

UNIVERSITY OF LONDON

**UNDERSTANDING DEFENCES
IN INTERNATIONAL CRIMINAL LAW**

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**A THESIS SUBMITTED TO THE DEPARTMENT OF LAW
OF THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE
FOR THE DEGREE OF**

DOCTOR OF PHILOSOPHY

**LONDON, UK
OCTOBER 2006**



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ABSTRACT

The objective of this study is to offer a different way of seeing and understanding defences in international criminal law. By contrast to the standard texts on defences which identify what the law *is* – and in some few cases to suggest what it *should* be – this work seeks to understand *why* the law is the way it is, and in doing so, reveal the gender biases that international criminal law defences conceal.

International criminal law evolved out of a need to respond to gross wrongdoings that amounted to *international* offences perpetrated during conflict. The paradox is that conflict is about the ‘legalised’ use of violence by men and it is through this process that all too often women, subsumed within the category of civilians, become the direct and indirect victims of that violence.

From its inception international criminal law has primarily addressed wrongs committed in conflict – but as *perceived* and *defined* by men. Moreover, because war crimes trials have always been about selective narratives that are controlled by the most powerful, women’s voices have consistently been excluded. This study questions whether, as with offences, defences have evolved in such a way as to prefer the interests of the male soldier over the civilian and thereby foster a gendered view of defences in international criminal law.

This work has been guided by some of the more recent theoretical debates that have engaged the scholarly community on the domestic level that challenges the traditional explanations of defences and that exposes the law to be fundamentally incoherent and characterised by bias. It offers an alternative perspective on defences in international criminal law that seeks to understand the interests that legal defences serve to protect.

This thesis concludes that defences play a vital function in regulating relations between individuals and between the state and citizens by articulating the responsibilities of the different participants in a social grouping. Defences provide a powerful means through which the law delineates a society’s moral boundaries and an effective mechanism through which specific normative values of liberal states are conveyed. The overriding objective of this study is to emphasise the need to take greater account of the inherent gender bias that continues to characterise the law in the process of judging the defendant who is charged with serious violations of international law perpetrated in a conflict.

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ACKNOWLEDGMENTS

I am extremely grateful to a great many people who have helped, guided, encouraged and supported me through this project.

I begin with a thanks to my supervisor Dr Gerry Simpson, Reader in International Law, London School of Economics and Political Science, who over the years has challenged me intellectually and broadened my understanding of international law. Gerry's unconventional approach to the subject has been a great source of inspiration for which I am deeply grateful. I am also profoundly indebted to Professor Christine Chinkin, Law Department, LSE, for her valuable feedback during the upgrade process and to Professor Nicola Lacey, Law Department, LSE, for her suggestions and comments at a time when I was in need of guidance. Christine and Niki's intellectual vigour and scholarly contributions in the field of international law and criminal law respectively have continued to inspire me through the years and both have set standards to which I have constantly aspired.

I wish also to thank Professor Christopher Greenwood, Law Department, LSE, for encouraging me to teach public international law. It was Chris' wise advice – that teaching was the best way of understanding the law – which has helped me to come this far. A special thanks is also due to Professor Charles Garraway who has been an invaluable teacher and critic but most of all a good friend over the years. His patience has been unsurpassed and his willingness to engage with me and to challenge me has allowed me to develop an understanding of international humanitarian law and international criminal law that would not have been possible without him. I also thank him for taking the time to read and to comment on this entire work before it went to print. I wish also to thank Professor Michael Schmitt, George C Marshall European Center for Security Studies, who has been incredibly generous with his time and wisdom and on countless occasions has helped me to clarify my arguments.

Although some PhD candidates describe this process as lonely, I do not share that view. Through this process my world has expanded many times over; moreover, I have had the good fortune of meeting countless numbers of people both in person and through email who, in different ways, have contributed to this work. I wish to record a special thanks to three people who I have only 'met' through emails: Professor Michael Bohlander, Law Department, Durham University, Dr Dieter Fleck, and Professor Albin Eser, who was recently appointed as an ad litem judge at the ICTY. Judge Eser generously sent me one of his out of print manuscripts while Professor Bohlander and Dr Fleck offered me advice and feedback via a series of emails

on points of law. I have been touched by the spirit of generosity and kindness that each has extended to me, a complete stranger.

A word of gratitude is also due to Professor Paul Roberts, Nottingham University, because it was Paul who, as my personal tutor at Nottingham, suggested that I consider doing a PhD. Without his encouragement, I would simply not have gained so much.

I shall forever be indebted to Lord Goodhart, QC, House of Lords, for whom I have worked since first embarking on this project. I have learnt more from Willie about how to construct an argument with clarity than from anyone else and am profoundly grateful for that. I also thank him for his constant interest in the progress of my thesis, for his enduring support, and for his weekly company which I have valued far more than I can possibly express.

I owe a special thanks to Gina Heathcote, PhD candidate, LSE, for her enthusiasm and willingness to read my first full draft of this work. Gina's incisive comments and penetrating questions helped me to go back to the original work and to pull it into its current shape. But it is for her constant friendship and words of encouragement over the years that I am especially grateful.

Finally, my love and thanks to my family who have never doubted that I would one day complete this project.

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PREFACE

On July 11, 1995 following a relentless and targeted attack, the town of Srebrenica – a designated UN ‘safe area’ – fell to the Bosnian Serb forces resulting in a mass exodus of thousands of Muslim civilians. During the following week the men were separated from the women and children by the Bosnian Serb authorities and transported to a farm north west of Zvornik. On July 16 Drazen Erdemovic and seven members of the 10th Sabotage Unit of the Bosnian Serb army were instructed to go to the farm and on their arrival, ordered to kill the arriving civilians. Erdemovic had initially refused to comply with the order but on being threatened with death, he took part in the mass murder, personally killing about seventy people.

A year later Erdemovic was arrested and transferred to The Hague where, in November 1996, following a guilty plea he was sentenced to 10 years for his part in the massacre.¹ In 1997, on appeal, the tribunal issued a judgement that concerned a vital question of law on whether duress could afford a complete defence to a charge of crimes against humanity and/or war crimes which involved the killing of innocent people. The process of reaching the decision was fraught with difficulties and the final outcome, highly contentious. The judgment has been described by Robert Cryer as one that was characterised by two philosophies manifested in four opinions.² The issue once again surfaced during the ICC negotiations and the final provision on duress, recognises the defence even in the killing of innocents, thus setting aside the jurisprudence of the ICTY. Today, academics and practitioners continue to divide on the content of duress for what are essentially the same reasons as those that divided the Appeals Chamber.

What the *Erdemovic* case clearly demonstrates is the enormous challenge that war crimes tribunals face in determining the scope of any defence *because* they encapsulate a society’s moral values and political priorities. But what this case also exposes is the extent to which the international criminal law (ICL) narrative continues to be dictated by the dominant methodologies of western liberal states and the values around which their criminal justice systems are structured. The objective of this study is to offer an understanding of legal defences in ICL that explains *why* the law is the way it is and to reveal the core liberal values that ICL defences serve to protect. In other words, I look below the surface at the partially hidden narratives to discover what normative values ICL, through legal defences, functions

¹ *Prosecutor v Erdemovic*, IT-96-22.

² Robert Cryer, “One Appeal, Two Philosophies, Four Opinions and a Remittal: the Erdemovic Case at the ICTY Appeals Chamber,” (1997) 2(2) *Journal of Conflict and Security Law*, 193-208.

to safeguard. But my interest also lies with the omitted narratives that continue to remind us of the structural failures of the law and how much further ICL still needs to progress before it can live up to its own description of being genuinely international in the universal and inclusive sense of the word.

In my opening chapter I locate ICL defences within their historical context and argue that the scope of a defence has been largely determined by the struggle over control of the narrative, most notably between the liberal legalists and realists, and that in that confrontation the male voice has dominated. The exclusion of the woman's voice was to cultivate an ICL narrative that was originally deeply gendered, most clearly exemplified by the near absence of offences that disproportionately harmed women in conflict. Although in recent years significant progress has been made to address the gender imbalances that so characterised the post-war narrative, I question whether, as with offences, defences have also evolved in such a way as to prefer the interests of the male soldier above the civilian thereby fostering a view that is intrinsically gendered.³ The critique I offer in this chapter should not be interpreted as a rejection of the ICL project since in spite of the law's shortcomings, I take the view that ICL has the potential to offer significant rewards.

Critically examining the dominant methodologies that have shaped the jurisprudence of war crimes trials as they vie with one another to tell the ICL story is the subject matter of my second chapter. I pay particular attention to the civil law/common law divide because it is only by being sensitive to the theoretical distinctions that characterise each tradition that we can better comprehend some of the fundamental differences that manifest themselves in legal defences. I conclude this chapter with a general sketch of some of the legal commentaries on defences generated in response to the establishment of the International Criminal Court (ICC), and suggest that by contrast to most, which have sought to identify *what* the law is and to assess the extent to which the treaty provisions correlate with customary international law, my project is one that seeks to question the assumptions upon which ICL is founded.

³ I do not however wish to convey the impression that men are not equally at risk in conflict; the atrocities that took place in Srebrenica clearly indicate otherwise. Statistics reveal that more men *are* killed as a consequence of conflict; nonetheless it is widely accepted that women and children are "disproportionately targeted in contemporary armed conflicts and constitute the majority of all victims"; Report of the Secretary-General on *Women, Peace and Security*; S/2002/1154. The equally troubling trend is that over the course of the 20th century, the ratio of civilian fatalities escalated dramatically from 5 per cent at the turn of the century to over 75 per cent during the last decade; Elisabeth Rehn and Ellen Johnson Sirleaf, *Women, War and Peace*, [2002] United Nations Development Fund for Women, 5

Whether the intrinsic incoherencies that plague ICL can be surmounted is a concern that continues to trouble scholars. As ICL oscillates back and forth between the international and national domains its discomfort with having to reconcile the realities of collective violence with its faithful and necessary attachment to the notion of individual responsibility and the free will paradigm, becomes apparent. In Chapter Three I consider in some detail the conceptual problems that will continue to challenge the way we think of and respond to ICL. But I also look to the criminal law, from which ICL has so heavily borrowed, and to the theoretical debates that have engaged the criminal law community in recent years in an attempt to initiate similar debates at the international level. How might we distinguish between offences and defences in ICL? And between justification and excuse? How accurate is it to talk of free choice in conflict? And what of moral luck? Having raised some of the questions which I believe are vital to a richer understanding of defences in ICL, I turn my attention over the course of the following three chapters to specific defences in ICL.

In Chapter Four, I limit my field of inquiry to the defences of mistake of fact and law. As with each of the defences that I examine in the remainder of the work, I begin with the theoretical reasoning that forms the basis upon which the law exculpates the defendant. My concern throughout is to reveal the assumptions that are made by the law on the nature of free choice and moral responsibility, and about the obligations that individuals owe to one another in a social context and the extent to which such obligations contain a gendered element. But I also suggest that “hidden in plain view” are the normative values that liberal theory conveys through legal defences about the rule of law, pluralism, and its concerns over self-exemption. And finally my purpose is to question whether the rationale that explains a legal defence in domestic law is sustainable in the context of ICL given the fundamentally altered context that the condition of conflict creates. This is because the scope and conditions of any legal defence, it would seem, are intimately linked to the context within which an offence has been perpetrated and the relationships between the individuals within that given context.

Since the condition of conflict not only radically changes the environment but the relationships between the various participants in war and the obligations they might owe one another, it should come as no surprise that the scope and conditions of a legal defence in ICL might need to be reconceptualised and merit some modification. So for example, that the rationale that explains self-defence in domestic criminal law is not easily reconciled with how self-defence operates in ICL is an argument that I pursue in Chapter Five. Under this chapter I also consider in some detail the defences of military necessity and belligerent

reprisal, and conclude that of all the available defences in ICL, it is the latter that conceals a profoundly disturbing rationale that, in effect, justifies the disproportionate targeting of women.

Defences, both in the criminal law and ICL, serve a dual role insofar as they delineate the boundaries of morally acceptable behaviour and at the same time function to regulate the relationship between individuals and between the state and the citizen. This dual theme forms the backdrop to Chapter Six in which I consider the defences of duress and necessity. Both these defences raise very difficult questions pertaining to choice and character, blame and responsibility and in the most adverse situations, good and evil.

My objective in critically examining defences in ICL should not be misconstrued as an attempt to deny a soldier a defence when justice so demands. For the soldier might be viewed as much a victim of conflict as those he has harmed. Yet if we are all to be judged by the choices we make in life, it would seem that the soldier, by entering the military or joining a rebel movement, has made the choice to take on a role that risks placing him in a situation in which violence becomes the norm.⁴ And although that heightened state of violence allows the soldier to resort to violence, that right is very much subject to legal constraints and to legal and moral responsibilities.

In wanting to bring 'gender' into the body of this work, I initially chose to use the female pronoun but realised that to do so would be to convey a wrong impression. Of course not all women are merely passive victims in conflict. But as far as ICL is concerned, it would be disingenuous to ignore the fact that women do enter the narrative principally as victims and only in a very few instances as the perpetrators of violence.

⁴ Subject, of course, to conscription.

CHAPTER 1

WAR CRIMES TRIALS: A LIBERAL LEGACY

A question that has engaged the scholarly community since the 1990s, prompted in large measure by the establishment of the *ad hoc* tribunals and the creation of the International Criminal Court (ICC), has been why states have supported the establishment of international war crimes tribunals particularly when such institutions might one day “turn against” the very creators themselves.¹ But to ask that question seems to give undue weight to the realist concern that the development and institutionalisation of international criminal justice equates to the concomitant loss of state sovereignty; and what is more, it is to underestimate the extent to which international criminal law (ICL) might be viewed as a didactic process through which liberal states can most effectively transmit and reinforce liberal values within a specific normative framework.

I begin this chapter with a critical examination of the long-standing discord between realists and liberal legalists² over war crimes tribunals. My interest is not in the content of that disagreement but the consequences of the tension and, in particular, its effect on the development of the law in relation to legal defences. Since defences are the criminal law’s way of selectively opening its ears to *some* narratives that allow for the context within which the defendant acted to be given far greater prominence, whether or not a plea is recognised as amounting to a valid legal defence under ICL has provoked significant debate and disagreement not only between realists and liberals but among the liberals themselves. How ICL has attempted to reconcile these differences will be the topic of the first section.

War crimes tribunals have always been about and will no doubt continue to be about selective narratives that are controlled by those who wield the most power. In the second part of this chapter I consider the intimate relationship that exists between control over the legal narrative and power and in doing so examine the extent to which such control serves as a catalyst that continues to divide realist from legalist. I conclude that since legal narratives are controlled by those that claim and assert such power it is of little surprise that war crimes

¹ See Frederic Megret, ‘The Politics of International Criminal Justice’ (2002) 13 *EJIL* 1261 and G. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, Princeton 2000) 6.

² Unless otherwise stated, any further reference to ‘liberals’ will denote the sub-category of liberal legalists.

tribunals and ICL have, at least until very recently, been dominated by the male voice. This leads me to question whether, and to what extent, legal defences in ICL have developed in such a way as to prioritise the interests of the male combatant over the civilian. My objective is to ask whether ICL might be sustaining the gender bias that all too often characterises international humanitarian law (IHL).

I end this chapter on a less sceptical note as ICL and war crimes trials, if done ‘properly’, are capable of offering significant benefits and advantages to societies that have been damaged by the ravages of conflict. Throughout this work I aim to illustrate how, through legal defences, ICL plays a vital function in conveying and advancing some of the most fundamental moral and political values that shape and characterise liberal states – from the separation of powers to the fear of self-exemption, from tolerance to the celebration of pluralism and the rule of law.³ In doing so, I aim to make a positive contribution to the debate as to why states support war crimes tribunals.

1.1 A HISTORY OF LEGAL DEFENCES IN ICL

How states might properly treat individuals who have engaged in large scale violence continues to divide the realist from the liberal.⁴ This tension is no better exemplified than by the Bush administration’s policies concerning the treatment of enemy combatants in the ‘global war on terror’ which have been the subject matter of numerous legal proceedings in the US courts.⁵ In many respects, there is little that differentiates the more recent debates

³ The dominance of liberal legalism and the law’s part in maintaining it has come under considerable critical scrutiny by both critical legal studies theorists and feminists although because the priority of the latter has been to address gender inequality, criticism of liberalism’s shortcomings has been more tempered. See D. Rhode, ‘Feminist Critical Theories’, (1989) 42 *Stanford Law Review* 617, 627 and more generally, R. West ‘Jurisprudence and Gender’, (1988) 55 *University of Chicago Law Review* 1.

⁴ By ‘realist’ I refer to those who view the development of ICL as a process that is determined by power and state interests. According to Falk, realism is the dominant orientation among the leadership of most states insofar as the formation of policy is concerned. State interests take priority while international law and morality are largely regarded as “instruments of propaganda useful in relation to adversary states, rather than as providing policy guidelines that clarify national interests for one’s own country.” Although they are a divergent group, what unites realists is the fundamental view that “interests, not rules or values, are the grounds of policy for a state in its external relations”; ‘Telford Taylor and the Legacy of Nuremberg’, (1999) 37 *Columbia Journal of Transnational Law*, 706-7. By liberal, I refer to those who regard the law as pivotal element in regulating relations whether it is between states, between the state and the individual, or between individuals in a society. But as with the realists, liberals too comprise a divergent group although what unites them is a belief that legalism, understood as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules”, is a fundamental feature of liberal ideology; see J. Shklar, *Legalism*, (1964) 1.

⁵ See for example, *Rasul v Bush*, 124 S. Ct. 2686 (2004), *Hamdi v Rumsfeld*, 124 S. Ct. 2633 (2004), *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), *Gherebi v Bush*, 374

from those that took place during the period prior to the establishment of the Nuremberg tribunal despite the apparent shift in recent years among realists to support some form of legal procedure for the leaders of mass atrocities.⁶ But, clearly, what continues to divide opinion is the extent to which such a legal process must satisfy the demands of a liberal judgment.

The divergent and sometimes conflicting priorities and objectives of realists and liberals have clearly led to the selective enforcement of the law; but this tension has also translated into the selective development of the substantive law, no more so than in the area of legal defences. Although war crimes tribunals have generally been set up in circumstances in which the interests of both groups have happened to coincide, because the priorities of each group has differed quite significantly, the law itself has been subject to constant transformation, modification and redefinition. In this section I trace the relationship between realists and liberals since the post-war period to show how the scope and nature of some 'defences' have evolved in response to compromises negotiated between the two competing viewpoints.⁷

It is common knowledge that as late as October 1944 neither Roosevelt nor Churchill had any intention of pursuing criminal prosecutions of Nazi leaders preferring the option of summary executions. What is however often overlooked is that a distinction had always been made between how best to treat the *leaders* who had engaged in criminal conduct and "the great mass of German war criminals" who, it was assumed, would be judged and punished in the jurisdictions in which the crimes had been committed.⁸ The belief that the law could not adequately accommodate the wrongdoings of the leadership was made abundantly clear in a draft memorandum from Churchill to Stalin proposing a list be prepared of up to 100 high ranking Nazis who would be shot within six hours of a court confirming their identity. The

F.3d.727 (9th Cir. 2004), *Khalid v Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005), *Hamdan v Rumsfeld*, S. Ct. 29 June 2006.

⁶ For example, the support in the Bush Administration for the prosecution of Saddam Hussein; <http://www.state.gov/s/l/rls/61110.htm> (last accessed 06/06) and the Clinton Administration's support for Milosevic to be brought to justice before the ICTY. Of course not all political realists support a legal process and even under the Presidential Military Order of 13 November 2001, authorising the establishment of military commissions, the option for indefinite incarcerations was left open, prompting wide-spread criticisms by the legal community for having introduced a programme of indefinite administrative detentions without charge or trial; <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last accessed 06/06).

⁷ I focus in this section of superior orders and immunity although I am acutely aware that the latter is better regarded as a bar to adjudicative jurisdiction rather than a legal defence while the prevailing opinion is to treat superior orders as a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether duress or mistake are made out.

⁸ War Cabinet document (3 October 1944) W.O. (44) 555, PREM 4/100/10, Public Records Office (PRO) UK.

proposal, based on a separate submission that had rather ironically been drafted by the Lord Chancellor, was defended on the grounds that:

...[i]t would seem that the method of trial, conviction and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goring, Goebbels and Ribbentrop. Apart from the formidable difficulties of constituting the Court, formulating the charge and assembling the evidence, the question of their fate is a political and not a judicial one. It could not rest with judges however eminent or learned to decide finally a matter like this which is of the widest and most vital public policy. The decision must be 'the joint decision of the Governments of the Allies'.⁹

Yet two weeks later in a telegram sent to Roosevelt, Churchill requested the memorandum to be considered withdrawn following discussions held with Stalin who had insisted on criminal prosecutions for the Nazi war leaders.¹⁰ In Washington opinion was divided between the Treasury Department headed by Henry Morgenthau Jr., a realist, who advocated summary executions for the Nazi leaders and the War Department headed by Henry Stimson who continued to press for some form of judicial process.¹¹ This impasse was finally resolved in April 1945 in favour of the establishment of a tribunal when Harry Truman, a former judge, succeeded Roosevelt in the White House and appointed Justice Robert H. Jackson of the Supreme Court to the post of 'Chief of Counsel for the Prosecution of Axis Criminality'. Although on one level this development might be seen as the ascendancy of legalism over realism, the more accurate assessment is that the realists in Washington had begun to regard the prospect of a trial as a process that could more successfully address some of the post-war reconstruction concerns that summary executions would fail to fulfil.¹² Realist and liberal objectives did coincide in one very important respect. For the realists it

⁹ *Ibid.*

¹⁰ The text of Churchill's telegram to President Roosevelt of 21.10.44 stated: "On major war criminals U.J. took an unexpectedly ultra-respectable line. There must be no executions without trial otherwise the world would say we were afraid to try them. I pointed out the difficulties in international law but he replied if there were no trials there must be no death sentences, but only life-long confinements. In face of this view from this quarter I do not wish to press the memorandum I gave you which you said you would have examined by the State Department. Kindly therefore treat it as withdrawn"; PREM 4/100/10, PRO.

