2010.

2 See *inter alia* Ginbar, *Why not torture terrorists? Moral, practical and legal aspects of the 'ticking bomb' justification for torture* Oxford University Press, 2003; M Bagaric and J Clarke, *Not enough official torture in the world? The circumstances in which torture is morally justifiable* 39 U.S.F. L. Rev. 581-616 2004-2005; M Evans, *Getting to grips with torture*, I.C.L.Q. 2002, 51(2) 265-383.

3 See *inter alia*, article 2 UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984; Article 3, European Convention on Human Rights 1950; Article 7, International Covenant on Civil and Political Rights 1966.

4 Article 2(2) and 2(3), UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment 1984.

5 Article 7(f), Rome Statute of the International Criminal Court 1998.

6 Article 8(2)(a)(ii), *ibid.*.

7 Article 2, Geneva Convention IV 1949.

8 A Cassese, *International law*, Oxford University Press, 2005 at 445.

have been different efforts to circumvent the ban,[9] in particular through the use of *ex post facto* defences. Initially, the use of such defences in the context of crimes against humanity was rejected by a decision from the International Criminal tribunal for the Former Yugoslavia,[10] (ICTY) which held that there was no availability of the defence of duress or necessity in respect of crimes against humanity, specifically murder. The Statute of the ICTY, drafted in 1991, makes no provision for any form of defence and nor for any circumstances which could exclude criminal liability. However, in the drafting of the Rome Statute of the International Criminal Court 1998, provision was made for the exclusion of criminal liability for crimes against humanity and war crimes where, *inter alia*, 'the conduct…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.'[11] The action taken must not generate a greater harm than that which is sought to be avoided and can be created by another person or 'circumstances beyond…the control'[12] of the personnel justifying the commission of the crime. Further to this, the Israeli case of the Public Committee of Israel against Torture v State of Israel[13] held that it would be possible for State investigators to use the Israeli defence of necessity, provided for within the domestic penal code,[14] if indicted for the crime of torture.

This would therefore appear to be a relatively straightforward issue, were it not for article 2 of the UN Convention Against Torture 1987, which rejects the idea that any 'exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.' The recent academic commentary on the use of the defence of necessity, distinguishing between a justification for torture and an excuse,[15] provides a useful insight into the defence itself. It is of vital importance that the military is aware of and understand this distinction, and its consequences for personnel. This paper seeks to analyse the distinction from a military perspective, drawing on international and national legal sources.[16] The principal aim of this analysis is to explore the possible provision of such defences for war crimes and crimes against humanity, in order to clarify the

9 For academic debate on methods of avoiding the prohibition, see A Harel and A Sharonis., *What is really wrong with torture?* J.I.C.J. 2008, 6(2), 241-259 and in particular, A Dershowitz, *Shouting Fire: Civil liberties in a turbulent age*, Little Brown and Co, 2002

10 *Erdemovic*, ICTY, Appeals Chamber, 14 April 1997 (Case no IT-96-22-A).

11 Article 31(1)(d), Rome Statute of the International Criminal Court 1998

12 *Ibid.* article 31(1)(d)(ii)

13 HC 5100/94

14 Article 34(1) of the Israeli Penal Code 1977 states that an individual 'will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from' the circumstances in which he is place, and additionally where 'alternative means' are unavailable to avoid the harm

15 J D Ohlin, *The bounds of necessity*, JICJ 2008, 6(2), 289-308. See also P Westen and J Mangiafico, *A justification, not an excuse – and why it matters*, 6 Buff Crim L Rev 2002-2003 833-950

16 Article 38(1)(c), Statute of the International Court of Justice states that 'the general principles of law recognized by civilised nations' form a source of international law. Consequently, they ought to be of value when analysing the defence of necessity from a military perspective.

issue from a military policy perspective, and as such, the purpose for which the torture is being committed is outwith the scope of this paper.[17]