¹¹ Bradley Smith, *Reaching Judgment at Nuremberg* (Andre Deutsch, London 1977), 24; see also B. Smith, *The American Road to Nuremberg* (Hoover Institution Press, California 1982), 27-30.

¹² According to Falk, "Nuremberg occurred only for opportunistic reasons within the specific historical setting of the ending of World War II, and that far deeper than the normative impulses associated with imposing criminal liability on the individuals responsible were the currents of opinion that stressed the vital importance of moving toward unabashed realism in terms of American participation in the world". As Falk suggests, the shift in favour of trials among the realists can be attributed to a number of converging interests including public pressure for punitive action, the geopolitical idea that the defeated enemy might make valuable allies in the next phase of geopolitical rivalry, the guilty conscience that not enough had been done to protect the victims of Nazi persecutions and that reconstruction would be furthered by taking a moderate line; Falk 'Telford Taylor' 711-12.

was vital that any record of what had transpired be depicted as the defeat of “an evil ideology” by the victorious powers and criminal prosecutions of the Nazi leaders could satisfy that objective.¹³ For the liberals, the prospect of a trial also offered an opportunity to record the catastrophic events that had taken place but in the language of legalism and as the triumph of liberalism over facism. As Stimson made clear:

the very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity [and] it will afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence.¹⁴

The British, still sceptical of a judicial process, nevertheless recognised that the tide had turned and in appointing the new Attorney-General David Maxwell Fyfe as negotiator-prosecutor, paved the way for the liberals to take control over the fate of the Nazi leadership. This transfer of responsibility did not mean, however, that the realists had no hand in influencing the terms of the Charter of the tribunal as negotiations to co-ordinate certain aspects of the substantive law had already been pursued during the latter war years between London and Washington. Moreover, throughout the drafting process, the realists continued to take every available opportunity to contribute to the determination of the substantive law and consequently were to have a decisive input into the final provisions of the Charter.

The degree to which the realists were involved in the delineating the scope of the substantive law distinguishes the post-war military tribunals from other ‘safe’ tribunals and thus deserves closer scrutiny.¹⁵ By early January 1945, when it was becoming increasingly clear that the US War Department was winning the argument in favour of criminal prosecutions, officials from the Treasury Department reluctantly conceded that they would accept a judicial process on condition that it was unencumbered by “technical delays and defenses ... that impeded the execution of justice”.¹⁶ More specifically, the Treasury insisted that the pleas of “sovereign immunity, superior orders, and insanity be eliminated as automatic

¹³ Falk ‘Telford Taylor’ 711.

¹⁴ Smith, *The American Road*, 30-1. Telford Taylor in *The Anatomy of the Nuremberg Trials* (Alfred Knopf, N.Y. 1992) 42 explains, “...in the minds of Stimson and his colleagues, their prime purpose was to bring the weight of law and criminal sanctions to bear in support of the peaceful and humanitarian principles that the United Nations was to promote by consultation and collective action.”

¹⁵ A distinction between ‘safe’ and ‘unsafe’ tribunals was initially made by Michael Bothe in ‘International Humanitarian Law and War Crimes Tribunals, Recent Developments and Perspective’ in *International Law: Theory and Practice, Essays in Honour of Eric Suy*, (Karel Wellens, ed.) (Martinus Nijhoff Publishers, The Hague, 1998) 581-95. The distinction is based on whether the creators of the tribunal and the prospective defendants are of the same nationality.

¹⁶ Smith, *The American Road*, 128.

defences”.¹⁷ In London there had been little, if any, debate on the defences of immunity and insanity; what had concerned government officials was the defence of superior orders which had been discussed on numerous occasions since 1942. As far as the Foreign Office was concerned, the defence was one that involved a policy decision rather than a legal opinion. In the comments attached to a parliamentary question addressed to the Foreign Secretary requesting clarification on its scope, officials in the Foreign Office observing that superior orders had been one of the “most fruitful sources of controversy among international lawyers”, added:

[i]t was by pleading this defence that many of the accused at the Leipzig trials after the last war were able to escape conviction. Apart from a general feeling that this must not be allowed to happen again, the Allied Governments represent upon the United Nations Commission for the investigation of War Crimes have not yet made their attitude clear on the subject. HM Government have hitherto skated round it. ...[I]n all the circumstances it would seem best that in replying we should adhere to the rather vague formula hitherto adopted.¹⁸

That the formula was regarded as ‘vague’ was probably due to the obvious inconsistency between the defence as had been interpreted by the courts during the inter-war years in which the ‘manifest illegality’ principle had been applied¹⁹ and the defence as defined in the military manuals of both the UK and US which had adopted Oppenheim’s version of the defence based on the doctrine of *respondeat superior*.²⁰ The uncertainty as to the legal effect of the defence continued to trouble government lawyers in London although there was a growing consensus that superior orders might be best regarded as a conditional defence. Following a consultation process on the ambit of the defence in 1942, the Attorney General and Solicitor General indicated that neither was convinced that superior orders afforded a *prima facie* defence yet neither were they prepared to call for its absolute rejection.²¹ Yet

¹⁷ *Ibid.*

¹⁸ Parliamentary question put by Sir John Mellor and responded to on 2 February 1944; FO 371/38990, PRO.

¹⁹ See *Dover Castle Case*, (1922) 16 *AJIL* and the *Llandoverly Castle Case* (1922) 16 *AJIL* and for additional analysis, Yoram Dinstein, *The Defence of ‘Obedience to Superior Order’ in International Law* (Leyden, Sijthoff 1965) 19.

²⁰ According to Oppenheim if members of the forces “commit violations ordered by their commanders, the member may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy”; *International Law, Volume 2* (1906) at 264. In other words, superior orders could afford an absolute defence to a subordinate who acts on the orders of his commander.

²¹ “We are not quite sure whether we accept the view that it is *prima facie* a defence. We think probably the right view is that it is not a defence; but it would be contrary to all our principles to proceed after hostilities are over against a subordinate acting under orders in circumstances in which he clearly had no option but to obey. To take an obvious example, if there had been an illegal shooting, no one would think of proceeding against the firing squad: they would proceed against the

little effort was made to alter the British military manual. In July 1943 the issue surfaced once more in the correspondence between Sir H. MacGeagh of the Office of the Judge Advocate-General and the Solicitor General when the former noted, “[t]his question of ‘superior orders’ ... was raised to me in February of this year by Colonel Betts of the U.S. Forces. I then, in confidence, showed him your Opinion and expressed my view that ‘superior orders’ was no defence, except possibly where an accused was a mere automaton such as a member of a firing squad who really had no discretion and would himself probably be shot if he disobeyed the order. I understood from Betts that this was also the American view.”²² Yet once again little effort was made to alter the manual and it was not until January 1944 that the matter was brought to the attention of the Chiefs of Staff who “agreed that it was desirable that an early attempt should be made to co-ordinate British and American policy on [the] matter”²³ with the result that both the British and American manuals were amended. But rather than adopting a uniform approach, the revised British version incorporated the manifest illegality principle while the American version accepted superior orders as a possible defence or as a factor to be considered in mitigation of punishment.²⁴

In March 1945 the U.S. War Department once again reiterated its concerns regarding the status of certain legal defences that would serve to exculpate the Nazi leaders and recommended, *inter alia*, that:

the Joint War Crimes Organization amend the Rules of Land Warfare of the United States and England, and possibly of other countries, to the extent necessary to clarify the offenses to be charged and to deny the defenses of ‘sovereignty’ or ‘acts of State’ and to deny or materially modify the defense of ‘superior orders.’²⁵

While the liberals involved in the drafting of the Charter were not averse to the absolute denial of the immunity defence, a draft proposal presented to the foreign ministers who met at San Francisco in April 1945 did contain a provision on superior orders that, in principle, retained it as a conditional defence. As far as Jackson was concerned the doctrine of immunity coupled with superior orders as an absolute defence was unacceptable since

officer who had ordered the man to be shot.” Memorandum by the Law Officers of the Crown, April 15, 1942; FO 371/30916, PRO.

²² FO document C729/14/62, FO 371/38990, PRO.

²³ Letter from Colonel Price, War Cabinet Offices to OC Harvey, FO/ 6 Jan 1944; FO 371/38990, PRO.

²⁴ Cryer, ‘The Boundaries of Liability in International Criminal Law, or Selectivity by Stealth’, 12.

²⁵ In a memorandum from Brigadier General Kenneth Royall, to the US Assistant Secretary of War cited by Smith, *The American Road*, 143. According to Smith, “a major factor in this revision was the desire to facilitate enemy war crimes prosecutions.”

clearly the combination of these ‘defences’ would mean that no individual could be held responsible for any offence. Yet Jackson remained unconvinced by the arguments calling for the absolute denial of superior orders.²⁶ And despite the continued pressure from the War Department, the initial draft of the provision submitted on 14 June to the delegates at the London Conference by Jackson and his legal staff read:

in any trial before an International Military Tribunal the fact that a defendant acted pursuant to orders of a superior or government sanction shall not constitute a defense per se, but may be considered either in defense or in mitigation of punishment if the tribunal determines that justice so requires.²⁷

Sometime between the 14 and 30 June, a decision was taken by Jackson to opt for the absolute rejection of superior orders; and it was this amended version which was to form the text that was finally incorporated into the Charter.²⁸ What led Jackson to change his mind remains uncertain. But what is clear is that during the remaining negotiations both Jackson and Maxwell-Fyfe continued to emphasize that the objective of the provision was to reject superior orders absolutely as a defence.²⁹ The most convincing explanation for this apparent *volte face* is the suggestion that the defence was not abolished by the provision but excluded in “very particular and unusual circumstances”.³⁰ The individuals that were to be prosecuted had been identified some time prior to the drafting of the Charter³¹ and had been chosen *because* of their role or prominence in the Nazi war machinery and therefore the jurisdiction

²⁶ In his report to the President dated 6 June 1945, Jackson comments: “there is doubtless a sphere in which the defense of obedience to superior orders should prevail”;

<http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm> (last accessed 06/06).

²⁷ Revision of American Draft of Proposed Agreement, June 14, 1945;

<http://www.yale.edu/lawweb/avalon/imt/jackson/jack09.htm> (last accessed 05/03)

²⁸ Article 8 of the Charter provides: “The fact that the defendant acted pursuant to orders 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.” Article 6 of the Charter of the IMTFE reads: “Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to orders of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

²⁹ See, for example, the exchange that took place during the London Conference between Judge Falco, Jackson and Maxwell-Fyfe; minutes 24 July 1945

<http://www.yale.edu/lawweb/avalon/imt/jackson/jack47.htm> (last accessed 06/06).

³⁰ H. McCoubrey, ‘From Nuremberg to Rome: Restoring the Defence of Superior Orders’ (2001) 50 *ICLQ* 386, 391.

³¹ By spring 1944, the British had already compiled a list of leading Nazis for summary execution but when the decision to hold criminal trials was finally taken the number of names on the list were cut to shorten and simplify the proceedings. The Attorney General, Maxwell-Fyfe, suggested ten individuals including Goering, Hess, Ribbentrop, Ley, Keitel, Steicher, Kaltenbrunner, Rosenberg, Frank, Frick, on the basis that “their names were well known to the general public”; Taylor, *The Anatomy*, 86. Taylor comments: “apparently, little effort had been made to assess the evidence which might be available against them individually... All in all, the task of selecting the defendants was hastily and negligently discharged, mainly because no guiding principles of selection had been agreed on”, 90. Also see Taylor’s commentary concerning the “sloppiness of the selection process” and the “mix-up” over Gustav and Alfred Krupp, 90-94.

of the tribunal was restricted in scope.³² Moreover, as far as the drafters of the Charter were concerned the offences under consideration were so serious that any order to commit such acts would have been considered manifestly illegal *per se*.³³

Perhaps too Jackson saw this modification to the substantive law as a small price to pay given the greater legal battles that had to be won including agreement not only on the definitions of the relevant crimes and criminalizing organisations but an acceptance by all parties to the London Conference as to the validity of the charge of conspiracy.³⁴ But whatever the intention of Jackson and Maxwell Fyfe, that the wording of Article 8 on superior orders was replicated in subsequent legal instruments³⁵ led to some serious legal questions being raised in successive tribunals that attempted to apply what was considered a precedent-setting Nuremberg principle.³⁶ On a second level the decision to incorporate the restrictive wording on superior orders had the unfortunate consequence of inadvertently laying open the post-war tribunals to criticisms of selectivity.

The attempt to codify defences through multi-lateral treaties in the post-war period generally resulted in failure with states displaying a reluctance to agree in principle to restrictions being imposed on their own nationals.³⁷ In November 1948 when state representatives of an *ad hoc* committee set up by the United Nations Economic and Social Council met to negotiate the terms of the draft Genocide Convention the definition of superior orders caused

³² Of course this means that the provision *was* an intrusion into the fact-finding powers of the court; Cryer, 'The Boundaries', 12.

³³ As McCoubrey suggests: "[i]t was unequivocally clear that the upper echelons of the Third Reich were all too well aware that many of their decisions and actions were made and undertaken in violation of international law"; 'From Nuremberg' 390. Also see C. Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?' (1999) 336 *IRRC*, 785.

³⁴ See report by Robert Jackson, December 29, 1947

<http://www.yale.edu/lawweb/avalon/imt/jackson/preface.htm> (last accessed 05/03).

³⁵ Article II 4 (b) of Control Council 10 read, "[t]he fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation." Article 6 IMTFE provided, "[n]either the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

³⁶ See for example, *The Hostage Case*, *TWC*, Vol. XI and the *Einsatzgruppen Case*, *TWC*, Vol. IV.

³⁷ For a concise historical analysis see M.C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (M. Nijhoff Publishers 1992) 477-81. See also G. Schwarzenberger, 'The Problem of an International Criminal Law', (1950) 3 *Current Legal Problems* 263; Kriangsak Kittichaisaree, *International Criminal Law* (OUP 2001) Chapter 1, 3-16; A. Cassese, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', (1998) 9 *EJIL* 2.

serious splits among the delegates.³⁸ In a rather ironic twist the Soviet proposal to incorporate the wording of the defence as provided in the Nuremberg Charter was rejected by both the committee and subsequently, by the General Assembly³⁹ with representatives of the US and UK resisting any mention of the defence being drafted into the Convention preferring to “leave the judge free to pronounce judgment in each individual case, taking the special circumstances into account.”⁴⁰ As a result the Convention is silent on the subject. Failure to reach an agreement on superior orders during the negotiations over the Geneva Conventions⁴¹ as well as the 1977 Additional Protocol I⁴² meant that no reference was made to the defence in any of the final versions of these conventions.

The IMT and IMTFE remained the only examples of official international tribunals for nearly fifty years until the establishment of the International Criminal Tribunal for former Yugoslavia (ICTY) in 1993 and the International Criminal Tribunal for Rwanda (ICTR) the following year. The repeated failure by states to reach a consensus on the scope of superior orders in treaty negotiations did not however seem to present much of an obstacle where it concerned the drafting of the statutes of the *ad hoc* tribunals in which the defence was explicitly excluded under Articles 7 and 6 of the ICTY and ICTR statutes respectively.⁴³ As Theodor Meron has observed, that the drafters of both Statutes opted to adopt “the black letter of the Nuremberg Charter without taking into account the more nuanced approach adopted by the post-World War II war crimes tribunals, literature and manuals of military law”⁴⁴ was unfortunate.⁴⁵ This incongruity is perhaps best understood not only within the

³⁸ *Ad hoc Committee on Genocide*, Summary Record of the 18th Meeting, (23 April, 1948) E/AC.25/SR.18 and 28th Meeting, (10 May 1948) E/AC.25/SR.28. See A. Cassese, *Violence and Law in the Modern Age* (Polity Press, Cambridge 1986) 142-3.

³⁹ *General Assembly Official Records* (1948), VI Committee, 3rd Session, 301-14.

⁴⁰ Per Maktos, US representative at the 92nd meeting of the General Assembly, *Official Records* (1948), VI Committee, 3rd Session, 307.

⁴¹ The 1949 proposed article provided: ‘The fact that the accused acted in obedience to orders of a superior or in pursuance of a law or regulation shall not constitute a valid defence if the prosecution can show that in view of the circumstances the accused had reasonable grounds to assume that he was committing a breach of this Convention. In such a case the punishment may nevertheless be mitigated or remitted, if the circumstances justify’; cited by P. Gaeta, ‘The Defence of Superior Orders,’ (1999) 10 *EJIL*, 172, fn. 44.

⁴² The proposal read: ‘(1) No person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol. (2) The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it is established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order’; cited by Gaeta, ‘The Defence of Superior Orders’, fn. 44.

⁴³ The right to raise other defences is, however, permitted through the Rules of Procedure and Evidence, Rule 67(A)(ii); www.un.org/icty/basic/rpe/IT32_rev22.htm#67.

⁴⁴ Theodor Meron, *War Crimes Law Comes of Age* (Clarendon Press, Oxford 1998) 224.

broader context of realists/liberal tension, but more specifically within the emerging divide among the liberals themselves. This division can best be explained by an appreciation of the context within which the *ad hoc* tribunals came into being.

In response to mounting public pressure fuelled by the escalation of violence in the former Yugoslavia during 1992 precipitating widespread violations of international humanitarian law, member states, acting under the Security Council adopted a resolution to request the Secretary-General to establish a Commission of Experts to report on the evidence of grave breaches being committed by the parties to the conflict.⁴⁶ Several weeks after the publication of the Commission's first interim report in January 1993 the Security Council adopted Resolution 808 to establish an international tribunal. That the Secretary-General was given the mandate to determine the content of the provisions of the tribunal points to a general lack of interest among state representatives to become involved in the drafting of the statute and although some states did submit draft proposals, the vast majority displayed little interest in actively engaging in the process. From a realist perspective there was little to be gained and no apparent interests to protect; the tribunal itself was of no direct relevance to nationals other than those in the Balkans, whether as potential defendants or victims. What was far more significant for the realists was that the respective governments had been seen to take an active step to stem the atrocities in the region by calling for the establishment of a mechanism by which to hold individuals accountable for their wrongdoings. Paradoxically, Resolution 808 might be viewed as a realist response to a complex political situation that necessitated some kind of action. A self-contained tribunal offered an unthreatening answer demanding little significant commitment by individual states.⁴⁷

Although in his final report to the Security Council Boutros Boutros-Ghali made clear that in proposing the terms of the ICTY statute he had taken into account the views of thirty-one

⁴⁵ However, in *Erdemovic*, the Trial Chamber stated, "while the complete defense based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict."

⁴⁶ SC Res. 780, 6 October 1992, UN Doc. S/RES/780 (1992). The 'unspoken understanding' was that the Commission was a step towards the establishment of a tribunal to prosecute individuals who had breached the laws of war; Daphna Shrager and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia', (1994) 5 *EJIL* 360, 361.

⁴⁷ This presumption was to be challenged to the extent that following NATO's bombing of the FRY in 1999, allegations of violations of IHL by NATO were brought to the prosecutor's attention which resulted in the creation of a committee to examine and assess the charges. In June 2000 the ICTY prosecutor, in a report to the Security Council, determined that there was no basis to open a criminal investigation into any aspect of the NATO campaign; <http://www.un.org/icty/pressreal/nato061300.htm> (last accessed 06/06).

states and several organizations,⁴⁸ only in five submissions are legal defences mentioned, three of which cite the definition of superior orders that had been proposed by the ILC in its 1991 draft Code of Crimes against the Peace and Security of Mankind.⁴⁹ Perhaps the most revealing of the contributions was that submitted by the United States in which a preference for the incorporation of a conditional superior orders defence was mooted.⁵⁰ Thus it seems even more anomalous that the Security Council should have unanimously adopted the statute of the ICTY containing the restrictive Nuremberg definition that only allowed superior orders to be considered in mitigation of punishment.⁵¹ The most plausible explanation for this is that while some states were willing to offer drafting suggestions none held strong views on the subject because there were no immediate or apparent interests to protect. What remains unclear is why the office of the Secretary-General was so keen to adopt the Nuremberg wording rather than that proposed by the ILC.⁵² One explanation may be that Boutros Boutros-Ghali may have been persuaded by those international lawyers who favoured a ‘modern’ deductive approach to identifying customary international law rules above the ‘traditionalist’ inductive approach signifying an emerging divide among the liberals.⁵³

If the content of the ICTY statute stimulated little interest among states, the ICTR statute inspired even less and only the US and New Zealand, as the two original proposers of a tribunal, directly participated in the drafting process. Once again a Commission of Experts was established by the Secretary-General – this time to examine and report on the allegations of genocide in Rwanda.⁵⁴ In its Final Report the Commission referred briefly to defences in general but in particular it concluded that “since the inception of the Nuremberg Charter it has been recognized that the existence of superior orders may be taken into

⁴⁸ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc: S/25704, paras. 13-14.

⁴⁹ See *Yearbook of the ILC* (1991) 100.

⁵⁰ Letter dated 5 April 1993 from the US Permanent Representative at the UN, S/25575.

⁵¹ Security Council Resolution 827 (25 May 1993). Nevertheless during the debate following the adoption of the Statute of the ICTY, the US ambassador to the UN, Madeleine Albright, reiterated the US position that a superior order should be considered a defence if “the accused was acting pursuant to orders where he or she did not know that the orders were unlawful and a person of ordinary sense ... would not have known the orders to be unlawful”. S/PV.3217, p. 16 cited by Andreas Zimmermann, ‘Superior Orders’ in *The Rome Statute of the International Criminal Court: A Commentary*, Cassese, Gaeta, & Jones (eds) (OUP 2002).