The defence of necessity

The identification of the existence of the defence of necessity can be traced back to the sixteenth century writings of the English jurist Francis Bacon,[18] who stated that 'the law chargeth no man with default where the act is compulsory, and not voluntary.'[19] He divided necessity into three distinct categories: acts which were committed necessarily to preserve one's own life, acts committed through the 'necessity of obedience' and acts of necessity committed in response to an 'act of God.'[20] He gives several examples of situations for which criminal responsibility should be excused where there is threat to life or limb, and also indicates that there should be no criminal liability where an individual seeks to avert damage caused by natural disasters by damaging property, e.g. by destroying one house to prevent a fire spreading along a terraced row.[21] Necessity of obedience is defined essentially as acts committed by State diplomats who owe a duty of obedience to their State and therefore may be relieved of responsibility for all wrongdoing except conspiracy,[22] indicating that it may be an early form of State immunity for officials. To invoke the defence of necessity, according to Bacon, there should be a direct threat to the life of the individual which compels him to act, or he should be compelled to act in response to a natural disaster. There is little ambiguity at this point in time of being compelled to act to achieve a certain crucial military objective, such as the extraction of information during an interrogation. When examining the problem of torture through the lens of his sixteenth-century definition it is clear that there can be no reliance on the defence of necessity to justify or excuse coercive interrogational techniques.

To place the defence in the context of causing physical harm to another, and justifying that by arguing that it prevented a greater harm, a further development was made during the nineteenth century. In two cases, the question of whether or not the defence of necessity should be raised in relation to murder charges was discussed. The first, United States v Holmes,[23] argued that the defence of necessity should be permitted where a sailor had acted to preserve the lives of his passengers by throwing three other passengers overboard, to prevent a leaking lifeboat from sinking. The second[24] involved two sailors who had killed and eaten another member of their crew to prevent them from dying of starvation, where there was no hope of rescue. In both cases, the use of the defence to counter a charge of murder was rejected. The

17 See F Jessberger, *Bad torture – good torture? What international criminal lawyers may learn from the recent trial of police officers in Germnay* J.I.C.J. 3 (2005) 1059-1073

18 F Bacon, *The elements of the common lawes of England* 1597, republished in 1826

19 *Ibid.* at 33

20 *Ibid.* at 34

21 *Ibid.*

22 *Ibid.*

23 1841 26 F Cas 360

24 *R v Dudley and Stephens* (1884-85) LR 14 QBD 273

crime itself was considered too serious to ever contemplate allowing such a defence, despite the above extreme circumstances clearly invoking the 'compulsory' elements of Bacon's definition[25] to avoid greater loss of life. In the English case, Lord Coleridge explained that the use of the defence of necessity 'once admitted might be made the legal cloak for unbridled passion and atrocious crime.'[26] He then went on to state that if a case caused particular hardship to an individual, the Crown prerogative of mercy was available under the constitution of the United Kingdom.[27] The concept underpinning both rejections is the idea that a 'slippery surface'[28] would be created by the admission of such a defence. If the State holds that a certain undue harshness has been inflicted by correct application of the law, there is a mechanism to deal with this.[29] This directly correlates to the idea that there is no defence available for certain crimes considered by humanity to be too grievous, in particular those involving direct physical harm to another individual.

There is also direct provision for the defence within different national penal codes. Specifically, the Israeli criminal code[30] stipulates that an individual 'will not bear any criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, imminent from the circumstances in which he is placed.'[31] The application of such a defence is broadened to 'any act immediately necessary'[32] rather than any necessary or required acts – it is dependent entirely on the circumstances at hand and applies no limitation on the conduct which it may involve. It also arguably provides a defence for the violation of war crimes and crimes against humanity such as torture, as an act could conceivably constitute one which was 'immediately necessary' should the appropriate circumstances arise. The defence was discussed in an Israeli High Court case[33] in the context of torture, where the President of the Court held that 'an act committed under conditions of 'necessity' does not constitute a crime. Instead it is deemed an act worth committing in such circumstances in order to prevent serious harm to a human life or body. We are therefore speaking of a deed that society has an interest in encouraging.'[34] The precedent set by this case is that Israel Security Agency investigators are permitted to rely on the necessity defence, if the coercive interrogational techniques they employ lead to criminal charges of torture. As the law has been extended, through the domestic penal code,[35] to threats both to the individual themselves and to 'fellow persons', it is conceivable that investigators may be acting to prevent harm to Israeli nationals and therefore meet this requirement. The argument here is that within the context of an organised interrogation, there are acts of physical harm