⁵² According to Shraga & Zacklin, the final report was “very much the Secretary-General’s report”; ‘The ICTY’ 362.

⁵³ See Chapter 2.1 on sources for further commentary.

⁵⁴ SC Resolution 935 (1994).

account with respect to mitigation of punishment.”⁵⁵ It is therefore hardly surprising that the text of the Rwanda statute adopts the identical wording as that of the ICTY statute.

That the realists who had played an integral part in establishing both the *ad hoc* tribunals were not discontent to accept a narrow definition of superior orders is understandable given that both tribunals were considered ‘safe’.⁵⁶ But as the prospect for the establishment of an international criminal court with jurisdiction over all individuals, regardless of nationality, began unexpectedly to take shape interest among the realists in contributing more actively to the drafting process began to increase. Although throughout 1996 deliberations among the respective delegations were clearly becoming “much more intensive, substantive, and technical”⁵⁷, the adoption of General Assembly Resolution 51/207 in December 1996 setting a date for a Diplomatic Conference on the Establishment of an International Criminal Court for June 1998, proved to be the turning point when state representatives began to take seriously the implications of setting up such a court. That the draft statute, prepared by an inter-sessional meeting held in Zutphen, Netherlands, during which participating states were given the opportunity to submit proposed amendments, was “riddled with some fourteen hundred square brackets, i.e., points of disagreement, surrounding partial and complete provisions, with any number of alternative texts”⁵⁸ is indicative of a significant shift in attitude among the realists.

During the Rome negotiations, legal defences received far less scrutiny compared with the provisions relating to the Court’s jurisdiction and triggering mechanisms which were regarded as the most complex and politically sensitive to be negotiated *because* they threatened to impinge on state sovereignty.⁵⁹ As far as the provisions on the substantive offences and principles of liability were concerned, there was a general consensus among the leading state delegates that the new court would be accorded very limited discretionary

⁵⁵ *Final Report of the Commission of Experts established pursuant to Security Council Resolution 935* (1994), UN Doc. S/1994/1405, paras. 174-5. The Commission further noted that “it considers the defences of duress and mistake of fact as possible defences to individual allegations of serious human rights violations.”

⁵⁶ But the ILC’s decision to amend its 1996 version of the Draft Code of Crimes to reflect the wording of the statutes of the ICTY and ICTR is disappointing. See draft Code at <http://www.un.org/law/ilc/reporfra.htm> (last accessed 05/03).

⁵⁷ Adrian Bos, ‘From the International Law Commission to the Rome Conference’ in *The Rome Statute of the International Criminal Court*, Cassese, Gaeta, & Jones (eds) (OUP 2002) 54.

⁵⁸ Philippe Kirsch & John Holmes, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’, (1999) 93 *AJIL*, 2, 3.

⁵⁹ Kirsch & Holmes, ‘The Rome Conference’, 8. According to Bassiouni, these “weighty issues ... were left for last minute political compromises”; Bassiouni, ‘Negotiating’, 448.

powers to develop the law with the exception of grounds for exculpation.⁶⁰ Although the *ad hoc* tribunals are also able to take into consideration other potential defences there is a fundamental difference between expressly providing a tribunal with such powers and implicitly allowing the tribunal to claim the same power.⁶¹ Moreover, while superior orders was excluded as a defence to genocide and crimes against humanity, it was controversially 'reintroduced' in its conditional form for war crimes.

In this section I have tried to illustrate how the evolution of certain defences, and in particular that of superior orders, have been subject to constant modification primarily as a consequence of whether or not realists have perceived there to be any political interest at stake. But this is not to suggest that defences are simply the product of political impulses dictated by realists since tribunals have generally asserted their discretionary powers in the interpretation and application of pleas entered by defendants irrespective of the actual text in the relevant statute. Where realists have taken a 'back seat' the scope of a defence has been very much moulded by a more subtle divide that has emerged between those liberals who adopt a 'modern' approach and those who take a 'traditional' approach to identifying the applicable customary law rule.

The proliferation of war crimes tribunals witnessed since the early nineties can, in part, be attributed to the shift in attitude among realists who are increasingly treating ICL as an alternative means through which to respond to challenging political situations in which there is little direct state interest to be gained from a more robust form of intervention whether it is to prevent further violations in a volatile environment or in response to post-conflict needs.⁶² For the realist, war crimes tribunals can serve a useful function but only to the extent that such institutions have limited jurisdictional scope. On one level, it may be possible to describe the realist/liberal divide over war crimes tribunals as being founded on fundamentally differing conceptions of the law itself. While it cannot be denied that the more reactionary realists continue to view international law as an obstacle to state interests,

⁶⁰ Roy Lee, 'Introduction: the Rome Conference and its Contributions to International Law', in *The International Criminal Court*, R. Lee (ed.) (Kluwer Law International, The Hague 1999) 1-39, 4. Bassiouni, 'Negotiating' 454. Article 31(3) allows the Court to "consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21." See also Cryer, 'The Boundaries', 4.

⁶¹ The absence of any reference to legal defences other than superior orders and immunity in previous statutes has been explained on the grounds that, "by making generally accepted legal rules applicable, they [judges] can and in their practice do take consideration" other potential defences; Otto Triffterer, *Commentary on the Rome Statute of the ICC*, Ambos & Triffterer (eds.) (Baden-Baden, 1999) 558-9.

⁶² For a similar 'realist response' see also Security Council Resolution 1593 (2005) referring the situation in Darfur to the Prosecutor of the ICC. This in part also accounts for the Bush administration's support for the Iraqi Special Tribunal as well as the Clinton administration's support for the ICTY.

it would seem that among the more moderate realists, what is really at issue is who has control over ICL's narrative.

1.2 CONTROLLING THE NARRATIVE

While all trials are selective narratives of one sort or another war crimes trials are particularly susceptible to the charge of being politicised selective narratives. For the realist, the apprehension that war crimes tribunals evoke is located in the fear that, in the hands of the 'wrong' narrator, the law may convey the 'wrong' narrative. This was certainly what disturbed the Foreign Office on hearing in late 1943 that the German government were intending to try British and American POWs for war crimes. Drawing the matter to the attention of the Chiefs of Staff, Sir William Malkin, Legal Advisor at the Foreign Office, warned:

[i]t seems to be extremely probable that if the Germans carry out their threat to put on trial British prisoners of war for war crimes, the first prisoners of war to be tried will be airmen. In announcing this yesterday the German radio said that these trials will be given all publicity, that British and American papers will have ample opportunity to publish reports and that the airmen will be able to reveal the exact nature of their bombing missions. . . . If these men are brought to trial *it is most important I think that the Allied case for bombing German war industries should be properly presented*; even if there were no publicity this would be important for purposes of record. If the trials are to receive maximum publicity it becomes much more important. But these airmen are young officers or NCO's who know little or nothing about the rules of air warfare, and they will get very little help from their German counsel. I foresee that they will be cross-examined on such questions as what is indiscriminate bombing, the definition of a military target, or the question of prior notice to civilians to evacuate an area which is to be bombed [emphasis added].⁶³

These very same fears are also found in the language of officials from the Bush administration as, for example, when announcing that the US would not become a party to the Rome Treaty, the Under Secretary for Political Affairs explained: "we must ensure that our soldiers and government officials are not exposed to the prospect of politicized prosecutions and investigations".⁶⁴ For the realist, maintaining full control over the narrative will continue to take priority over other considerations since to do otherwise is to risk the loss of power that would result as a consequence of the state being judged for its structural failures by the international community. This fear is no better exemplified than by the Bush

⁶³ Memorandum of 24 December 1943, FO 371/38990, PRO.

⁶⁴ Per Marc Grossmen, 'American Foreign Policy and the ICC', Remarks to the Center for Strategic and International Studies, Washing DC, 6 May 2002.

administration's global campaign to conclude Article 98 agreements prohibiting the signatory state to surrender US nationals to the ICC. Yet at the same time, the realists continue to emphasise their commitment to ending impunity and holding perpetrators of genocide, crimes against humanity and war crimes to account – even their own.⁶⁵ So how might these seemingly incongruous positions be reconciled? I suggest the problem lies in the inherent nature of the war crimes tribunal that situates the individual in a significantly broader historical narrative than that of the ordinary criminal trial or court martial. War crimes tribunals are often more than about the deviance or culpability of the individual and can function as a platform from which to deliver a judgment about the state itself. And it is the prospect of the individual being used as a conduit through which the state's conduct and policies are assessed that most alarms the realist.

Where the defendant is a non-national, war crimes tribunals can afford a useful means through which a broader narrative about failed histories, politics and ideologies of *other* states can be conveyed. But where the violator is a national, court martial proceedings are preferred because, only then, can the state effectively contain the narrative to the *criminality of the individual*. Moreover, the realist simultaneously seeks to distance the violator from the rest of his society by displaying indignation and disapproval at the deviant's conduct which can then be followed by a prosecution that functions to reaffirm the state's own integrity.⁶⁶ As long as the state of nationality of the offender is able to retain 'ownership'

⁶⁵ Grossmen, 'American Foreign Policy and the ICC'.

⁶⁶ For example, when evidence of torture and prisoner maltreatment was revealed at Abu Ghraib, President Bush, quick to distance himself from the violations, described what had happened as "abhorrent [and that] ... what took place in that prison does not represent the America that I know". A spokesperson from the coalition described the abuse as the work of a "few bad apples" who did not represent the US army. For further commentary, <http://news.bbc.co.uk/1/hi/world/americas/3685669.stm> (last accessed 06/06). For further information on the court martial of Private Lynndie England & others see <http://www.timesonline.co.uk/article/0,,7374-1597384,00.html>. In addition to the prosecutions relating to the torture at Abu Ghraib, the US has investigated and prosecuted dozens of alleged violations by its own soldiers in Iraq (for details, see <http://www.cid.army.mil/>, The US Army Criminal Investigation Command) including most recently, the events surrounding the massacre at Haditha http://news.bbc.co.uk/1/hi/world/middle_east/5033648.stm (last accessed 06/06). The UK has also investigated numerous allegations of violations by UK soldiers and has brought courts martial proceedings against over a dozen soldiers for their part in the death or maltreatment of Iraqi civilians. See also response of Prime Minister Blair to the evidence of abuse by British soldiers at camp Bread Basket, Basra in January 2006: "First, let me say that everyone finds those photographs shocking and appalling. There are simply no other words to describe them. However, in fairness to our armed forces, I want to make two points. First, the difference between democracy and tyranny is not that in a democracy bad things do not happen, but that in a democracy when they do happen people are held and brought to account, and that is what is happening under our judicial system. Secondly, the vast majority of those 65,000 British soldiers who have served out in Iraq have done so with distinction, with courage and with great honour to this country. So while we express in a unified way our disgust at those pictures, I hope that we do not allow that to tarnish the good name—fully deserved—of our British armed forces". For further details on the courts martial of Corporal Daniel Kenyon & two others, see http://www.army.mod.uk/news/year_2005/cgs_sentence_statement.htm.

over the narrative it is able to redefine the offence as one that is about individual deviance rather than state responsibility.⁶⁷

Paradoxically, it is the *sceptics* of the ICC who have most often cited the dangers of selectivity in a bid to undermine the credibility of the new court. In describing the ICC as an “institution too far” former UK Secretary of State for Foreign Affairs Lord Hurd warns:

governments making their own policies pick and choose between peace and justice to suit the requirements of each case. But a Court cannot pick and choose. It is concerned not with policy, but with law which has to be applied evenly if it is to command respect. Policy can be selective; law has to be universal. A Court which failed to prosecute individuals who belonged to powerful countries or who might be needed in a peace process however fearful their offences, would not be a true Court but just an instrument of policy pretending to be something else.⁶⁸

The underlying problem with Hurd’s position, if taken to the extreme, is that no prosecutions would be preferable to selective prosecutions. But in addition, Hurd’s statement reveals the very critique that has long-bothered the liberals – that war crimes trials have always been the prerogative of the powerful and are merely politics in disguise; in other words, war crimes trials are in effect, show trials.

Liberals have, on the other hand, always sought to distinguish between war crimes trials that, for all intents and purposes, are show trials and those that are founded on a sincere belief in the merits and value that legalism has to offer. For the liberal, the histories of war crimes trials are troubling because they have all too often been marred by selective enforcement guided by political considerations. Critics, like Cherif Bassiouni, have repeatedly condemned states for being all too willing to subjugate the pursuit of justice to their political interests as a result of which “impunity has become the political price paid to secure an end to the violence of ongoing conflicts or as a means to secure tyrannical regime changes”.⁶⁹ Justice, Bassiouni concludes, has become the victim of realpolitik evidenced by the absence of the uniform application of ICL. That the enforcement of ICL through war crimes trials is

⁶⁷ For example, those who took an active part in the torture and abuse at Abu Ghraib could be charged under Article 93 of the Uniform Code of Military Justice (UCMJ) for ‘Cruelty and Maltreatment’. The offence reads: “any person subject to this chapter who is guilty of cruelty towards, or oppression or maltreatment of, any person subject to his orders shall be punished as a court-martial may direct”. What is crucial is that the wording of this provision excluded any state involvement which contrasts sharply from the definition of torture under the Convention Against Torture.

⁶⁸ The Rt. Hon. Lord Hurd of Westwell, ‘Is there an international community?’ *The John Smith Memorial Lecture*, Edinburgh, 13 June 2002.

⁶⁹ Cherif Bassiouni, ‘Searching for Peace and Achieving Justice: the Need for Accountability’, (1996) 59 *Law and Contemporary Problems*, 9, 11-12.

characterised by selectivity is self-evident.⁷⁰ Few would argue that the most troubling aspect of the post-war tribunals were that they represented the most blatant form of selectivity – victor’s justice – insofar as they involved “the imposition of structures and processes for the collective prosecution of alleged atrocities by Axis Power individuals with no willingness to countenance the subjection of Allied Power individuals to the same or similar procedures”.⁷¹ This aspect of victor’s justice is perhaps most clearly reflected in the sheer number of trials (usually referred to as ‘B’ and ‘C’ category trials) held in the post-war period of Axis Power nationals compared with those held of Allied nationals despite evidence indicating that war crimes had also been committed by Allied soldiers.⁷² Given that they are rarely mentioned, the number of trials that were held by the Allies in the aftermath of the Second World War – quite apart from Nuremberg and Tokyo Trials – is staggering. In the Far East alone, the United States prosecuted 1,409 defendants in 474 trials;⁷³ Australia prosecuted 924 defendants in 296 trials;⁷⁴ Britain prosecuted 920 defendants in 306 trials;⁷⁵ China prosecuted 883 defendants in 605 trials;⁷⁶ the Dutch prosecuted 1,038 in 448 trials;⁷⁷ the Philippines prosecuted 169 in 72 trials;⁷⁸ the French prosecuted 230 in 39 trials;⁷⁹ Russian

⁷⁰ See G.J. Simpson, ‘War Crimes: A Critical Introduction’ in T.L.H. McCormack & G.J. Simpson (eds.) *The Law of War Crimes: National and International Approaches* (1997) 1, 11; T.L.H. McCormack, ‘Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law’ (1997) 60 *Albany Law Review* 681-732; R. Cryer, ‘The Boundaries’.

⁷¹ McCormack, ‘Selective Reaction’ at 717. As other commentators have already pointed out, the criticism of victor’s justice levelled at those who were involved in Nuremberg and Tokyo should not in any way, minimize the crimes of those found guilty by the respective tribunals. The victor’s justice argument was raised by the defendants at Nuremberg in a bid to dismiss the indictment on the grounds that the composition of the tribunal was exclusively made up of nationals from Allied States with no judges from neutral states taking part. On behalf of all the defendants Dr. Stahmer challenged the tribunal’s legitimacy reasoning: “...judges are appointed only by states that belong to one side of this war. This side is everything in one: creator of the charter, of the penal law, the prosecutor and the judge.” Rather than merely dismissing the problem Justice Jackson, Chief US Prosecutor, countered that “unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The world-wide scope of the aggressions carried out by these men has left but few neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves...”; <http://www.yale.edu/lawweb/avalon/imt/proc/v1-30.htm> (last accessed 11/02).

⁷² Records of the WUSt German Army Agency for Investigating Violations of International Law which was responsible for investigating allegations of war crimes by *all* nationals indicate that following the Nazi assault on Poland, many atrocities were committed by the Poles against the ethnic Germans; moreover, allegations of serious violations of IHL by Soviet troops against both the Germans and Polish population are also supported by credible evidence; B. Ferencz, Book Review (1981) 75 *AJIL*, 403.

⁷³ Philip Piccigallo, *The Japanese on Trial* (University of Texas Press, 1979) at 95 (hereinafter ‘The Japanese’); other writers have suggested different figures, see John Ginn, *Sugamo Prison, Tokyo* (McFarland & Co., N.C., 1992) at 56, who suggests that the Eighth Army Military Commissions based in Yokohama prosecuted 1,002 defendants instead of the 996 quoted by Piccigallo.

⁷⁴ Piccigallo, *The Japanese*, 139; see also David Bevan, *A Case To Answer* (Wakefield Press, 1994), 24.

⁷⁵ Piccigallo, *The Japanese*, 120.

⁷⁶ *Ibid.*, 173.

⁷⁷ *Ibid.*, 183.

⁷⁸ *Ibid.*, 197.

figures remain, to this day, undisclosed.⁸⁰ By contrast, trials of soldiers of the Allied Powers for offences committed during this period are few⁸¹ and restricted primarily to charges of espionage⁸² while there was no attempt to hold the leaders of any of the belligerent states responsible for decisions taken in the conduct of hostilities save that of the Axis Powers. The fundamental hypocrisy among the Allies is most visibly revealed by the inclusion of the Russian delegation as a full and equal participant in the Nuremberg process despite its appalling record.⁸³ As John Kenny explains:

[h]aving entered into a non-aggression pact with Germany, the Hitler-Stalin Pact of August 23, 1939, the Soviet Union proceeded to violate 'its treaties with Finland, Estonia, Latvia, Lithuania, Poland and Rumania, and annexed parts of Finland, all the Baltic States, and parts of Poland and Rumania.' ... yet instead of standing trial for these aggressive acts in violation of international treaties, agreements and assurances, Russia participated in the trial and punishment of the Nuremberg defendants.⁸⁴

But if the Russian leadership were guilty of violations of international law, so were the leaders of the other Allied Powers, albeit not to the same extent. Yet it was only the leaders of the Axis States who had to answer for their conduct and so while Admiral Raeder and

⁷⁹ *Ibid.*, 208.

⁸⁰ According to Piccigallo the Soviet Union continued during the post-war years to refuse to repatriate over 400,000 Japanese POWs claiming that they were 'war criminals'. After much pressure, the *Khabarovsk* Trial was held in December 1949 although it was essentially a 'political trial' where only a handful of defendants were tried under highly dubious circumstances; *The Japanese on Trial*, 141-157.

⁸¹ For example when, in reprisal for the Kharkov trials held by the Russians, the German Administration threatened to hold trials of British and American prisoners of war who had been accused of war crimes Foreign Office minutes addressed to Sir William Malkin in January 1944 state: "[t]he Germans have alleged that certain of our prisoners were guilty of atrocities in Crete and have sent us documents. *The claims are probably exaggerated but cannot be entirely dismissed*"; FO 371/38990, PRO. As Dinstein points out when war crimes are committed against an enemy's nationals states have been inclined "to show a remarkable degree of empathy for the root causes of the crime, often failing to prosecute or punish the offenders. Conversely, when a state is the victim of war crimes, it is liable to act ruthlessly and immoderately in responding to the same pattern of behavior"; Y. Dinstein, 'The Parameters and Content of International Criminal Law' (1990) 1 *Touro Journal of Transnational Law*, 315.

⁸² The issue of whether British citizens would also be prosecuted was raised in a Parliamentary question on 18 January 1944 by Sir Waldron Smithers but the question was restricted to those who had "committed acts of sabotage or fomented industrial strife or who [had] in any other way deliberately hindered the war effort".

⁸³ This caused great antagonism during the negotiations of the London Agreement between the US representative, Jackson, and the Soviet delegation headed by General Nikitchenko. See Whitney Harris, 'Justice Jackson at Nuremberg' (1986) 20 *International Lawyer* 867. Likewise, following the presentation of evidence by the prosecution on the effect of Hitler's Commando Order in Western Europe, Telford Taylor admits, "after the midmorning recess, we turned our attention to the East, but to protect Soviet sensibilities I disavowed any intention 'to make a full or even partial showing of war crimes on the Eastern Front'; *The Anatomy*, 255. See also R. Minear, in *Victors' Justice*, (Princeton University Press: NJ, 1971) 93-102, who observes that at no time did the Tribunal consider adjudicating on war crimes committed by the Allies.

⁸⁴ John Kenny, *Moral Aspects of Nuremberg* (1949), 118-119.

Alfred Rosenberg were each found guilty for their part in the planning of aggressive war against Norway – and for which the former was sentenced to life and the latter hanged – the fact that the British too were guilty of aggression against, what was in the Spring of 1940, a neutral Norway was largely ignored by the tribunal.⁸⁵ The victor's justice critique is perhaps best illustrated by the Allied bombing campaign on major German cities and in particular Dresden which has in recent years been subject to serious criticisms. Although the rules of warfare during the Second World War were ill-defined, it was generally recognised that the aerial bombardment of civilian populations was considered illegal.⁸⁶ Yet at a War Cabinet meeting held in July 1944 the Chiefs of Staff agreed “that the time might well come in the not too distant future when an all-out attack by every means at our disposal on German *civilian* morale might be decisive” and further recommended to the Prime Minister “that the method by which such an attack would be carried out should be examined and all possible preparations made”.⁸⁷ In January 1945 the War Cabinet authorised the “adjustment” of

⁸⁵ See Smith, *Reaching Judgment*, 149-151. Raeder defended his actions arguing that “our Intelligence Service ... had received reports at various times during the last week of September [1939] that the British intended to occupy bases in Norway.” Cabinet office and Chief of Staff documents during this period indicate that the intelligence information *was* accurate and that there was strong support among Cabinet members for a pre-emptive occupation of Norway (see CAB 65, PRO, for the exchange of correspondence on the legal consequence of whether to pre-empt or wait to react to Germany's potential invasion of Norway.) In his defence, Raeder further reasoned, “I described the dangers which might result to us from a British occupation of bases on the Norwegian coast and might affect our entire war effort, dangers which I considered tremendous. ...I told Hitler that the best thing for us would be strict neutrality on the part of Norway. ...[a]t the time I did not make any proposal that we should occupy Norway or that we should obtain bases in Norway. I only did my duty in telling [Hitler]...about this grave danger which was threatening us and against which we might have to use emergency defensive measures”; *The Trial of German Major War Criminals: Proceedings of the IMT*, Part 14, (HMSO, 1951), 145-147.