25 *Supra* n19
26 *Supra* n24 at 288
27 *Ibid.*
28 Y Ginbar, *op. cit.* at 38. The idea is not necessarily that there would be downward slope thereafter, or a 'slippery slope' would be created by the inclusion of such a defence, but rather that 'additional acts may have to be justified if one act is justified,' and therefore it would be more difficult to determine which
29 See *R v Bentley (Deceased)*[2001] 1 Cr.App.R. 307
30 Criminal Code Ordinance 1977, as amended in 1994
31 *op. cit.* n29, article 34(1)
32 *Ibid.*
33 *Public Committee against Torture v State of Israel* H.C. 5100/94 (1999)
34 *Ibid.* at 33
35 *Op. cit.* n29

which would be 'immediately necessary.'[36] Presumably, this is because there is a requirement to immediately access information that the individual subject of the interrogation, the means of achieving the aim being torture. The idea that the defence of necessity deals with 'a person's reaction to a given set of facts,'[37] underpins the concept that it may be necessary to use torture in certain circumstances.

The necessity of this reaction, of employing methods of torture in order to access the crucial information, is defended in the context of military operations: the effectiveness of the methods deployed is not considered.[38] Since the necessity of the reaction cannot be measured in relation to the achievement of the aim, the question then arises as to whether the conduct can be justified, militarily, as necessary or excused as necessary. The distinction between the two types of necessity that has been made is important, as a justification defence may be available in some circumstances where an excuse is not, and *vice versa*.[39] It is also crucial that the distinction is made, for the preservation of the categorisation of war crimes and crimes against humanity as such, and also for the proper application of the law. By its very nature, the law provides for exigencies: there are certain circumstances in which certain conduct is necessary. However that same conduct should not necessarily be justified. It may be more appropriate to excuse criminal conduct, where it has been found to be necessary. The distinction between the two types of necessity is important when dealing with absolute prohibitions and indefensible conduct, particularly where legal authority is in direct conflict with primary legislation. It also assists in 'grey areas:' it is on the grey area of this distinction, and its potential application, that the next two parts of this paper seek to focus.

Justifying necessary conduct

The qualities which distinguish justifications from excuses in the context of necessity have been evaluated in different ways. As highlighted by Greenawalt,[40] a distinction can be made between the two on the grounds of 'warranted and unwarranted behaviour.'[41] Justified necessity is warranted behaviour, the kind

36 As per *supra* n31
37 Lord Hope of Craighead, *The judges' dilemma* ICLQ 2009 58(4) 753-765 at 758
38 See J Mayer *Whatever it takes*, The New Yorker, February 19 2007 at p4, available at http://www.newyorker.com/reporting/2007/02/19/070219fa_fact_mayer?currentPage=1 (correct as of 21 April 2011)
39 E Milhizer, *Justiciation and excuse: what they were, what they are and what they ought to be* 78 St John's L Rev 2004 725-896 at 850-851
40 K Greenawalt, *The perplexing borders of justification and excuse*, 84 Colum L Rev 1984 1897-1927
41 *Ibid.* at 1903

which has been accepted as legal and permissible because of the gain that society stands to make from it. Ordinarily, it would be considered wrongful and criminal, but the aim it seeks to achieve dissolves any criminal liability associated with the conduct. Other commentators note that if the question 'did society…avoid a net harm by the defendant's otherwise criminal conduct?'[42] can be answered in the affirmative, then the conduct can be justified. One commentator[43] makes reference to the German Penal Code in distinguishing the two branches of necessity.[44] It differentiates between justified necessity[45] and excused necessity,[46] stating that those who commit an act 'in order to avert an imminent danger… (do) not act unlawfully if…the interest (they protect) significantly outweighs the interests which (they) harm'[47] are entitled to the protection of the defence of justified necessity. One caveat applicable to the defence is that the means employed 'must be appropriate…to avert the damage.'[48] The three qualities, that of imminent danger, the infliction of harm for the protection of an important interest and the exemption from criminal responsibility, are mirrored precisely in the necessity defence defined in the Israeli penal code.[49]

However, neither the judiciary nor the legislature makes any such distinction between justification and excuse. Arguably the Israeli defence is that of justification, rather than excuse, as it seeks to decriminalise the act rather to admonish the actor. The applicability of this defence to war crimes and crimes against humanity such as murder and torture was examined in the ICTY case of Erdemovic.[50] The accused admitted that he had taken part in the mass murder of Bosnian Muslims as a soldier during the conflict in the former Yugoslavia, but raised a defence of necessity. He argued that he had been compelled to murder as a result of threats made against his own life and the lives of his wife and child. The Tribunal held, on appeal, that 'no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing…The post World War II military tribunals did not establish such a rule. We do not think that the decisions of these tribunals constitute consistent and uniform state practice underpinned by *opinio juris*."[51] The Tribunal sitting as an Appeals Chamber rejected the applicability of a defence of necessity which could justify, rather than excuse such conduct.
Interestingly, there was more than one dissenting judgment on the matter.[52] Judge Cassese disagreed with the opinion of the majority and clarified that the defence should be used in terms of justified rather than excused necessity: "acting under a threat from a third person of severe and irreparable harm to life or limb entails that no criminal responsibility is incurred by the person acting."[53] He then added that the "legal regulation of duress in case of murder…is both realistic and flexible."[54] Although this is a dissenting

42 Milhizer, *op. cit.* at 851
43 Ohlin, *op cit.*
44 *Ibid.* at 292
45 Strafgesetzbuck 1975, s34
46 See *supra* n45 s35
47 See *supra* n45 s35
48 See *supra* n45 s35
49 See *supra* n4
50 See *supra* n10
51 See *supra* n10 at 55
52 See separate and dissenting opinions of Judge Li, Judge Stephen and Judge Cassese, *supra* n6
53 See *supra* n10, Cassese dissent at 15
54 *Ibid.*, at 47

judgment, it qualifies as *opinio juris* from an eminent international law judge and professor. It is also relevant in the context of a military operation, as the accused was a soldier at the time of the offence. Furthermore, the case concerns murder, which is placed on an equal legal footing with torture as both a crime against humanity and a war crime. The accused argued that he was compelled to follow orders as a soldier and thereby commit murder. Possibly drawing on this judgment, the Rome Statute of the International Criminal Court (Rome Statute) provides for the defence of necessity as a justification in certain instances. Again, it does not seek to excuse the conduct, but rather to exclude criminal liability. For the defence to be available, there must be a threat of imminent death or of continuing or imminent serious bodily harm, and the person must be acting necessarily and reasonably to avoid this threat.[55]

The Rome Statute further includes the acts of third parties as potentially necessitating the justifiable criminal conduct. Despite this, there is something decidedly uneasy about a defence of justification appearing in a Statute regulating the prosecution of war crimes and crimes against humanity. The Statutes of previous international criminal tribunals[56] were drafted in response to events which had shocked the conscience of humanity. As such, it would have been, at the very least, outright hypocrisy to include any justifications within these Statutes. It also sits uncomfortably next to the concept of individual criminal responsibility[57] - the idea that some acts are so terrible that they can never be justified and individuals must bear full responsibility for their commission. However, it is worth noting that the Rome Statute has been drafted in anticipation of future war crimes. The lack of immediate victims for these crimes may be reason for its inclusion, but it nonetheless a development for the concept of justified necessity in law.

Justified necessity has been analysed by two academics as consisting 'of careful assessments of the appropriateness of an actor's conduct in light of the alternatives that were available to him.'[58] Bacon's initial element of 'compulsory'[59] conduct remains, as well as that of the full exclusion from criminal liability. The defence of justified necessity, although initially rejected by each of the Statutes of the IMT and the ICTY and subsequent case law thereof as a defence to crimes against humanity and war crimes, has now been subsumed by the inclusion of the defence in the Rome Statute.[60] The common thread, however, remains that there is no recognised international distinction between justified necessity and excused necessity, other than in the German Penal Code.[61] The initial inclusion, in the Statute of the IMT, of notice that 'the fact that defendant acted in pursuant to an order of his government or of a superior shall not free him of responsibility, but may be considered in mitigation of punishment'[62] indicates that the development

55 Article 31(d), Rome Statute of the International Criminal Court 1998

56 See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945 (Charter of the IMT); Statute of the International Criminal Tribunal for the Former Yugoslavia 1991; Statute for the International Criminal Tribunal for Rwanda 1994

57 Article 25, Rome Statute, originating in article 6, Statute of the IMT

58 Westen and Mangiafico, *op. cit.* at 897

59 Bacon, *op. cit.* at n19

60 See *supra* n34

61 See *supra* n45 and n46

62 Article 8, Charter of the IMT

of the defence of justified necessity may have emerged through confusion of the law and precedent. It should be considered that crimes against humanity and war crimes are such for a reason: that even during military operations, some conduct is beyond the moral pale. As a result, it can never be justified, no matter how necessary it may appear to be at that moment in time. Therefore, if such conduct can never be justified, may it be excused in some circumstances? This approach does not avoid criminal liability, but seeks to mitigate punishment under the circumstances. The next section will look to evaluating the availability of the defence of excused necessity in respect of a charge of torture.