⁸⁶ A statement by Prime Minister Neville Chamberlain on 21 June 1938 outlining three principles that should govern the protection of civilians against aerial bombing was adopted in a Resolution of the League of Nations Assembly in 1938. It called for the prohibition of the intentional bombing of civilian populations, specifying that only identifiable military objectives should be targeted and suggested that care should be exercised to avoid the bombing by negligence of the civilian population. For further details see, D. Schindler & J. Toman, *The Laws of Armed Conflict*, (Martinus Nijhoff, 1988), 221-2.

⁸⁷ A memorandum entitled ‘Air Attack on German Civilian Morale’ was issued by the Chief of Air Staff in August 1944 in which five separate forms of attack were suggested and considered; PREM 4/100/10, PRO. These included:

- i) Widespread strafing attacks by fighters on civilian objectives in Germany. Such attacks can undoubtedly do much to cause widespread uneasiness and confusion. They could not, however, be applied on a sufficient scale to produce any catastrophic calamity or threat to the civilian population as a whole.
- ii) Air Control. As a variant of the above proposal, it has been suggested that we should proclaim that from a given date all road and rail movement in Germany should cease and that all disobeying this order would be attacked. It would not in fact be practicable to execute this threat effectively throughout a country such as Germany, with the forces available.
- iii) Attack of small towns (say 20,000 inhabitants). Towns of 20,000 inhabitants represent small targets which can only effectively be attacked by visual bombing and this must normally be carried out by day. To ‘write off’ a town of this size would require that 600 tons be aimed accurately at the target, and this on an average would demand the despatch of about 900 tons to each town in favourable weather conditions. ... It is ... difficult to even in the best conditions to achieve a scale of attack of sufficiently catastrophic force....

bombing priorities for the Strategic Bomber Forces: while oil plants remained the primary target of the bombing raids, the attack of Berlin, Leipzig, Dresden and associated cities were also listed as high priority targets on the basis that heavy attacks “will cause great confusion in civilian evacuation from the East...”⁸⁸ There is little doubt that the resulting destruction of Dresden by British and US bombers during the course of two days in February 1945 killing as many as 100,000 civilians would have been held to be a war crime had it been perpetrated by the Axis Powers.⁸⁹ The defendants did, of course, cite each of these examples of Allied misconduct within the context of the *tu quoque* plea – a doctrine that is better regarded as a principle of equity rather than as a criminal law defence.⁹⁰ In rejecting the plea as inapplicable, the tribunal in the *Ministries Case* held that even were Russia’s actions wholly untenable, and its guilt “as deep as that of the Third Reich ... this cannot in law avail the defendants or lessen the guilt of those of the Third Reich who were themselves responsible” while in the *High Command Case* the tribunal reasoned: “an accused does not exculpate himself from a crimes by showing that another committed a similar crime”.⁹¹ Although the tribunals’ decision to reject the *tu quoque* plea cannot be faulted, the dismissal of the doctrine high-lighted, what for the liberals, was the most problematic feature of war crimes tribunals: that they have always been, and will for the foreseeable future continue to be, characterised by selective enforcement – and therefore selective narratives by those who wield the most power both militarily and politically. To the extent that the judgments of the post-war tribunals have conveyed a strong and lasting impression about the criminality of the Axis States, combined with a deafening silence as to the conduct of the Allied States (thus indirectly legitimising their behaviour), their legacy from a realist perspective must be regarded as an unmitigated success. But the judgments of the post-war tribunals also conveyed another narrative in the form of a silence which has only in recent years begun to

iv) Berlin. The operational advantage of selecting Berlin as a target is that in view of its large size, attack is relatively free from restriction by weather conditions; the attack may be sustained over periods of bad weather by the use of blind bombing devices. It would thus be possible to arrange a heavy attack on Berlin at short notice and to maintain it for a number of consecutive days in all but the very worst weather conditions....

v) Other large towns. ...Immense devastation could be produced if the entire attack was concentrated on a single big town other than Berlin and the effect would be especially great if the town was on hitherto relatively undamaged. The political effect would however be less than that of comparable devastation in Berlin.”

⁸⁸ War Cabinet Chiefs of Staff Committee minutes, COS (45) 92, 1 February 1945, PRO.

⁸⁹ The outcome of the type of selective approach taken by the Allies at Nuremberg and Tokyo was that it seemed to almost legitimise Allied conduct during the war in comparison to the depravity of Axis Power atrocities; see T.L.H. McCormack, ‘Selective Reaction’, 719.

⁹⁰ Quincy Wright, ‘The Law of the Nuremberg Trial,’ 41 *AJIL* (1947) 38, 46.

⁹¹ *The Ministries Case*, 14 *TWC* 332-23; *The High Command Case*, 11 *TWC* 482. For a less convincing response to the Allied bombing of German cities, see *The Einsatzgruppen Case*, 4 *TWC* 466. But see Arendt, on the *tu quoque* argument and the problem of selective enforcement of ICL; Hannah Arendt, *Eichmann in Jerusalem: a report on the banality of evil* (Faber: London 1963), 234-35.

be addressed. For despite the abundance of evidence of serious offences directed specifically at women, and in particular the mass rapes that were perpetrated in both Europe and the Pacific, such information was often met with incredulity and very rarely prosecuted. And it was this silence that helped to sustain the gender biases inherent in ICL for the next fifty years.

1.2.1 The absent voice

If war crimes tribunals are, as I suggest, forums for conveying narratives that are controlled by those who exercise the most power, it is of little surprise that gender specific offences were absent or 'hidden from view' in the post-war statutes since the process of drafting these statutes was clearly dominated by the male voice.⁹² Nor is it surprising that little effort was made by the tribunals to prosecute gender specific offences even when such offences were expressly contained within the statutes since the tribunals themselves were dominated by men.⁹³ This near absence of any attention to offences that had disproportionately affected women in the conflict was clearly a reflection of male-centric perceptions about the priority that was accorded to some interests above others, rather than as a consequence of any lack of evidential material pointing to gross gender specific violations perpetrated during the war.⁹⁴

The effects of these failings were however far-reaching. The failure to expressly criminalise certain conduct was to convey the impression that there was no legal right to protect and to treat offences like rape as an inevitable feature of conflict.⁹⁵ But equally, the failure to prosecute an offence that had been expressly recognised was to treat the legal right it protected as a right that was intrinsically of a lesser value than those rights that were protected through prosecutions and to perpetuate the belief that rape, for example, was not as grave as other war crimes.⁹⁶ Moreover, the exclusion of the female voice from war crimes

⁹² As Campanaro points out nowhere in the IMT Charter was 'rape or 'sexual assaults' explicitly mentioned; Jocelyn Campanaro, 'Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes,' 89 *Georgia Law Journal* 2557 (2000), 2561. For a more detailed analysis of the different post-war statutes, see 2557-2565.

⁹³ There were of course some notable exceptions as in the trial of General Yamashita; see Campanaro, 'Women, War', 2564.

⁹⁴ The Nazis efficiently kept updated records and therefore, as Campanaro points out, there were ample reports and transcripts containing evidence of rape, forced prostitution, forced sterilization, forced abortion, pornography, sexual mutilation and sexual sadism; Campanaro, 'Women, War', 2561.

⁹⁵ For further commentary, see D. Thomas & R. Regan, 'Rape in War: Challenging the Tradition of Impunity,' *SAIS Review* 1994, 82-99.

⁹⁶ Campanaro, 'Women, War' 2561. But for a revealing study, see Joan Ringelheim, 'Women and the Holocaust: A Reconsideration of Research,' *Signs* 10:4 (1985: Summer) 741, 745. Critically re-examining her own work, Ringelheim comments, "one survivor told me that she had been sexually

trials was to conceal a further reality about the nature of women as victims in warfare: that women are usually victimized several times over – as enemy nationals, as women, as mothers.⁹⁷ And although gender bias in ICL has over recent years received far greater attention and scrutiny than ever before evidenced by revolutionary changes at the institutional level⁹⁸ as well as to the substantive law⁹⁹ and not least, with the unparalleled prosecutions of various forms of gender-related crime by the *ad hoc* tribunals,¹⁰⁰ bias continues to characterise war crimes trials and international law at a more subliminal level. This is so in two respects: first, through the legitimisation of the use of force (a masculine response) to maintain order and control; and second, through the retention of male-centric principles that underpin both humanitarian law and ICL.

It is widely accepted that the state has a monopoly on the right to resort to violence¹⁰¹ and that it uses force and the threat of force to maintain social order.¹⁰² According to liberal theory, were the state to relinquish its monopoly on violence, it would risk vigilantism or the

abused by a number of Gentile men while she was in hiding, when she was about eleven years old. Her comment about this was that is ‘was not important ... except to me.’ She meant that it had no significance within the larger picture of the Holocaust. By why should ideas about the Holocaust as a whole exclude these women’s experiences – exclude what is important to women – and thus make the judgment that women’s experiences as women are trivial?”

⁹⁷ For example during the Holocaust, Jewish women found themselves not only vulnerable as women but also in mortal danger as Jews. See generally Ringelheim, ‘Women and the Holocaust’. See also the Jager Report, produced by the commander of Einsatzkommando 3, in which a detailed record was kept of the massacres by the unit in Lithuania. In determining that the “Jewish problem for Lithuania” had been achieved, Jager further noted “I am of the view that the sterilization programme of the male worker Jews should be started immediately so that reproduction is prevented” but then concluded, “if despite sterilization a Jewess becomes pregnant she will be liquidated”; www.nizkor.org (last accessed 06/06).

⁹⁸ To date, two out of the three Chief Prosecutors to the ICTY and ICTR have been women and the number of women judges appointed to these tribunals has far exceeded any other international tribunal. In an effort to further build on this progress and to tackle overt institutional bias, Article 36 of the ICC statute that deals with the qualifications, nomination and election of judge to the ICC, attempts to secure a more equitable balance of representation; www.iccwomen.org/Elections/ELECTIONSindex.htm. In February 2003, of the 18 judges elected to the ICC, 11 were men and 7 women.

⁹⁹ The judgments of the *ad hoc* tribunals, too, have led to considerable advances in what Askin describes as “redressing crimes committed disproportionately against women and girls, particularly rape and sexual slavery”; Kelly Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles,’ (2003) 21 *Berkley Journal of International Law*, 288. See in particular, *Prosecutor v Furundzija* (IT-95-17/1-T), *Prosecutor v Delalic et al* (IT-96-21-T) and *Prosecutor v Akeyasu* (ICTR-96-4).

¹⁰⁰ See generally, Askin, ‘Prosecuting Wartime Rape’ and Campanaro, ‘Women, War’.

¹⁰¹ Max Weber ‘Political Concerns,’ in *From Max Weber: Essays in Sociology*, (H.H.Gerth & C. Wright Mills: eds.) (Routledge, London, 1997), 78. Weber also points out that that “...the right to use physical force is ascribed to other institutions or to individuals only to the extent to which the state permits it”. Nozick comments: “a state claims a monopoly on deciding who may use force when; it says that only it may decided who may use force and under what conditions; it reserves to itself the sole right to pass on the legitimacy and permissibility of any use of force within its boundaries”; Robert Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974) 23.

¹⁰² V. Spike Peterson, ‘Security and Sovereign States: What is at Stake in Taking Feminism Seriously?’ in *Gendered States*, V.S. Peterson (ed.) (Lynne Rienner Publishers: London, 1992), 46.

unilateral use of force by individuals that would inevitably lead to the dominance of the strong over the weak and ultimately, anarchy. But the very process of upholding the social order – whether internal or external – by means of force not only serves to maintain the deep structural gender biases that characterise the very makeup of the state itself¹⁰³ but also functions to perpetuate, reinforce and even institutionalise this ‘masculine’ response.¹⁰⁴ For in the hands of the state, violence itself is given legitimacy. What is more, at the international level, respect for the principles of ‘sovereignty’, ‘territorial integrity’ and ‘political independence’ function to “legitimize the maintenance of the state system in which direct violence is the ultimate arbiter of social conflict(s).”¹⁰⁵ And, not least, through *jus ad bellum* and *jus in bello*, violence is given legal form providing for its presence within reason¹⁰⁶ and because we seem destined to regulate the use of force rather than to transcend it, peace is paradoxically secured only insofar as it is a ‘negative peace’.¹⁰⁷

As with peace, justice too is conditioned on violence. Because war crimes trials are founded on the principles of legalism they are generally regarded as the embodiment of the triumph of law over power obscuring the fact that war crimes trials act “to legitimate an order achieved through military force.”¹⁰⁸ According to Chesterman, justice through war crimes trials can legitimate violence in two ways: “[f]irst, it explicitly validates certain acts of violence as lawful and acceptable [and] second, it binds the dominant conception of order (equated with ‘peace’) to the continual possibility of and respect for violence”. This process, Chesterman concludes, is “dominated by force, instrumental power, and the perpetual opposition of unitary actors [that, to all intents and purposes] may be characterized as a

¹⁰³ As Charlesworth, Chinkin & Wright remind us: “states are patriarchal structures ... because they are based on the concentration of power in, and control by, an elite and the domestic legitimation of a monopoly over the use of force to maintain that control. This foundation is reinforced by international legal principles of sovereign equality, political independence and territorial integrity and the legitimation of force to defend those attributes”; Hilary Charlesworth, Christine Chinkin & Shelly Wright ‘Feminist Approaches to International Law,’ (1991) 85 *AJIL* 613, 622.

¹⁰⁴ Reardon suggests that war has also “been legitimated and institutionalised”; Betty A. Reardon, *Sexism and the War System* (1985, Teachers College Press: New York) 13.

¹⁰⁵ Peterson, ‘Security and Sovereign States’, 48. See also David Kennedy, *International Legal Structures*, (1987, Nomos Verlagsgesellschaft: Baden-Baden) 261.

¹⁰⁶ D. Kennedy, *International Legal Structures* at 260.

¹⁰⁷ Peterson, ‘Security and Sovereign States’, 48. Kennedy had earlier commented on this paradox: “...this drive to overcome warfare – to institutionalize peace – seems, if not a continuation of violence, at least a continual reference to and respect for violence”; *International Legal Structures*, 283

¹⁰⁸ Simon Chesterman, ‘Never Again...and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond,’ (1997) 22 *Yale Journal of International Law*, 299, 321. Jacques Derrida also reveals the complex relationship between law and violence in *Force de Loi* when he observed: “après la cérémonie de la guerre, la cérémonie de la paix signifie que la victoire un nouveau droit. Et la guerre, qui passé pour la violence originaire ... est en fait une violence fondatrice de droit”. ‘Prenom de Benjamin’ in *Force de Loi* (Paris: Galilée, 1994) 97. (After the ceremony of war, the ceremony of peace signifies that victory has inaugurated a new rule of law. And so war, mistaken for crude violence, is in fact a violence which founds the law.)

masculine conception of international ‘order’”.¹⁰⁹ But in exposing that legal discourse is apt to mislead and lull us into believing that what we are engaged in is a gender-neutral process is certainly not to suggest that war crimes trials should be abandoned altogether for they can offer substantial benefits to individuals and communities alike; my aim, at this stage, is to reveal the structural biases that characterise ICL for only then can they be fully addressed.

The disproportionate effect that the legitimisation of violence in conflict has on women has been considered in some detail by scholars.¹¹⁰ In particular, Judith Gardam’s valuable insight and analysis has exposed how the laws of war are inherently gendered because international humanitarian law (IHL) takes as its norm the male combatant who is accorded priority treatment over civilians for reasons of military necessity. In distinguishing between combatants and civilians, IHL unavoidably integrates a gender component that incorporates assumptions as to the value of lives.¹¹¹ Gardam reveals not only how the rules of IHL reflect a particular view of the interests of states, but how the combatant plays an integral role in protecting those interests which can often be at the expense of the civilian.¹¹² And even within the subset of civilians, it is the male civilian who is treated as the norm around which IHL has evolved.¹¹³

That gender bias characterises ICL is only to be expected given that the discipline has evolved from an amalgam of IHL and human rights law and in doing so, has ‘adopted’ the “gendered blind spots of both traditions”.¹¹⁴ As I have already suggested, as far as the post-war tribunals are concerned, because it was predominantly men who determined what conduct was so grave as to warrant criminal prosecution, crimes that had disproportionately

¹⁰⁹ Chesterman, ‘Never Again’, 321.

¹¹⁰ For example, see Chris af Jochnick & Roger Normand, ‘The Legitimation of Violence: A Critical History of the Laws of War,’ (1994) 35 *Harvard International Law Journal*, 49; Judith Gardam, ‘Women and the Law of Armed Conflict: Why the Silence?’ [1997] 46 *ICLQ* 55; Simon Chesterman, ‘Never Again’, 299-343; Judith Gardam & Hilary Charlesworth, ‘Protection of Women in Armed Conflict,’ (2000) 22 *Human Rights Quarterly*, 148; Hilary Charlesworth & Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester University Press: Manchester, 2000).

¹¹¹ Judith Gardam & M. Jarvis, *Women, Armed Conflict and International Law* (Kluwer Law International: The Hague, 2001) 118.

¹¹² Gardam & Jarvis, *Women, Armed Conflict and IL*, 251; but see also 112-122. Gardam argues: “the role of the military is pivotal and, as we will see, the law reflects these values by privileging the life of the combatant. It does this through the doctrine of military necessity”; ‘Gender and Non-Combatant Immunity,’ (1993) 3 *Transnational Law and Contemporary Problems*, 345, 349.

¹¹³ See generally Gardam, ‘Why the Silence?’ and Gardam & Jarvis, *Women, Armed Conflict and IL*, 251.

¹¹⁴ H. Charlesworth, ‘Feminist Methods in International Law,’ (1999) 93 *AJIL*, 379.

affected women in war were more often than not overlooked.¹¹⁵ But if the *offences* were dictated by male interests, did *defences* also conceal gender biases and function to relegate the interests of women in conflict?

Records indicate that apart from a handful of pleas that were rejected absolutely¹¹⁶ the tribunals were persuaded in principle to admit most legal defences although they were usually denied on the facts. The willingness of the tribunals to admit defences that had evolved in the context of domestic criminal law does however raise questions as to whether, in the circumstances, it was appropriate to do so given the gravity of the offences that had been perpetrated during the conflict.¹¹⁷ But in addition to those defences traditional recognised under the domestic law, ICL also recognises a subset of justifications that derive from international law including for example, reprisals and military necessity. That these defences were admitted as valid legal pleas was to legitimise their presence in ICL. But against a backdrop of unprecedented massive civilian casualties, in which women had disproportionately been affected, whether these pleas functioned to protect the interests of men at the expense of women clearly requires careful but urgent consideration.¹¹⁸ What is clear is that in spite of the unparalleled advances in ICL, the statute of the newly created Court is not entirely satisfactory to the extent that “the definitions of previously existing principles are at times wider where defences are involved, and frequently narrower on

¹¹⁵ Gardam & Jarvis conclude that “historically, it has been actions most likely to affect men that have been criminalised and prosecuted. This trend has continued in the initiatives adopted by the Security Council to respond to violations of IHL”; *Women, Armed Conflict and IL*, 252.

¹¹⁶ Apart from immunity, the plea that the act was legal or obligatory under municipal law was also rejected; superior orders was despite the wording in the text of the statutes admitted subject to the ‘manifestly unlawful’ test.

¹¹⁷ Whether criminal law principles can readily be transplanted to the international arena will be considered more fully in the following chapter at 2.2.2.

¹¹⁸ Of the estimated 62 million deaths during World War II, 37 million comprised civilians; the war seemed to mark the beginning of a global trend to the extent that civilians have continued to be targeted at an alarming rate in conflict. In a report entitled *Women, Peace and Security*, submitted by the Secretary-General pursuant to Security Council resolution 1325 (2000) and published in 2002, it was confirmed that “while during the First World War, only 5 per cent of all casualties were civilians, during the 1990s civilians accounted for up to 90 per cent of casualties. ...in contemporary conflicts civilians are targets. Mass displacement, use of child soldiers, and violence against ethnic and religious groups, as well as gender-based and sexual violence, are common”; <http://www.un.org/womenwatch/daw/public/eWPS.pdf> (last accessed 10/03). These statistics have been challenged by a recent study conducted by the Human Security Centre at the University of British Columbia. According to the authors, the claim has no basis in fact and the ‘misinformation’ traced back to two sources: a report published by Uppsala University in 1991 entitled *Causalities of Conflict* in which the claim that nine out of ten victims of conflict are civilians included those killed and displaced by conflict. The authors maintain that the more accurate number killed as a consequence of conflict in 1989 stood at 67%; Human Security Report 2005, <http://www.humansecurityreport.info/> (last accessed 01/06). But while this figure may be lower, it is still unacceptably high and clearly disproportionate to the number of women who comprised regular army personnel which, in 1995, stood at 2 percent globally; Charlesworth, ‘Feminist Methods in International Law,’ 379.

inculpatory doctrines”¹¹⁹ and therefore fails to accurately reflect existing international law. To the extent that women continue to be disproportionately affected by the violence done by men, the consequences of this ‘realignment’ of the substantive law deserves further critical commentary.