Excusing necessary conduct

The concept of excused necessity can also be found within the German Penal Code,[63] which states that anyone 'faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act…acts without guilt.'[64] It differs from justifying the conduct because the act itself remains illegal. As was noted by Robinson in his study of criminal law defences, 'acts are justified and actors are excused.'[65] The German Penal Code's defence of excused necessity[66] supports this assertion by freeing the actor from criminality, rather than the act. In Robinson's study, he identifies four conditions which will allow behaviour to be excused by society: firstly, where the actor understands what he is doing, secondly, where he understands the "physical consequences" of the act, thirdly, where he understands the wrongfulness and unlawfulness of the act and lastly, where he lacks the ability to control the conduct.[67] This lack of ability to control oneself, argues Robinson, is the reason as to why it is 'no longer proper to hold him accountable for it.'[68] However, no degree of accountability is discerned: the individual's punishment is not mitigated, but rather he is absolved of all guilt. This is again a slight confusion of the idea of an excuse, as it should mitigate punishment rather than justify conduct through a disabling factor in the individual's judgment. There should be no question within the idea of excuse of absolving the individual from all criminal responsibility, as the conduct should be clearly defined as wrong, yet difficult to avoid under the specific circumstances. The circumstances, relevant to a defence of excused necessity, point to an idea that there was no reasonable alternative. It should not justify wrongful conduct.

Another academic argument[69] is that 'an actor is excused if, though he engages in the most heinous of war crimes, he nonetheless suffers from a defect of perception…or a defect in capacity for rational

63 See *supra* n46
64 *Ibid.*
65 P Robinson, *Criminal law defenses: A systematic analysis*, Colum. L R 82 (2) 199-291 1982
66 See *supra* n46
67 *Ibid.* at 222
68 *Ibid.*
69 Westen and Mangiafico, *op. cit.*

behaviour…that negates his having the malevolence, callousness, or heedlessness that renders a malefactor an appropriate object of public resentment.'[70]

This lack of evil intent, as opposed to intentional conduct, is what differentiates excused necessity from that of justified necessity. It is also what makes excused necessity more relevant in relation to war crimes and crimes against humanity, and more in line with the development of the defence of necessity through the jurisprudence of the international criminal tribunals.[71]

The case of Erdemovic[72] demonstrates the understanding in the international tribunals that, in relation to war crimes and crimes against humanity, excuses can often be relevant in relation to punishment. While the court rejected the defence of necessity outright, with the dissents arguing that it may be relevant, no distinction was drawn between necessity and excuse. The Cassese dissent[73] discussed the idea that necessity may be available as a defence to murder,[74] but did not develop the discussion as to whether it should relieve criminal responsibility or simply mitigate punishment. The legal precedent suggests that there should never be any justification for any war crimes or crimes against humanity – there is some conduct which is simply too serious to be regarded as acceptable even under the most extreme of circumstances. However, there is potential to develop the idea that an individual may be excused of full responsibility as a result of the circumstances in which they have been placed. This idea of mitigating punishment may have been the basis for Judge Cassese's dissent in the Erdemovic case, where the conduct is still acknowledged as wrongful, but the actor could be excused of full responsibility as a result of the circumstances.

Academic argument suggests that this acknowledgement of the distinction between excuse and justification within the defence of necessity may have great benefit for the prosecution of crimes such as torture, and may even contribute to the support for the ban in international law on torture. Ohlin comments that 'by recognizing that torture can conceivably be excused – but never justified – the criminal law may reinforce the general prohibition against torture as standing outside the bounds of justified necessity.'[75] This argument draws the distinction between the two types of necessity and argues that justified necessity is not appropriate as a defence for war crimes or crimes against humanity. However, it distances the idea of excused necessity from that of justified necessity and allows the former to mitigate punishment in respect of war crimes and crimes against humanity. This proposition is particularly attractive because it does not avoid individual criminal responsibility,[76] a key concept in the development of the prosecution of crimes against humanity and war crimes, and retains the idea that the conduct is wrongful under any circumstances. Cassese's dissent, again, hints at the idea that such a defence may be permissible under international law.