1.3 THE PARADOXES OF ICL

If war crimes trials are merely forums controlled by the most powerful for transmitting partial and gendered messages, one might validly question whether there is much value to them. But if war crimes trials are criticised for doing too little, they are equally subject to the criticism that they do too much to the extent that major war crimes trials have been used as vehicles for producing broad historical/political narratives with didactic objectives. As such, they have come under attack not only for being inappropriate forums for delivering finite statements on such matters but also that they are simply incapable of adequately satisfying those objectives.

In this last section I argue that the strength of war crimes tribunals does not lie in the ability to record major historical events principally because the criminal law itself resists this trend. I suggest that the paradox of ICL is that it is both drawn by the need to contextualise within the larger historical/political narrative, but that because its foundations are located in the criminal law it needs to decontextualise the individual to locate culpability. If war crimes trials have a vital didactic purpose, I suggest that it is not primarily or necessarily to do with recording the ‘truth’ about the broader political or historic context within which the offence took place but rather about conveying the values and principles that liberal theory has to offer through the criminal law.¹²⁰ This is not to deny that such trials can also offer a symbolic statement that helps to facilitate post-conflict recovery for both the individual victims and post-conflict societies as a whole. But what war crimes trials are most effectively able to do – if done properly – is through the process of punishing the culpable offender, convey something more about the nature of liberal governance and to advance particular political values through the medium of legalism.¹²¹ For if these selective narratives – whether told in Nuremberg or Arusha, in The Hague or Baghdad – come to have

¹¹⁹ R. Cryer, *Prosecuting International Crimes* (CUP 2005), 326.

¹²⁰ It may be that truth and reconciliation commissions or local justice mechanisms like gacaca hearings are better able to offer to address and record the ‘truth’ unencumbered by the criminal law.

¹²¹ This, of course, is in *addition* to punishing culpable offenders.

the ‘power of truth’, they offer a powerful means through which to convey more than just a story about a defendant’s guilt or innocence.

1.3.1 History, politics and the decontextualised defendant

One of the most influential advocates of the view that war crimes tribunals should not delve into the realms of history is Hannah Arendt who, reporting on the Eichmann trial, vehemently argued:

the purpose of the trial is to render justice and nothing else; even the noblest of ulterior purposes – “the making of a record of the Hitler regime which would withstand the test of history,” ... can only detract from law’s main business: to weigh the charges brought against the accused, to render judgment, and to mete out punishment.¹²²

Arendt’s discomfort with Prime Minister David Ben-Gurion’s attempt to use the trial as an opportunity to further the goals of Israeli nation-building, also extended to the tactics used by the Prosecutor on the basis that they were “bad history” and “cheap rhetoric”, the consequence of which was that “it is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history”.¹²³ Arendt’s central critique is based on the view that the law should not try to answer the broader historical or political questions going to the origins of a conflict nor pass judgment between competing historical interpretations¹²⁴ because that risked undermining the right of the accused to due process and with it, the credibility of the law itself. A similar concern is shared by Shklar, albeit in the context of the IMT, when she observes that “history had to be tortured throughout in order to reduce events to proportions similar to those of a model criminal trial within a municipal system”.¹²⁵ For both Arendt and Shklar the law cannot easily – if at all – accommodate the wider historical events because the ‘truth’, according to the law, represents something quite different from history.¹²⁶ That the law is inherently inadequate becomes particularly evident in the wake of mass atrocities where the magnitude of the offences

¹²² Arendt, *Eichmann in Jerusalem*, 232. Arendt does however commend the parts of the judgment because the court had limited its inquiry to the question of law and justice.

¹²³ Arendt, *Eichmann*, 7-8

¹²⁴ “Justice demands that the accused be prosecuted, defended and judged, and that all other questions of seemingly greater import – of ‘How could it happen?’ and ‘Why did it happen?’, of ‘Why the Jews?’ and ‘Why the Germans?’, of ‘What was the role of other nations?’ ... – be left in abeyance”; *Eichmann*, 3.

¹²⁵ Judith Shklar, *Legalism*, 147.

¹²⁶ M. Koskeniemi, observes, “as criminal lawyers have always known, legal and historical truth are far from identical”; ‘Between Impunity and Show Trials’, (2002) 6 *Max Planck Yearbook of United Nations Law* 1, 11.

perpetrated are such that punishing an individual does not even begin to address the gross wrongdoings. As Arendt comments:

the Nazi crimes, it seems to me, explode the limits of the law... For these crimes, no punishment is severe enough. It may well be essential to hang Goring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. That is the reason why the Nazis in Nuremberg are so smug. ... We are simply not equipped to deal, on a human, political level, with a guilt that is beyond crime and an innocence that is beyond goodness or virtue.¹²⁷

But as Arendt also seems to concede, because even politics cannot respond adequately to mass atrocities, we are 'left' with nothing but the law despite its shortcomings:

it seems to me to be in the nature of this case that we have no tools to hand except legal ones with which we have to judge and pass sentence on something that cannot even be adequately represented either in legal terms or in political terms.¹²⁸

A second criticism that is directed at the law is its inability to offer more than one 'truth'.¹²⁹ Because the law can only offer a single narrative about a series of historical events it "is likely to discredit itself when it presumes to impose any answer to an interpretive question over which reasonable historians differ".¹³⁰ As Koskeniemi points out, this problem is even more difficult to resolve at the international level where there is a plurality of 'truths' and the challenge for a tribunal is in judging who's truth to convey. In Milosevic trial for example, "the narrative of 'Greater Serbia' collides head-on with the self-determination stories of the seceding populations, while political assessments of 'socialism' and 'nationalism' competes with long-term historical and religious explanations".¹³¹ As I have already suggested because the narrative that is accepted and officially adopted transforms into fact, it leaves alternative accounts largely ignored, dismissed, or at worst, disbelieved.¹³²

¹²⁷ Extract from letter date August 17, 1946 from Arendt to Jaspers, *Hannah Arendt Karl Jasper Correspondence 1926-1969* (Kohler & Saner: eds) (Harcourt Brace Joavanovich: London, 1992) 54.

¹²⁸ Extract from letter dated 23 December 1960 from Arendt to Jaspers in *Correspondence*, 417.

¹²⁹ Legal argument, Luban points out "is a struggle for the privilege of recounting the past"; David Luban, 'Difference Made Legal: The Court and Dr. King,' (1988) 87 *Michigan Law Review* 2152, 2152.

¹³⁰ Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, Transaction Publishers, London 1997, 119.

¹³¹ M. Koskeniemi, 'Between Impunity and Show Trials,' 12.

¹³² In a meeting held on 29 June 1945 in London to assess and plan for evidence gathering, the role of Jewish refugee groups were simply discounted as is evidenced by the minutes that state: "the view was expressed that their materials are mostly gossip and that their evaluations are very emotional. It was considered that they are not a useful source for evidence"; moreover, detailed reports into what had happened at Dachau and Buchenwald were considered of "questionable value". As Hagan & Greer observe, "the European victims of the Holocaust were not simply powerless ... but this

And the choice of one story above another is of crucial concern not just to the defendant but to the victims and to society, for that choice has real legal consequences.¹³³

A third criticism of the law is located in the nature of legal reasoning itself which is an inherently “repressive form of interpretive thought” that limits our understanding and comprehension of the social world.¹³⁴ The criminal law needs to treat the individual as ‘separate’ from his social context because the criminal law is a system that blames *individuals*.¹³⁵ The more the criminal law locates the individual in their social context the less it is able to assign individual liability and at the international level the law’s limits become even more evident. Within a criminal state, the individual offender becomes subsumed within the bigger narrative and begins to appear like an ‘innocent executor’ of some foreordained destiny.¹³⁶ Yet at the same time, the law’s focus on individualisation risks ignoring the environment within which the offence became possible – and even normal. As with the criminal law, ICL oscillates back and forth between needing to decontextualise the individual in order to find him criminally culpable which it can only really do by assuming that the individual has the capacity for individual judgment, yet at the same time ICL necessarily needs to situate the individual within a broader historic, social, cultural and political space. Although Koskenniemi speaks of not trying to settle the epistemological controversy about whether the individual or the contextual focus provides a better truth, it would seem that for both the criminal law and ICL, the focus must necessarily be on the individual.¹³⁷ And artificial though it may be, it is through defences that both the criminal law and ICL are able, most comfortably, to introduce context. Perhaps then judgments about history and politics are better serviced through truth commissions, or the works of historians and the conduct of politicians. I do not mean to avoid this difficult question; but it would seem that if we want the criminal trial to do more than it currently does, we may need to reinvent it. But if we do that, it may be that what we are left with is no longer a trial.

powerlessness placed them at risk of historical invisibility”.; J. Hagan & S. Greer, ‘Making War Criminal,’ 40 *Criminology* 231, 249.

¹³³ See generally Scheppele, ‘Foreword: Telling Stories,’ (1988) 87 *Michigan Law Review* 2073 and in particular 2085.

¹³⁴ J. Gabel, ‘Reification in Legal Reasoning,’ in *Marxism and Law* 262 cited by Kim Lane Scheppele, ‘Foreword,’ 2077-78. Judicial narratives are always selective and come to be regarded as the ‘truth’ “despite there being other versions that lead to other conclusions or other ways of seeing”; Scheppele, ‘Foreword’, 2074.

¹³⁵ I explore this more fully in Chapter 3.2.

¹³⁶ Koskenniemi, ‘Between Impunity and Show Trials,’ 16.

¹³⁷ Koskenniemi, ‘Between Impunity and Show Trials,’ 15.

1.3.2 Liberal theory and ICL

In a vitriolic attack on the International Criminal Court, Baroness Thatcher, former UK Prime Minister, has argued:

[t]he Nuremberg trials were attacked at the time as ‘victor’s justice’. And this is precisely what they were – and were intended to be. Far from being staged by uninvolved outsiders, they were organised by the powers which together had defeated and occupied Germany. It was these occupying powers which now exercised sovereignty there.

Why is all this so important? Because those now advocating ever greater intrusions of international justice into the affairs of sovereign nations repeatedly claim that in some sense they are building upon and fulfilling the aims of Nuremberg. And this is quite wrong...

I have no doubt that the twelve Nazi leaders sentenced to death for their part in the Nazi crimes deserved their fate. The Holocaust was the greatest crime committed against any group, nation or race. The disadvantage of treating the means by which these terrible figures received their just deserts as a trial with all the panoply of judges and lawyers was that it set an ambiguous precedent.¹³⁸

That Thatcher is unable to see the war crimes trial as anything but a ‘political’ instrument and a threat to the sovereign independence of states is typical of the realist view that considers the ‘moralistic’ Nuremberg model as both “misplaced and dangerously sentimental.”¹³⁹ In this final section I argue that this view, also espoused by an overwhelming majority in the Bush administration,¹⁴⁰ reflects a fundamental failure to recognise that, “[t]here are occasions when political trials [as with Nuremberg] may actually serve liberal ends, where they promote legalistic values in such a way as to contribute to constitutional politics and to a decent legal system.”¹⁴¹

That war crimes trials are ‘political’ trials seems to be self-evident; but as with any trial, it would seem that the more appropriate question to ask is what interests and normative values are being conveyed through such trials.¹⁴² In other words, what political objectives are these trials seeking to secure? I remain unconvinced by the view that liberal states pursue a policy

¹³⁸ M. Thatcher, *Statecraft* (Harper Collins, London) 2002.

¹³⁹ Falk, ‘Telford Taylor’, 706.

¹⁴⁰ Commenting on the role of the ICC following the Iraq conflict, Michael Byers notes, “[l]egal protections aside, even the theoretical prospect of international prosecutions of its soldiers and officials has left the Bush administration apoplectic. An absolutist conception of sovereignty prevails in Washington, where international rules that might constrain the US are regarded as threats to American democracy.” See ‘America in the Dock’ *Independent on Sunday* (London), 9 March 2003, p. 29.

¹⁴¹ Judith Shklar, *Legalism* (1964) 145.

¹⁴² Consider, for example, cases involving civil disobedience.

based on legalism as a “principled idea” and out of a sense of what is *right* or *just* since legalism is better understood as a policy or instrument that is compatible with different definitions and understandings of ‘justice’.¹⁴³ Legalism, I suggest, might be better viewed as a policy through which liberal states have most effectively been able to channel and control private violence while transmitting some of liberalism’s core political values.¹⁴⁴ Liberal states instinctively turn to trials and legalism not because they are inherently ‘better’ states but because the criminal law serves as an effective means through which to respond to private violence and a powerful tool by which to govern. As Judith Shklar, commenting on the International Military Tribunal (IMT), suggests:

The Trial fulfilled an immediate function which is both the most ancient and the most compelling purpose of all criminal justice. It replaced private uncontrolled vengeance with a measured process of fixing guilt in each case, and taking the power to punish out of the hands of those directly injured. ... When one remembers the setting in which the Trial took place, it is clear that these men had to be punished. The only consequence of officially doing nothing would have been to invite a perfect blood bath, with all its dynamic possibilities for anarchy and conflict on an already disoriented continent.¹⁴⁵

For liberal theory, private violence poses a serious structural threat for if it is not controlled, it risks the rule of the strong over the weak, and threatens to undermine the “strong norm at the heart of liberal morality: the self-exemption prohibition”.¹⁴⁶ One way that liberal states safeguard and protect this norm is obviously through the separation of powers, an integral feature of liberal criminal justice. That liberal theory needs there to be clearly defined boundaries between the different organs of the state explains the response by the Foreign Office in June 1944 when, on hearing that the Nazis were to hold trials of British and American prisoners of war who had been accused of war crimes, it was stated: “we cannot object to trials, if properly conducted, in principle and we have urged the Germans on several occasions that British prisoners whom they have captured in Norway while they were engaged on special operations, should have been tried before being shot.”¹⁴⁷ This need to separate, functions to sustain the prohibition on self-exemption and is replicated at all levels: at the institutional level it is clearly ‘visible’ through judgments including, for example, the Supreme Court’s decision in *Hamdan* or the Law Lords’ decision in *A(FC) and*

¹⁴³ Bass, *Stay the Hand of Vengeance*, 7; see also Shklar *Legalism* 113-123.

¹⁴⁴ For example, Shklar suggests that Nuremberg functioned as “a legalistic way of coping with violence, vengeance, disorder, and even the future of German politics”; Shklar *Legalism* 147.

¹⁴⁵ Shklar, *Legalism*, 158.

¹⁴⁶ Per Stephen Holmes, *The Anatomy of Antiliberalism* at 238 cited by V.F. Nourse, ‘Reconceptualizing Criminal Law Defenses,’ 1738.

¹⁴⁷ FO 371/38990, PRO.

others v Home Secretary.¹⁴⁸ But the need to ‘separate’ is also found in the law itself and in individual defences which will be explored in the following chapters.

A second way in which liberal criminal law safeguards the prohibition on self-exemption is through an uncompromising commitment to processes and rules that are applicable to all citizens without exception. For Justice Jackson, the rule of law was a fundamental political principle that could best be conveyed through a trial that would “set the tone of the Allied occupation of Germany by showing that a government of laws and not of men has begun”. Liberal states *had* to be distinguished from totalitarian ones and the law provided the answer since the alternative, “a political disposition of the Axis leaders ... would look like, and would be, a continuation of totalitarian practices”.¹⁴⁹ And although the criminal law’s inability to adequately respond to mass atrocities is generally regarded as an inherent failing of the law, by treating the leaders of such atrocities within the same legal framework as that of the common criminal, liberal criminal justice underscores the principle that all men are subject to the same laws. Thus, in responding to Arendt’s unease over the Nuremberg tribunal, Karl Jasper suggests that prosecutions are necessary because:

a guilt that goes beyond all criminal guilt inevitably takes on a streak of ‘greatness’ – of satanic greatness – which is, for me, as inappropriate for the Nazis as all the talk about the ‘demonic’ element in Hitler and so forth. It seems to me that we have to see these things in their total banality, in their prosaic triviality, because that’s what truly characterizes them¹⁵⁰

And perhaps it is only through the trial that we are able to perceive and judge former leaders as ordinary men despite their extraordinary offences:

It was only in the courtroom, at the American military base, that their physical insignificance, their sheer unremitting ordinariness, became so plain.

On television last Thursday, the images of the 12 former Iraqi leaders conveyed an altogether bigger impression, perhaps because the lens tightened until their faces filled the screen. But to a reporter sitting 25 feet away, for the five hours it took to complete preliminary hearings against Saddam Hussein and 11 others who terrorized Iraq, they seemed to have shrunk, pressing home the question: How could these utterly unremarkable men, forgettable in any other context,

¹⁴⁸ *Hamdan v Rumsfeld*, SC decision 29 August 2006; *A(FC) and others (FC) v Secretary of State for the Home Department*, [2005] UKHL 71, 8 December 2005.

¹⁴⁹ “A purely political disposition of the Axis leaders without trial, however disguised, may be regarded eventually, and probably immediately, as adoption of the methods of the Axis itself”; *Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders*, Report of the R. Jackson, 30 April 1945; <http://www.yale.edu/lawweb/avalon/imt/jackson/jack05.htm> (last accessed 06/06).

¹⁵⁰ Extract from letter dated 19 October 1946 from Jaspers to Arendt in *Correspondence*, 62-NTV.



have so tyrannized their 25 million countrymen that they remained unchallenged for 35 years?¹⁵¹

But liberal criminal justice conveys more than just the prohibition on self-exemption, for it seeks to disseminate pluralism, social diversity and tolerance. Liberalism is committed to the belief that “tolerance is a primary virtue and that a diversity of opinions and habits is not only to be endured but to be cherished and encouraged”¹⁵² and it is through the criminal law and individual legal defences that liberal states are able to accommodate and mediate between conflicting interests. As Shklar comments:

law as a political instrument can play its most significant part in societies in which open group conflicts are accepted and which are sufficiently stable to be able to absorb and settle them in terms of rules... A trial, the supreme legalistic act, like all political acts, does not take place in a vacuum. ... A trial within a constitutional government is not like a trial in a state of near-anarchy, or in a totalitarian order.¹⁵³

To return once again to the question posed at the beginning of this chapter as to why states support the creation of war crimes tribunals, the answer may lie in the fact that liberal states intuitively recognise the enormous potential benefits that such trials offer and in spite of the risk that one day those very tribunals may even turn against the creators, the advantages simply outweigh the risks they pose. Certainly insofar as the ICC is concerned, those liberal states that have supported its creation rely on the complementarity provision within the statute to preserve their ‘ownership’ over prosecuting their own nationals. They do so not necessarily because the defendant is their national but because, by contrast to the ‘visual scope’ of international tribunals which extends beyond the individual to the state itself, the criminal law, as with courts martial proceedings, remains ‘blind’ to the presence of the state. The consequence of this is that the state’s participation and involvement is simply excluded.

¹⁵¹ John Burns, ‘Shrunk to Size, Hussein Faces His Reckoning,’ *New York Times*, 4 July 2004.

¹⁵² Shklar, *Legalism*, 5.

¹⁵³ Shklar, *Legalism*, 144.

CHAPTER 2

LOCATING DEFENCES IN ICL SOME CHALLENGES

But for the huge selection of literature on *superior orders* the lack of scholarly interest in ICL defences – at least prior to the emerging jurisprudence of the ICTY and ICTR and the adoption of the Rome Treaty – is not disputed.¹ The issue of whether or not individuals accused of committing the most serious crimes should, in principle, be entitled to rely on a legal defence that exempts them from responsibility or punishment is an emotive one. Thus, what is more surprising is that so *little* commentary has been generated on the topic.

An alternative explanation is that it is only in recent years that scholars have begun to *systematically* examine the constituent elements that make up the ‘general part’ of ICL of which defences comprise but one aspect. What is more, it seems that scholars who have been drawn to ICL, have been primarily concerned with the normative development of the ‘general part’ that focuses on responsibility. Perhaps the most convincing explanation for the absence of critical commentary and analysis is simply that this reflects the lack of juridical pronouncements on individual defences by international tribunals since where courts have dealt with specific defences – as in the case of *Erdemovic* and *Kupreskic*² – scholarly commentary is immediately stimulated.

In the following section I first locate ICL within public international and then consider the doctrine of sources in international law and specifically as it relates to ICL. The traditional sources not only define the boundaries within which the law might be identified but determine the relative value of the respective sources which patently affects how the scope and content of a defence in ICL might be defined. Given its relative short history, the indeterminacy of the law continues to challenge adjudicators and scholars alike. In the second section I consider some of the competing ‘visions’ of ICL that have been preferred by adjudicators to illustrate the extent to which a preference for a particular perspective or methodology has real legal consequences. My purpose is both descriptive and analytic for I suggest that the traditional views are based on assumptions that fail to recognise the biases

¹ Albin Eser describes the topic as a “vast *terra incognita*”; “Defences” in War Crimes Trials, (1995) *Israel Yearbook on Human Rights* 201-222, 202.

² In the case of the former, duress was at issue while in the case of the latter, the law on belligerent reprisals was debated in some depth by scholars.

that characterise the law. In the final section I explore other contributions and commentaries on defences in ICL to show how this work may be distinguished from the work of other contributors in the field.

2.1 SOURCES

Most commentators share the view that ICL should be regarded as a branch of public international law;³ accordingly, the relevant sources of law are to be found in international law. But while it might be convenient to view ICL as a branch of public international law, the premises on which each body of law is constructed differs significantly. As such, before examining the different sources, a number of observations about the nature of ICL seems not only apposite but necessary.

The underlying objective of public international law is to promote the co-existence and co-operation between states; as a result the rules and principles that apply in international law have generally been determinate where the rule is facilitative in nature but indeterminate where the rules have contained a moral element.⁴ Consequently treaties and customary international law principles that contain a heavy moral content have inclined to encapsulate fairly broad normative standards and even those treaties that proscribed certain conduct in conflict failed to provide a corresponding enforcement mechanism.