70 *Ibid.* at 897-898
71 See Erdemovic, *supra* n10
72 See *supra* n10
73 See *supra* n53
74 *Ibid.*
75 Ohlin, *op. cit.* at 308
76 Article 6, Charter of the IMT

However, the argument that the international ban on torture and similar war crimes and crimes against humanity would be strengthened through the availability of the defence of excused necessity is fundamentally flawed. The central problem is that any defence to these crimes would automatically create a degree of permissibility in their commission, which ultimately would cause a weakness within any prohibition or illegality as the law currently stands. The distinction between excused and justified conduct is important, as the defence of necessity should encompass both aspects in order to truly reflect what necessity means. The inclusion of the defence of necessity within the Rome Statute[77] further supports the argument that the distinction should be made clearer in order to encompass the circumstances which can arise during wartime. However, it is the application of these defences specifically to war crimes and crimes against humanity which is most troubling. The international ban on such conduct emerged from a specific point in history where the need was recognised for accountability to humanity in respect of certain violations – certain conduct is so offensive, that the commission of an act which harms one individual affects us all as humanity. Examining certain situations and justifying this conduct, where there have been two further tribunals in the past twenty years for the prosecution of war crimes and crimes against humanity is clearly unacceptable and has no legal basis.

The idea of excused necessity, however, is more discreetly objectionable and, owing to the lack of primary legal authority on the distinction, there is less of a legal basis on which to accept or reject the defence. However, the initial categorisation of these crimes was to prevent their commission and punish any future breaches, regardless of circumstance. Naturally there will be cases where the reasons behind an individual's involuntary conduct, such as Erdemovic,[78] will mean that that court is sympathetic to the problem. This does not mean, however, that there is any defence to what the individual has done. There should be no principle in law which states that crimes against humanity or war crimes can ever be excused. That is a fundamental tenet of international criminal law and it should remain so. As Melhizer[79] noted, 'excuse is…far more imprecise than is justification because free will, the *sine qua non* of excuse, is not susceptible to empirical measurement and, in some sense, can never be determined with the same type of objective confidence as can justification.'[80] The added flexibility of this defence is precisely why it should not be available to defend the commission of crimes against humanity and war crimes.

The importance of the distinction for the military

When formulating policies and making decisions from the centre of an organisation, it is of particular importance that the instructions which are cascaded are clear. No less clear should the legal reasoning

77 See *supra* n11
78 See *supra* n10
79 Milhizer *op. cit.*
80 *Ibid.* at 850

behind policies, which is of great importance in order to secure military legitimacy. The idea that *inter armas silent leges*[81] should be firmly consigned to the past, to be replaced with the modern criminal law concepts of individual criminal responsibility and accountability for the most heinous of crimes, whether committed during times of peace or war. However, modern law also recognises that certain defences may be raised in respect of different crimes. The inclusion of a defence of necessity is now common throughout national penal codes, although the distinction between two different types of necessity is still only made infrequently. The current consensus on necessity defences, reflected by the Israeli Penal Code and the Rome Statute seems to focus on the idea that in certain instances conduct is justified as a result of the circumstances in which the actor finds himself. There is no question of mitigating punishment or reducing responsibility, the idea is rather to exclude liability as a result of the circumstances. Even then, there are elements of both aspects of the defences which have been mixed in both the domestic Penal Codes and through the Rome Statute. As a result of this conflation, it is vital that the military who will be making the policy decisions and ultimately determining the level of acceptable conduct of their personnel, understand the distinction between the two types of necessity.