With the establishment of the Nuremberg tribunal, the traditional perception that the 'international' was the exclusive domain of states was fundamentally altered. That *individuals* also had rights and responsibilities in international law was to prompt the emergence of two new bodies of law: international human rights law and international criminal law. Both bodies of law would find their way into the texts of the Geneva Conventions which, *inter alia*, created a regime of grave breaches that "opened the way" for prosecutions.⁵ Nevertheless, for reasons primarily linked to the outbreak of the Cold War,

³ A. Cassese, *International Criminal Law* (OUP, 2003) 16. Dinstein suggests that ICL should be regarded as a "branch of international law, just as Italian criminal law is a branch of Italian law"; Yoram Dinstein, 'The Parameters and Content of International Criminal Law,' (1990) 1 *Touro Journal of Transnational Law*, 315.

⁴ As Roberts observes, "claims about 'morality' are contentious because it remains unclear whether morality is objective or culturally relative"; A. Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation,' [2001] 95 *AJIL* 757, 762.

⁵ Bing Bing Jia, 'Protected Property and Its Protection in International Humanitarian Law,' (2002) 15 *Leiden Journal of International Law*, 131, 134. Citing both state practice and *opinio juris* the Nuremberg Tribunal held that a finding of individual criminal responsibility was not barred by the lack of treaty provisions providing for the punishment of violations. According to the tribunal there was clear evidence to indicate that states intended to criminalise certain conduct and because "crimes against international law are committed by men, not by abstract entities"; moreover the tribunal went

ICL as a discipline was to develop in a piecemeal fashion initially through the jurisprudence of the post-war tribunals, but more recently through the work of the *ad hoc* tribunals.⁶

ICL provides a normative framework that allows for the criminalisation of *some* serious violations of international humanitarian law (IHL) and international human rights (HR) law. Since not all violations of IHL translate into offences that incur criminal responsibility,⁷ what is considered 'harm' in international law can seem incongruous and arbitrary.⁸ That this is so is of little surprise since the discipline amalgamates and attempts to reconcile the penal aspects of international law and IHL with principles derived from national criminal law while maintaining a legal distinction between offences committed in wartime and those committed in peace, and between those perpetrated in international conflicts and those committed in internal conflicts. These separations are politically convenient and from the vantage of the parties to the respective treaties are internally coherent. The law therefore treats the distinctions as necessary yet at the same time they are clearly artificial divisions and, as such, from the perspective of women who are victims of violence they remain difficult to justify. As Rehn and Sirleaf explain:

The extreme violence that women suffer during conflict does not arise solely out of the conditions of war; it is directly related to the violence that exists in women's lives during peacetime. Throughout the world, women experience violence because they are women, and often because they do not have the same rights or autonomy that men do. They are subjected to gender-based persecution, discrimination and oppression, including sexual violence and slavery. ...Because so much of this persecution goes largely unpunished, violence against women comes to be an accepted norm, one which escalates during conflict as violence in general increases. Domestic violence and sexual abuse increase sharply. Militarization and the presence of weapons legitimize new levels of brutality and ever greater levels of impunity.⁹

ICL's willingness to accept IHL's distinctions has meant that certain forms of violence even when committed in the midst of conflict, are simply not the concern of international law thereby perpetuating the public/private divide that leaves a significant proportion of women marginalised and stripped of a legal remedy. A further troubling consequence of the

on to state: "only by punishing individuals who commit such crimes can the provisions of international law be enforced."

⁶ M. McAuliffe de Guzman, 'Article 21' in *Commentary on the Rome Statute*, Otto Triffterer (ed.), 435, 438. In his separate opinion in *Tadic*, Judge Abi-Saab regarded the establishment of the *ad hoc* tribunals as affording "a unique opportunity to assume the responsibility for the further rationalisation" of ICL given the piecemeal way in which the discipline had evolved; (IT-94-1) Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

⁷ See *Prosecutor v Tadic* (IT-94-1), Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para.94.

⁸ Ratner has famously described ICL to be 'schizophrenic'; Steven Ratner, 'The Schizophrenias of International Criminal Law,' (1998) 33 *Texas International Law Journal*, 237.

⁹ E. Rehn & E Johnson Sirleaf, *Women, War and Peace*, [2002] UNIFEM, 10-11.

amalgamation of IHL, IHR and the criminal law is that ICL has adopted the “gendered blind spots”¹⁰ of each discipline. Although significant progress has been achieved through both the jurisprudence of the *ad hoc* tribunals and the codification of offences that disproportionately affect women in conflict ICL has, as I have already suggested, too readily embraced the masculine language and discourse of IHL which has reinforced the development of a discipline based on a male-dominated vision characterised by male-centric values.

While a tribunal’s primary source of law is to be found within its own statute, that treaties and customary international law principles that encapsulate obligations entered into between states provide much of the content of the law, remains a conceptually challenging feature of ICL. In recognition of the special nature of international *criminal* law, Article 21 of the ICC Statute – which constitutes the first codification of the sources of ICL¹¹ – *modifies* the traditional sources of international law¹² and reads:

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedures and Evidence;
 - (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion, or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

¹⁰ Charlesworth ‘Feminist Methods’, 386.

¹¹ McAuliffe de Guzman, ‘Article 21’, 438.

¹² *Ibid.*, 436. The ‘traditional’ sources refers to Article 38(1), which is the most authoritative statement on the source of general public international law provides: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

This provision leaves much to judicial discretion. The ‘principles and rules of international law’ refers to customary international law, of which there are two elements: state practice and *opinio juris*.¹³ The jurisprudence of the International Court of Justice (ICJ) suggests that for a rule to be regarded as part of customary international law, state practice needs to be both widespread and consistent.¹⁴ Moreover, *opinio juris sive necessitatis* – the belief by states that certain conduct is legally obligatory or permitted – is considered a necessary prerequisite to establishing the existence of a customary rule.¹⁵ Somewhat paradoxically, despite the emphasis placed by the Court on the need to show widespread and consistent state practice, in the *Nicaragua (Merits)* case¹⁶ the ICJ willingly ‘found’ a customary international law rule on non-intervention derived primarily from statements made by states and General Assembly resolution with little regard for actual state practice. This suggests a shift in emphasis as to how customary law might validly be identified particularly where the subject matter contains a strong normative element.¹⁷

As with the ICJ, international tribunals – including both the post-war and *ad hoc* tribunals – have been far more disposed to ‘finding’ customary international law through a process of ‘deduction’ with an emphasis on *opinio juris* rather than state practice. Theodore Meron has observed that international courts have a tendency to ignore the lack of evidence of state practice and “to assume that noble humanitarian principles that deserve recognition as the positive law of the international community have in fact been recognized as such by States. The ‘ought’ merges with the ‘is,’ the *lex ferenda* with the *lex lata*.”¹⁸

While this trend has been welcomed in many quarters, it has also been the subject of significant criticism by those who prioritise descriptive accuracy over substantive normativity.¹⁹ Any attempt to accommodate the views of those who favour the traditional inductive approach to identifying custom from state practice with those who favour a

¹³ *North Sea Continental Shelf Case*, I.C.J. Reports 1969, para.77. For the sake of clarity, I adopt the distinction used by Anthony D’Amato between action – as state practice – and statements – as *opinio juris*. Treaties and declarations are therefore treated as *opinio juris* because they are statements about the legality of the action rather than examples of the action. For a critical comment on the fallacy of the orthodox two-element theory for identifying customary law, see M. Koskenniemi, ‘The Pull of the Mainstream,’ (1990) 88 *Michigan Law Review*, 1946, 1952.

¹⁴ See in particular *Anglo-Norwegian Fisheries case*, I.C.J. Reports 1951, 116. In the *North Sea Continental Shelf case*, the ICJ noted that for a rule to be considered as binding under customary law, state practice had to be both “extensive and virtually uniform”. I.C.J. Reports 1969, para.74.

¹⁵ *S.S. Lotus (France v Turkey)* 1927, P.C.I.J. Reports, Series A, No. 10.

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.) I.C.J. Rep.* 1986.

¹⁷ J. Tasioulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case,’ 16 *Oxford Journal of Legal Studies*, 85.

¹⁸ T. Meron, ‘The Geneva Conventions as Customary Law,’ (1987) 81 *AJIL* 348, 361.

¹⁹ See chapter 5.3 on belligerent reprisals.

'modern' deductive approach that focuses primarily on *opinio juris* will no doubt prove futile.²⁰ It is however difficult to envisage the ICC adopting any approach in identifying the principles and rules of customary international law other than the 'modern' one embraced by all previous international criminal tribunals. As Meron points out, tribunals "are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law".²¹

The reference to 'general principles' in paragraph 1(c) includes, for example, such well-established international law principles as legality, specificity, and the presumption of innocence, all of which can be traced back to domestic criminal law principles; but the provision also allows the Court to consider any other general principle by means of comparative law analysis.²² But if the jurisprudence of the *ad hoc* tribunals is anything to go by, determining the scope and content of the law will no doubt continue to be dominated by compromises reached between the adversarial and inquisitorial methodologies.

One issue that continues to cause concern is whether ICL 'borrows' too indiscriminately from national criminal law paradigms given that ICL differs from domestic criminal law in very fundamental ways.²³ This was certainly a matter that concerned those who advocated a legal solution to the atrocities that had been committed by the Nazis since in dealing with the defendants it was necessary to act as though an international legal system existed analogous to a domestic order.²⁴ But in view of the fact that ICL has structured itself on the domestic model and does 'extract' from domestic criminal law, my concern throughout the rest of this work is to ask whether what has been 'replicated' on the international level is sustainable in its own right.²⁵

²⁰ See generally, Roberts, 'Traditional and Modern'.

²¹ Meron, 'The Geneva Conventions' 361.

²² For additional commentary, see *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, S. Ratner & J. Abrams (eds), OUP (2001), 21-24.

²³ Minear also comments: "[i]nternational law is not domestic or national law. In domestic law there is not often question as to who is sovereign, not often question as to who makes or interprets law. In international law, however, these are very real questions. In the absence of world government, who makes law and who interprets it? If 'all civilized nations' – what exactly does 'civilized' mean? – are party to a treaty establishing a tribunal, defining international crimes and setting punishments for these crimes, then there are few problems"; Minear, *Victors' Justice*, 35. Dinstein also stresses the importance of distinguishing ICL from domestic criminal law and comparative criminal law on the grounds that ICL does not reflect the fundamental precepts shared by the domestic criminal laws of sovereign states; 'Parameters', 315.

²⁴ Shklar, *Legalism*, 146.

²⁵ Drumbl suggests that "when deconstructed, the discipline of international criminal justice lacks independent theoretical foundations". He continues "the structure, modalities, rules and methodologies of international criminal process and punishment largely constitute an extension of the structure, modalities, rules and methodologies of ordinary criminal process and punishment"; M.

Whether the “expropriation” of domestic methodologies to the international level is appropriate given the stark contrast between the context within which offences in domestic law and international offences take place is a particularly vexing question where culpability is concerned. Because the latter often contain a “group component” the deviant nature of the conduct in question is often partially concealed particularly in environments in which state-sanctioned violence has become the norm.²⁶ Of course this is not to suggest that those who have participated in the violence should be able to rely on a culture, climate or environment of ‘collective violence’ in mitigation or exculpation for then we come close to treating collective violence as an excuse behind which the individual might take shelter. But the collective nature of mass atrocities highlights the inherent weakness in the criminal law that focuses exclusively on the doctrine of *individual* culpability for wrongdoing. As a consequence, it has been suggested that the notion of responsibility in ICL might require reconceptualisation or even modification because it fails to fully capture the culpability of individuals who have participated in mass atrocities as part of a collective.²⁷ The recent jurisprudence of the tribunals is, however, conveying a mixed message as judgments seem to vacillate between broader notions of vicarious liability that incorporate the ‘collective’ to narrower traditional understandings of responsibility that focus on the individual’s culpability.²⁸

Comparative criminal lawyers have long advocated a cautious approach to legal transplants, arguing that the doctrinal, historical, sociological, structural and procedural characteristics between different criminal jurisdictions are so divergent that careful introspection is called for before embracing any form of legal transplant across jurisdictions.²⁹ But if ‘transplants’

Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity,’ (2005) 99 *Northwestern University Law Review* 539, 566-67.

²⁶ Drumbl, ‘Collective’, 567-69.

²⁷ Drumbl, ‘Collective’, 572. Mark Osiel also suggests that because state atrocities are often “the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organisations in the execution of criminal policies initiated at the highest levels of government” standard legal doctrines may prove inadequate; Osiel, ‘The Banality of Good: Aligning Incentives Against Mass Atrocity,’ (2005) 105 *Columbia Law Review* 1751, 1767. But also see M. Dan-Cohen, ‘Responsibility and the Boundaries of the Self,’ (1992) 105 *Harvard Law Review* 959, 985-89 and G. Fletcher, ‘Liberals and Romantics at War: The Problem of Collective Guilt,’ (2002) 111 *Yale Law Journal*, 1499.

²⁸ See *Prosecutor v Blaskic*, (IT-95-14-A) in which the Appeals Chamber reversed 16 of the 19 convictions and *Prosecutor v Krstic* (IT-98-33-A) where the tribunal held that in the case of a joint criminal enterprise, the intent had to be shared by the co-perpetrators.

²⁹ See for example, Malcolm Feeley, ‘Comparative Criminal Law for Criminologists: Comparing for What Purpose?’ in *Comparing Legal Cultures*, (David Nelken ed.), (Dartmouth, 1997) Chapter 5; Pierre Legrand, ‘How to compare now,’ (1996) 16 *Legal Studies*, 232-242; John Reitz, ‘How to Do Comparative Law,’ (1998) 46 *AJCL*, 617-636. T. Franck warns: “certainly, notions of basic human rights, limits on authority, distributive justice, and so forth developed in one society or culture, may

between jurisdictions (horizontal) demands caution, so do transplants between national and international levels (vertical). This sentiment was also voiced by Judge Cassese who warned against mechanically importing and automatically applying national laws in international criminal proceedings preferring a far more guarded approach when contemplating legal transplants.³⁰ The problems that direct transplants are prone to cause is clearly illustrated in the case of the wording of self-defence in Article 31 of the ICC Statute in which the concept of the protection of property – while widely recognised in national legal systems – was introduced into ICL with arguably inadequate consideration to the specificity of ICL.³¹

Describing the evolution of international norms through the ascending incorporation of domestic law into principles of ICL as a “process of hybridization”, Mireille Delmas-Marty suggests that this process goes beyond “simple juxtaposition, requiring genuine, creative recomposition through the search for a synthesis of, or equilibrium between, diverse elements or diverse systems.”³² Delmas-Marty argues that hybridization would address the unfortunate division that arose in the Appeal Chamber in the case of *Erdemovic* because it would “provide safeguards against law-makers who give precedence to a dominant legal system and judges who attempt to legitimate *a posteriori* a solution that they have already chosen.” But while hybridization may, in theory, offer the most satisfactory methodological approach in determining the scope and content of the law, on a practical level a resolution between two diametrically opposed positions may not be a viable option. In such instances the most equitable solution may be that judges should be encouraged to apply the national laws of the accused as this would offer “the best way to further effective progressive development, even at the expense of uniformity of the law.”³³ This point was also raised by Judge Cassese in *Erdemovic* when he convincingly argued:

have global application, but the transfer must be justified and its rationale cannot simply be assumed...Without teleological justification, transfer will fail. With it, transfer is often, hearteningly possible”; Thomas M. Franck, *The Power of Legitimacy Among Nations*, (OUP: Oxford, 1990) 14.

³⁰ Separate and Dissenting Opinion of Judge Cassese, *Erdemovic*, para.2. See also *Prosecutor v Furundzija* (IT-95-17) Trial Chamber judgment 10 December 1998, paras.177-8 and *Prosecutor v Blaskic*, (IT-95-14-AR108bis) para.23, Appeals Chamber, 29 October 1997 in which the Court held, “[d]omestic judicial views or approaches should be handled with the greatest caution at the international level, lest one should fail to make due allowance for the unique characteristics of international criminal proceedings”. For additional commentary see Mireille Delmas-Marty, ‘The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law,’ (2003) 1 *JICJ*, 13-25, 20. Along similar lines, Thomas Franck also warns: “certainly, notions of basic human rights, limits on authority, distributive justice, and so forth developed in one society or culture, may have global application, but the transfer must be justified and its rationale cannot simply be assumed. ...Without teleological justification, transfer will fail”; *The Power of Legitimacy Among Nations*, 14.

³¹ See 5.1.2 for further analysis.

³² Delmas-Marty, ‘The Contribution of Comparative Law’, 18.

³³ Jose Alvarez, ‘Crimes of States, Crimes of Hat: Lessons from Rwanda’, (1999) 24 *Yale Journal of International Law*, 365, 462.

assuming that no clear legal regulation of the matter were available in international law, arguably the Appeals Chamber majority should have drawn upon the law applicable in the former Yugoslavia. In the former Yugoslavia and in the present States of the area the relevant criminal law provides that duress (called “extreme necessity”) may amount to a total defence for any crime, whether or not implying the killing of persons. A national of one of the States of that region fighting in an armed conflict was required to know those national criminal provisions and base his expectations on their contents. [W]ere *ex hypothesi* international criminal law really *ambiguous* on duress or were it even to contain a *gap*, it would therefore be appropriate and judicious to have recourse – as a last resort – to the national legislation of the *accused*, rather than to moral considerations or policy-oriented principles.³⁴

Throughout the rest of this work an attempt will be made to identify possible principles of international law that may be relevant in determining the scope of a defence.³⁵ The judgments of international criminal tribunals, military tribunals, and domestic criminal courts – all of which will be explored – provide a rich source of substantive law. And although the content of military manuals will be referred to, they provide *evidence* of the law rather than being a definitive source of law in their own right.³⁶

2.2 COMPETING VISIONS

One consequence of ICL’s indeterminacy is that in some cases considerable friction has surfaced among adjudicators from different doctrinal traditions exposing the theoretical deficiencies and political disadvantages of the different approaches that courts have relied on to justify their decisions.³⁷ In the post-war period, the indeterminacy of the law drew

³⁴ Separate and Dissenting Opinion of Judge Cassese, *Erdemovic*, para.49.

³⁵ According to Dworkin, a principle is “a standard that is to be observed ... because it is a requirement of justice or fairness or some other dimension of morality”; R. Dworkin, *Taking Rights Seriously* (Duckworth: London, 1977) 22. See also Michael Bogdan, ‘General Principles of Law and the Problem of Lacunae in the Law of Nations’, 46 *Nordic Journal of International Law*, 37.

³⁶ For example, in *The Hostages Case* when the defence attempted to rely on the British and American military manuals in support of the defence of superior orders, the US military tribunal ruled: “[A]rmy regulations are not a competent source of international law. They are neither legislative nor judicial pronouncements. They are not competent for purpose in determining whether a fundamental principle of justice has been accepted by civilized nations generally. ...[w]hether a fundamental principle of justice has been accepted, is a question of judicial or legislative declaration. In determining the former, military regulations may play an important role but in the latter they do not constitute an authoritative precedent”; *TWC*, Vol. XI, 756, 858-864 and 1237. T. Meron also suggests that “manuals of military law and national legislation providing for the implementation of humanitarian law norms as internal law should be accepted as among the best types of evidence of [state] practice, and sometimes as statements of *opinio juris* as well. This is especially so because military manuals frequently not only state government policy but establish obligations binding on members of the armed forces, violations of which are punishable under military penal codes”; *Human Rights and Humanitarian Norms as Customary Law* (Oxford, 1989), 41.

³⁷ Shklar, *Legalism*, 157.

attention to the deep-rooted tension between positivism and natural law while, more recently, the tension that characterised the judgment of the *Erdemovic* Appeal Chamber derived from a conflict between legal positivism and a policy-oriented approach. As adjudicators vie with one another to impress their particular methodology or viewpoint in the formation of ICL, what becomes apparent is the crucial role that methodology occupies in the formation of the law.³⁸

That ICL is partially a product of natural law is a truism; nonetheless, over-reliance on natural law principles by Joseph Keenan, the American Chief Prosecutor at the IMTFE, was harshly criticised by Justice Pal in his dissenting opinion³⁹ and has been subject to much critical analysis by scholars since then.⁴⁰ By appealing to the law of nature as a basis for condemning the accused Keenan was, in the words of Judith Shklar:

only applying a foreign ideology, serving his nation's interests, to a group of people who neither knew nor cared about this doctrine. The assumption of universal agreement served here merely to impose dogmatically an ethnocentric vision of international order.⁴¹

Because natural law is premised on the assumption that the ultimate source of authority exists in a transcendent 'nature' and the rules and principles that govern human behaviour and society exist independently of any formally enacted laws, as Shklar observes, problems

³⁸ Although I do not suggest that the method preferred by individual judges will *necessarily* determine the outcome of a judgement, it is of some note that at the Tokyo Trial, Justice Pal, a firm adherent of legal positivism, concluded that all the defendants were entitled to an acquittal, while the majority, relying on natural law doctrines found all twenty-two defendants guilty, of whom seven were executed; *The Tokyo War Crimes Trials*, Volume 20, Judgment and Annexes, (R.J. Pritchard & S.M. Zaide, eds.) (Garland Publishing, N.Y. 1981).

³⁹ In attacking the majority's reliance on natural law principles to reach its Judgment on the grounds that its doctrines were not part of positive law, Justice Pal states: "I cannot leave the subject without referring to another line of reasoning in which reference is made to the various doctrines of natural law and a conclusion is drawn therefore that 'the dictates of the public, common, or universal conscience profess the natural law which is promulgated by man's conscience and thus universally binds all civilized nations even in the absence of the statutory enactment' ...[T]hat this natural law is not a mere matter of history but is an essential part of the living international law is sought to be established by reference to the preamble of the Hague Convention of 1907 as also to the text of the American Declaration of Independence. ... [F]rom these and various other authorities it is concluded 'that public international law' is based on natural law: It is said 'the principles of international law are based on the very nature of man and are made known to man by this reason, hence we call them the dictates of right reason. They are, therefore, not subject to the arbitrary will of any man or nation. Consequently, the world commonwealth of nations forms one natural organic, moral, juridical and political unity'. ...International life is not yet organized into a community under a rule of law. A community life has not even been agreed upon as yet. Such an agreement is essential before the so-called natural law may be allowed to function in the manner suggested"; *Tokyo WCT*, Volume 21, Separate Opinions, 147-151.