The issue of necessity is particularly important for the military as a whole, and the aspect of it defending its conduct in particular. It is recognised that the military have special responsibility in respect of the number of individuals who are under its command and the unique position of those individuals means that they are likely to experience stress to a degree unknown in a civilian context.[82] As such, to protect them and those in their custody, it is critically important that there is a secure legal framework within which acts can be commissioned, without problems arising from the potential application of individual criminal responsibility. Policies should be uniform and should protect the soldiers as agents of the State. It is therefore the military's responsibility to understand the defence of necessity and its applicability (or lack thereto) in respect of crimes against humanity and war crimes. Separating the concept of necessity into two distinct branches, justified necessity and excused necessity, assists when attempt to reason why certain conduct can never be exempted or the punishment for it mitigated. In the context of war, some acts can be justified. Other acts may also be excused. However, within this, there are some categories of crimes for which there can never be any mitigation or exclusion. Committing acts of torture or murder is always wrong, regardless of the aim that doing so seeks to achieve.

The proposition that 'there is no rule of human jettison'[83] helpfully assists in explaining why there is always criminal responsibility for certain acts. Crimes against humanity and war crimes, such as murder and torture, fall into this category. The application of both branches of the defence should therefore be rejected in respect of such crimes. It is not appropriate to exclude criminal responsibility for such crimes, given that this would strike right at the heart of the purpose for which they were so categorised. Furthermore, it is equally unacceptable to propone the idea that there should be any mitigation of

81 Cicero, *Pro Milone* 16, republished by Havard University Press, 1972

82 O Olusanya, *Excuse and mitigation under international criminal law: redrawing conceptual boundaries,* 13 New Crim. L Rev. 23-89 2010

83 B Cardozo, *Law and literature and other essays and addresses*, New York, 1931 at 113

punishment. The categorical prohibition of torture, in particular, in international law would undoubtedly be weakened as a result, by allowing a lesser punishment to be given where the individual charged argues that he tortured out of necessity. The defence of excused necessity would therefore create a loophole in the law if it were to be extended to crimes against humanity and war crimes, such as murder and torture. This was not the intended purpose of categorising these crimes as such.

Conclusion

It is of crucial importance that the issue of torture remains a high priority for the military in relation to both policy and the conduct of its personnel. The approval offered by the former U.S. President George W. Bush of the use of coercive interrogation techniques creates more legal clouds around the issue, particularly when his instructions are contrasted with international law on the matter.[84] Further confusion awaits when the legal authority applying the law is examined, which makes reference to *ex post facto* defences seeking to legitimise the use of torture through dissolution of criminal liability. Specifically, the defence of necessity was held by the Israeli High Court to constitute a defence to a charge of torture made in respect of a Security Agency investigator, if one was found to be using illegal coercive interrogational techniques during investigations. However, this defence is not necessarily appropriate in respect of a charge of torture. The rejection by the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[85] that torture can ever be justified refutes the idea that a defence of necessity is available.

However, academic comment on the issue suggests the defence of necessity should be divided into two parts: justification and excuse. Justifying the use of torture would never be in compliance with international law, however there is no comment on the use of the defence of excused necessity for the commission of torture. It is important to recognise the distinction between the two in order to create appropriate policies which are legally compliant and do not create further problems. It could be argued, at first glance, that the defence of necessity is available in respect of crimes against humanity or war crimes, relying on the Israeli High Court case as authority. However, an examination of this case leads to the conclusion that it is, in fact, a justification defence which would possibly not be available in other jurisdictions. Internationally, the Rome Statute provides for a form of the justification defence, but again this is not necessarily in compliance with the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, an internationally binding treaty.

Jurisprudence from the ICTY suggests that a form of excuse may be available to mitigate punishment, and this is supported by various academic sources. However, this paper contends that the distinction should be

84 See *supra* n3
85 See *supra* n3

made for one purpose only: to clarify the international prohibition. Any acceptance of a defence in respect of crimes against humanity and war crimes, such as murder and torture, would be completely contrary to the aim of an international ban on such conduct. Rather than reinforcing such a prohibition, encouraging the supply of a form of defence, whether of necessity or otherwise, would imply that there are certain circumstances in which the commission of these crimes is not as damaging as others. This is, primarily, a further offence to the victims, but also damaging from a military perspective. The purpose of abiding by international laws and prohibitions on certain conduct is to reinforce the idea of military legitimacy, that the aim sought to be achieved is being achieved through legal means. The supply of any such defences, it is argued, would not necessarily encourage the commission of crimes of torture and murder. Rather, it would destroy the idea that military conduct has limits. These limits should be respected by all, to prevent abuse and to entrench legitimacy, both outwith and within military organisations.

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