⁴⁰ See for example, A.M. Prevost, 'Race and War Crimes: the 1945 War Crimes Trial of General Tomoyuki Yamashita' (1992) 14 *Human Rights Quarterly*, 303 and B.V. A. Roling, *The Tokyo Trial and Beyond, Reflections of a Peacemonger*, (Antonio Cassese, ed.) (Polity Press: UK, 1993).

⁴¹ Shklar, *Legalism*, 128.

begin to appear when such rules and principles are enforced in the form of punitive judgments on those who do not share the same beliefs. The result is that the cultural realities of the situation make the application of the law seem both arbitrary and hypocritical⁴² while the principles of *nullem crimen sine lege* and of certainty are also challenged.⁴³

But the post-war tribunals also highlighted the ideological weakness inherent in positivism with the retrospective extension of international criminal responsibility for crimes against humanity which clearly violated a fundamental principle of legal positivism.⁴⁴ The difficult question of how, without undermining its own integrity the law might properly hold an individual criminally responsible for engaging in serious wrongdoings either in the absence of a prohibitory law or because they have complied with immoral laws, has been the subject of considerable debate and anguish among both the legal profession and scholars alike.⁴⁵ While the 'positivism versus natural law' debate has generally taken place within the context of offences and criminal liability, the methodological divide that had a real consequence in determining the scope of a defence, was one that emerged more recently between legal positivism and a policy-oriented approach. In their Joint Separate Opinion in *Erdemovic* Judges McDonald and Vohrah controversially concluded that in the absence of customary law, and where general principles of law were inconsistent, it would be appropriate for the Court to take account of broader policy considerations in determining the scope of a defence.⁴⁶ To justify their decision the Judges cite R. Higgins that in making a legal choice, "one must inevitably have consideration for the humanitarian, moral and social purposes of the law".⁴⁷ The conflation of law and policy by the majority prompted a forceful dissent by Judge Cassese who, locating his arguments squarely within the tradition of legal positivism, insisted that a fundamental condition of 'lawyering' required a strict adherence to

⁴² According to Joseph Kuntz, "natural law is not law, but ethics. ... a true natural law is not a system of legal norms, but a system of highest ethical principles"; 'Natural-Law Thinking in the Modern Science of International Law,' (1961) 55 *AJIL* 951, 958.

⁴³ See generally Alfred Rubin, *Ethics and authority in international law* (CUP, 1997) chapters 1-2.

⁴⁴ See in particular essay by Andrew Clapham discussing the 'judicial activism' of the IMT judges; 'Issues of complexity, complicity and complementarity: from the Nuremberg trials to the dawn of the new International Criminal Court,' in *From Nuremberg to The Hague*, (Philippe Sands, ed.) (CUP, 2003) 30.

⁴⁵ See H.L.A. Hart, 'Positivism and the Separation of Law and Morals,' and Lon L. Fuller, 'Positivism and Fidelity to Law – A Reply to Professor Hart,' (1958) 71 *Harvard Law Review* 593 and 630 respectively. In a handful of post-war cases, the defendants sought to rely on a plea that the offence for which were being charged had been legal or even obligatory under domestic law. In the *Justice Trial*, in rejecting the plea, the tribunal stated: "the very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and participation in the enactment and enforcement of them amounts to complicity in crime"; *TWC*, Vol. VI, 48-49.

⁴⁶ For a useful analysis, see Cryer, 'One Appeal, Two Philosophies, Four Opinions', 195.

⁴⁷ Joint Separate Opinion of Judges McDonald and Vohrah, *Erdemovic*, (IT-96-22-A) para.78.

identifiable concrete rules.⁴⁸ While positivism neither dismisses nor diminishes the value of policy, it is regarded as belonging *outside* a court of law; it was therefore of little surprise that Cassese was to 'remind' the Court that the tribunal should "refrain from engaging in meta-legal analyses" and that "a policy-oriented approach in the area of criminal law runs contrary to the fundamental principle *nullum crimen sine lege*."⁴⁹

What remains all too clear is that a tribunal's preferred methodology can have fundamental legal consequences for the defendant; for it can translate into the difference between being entitled to a full or conditional defence or alternatively, being precluded from pleading any defence whatsoever as was eventually to be the case for Erdemovic. But what these exchanges also highlight is that often, the traditional methods of locating the law are grounded in assumptions that simply fail to consider issues that pertain to gender. In some sense, the indeterminacy of the law has created an intellectual battleground in the court room, over method as much as substance, where adjudicators with different normative commitments and competing theoretical approaches confront one another as they grapple with profound ethical problems in an attempt to do 'justice' to the accused and the community touched by violence.

Although ICL has begun to develop its own rules the methodology it adopts, by and large, replicates the methods of prosecution and punishment that prevail within those states that dominate the international political order.⁵⁰ Drumbl has rightly criticised international criminal justice as being "a reflection of the hegemonic values of Western punitive criminal justice"⁵¹ in which adversarial and inquisitorial methodologies are reconciled through

⁴⁸ Simma and Paulus criticise a policy-oriented approach because conflating law with policy confuses norms and values. The consequence is that a policy-oriented approach "ideologizes international law, which is all too often based on a minimal consensus on means and not on ends"; B. Simma & A. Paulus, 'Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View,' (1999) 93 *AJIL* 302, 305. Also see Anne-Marie Slaughter & Steven Ratner, 'The Method is the Message,' (1999) 93 *AJIL* 410 at 421.

⁴⁹ Separate and Dissenting Opinion of Judge Cassese, *Prosecutor v Erdemovic*, Appeals (IT-96-22-A), para.11. It is worth noting though that while imposing inculpatory *ex post facto* laws is widely recognised as being prohibited, the extent to which courts may apply retroactive laws that *exculpate* remains unsettled. Stephen J., the author of the English draft Criminal Code of 1879 argued, "if the Code provided that nothing should amount to an excuse or justification which was not within the express words of the Code, it would, in such a case, be vain to allege that the conduct of the accused person was morally justifiable; that, but for the Code, it would have been legally justifiable; that every legal analogy was in its favour; and that the omission of an express provision about it was probably an oversight. I think such a result would be eminently unsatisfactory"; *The Nineteenth Century*, January 1880, 153-4, cited by Glanville Williams [1978] *Criminal Law Review* 128.

⁵⁰ See generally Diane Marie Amann, 'Harmonic Convergence? Constitutional Criminal Procedures in an International Context,' (2000) 75 *Indiana Law Journal* 809.

⁵¹ Drumbl, 'Collective', 599.

political settlements among the powerful international actors.⁵² Needless to say, if ICL is to become truly “cosmopolitan” in nature it cannot simply “extend Western doctrine onto the transnational plane without considering the implications for societies not sharing similarly underlying assumptions”.⁵³ That ICL suffers from a ‘democratic deficit’ insofar as its form is dominated by a Western conception of justice – and that it assumes an understanding of ‘justice’ that is fundamentally gendered – cannot be ignored.

The dichotomy between common law and civil law traditions within the context of the development of ICL is a topic that has led to some discord within tribunals and with the ICC being extended the right to determine general principles of law by means of comparative analysis, this tension will no doubt persist. For this reason alone, it becomes particularly vital that there is an understanding of the different doctrinal approaches. Comparative criminal lawyers have already examined in some depth the similarities and differences between the inquisitorial and adversarial models revealing how each model has evolved in response to, and as a consequence of, a host of considerations ranging from the differing emphasis accorded to the priorities and objectives of the criminal law, to the structures and organisational make-up of the state itself.⁵⁴ Although not wishing to over-emphasise their differences, each model has developed their own rules on, for example, the admissibility of evidence in order to best secure their respective goals while significant differences exist between the two approaches in how legal instruments are interpreted.⁵⁵

That in contrast to common law jurisdictions, civil law jurisdictions have a long established tradition of formally differentiating between justifications and excuses continues to cause some friction among international lawyers. Civil law lawyers have criticised the format adopted in the statute of the ICC which provides for a list of justifications and excuses

⁵² This problem with ICL has also been addressed by the ICTY which has expressly ruled that although reliance upon national legislation is justified this is subject to the condition that “reference should not be made to one national legal system only ... [but] rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world”; *Furundzija* (IT-95-17/1-T) para.178.

⁵³ Osiel, ‘The Banality of Good’, 1753.

⁵⁴ See in particular, Mirjan Damaska, ‘The Uncertain Fate of Evidentiary Transplants: Anglo-American and Continental Experiments,’ (1997) 45 *AJCL* 839 and ‘Epistemology and Legal Regulation of Proof,’ (2003) 2 *Law, Probability and Risk*, 117.

⁵⁵ Christie observes that “while there are important variations among the common law countries in how they interpret statutes and other legal instruments, it can be said that, on the whole, in the English-speaking world, the approach to interpretation is more narrowly-focused, literalistic, and, in the minds of some, less imaginative than the approach taken elsewhere”; George Christie, ‘Some Key Jurisprudential Issues of the Twenty-First Century,’ (2000) 8 *Tulane Journal of International and Comparative Law* 217, 219.

“haphazardly [and] without any distinction or categorization”⁵⁶ on the grounds that formally differentiating would have helped to clarify the practical consequences that ensue as a result of a successful defence plea particularly in relation to the status of victims and third parties.⁵⁷ But in addition to clarifying the practical consequences that may follow, distinguishing between justifications and excuses has the added benefit of helping to reveal the moral and political normative values being advanced by the particular society.

That adjudicators and scholars from different jurisdictions approach the ‘general part’ of the criminal law based on distinct and different preconceptions is a consideration that is often overlooked and thus deserves some comment. Perceptions as to how offences are structured can differ from state to state and among Continental and Anglo-American systems the modes of analysis fall into one of three categories – bipartite, tripartite or quadripartite.⁵⁸ Anglo-American and French criminal law are based on the bipartite model that distinguishes between *actus reus* and *mens rea*; the weakness of this formulae, according to Fletcher, is that defences exist ‘outside’ the offence. But the quadripartite system – the dominant theory under Communist criminal law – also treats justifications as falling outside the framework although excuses pertaining to the mental capacity of the individual are treated as part of the offence structure.⁵⁹ By contrast, the German tripartite model treats the offence as a “single entity” and as Fletcher explains, all the issues bearing on substantive liability are “ordered under a set of rules defining what it means to commit, and to be liable for a crime”.⁶⁰ Defences are treated *within* the three dimensions of liability – the definition of the offence, wrongfulness and culpability – where justifications negate wrongfulness and excuses negate culpability. And because under the tripartite model, culpability is treated as an integral

⁵⁶ A. Cassese, ‘Justifications and Excuses in International Criminal Law,’ in *Commentary on the Rome Statute* Ambos and Triffterer (eds.), 954.

⁵⁷ See 3.3.1 for a full discussion. Fletcher discusses the problems that common law jurisdictions encounter by not clearly distinguishing between the categories in his analysis of putative self-defence; see George Fletcher, *Rethinking Criminal Law* (OUP, 1978) 762-9. See also Albin Eser, ‘Justification and Excuse,’ (1976) 24 *AJCL*, 621. Paul Robinson argues that the failure to explicitly categorise suppresses important moral and penological functions of the defence doctrine”; ‘Criminal Law Defences: A Systematic Analysis,’ (1982) 82 *Columbia Law Review*, 199. However, not all commentators have supported compartmentalisation; see for example, Kent Greenawalt, ‘The Perplexing Borders of Justification and Excuse,’ (1984) 84 *Columbia Law Review*, 1897 and William Wilson, *Central Issues in Criminal Theory* (2002, Hart Publishing, Oxford), 282-292.

⁵⁸ G. Fletcher, ‘Criminal Theory in the Twentieth Century,’ (2001) 2 *Theoretical Inquiries in Law*, 265, 268. See also a useful publication written by Albin Eser & George Fletcher, *Justification and Excuse: Comparative Perspectives*, published by Albin Eser.

⁵⁹ As Fletcher explains, elements are classified into the following categories: “(1) the subject of the offense; (2) the subjective side of liability; (3) the object of the offense; and (4) the objective side of liability”. According to this format, the subjective side of the offence equates to the *mens rea* while the objective, to the *actus reus*. Because the first category refers to the person who is addressed by the norm, this allow the law to examine and consider ‘defences’ such as insanity and infancy.

⁶⁰ Fletcher, ‘Criminal Theory’, 272.

component in assessing liability, defences such as mistake of law are more readily assimilated into the process of judgment.

That the duress defence raised by *Erdemovic* should have led to a divided court is therefore hardly surprising given the diverse doctrinal traditions of the respective judges. The different sociological, cultural and legal traditions embraced by the individual adjudicators therefore begins to offer a partial explanation for the divide. Evident in the Joint Separate Opinion of Judges McDonald and Vorah is a reasoning that is ultimately dependant on the rationale adopted in common law jurisdictions that the defence is available to all offences except to a charge of murder. And while the explanations for this exception are often couched in the language of policy – that the law is there to guide people in difficult moral situations or that recognising the defence for murder would have untold social ramifications – at the heart of this exception is a moral statement about what it is to be a responsible human being as much as about the value of life itself. It is embodied in the statement made by Judges McDonald and Vorah, that those who kill innocent persons will not “get away with impunity for their criminal acts in the taking of innocent lives” whatever the circumstances.⁶¹ Although in civil law jurisdictions duress is likewise regarded as a paradigmatic example of an excuse by contrast to common law jurisdictions there is no impediment to invoking the excuse to any wrongful act including homicide.⁶² Starting with the premise that the law should only punish in cases of voluntary wrongdoing, the approach adopted in civil law jurisdictions has been to focus on the circumstances of the act and the actor’s capacity to avoid the wrong; hence, it is the inability of the actor to exercise *free choice* in her actions that underpins the basis for the law’s recognition of the defence.⁶³ Determining the resistance threshold – in other words, how much harm a morally responsible individual is required to tolerate given the harm that they inflict – is a matter of moral judgment. This approach to the duress defence is clearly the approach preferred by Judge Cassese in his dissenting opinion.⁶⁴

In the final section I review of some of the current literature on defences in ICL to illustrate how the same issues that have divided tribunals also divide scholars. What is clear is that the vast majority have generally preferred a methodological approach grounded in legal positivism; in other words, they have sought to identify the law as *is*. I suggest that my work can be distinguished on the basis that I pose a different set of questions as my interest lies in

⁶¹ Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemovic*, para.80.

⁶² Fletcher, *Rethinking*, 831.

⁶³ Stanley Yeo, *Compulsion in the Criminal Law* (Sweet & Maxwell, London 1990) 40.

⁶⁴ Separate and Dissenting Opinion of Judge Cassese, *Erdemovic*, para.16.

asking why the law is the way it is and in the process of doing so expose the biases that the law seeks to conceal.

2.3 LEGAL COMMENTARIES

International lawyers who have contributed to the discourse on defences in ICL can be broadly divided into those who emphasise the normative value of the law and consequently tend to adopt an approach that favours limiting the scope of a defence (or excluding it altogether) and those who emphasise the need to take into account contextual consideration and accordingly prefer a flexible approach towards both recognising and defining defences in ICL. For the former, because the protection of the most vulnerable in a time of conflict is all-important, their views are inclined to be based on a 'top-down' approach with a strong moralistic undertone.⁶⁵ Cherif Bassiouni is probably one of the most vocal proponents of a 'normative' approach and although he was one of the leading architects of the ICC, he has also been one of its greatest critics insofar as the Articles on defences are concerned. Attacking some of the provisions for being incongruous on the basis that there are no limitations on affirmative defenses such as insanity, intoxication, mistake of law, and mistake of fact, Bassiouni suggests that "a head of state could claim that he or she issued an order to commit genocide while intoxicated and should therefore be exonerated of criminal responsibility" and questions whether the drafters intended "to allow those who order, command, or execute such crimes as genocide and crimes against humanity to assert these affirmative defenses."⁶⁶ While these criticisms are not entirely convincing, they nonetheless illustrate the reluctance among some commentators like Bassiouni to recognise, in principle, certain defences to charges involving genocide or crimes against humanity.

Other scholars have criticised a number of the provisions in the Statute on the grounds that either it more closely reflects the law as applied in a particular jurisdiction or that the

⁶⁵ Commenting on what defences should be recognized by the ICTY, V. Morris & M. Scharf plead: "[i]n deciding whether to recognize defenses to war crimes and crimes against humanity, it is important that the International Tribunal carefully weigh the consequences of any erosion in the fundamental principles of individual criminal responsibility, which are perhaps the greatest legacy of the Nuremberg Judgment and the greatest protection against the commission of such atrocities in the future. While the law does not require a person faced with the dire consequences of an armed conflict to be a hero or a martyr, the memory of those heroic individuals who defied the criminal policies of their government and the orders of their superiors, and paid the ultimate price for doing so, should not be forgotten"; *An Insider's Guide to the ICTY*, Volume 1 (1995) 111. While conceding that there is no legal obligation for heroism in war, it seems rather disingenuous for Morris and Scharf to then urge the tribunal to keep in mind those individuals who do meet the highest of standard in conflict.

⁶⁶ M.C. Bassiouni, 'Negotiating the Treaty of Rome on the Establishment of an International Criminal Court,' (1999) 32 *Cornell International Law Journal*, 443, 463-64.

provision fails to reflect customary international law. Both these critiques obviously parallel the divisions that have characterised the judgments of some tribunals. That the provisions on defences in the ICC statute too closely replicate the common law perception of defences, to the exclusion of civil law approach, has been commented on by numerous scholars. For example, Albin Eser has remarked that “by abstaining from a closer differentiation between various types of exclusionary grounds, as known in most continental-European jurisdictions, article 31 appears to have been phrased along common law propositions of a rather broad and undifferentiated concept of ‘defences’”. With the exception of a handful of scholars primarily from civil law jurisdictions, there have been very few attempts to examine any of the defences in the statute in any great depth and consequently, much of the detailed critiques are offered through the lens of the civil law tradition. This is an unfortunate trend that needs to be redressed if only to address any possible misconceptions that may have arisen.

Scholars including Paola Gaeta and Antonio Cassese have expressed their disquiet with the wording of Article 33 on superior orders because, in their opinion, it departs from customary law. Although both scholars are adamant that superior orders is never a defence in international law to serious violations of humanitarian law, this conclusion is open to dispute. According to Gaeta and Cassese, because Article 8 sets out an exhaustive list of war crimes covering acts that are “unquestionably and blatantly criminal”,⁶⁷ it would be inconceivable that a situation might arise in which the conduct is deemed to fall under Article 8, yet the order to engage in the conduct was not manifestly unlawful. The difficulty with this position is that it may not necessarily be sustainable in practice. The conflict in Jenin in spring 2002 is a prime example of an instance where there was evidence to indicate that the tactics employed by *all* parties to the conflict contravened international humanitarian law and would arguably have violated the rules as proscribed under Article 8(2)(b)(vii) and (ix)⁶⁸. Soldiers did open fire on ambulances but given that the information available to them

⁶⁷ “How,” Gaeta questions, “would it be possible to claim that the order to commit one of those crimes is not manifestly unlawful or that subordinates cannot recognize its illegality?”; Gaeta, ‘The Defence of Superior Orders,’ 190; see also A. Cassese, ‘The Statute of the ICC: Some Preliminary Reflections,’ (1999) 10 *EJIL* 144, 157.

⁶⁸ War crimes under Article 8(2)(vii) and (ix) respectively include: “Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury”; and “Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives”. See in particular, the decisions of the Israeli Supreme Court in *Barake v Minister of Defense* and *The Public Committee against Torture in Israel v The Government of Israel* (12/2005) in which the court held that the law of international armed conflict applied to ‘any case of an armed conflict of international character – in other words, one that crosses borders of the state – whether or not the place in which the armed conflict occurs is subject to belligerent occupation’.

at the time strongly indicated that ambulances were being used to transport enemy combatants and weapons their conduct would probably have been held to be lawful because it fell within the exception in the definition of the offence. However, if it subsequently emerged that the information on which they had relied was wrong, it is not inconceivable that the soldiers would have been entitled to plead superior orders and mistake.⁶⁹ The fact that the soldiers presumably acted pursuant to orders would be a significant factual element that should be taken into consideration in conjunction with the plea of mistake.

In some respects, Cassese and Gaeta's position is based on a modern approach to CIL that emphasises *opinio juris* at the expense of state practice and can be contrasted with the views taken by other scholars who adopt a more traditional approach to identifying rules of CIL. Wary of setting normative standards that might be unrealistic given the realities of conflict, scholars like Matthew Lippman and Leslie Green have been far more inclined to take account of contextual considerations when determining the scope of a defence in ICL. Lippman articulates a view that is also shared by other scholars: that courts have typically underestimated the significance of both "trained obedience and the cataclysmic circumstances of military conflict" because introducing such realities would risk reducing respect for the integrity of the humanitarian law of war.⁷⁰

Of all the pleas, it is probably that of superior orders that most clearly divides commentators. While some reject the 'defence' absolutely, other scholars continue to support its retention subject to the condition that the order is not manifestly unlawful.⁷¹ For the latter, the superior orders plea consciously allows the tribunal to take account of military training as an integral factor that must be considered when assessing the culpability of a combatant accused of violating the law.⁷² For some, the defence does not go far enough in that it fails to fully capture the impact of conflict itself on the decision-making capability of the combatant caught in the midst of hostilities. Commenting on the guidance document issued by the U.S. Army in the aftermath of the *Calley* case on how soldiers are expected to react to *illegal* orders, Leslie Green observes: "it should perhaps be pointed out that these directives might sound completely reasonable outside the heat of battle and particularly to those who

⁶⁹ See in particular, Report of the Secretary-General prepared pursuant to General Assembly resolution ES-10/10 at www.un.org/peace/jenin/index.html, paras.26-7.

⁷⁰ M. Lippman, 'Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War,' (1996) 15 *Dickinson Journal of International Law*, 2, 111.

⁷¹ Those who subscribe to the latter view have described the provision in the ICC statute as "a sensible and practical solution". See for example, C. Garraway, 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied?' (1999) 336 *IRRC*, 785.

⁷² Lippman, citing N.C.H. Dunbar, concludes "the manifest illegality standard also reflects an appreciation for the view that a 'soldier cannot be expected to carry in his knapsack not only a Field Marshal's baton but also a treaties on international law"; 'Conundrums', 54.

will not have to carry the brunt of actual fighting. ... unfortunately, soldiers remain human beings and susceptible to all the normal human emotions and ideological reactions.”⁷³ As Green explains

it is easy to tell men that they are only allowed to search out and destroy the fighting capacity of enemy troops, and must not take action which would result in the death of women and children. But there is no attempt to tell the soldier how he is to distinguish the child from the boy soldier, and the ordinary civilian population from guerrilla units, when the latter are dressed in exactly the same clothing as the former, as appears to have been the case so often in, for example, Indochina; nor is any attempt made to indicate to ordinary soldiers when they may destroy civilian residences because the village is being used as a harbour for irregular troops.⁷⁴

Yoram Dinstein has probably been one of the harshest critics of Article 33 although in contrast to most scholarly analyses on superior orders,⁷⁵ Dinstein adopts what is essentially a criminological approach, reasoning that the right to legitimately rely on any legal defence to a charge of war crimes or crimes against humanity rests solely with showing the absence of *mens rea*. Accordingly, Dinstein suggests, superior orders cannot constitute a defence *per se* but “only a factual element that may be taken into account in conjunction with the other circumstances of the given case.”⁷⁶ It therefore follows that the legal defences that merit critical commentary are those on which superior orders depend – duress and mistake.⁷⁷ That Dinstein is inclined to lean towards a normative approach becomes apparent with his analysis of duress. Agreeing with the Joint Separate Opinion of Judges McDonald and Vohrah in *Prosecutor v Erdemovic*, Dinstein suggests that an accused cannot be exonerated on the grounds of duress if he committed atrocities or even plain murder because “neither ethically nor legally can the life of the accused be regarded as more valuable than that of another human being”. Dinstein’s assertion rests exclusively on his personal ethics and the very high moral threshold he sets does require that individuals under duress conduct themselves with a considerable degree of heroism. The standard was, in effect, rejected by those that negotiated the terms of the Rome Statute on the grounds that it far exceeded the

⁷³ L.C. Green, *Superior Order in National and International Law* (A.W. Sijthoff, Leyden 1976), 254. Commentators who support the retention of the defence also cite the changing nature of warfare as giving further support for retaining the conditional test. Dinstein too maintains that some account should be taken of the relative uncertainty of laws of war; Y. Dinstein, *The Defence of ‘Obedience to Superior Orders’*, 33.

⁷⁴ Green, *Superior Order*, 255-6.

⁷⁵ Most works on superior orders tend to assess its development over time in different jurisdictions and, in general, focus on the underlying philosophical justifications for recognising it as an absolute or partial defence or for rejecting it *in toto*.

⁷⁶ Dinstein, *‘Obedience to Superior Orders’*, 88. This was the approach adopted by Judges McDonald and Vohrah in their Joint Separate Opinion in *Erdemovic*, para.34.

⁷⁷ Y. Dinstein, “Defences” in *Substantive and Procedural Aspect of International Criminal Law*, Vol. 1, G. Kirk McDonald & O. Swaak-Goldman (eds.) (Kluwer: The Hague 2000).

level of conduct that could, or should, be expected of a soldier in a combat situation. By contrast, commenting on the duress provision in the ICC statute Kai Ambos commends the provision for recognising that “we cannot expect others to live up to a standard that is so high that we cannot guarantee that we ourselves would uphold it under similar circumstances.”⁷⁸

While superior orders most clearly illustrates the different approaches taken by the respective commentators, the defence of mistake has also divided commentators along similar lines. Cassese, for example, has suggested that ICL is governed by the principle *ignorantia legis non excusat* and therefore the ICC statute represents a departure from customary law; by contrast, Albin Eser defends the provision on the grounds that “even the soldier who has been informed of the contents of the Geneva Conventions may not be aware of the variety and reach of all relevant prohibitions, particularly insofar as they are of formal character.”⁷⁹ So while the priority for some scholars is clearly to ensure that the laws that protect the most vulnerable in conflict are strictly adhered to, for others scholars, far greater emphasis is placed on securing “a satisfactory balance between the interests of justice and the obligations of a soldier.”⁸⁰

Cautious about the top-down approach to the development of international humanitarian norms Mark Osiel, in his work on superior orders, rejects what he calls the ‘legalist approach’ because it focuses exclusively on the threats of punishment *ex post*.⁸¹ Through an in-depth study of superior orders, Osiel illustrates how the scope of the rules of warfare are determined by particular social contexts⁸² and rather than assuming that because the conditional test has traditionally been favoured by the military it must necessarily be the optimum means by which to secure military efficacy, Osiel re-examines the structures and relationships within the military in a bid to question this assumption. Following a critical study of the actual behaviour and reasoning of soldiers and the sources of atrocities in

⁷⁸ Kai Ambos, ‘Other Grounds for Excluding Criminal Responsibility,’ in *The Rome Statute of the International Criminal Court: A Commentary*, Cassese, Gaeta & Jones (eds.) (OUP, 2002) 1003 at 1043.

⁷⁹ Albin Eser, ‘Mental Elements – Mistake of Fact and Mistake of Law,’ in *The Rome Statute of the International Criminal Court*, Cassese, Gaeta & Jones (eds.), 889-948 at 945. Eser has also reasoned “the danger of committing an error as to the terms and rules of international war law is particularly great for military leaders who must act even when burdened by extraordinary responsibility and serious emotional strain; Eser, ‘Defences in War Crimes Trials,’ (1995) 24 *Israel Yearbook on Human Rights* 201-222 at 217

⁸⁰ Garraway, ‘Superior Orders’, 785.

⁸¹ Osiel, ‘Obeying Orders: Atrocity, Military Discipline, and the Law of War,’ (1998) 86 *California Law Review*, 1021-22. Osiel is equally critical of the traditional realist approach in that it is prone to misconstruing and oversimplifying reality.

⁸² See also comments by Alvarez, ‘Crimes of States’, 435.

conflict situations, Osiel argues that military law should abandon its traditional insistence on bright-line disciplinary rules in favour of general standards of circumstantial reasonableness which would better enhance both the efficacy of military operations as well as the moral accountability of individual soldiers who have executed the orders. In other words, Osiel concludes, soldiers should be held responsible not only for obeying orders that are manifestly unlawful but for any crimes resulting from an unreasonable mistaken belief that a superior's orders were lawful. Osiel's approach is useful because by questioning the assumptions that form the basis of this area of law, he is able to develop and offer an alternative perspective and a new way of 'seeing' that may more readily satisfy the concerns of those who want to ensure that the law does not set such high standards as to be completely meaningless and those who want to secure the maximum protection for victims in conflict.

My objective throughout the rest of this work is to question the assumptions – as Osiel has done – that form the basis of ICL and to do so through legal defences. In looking below the surface I seek to reveal what and whose interests the law is serving to protect and to question the extent to which defences in ICL sustain any assumptions that foster an intrinsically gendered view.

One of the most disturbing paradoxes about the criminal law is that it is the law itself that forces us to remember the names of the offender. And so it is with ICL. Open any textbook, any monograph, any collection of essays on ICL; attend any lecture, teach any class, read any opinion or judgment involving ICL and what names stare out at you from the pages but the names of the perpetrators. They are the names that we repeat, that we teach, that we remember. And, but for perhaps one or two exceptions, these names belong to men. Of course this is only to be expected since it is men who primarily engage in war. ICL is therefore necessarily about the extraordinary violence done by men in conflict. That the vast majority of defendants have been men, and at least for the foreseeable future will continue to be men, is an inevitable consequence of the gendered composition of the state itself where the vast majority of decision-makers and active servicemen are just that – men. Of course, this is not to suggest that women are not capable of transgressing the law and doing violence, as the case of Abu Graib clearly illustrates.⁸³ Nonetheless, the reality is that significantly fewer women are involved in front-line operations and in the higher echelons of

⁸³ Of course in internal conflicts a larger proportion of participants engaged in the violence are women; yet even in such conflicts, men make up the vast majority. Abu Ghraib is a particularly instructive example that highlights some of our preconceived notions about violence in conflict. The shock that one of the offenders was a woman seems to underscore the deep-rooted bias and acceptance that in conflict it is men who engage in violence and the abuse of power.

the political and military hierarchy. But women are not absent in conflict. They are there, more often than not, as part of the civilian population, as pawns, as providers, facilitators, carers and as direct and indirect victims of the belligerents. They are the names we shall never remember because they remain the victims and their presence and existence within the legal narrative, a peripheral issue.⁸⁴ While I cannot hope to make any contribution in changing how the law might better record legal narratives, what I propose to do throughout the rest of this work is by adopting a 'woman's perspective' critically re-examine ICL through a handful of legal defences. I do not adopt the 'standard' feminist perspective which asks whether the law sustains a gender bias in its operation and effect from the view of the woman who *commits* an act of violence. My concern for the present is to ask whether, given the virtual absence of women from the 'law-making process', legal defences in ICL have been moulded in such a way as to offer men disproportionate protection in times of conflict at the expense of women.

⁸⁴ "Somebody could have gunned Eichmann down on the street and then immediately given himself up to the police. That, too, would have produced a trial. The whole story would have been rolled out again just as it will be now – only with a different hero in the leading role. ... Shalom Schwarzbard did precisely this in Paris in the early 1920s when he shot the man who had been the ringleader of the Ukraine pogroms during the civil-war years in Russia, then immediately went to the nearest police station. After a two-year trial, during which the history of these pogroms was detailed, Schwarzbard was acquitted"; letter from Hannah Arendt to Karl Jaspers, 23 December 1960, *Arendt-Jaspers Correspondence*, 415.

CHAPTER 3

IN SEARCH OF A FRAMEWORK LESSONS FROM DOMESTIC LAW

As I have argued in the preceding chapter, the method or theory preferred by an adjudicator or scholar can have a profound effect on how each might respond to a host of questions including “what the law is, where it might be going, what it should be and why it is the way it is”.¹ International criminal lawyers who have examined the substantive law in any great depth have primarily subscribed to legal positivism or alternatively, a comparative methodology in a bid to identify the contours of ICL, in other words, to discover what the law *is*. By contrast, my interest lies principally in asking *why* the law is the way it is and to understand the rationale that lies behind individual defences in ICL. Especially where there is consensus as to substance, I seek to uncover the presumptions on which the particular rule is based and to isolate and reveal the interests being protected. In the two preceding chapters I have attempted to illustrate that the law is “neither objective nor neutral but, rather, reflects the particular cultural background and orientation of its creators”.² Bearing this in mind, the questions I pose and seek to answer throughout the rest of this work are simple. First, what is the rationale that sustains a particular defence?³ Second, what interests are being protected or promoted? And last, what gender implications might we draw from the answers to these questions? In seeking to respond to each of these questions, I shall rely extensively on the theoretical debates that have dominated the discourse among domestic criminal law scholars in recent times.

I begin this chapter by first exploring some of the more recent debates that have engaged the scholarly community at the domestic level to assess the extent to which these exchanges can offer some clarity to understanding defences in ICL. I do so in view of the fact that ICL has ‘borrowed’ extensively from domestic criminal law, and especially from the Western liberal

¹ Ratner & Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers,’ (1999) 93 *AJIL* 291, 292.

² Angela Harris, ‘Foreword: The Jurisprudence of Reconstruction,’ (1994) 82 *California Law Review*, 741, 748; Harris continues: “what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself”.

³ And, by implication, I aim to uncover the ‘structure of argument’ that underpins a defence.

criminal justice paradigm and bipartite model.⁴ I then turn my attention to the doctrine of defences as it provides a basic framework and starting point from which I propose to consider defences in ICL.

3.1 EXPOSING SOME ASSUMPTIONS

It is generally recognised that because the criminal law is characterised by internal contradictions it is constantly struggling to reconcile the theoretical assumptions that underpin it with its social practice.⁵ A clear example of this tension is the vacillation between satisfying the collective goals of order and security that at times conflict with the individual's right to a fair trial.⁶ On the international level, the contradictions and incoherencies are magnified several times over. Especially where major war crimes trials are concerned, the tension is most acutely felt between the need to offer the audience – from the victim to the wider global community – a persuasive narrative while simultaneously securing for the accused the minimum normative requirements of a liberal judgment. But whatever their broader objectives, at a *minimum* war crimes trials, like their domestic counterparts, are about establishing individual criminal responsibility.

What is clear is that the law that governed the post-war military courts as well as that which applies to the more recently established tribunals embodies assumptions about human nature and society that are essentially liberal in nature in that they are premised on “the moral autonomy and rational capacity of individual persons and their corresponding rights to equal concern and respect by fellow citizens and the state.”⁷ To establish both moral and legal responsibility the liberal paradigm requires “that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise those capacities.”⁸ For, it is reasoned, it is only when all the preconditions to responsibility are met, that the

⁴ Mark Drumbl, observes “...the methodology of international criminal law largely replicates methods of prosecution of punishment dominant within those states that dominate the international political order”; ‘Pluralizing International Criminal Justice,’ (2005) 103 *Michigan Law Review* 1295, 1303

⁵ See for example, Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, 1987) and Alan Norrie, *Crime, Reason and History*, (Weidenfeld & Nicolson, London 1993).

⁶ At the core of this ‘conflict’ is the tension between consequentialist objectives and nonconsequentialist demands, between which no stable compromise is possible; A. Duff, ‘Principle and Contradiction,’ in *Philosophy and the Criminal Law*, A. Duff (ed.) (CUP 1998) 123 referring to N. Lacey, *State Punishment* (1988), 46-56.

⁷ Mark Osiel, ‘Ever Again: Legal Remembrance of Administrative Massacre,’ (1995) 144 *University of Pennsylvania Law Review*, 463, 469, fn. 19.

⁸ H.L.A Hart, *Punishment and Responsibility* (1968) 152.

individual's choice to violate the law is a sufficient condition for criminal liability.⁹ To blame the individual the law needs to treat man's conduct as "autonomous and willed, not because it is, but because it is desirable to proceed as if it were"¹⁰ and through its emphasis on the *mens rea* doctrine, the criminal law assumes that the subject is ultimately responsible for the choices he makes and has the capacity to choose between good and bad from alternative options.¹¹

Since it is the inability of the subject to *choose* that undermines the essence of blaming,¹² the challenge for the law has been to define what is meant by 'choice' particularly in the face of the "ubiquitous specter of determinism".¹³ In assigning culpability the law presumes that a correlation exists between responsibility and choice but once the element of determinism is admitted this correlation is no longer fully sustainable: there can be no criminal responsibility, absent free choice.¹⁴ But rather than opt for incompatibilism¹⁵ – the thesis that if determinism is true, there is no point in talking about free will – most lawyers and scholars have adopted a 'compromise' position that lies somewhere between maintaining that human behaviour is not so resolute that blame is inappropriate while conceding that in some circumstances moral luck *is* relevant because it acts to displace the subject's free will.¹⁶ But a further problem for the law is that the notion of free will, and with it the idea

⁹ C. Finkelstein, 'Excuses and Dispositions in the Criminal Law, (2003) 6 *Buffalo Criminal Law Review*, 317, 323.

¹⁰ Packer, *The Limits of the Criminal Sanction* 74-75 (1968) cited by M. Moore, 'Causation and the Excuses,' (1985) 73 *California Law Review* 1091, 1122. Moore rejects this view on the basis that for him the legal and moral system is based on culpability and culpability depends on freedom. Without freedom – not just a pretence that freedom is – the legal and moral framework is unsustainable. But Kadish observes, "the idea that a normal actor, who commits a crime intentionally and under no physical or psychological compulsion, might have been unable to choose to act otherwise threatens to undermine blame at its foundation"; S. Kadish, 'Excusing Crime,' (1987) 75 *California Law Review* 257, 282.

¹¹ Lacey argues that "the development of a sophisticated mens rea doctrine contributed to the maintenance of a discrete area of specialist social knowledge and practice, answering both the demands of legal professional interests and those of a political establishment whose legitimising ideology was predominantly individualist"; Nicola Lacey, 'Contingency, Coherence, Conceptualism,' in *Philosophy and the Criminal Law*, A. Duff (ed.) (CUP, 1998) 33.

¹² Meir Dan-Cohen, 'Responsibility and the Boundaries of the Self,' (1992) 105 *Harvard Law Review* 959. The criminal law's assumption that the individual has the capacity to choose is, however, subject to certain qualifications including, for example, age or whether the defendant is considered sane or intoxicated. In this way choice theory gives rise to the capacity theory of excuses; Finkelstein, 'Excuses and Dispositions' 323.

¹³ *Ibid.*, 960.

¹⁴ As Duff explains criminal liability depends on establishing culpability which presumes some element of control. Where the subject has no control, there can be no criminal liability. This understanding of criminal liability, Duff suggests, "sits happily with central aspects of a familiar kind of liberal individualism that often finds its inspiration in Kant"; R.A. Duff, 'Virtue, Vice and Criminal Liability,' (2002) 6 *Buffalo Criminal Law Review* 147, 149.

¹⁵ Sometimes referred to as 'hard determinism'. See generally, Stephen Morse, 'Reason, Results, and Criminal Responsibility,' [2004] *University of Illinois Law Review* 363, 382.

¹⁶ A. Ashworth, *Principles of Criminal Law*, (OUP 2003) 28.

that individuals have choices, is usually a perspective of the privileged – and one that is also very gendered.¹⁷ For ICL, choice theory is apt to be hugely problematic for not only does conflict severely limit an individual's ability to choose, but the principle of military discipline also functions to curtail a soldier's right to engage in free choice.¹⁸

At the domestic level, the notion of the free will paradigm has come under critical scrutiny because it presupposes that the individual is a responsible moral agent who is both capable of and able to control his fate.¹⁹ Critics have exposed this premise to be a kind of 'falsehood' since it is to treat the individual as though he exists in isolation from his social and moral environment whereas the reality is that he is inextricably linked to his social surroundings.²⁰ Moreover, it is further argued, the liberal legal order is intrinsically masculine because it assumes the individual to be separate, atomistic and competitive; the inevitable consequence of this is that there is greater emphasis on rights over responsibilities, separateness over connection and the individual over the community.²¹ But a further consequence of this 'denial' is that the criminal law has evolved in such a way as to superficially differentiate between formal legal justice and the moral content of why the individual may have acted in a particular manner.²² As Alan Norrie suggests, the separation of the subject from his social and moral context has engendered "an individualism of legal culpability, in which fault terms must be rendered in formal, technical and 'substantively demoralized' terms".²³ In other words, the criminal law has pursued a content-neutral conception of fault and in doing so has attempted to exclude any reference to motives.²⁴ The reasons for *why* an individual might comply with society's norms – as with *why* they violate them – are simply treated as irrelevant. Delving into the reasons why the subject has breached the rule, or his 'motive' for having done so, would risk "contextualizing" him in his social and political environment that would have the effect of introducing wider moral

¹⁷ Barbara Hudson, 'Punishing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice,' in A. Duff et al (eds) *Penal Theory and Practice* (1994) 302 cited by Ashworth, *Principles of Criminal Law*, 28.

¹⁸ This accounts for the post-war tribunals' need to temper the rejection of superior orders by reference to a 'moral choice' test.

¹⁹ As Norrie points out, the criminal law presupposes an individual subject in whom responsibility is fixed by mental characteristics relating to the cognitive control of actions. But what if, Norrie rightly asks, subjects are not like that?; Alan Norrie, *Punishment, Responsibility and Justice: A Relational Critique* (OUP, 2000) 12.

²⁰ Moreover, if these presumptions are open to dispute, the wider criminal law project must also be questioned since the law and its respective legal categories are all premised on a falsehood. See also Dan-Cohen, 'Responsibility' 961.

²¹ Linda McClain, 'Atomistic Man Revisited: Liberalism, Connection and Feminist Jurisprudence,' (1991) 65 *Southern California Law Review*, 1171m 1173-74.

²² Generally, Norrie, *Punishment*.

²³ Norrie, *Punishment*, 166.

²⁴ But see Duff, 'Principle and Contradiction,' 170-189; it may be more accurate to say that the law treats as irrelevant, motive insofar as it is not an element of the definition of the offence.

arguments. But the law rigorously resists this ‘movement’ to preserve the illusion of neutrality that formal legal justice claims to embody.²⁵ This artificial separation is necessary on both national and international levels because only then can the law sustain any notion of *individual* criminal responsibility. This underlying tension seems to be most acutely felt in war crimes trials where the need to contextualise is at the same moment resisted by the law’s need to separate.

3.1.1 Offences and defences

The differentiation between formal legal justice and moral judgment in the general part is translated into the separation between the acts and intentions (*actus reus* and *mens rea*) that occupy the central position and general defences that are treated as secondary and exceptional components in the process of legal judgment.²⁶ The effect of this is that the minimal demand on the definition of an offense is that it reflects, as George Fletcher suggests, a “morally coherent norm” and that it is “only when the definition corresponds to a norm of this social force that satisfying the definition inculcates the actor”.²⁷ The norm, Fletcher maintains, must contain a sufficient number of elements to state a coherent moral imperative; in other words, “the norm must be so defined that its violation is incriminating”.²⁸ But the practical reality for the criminal law is that situations will inevitably arise when the elements of a particular offence are fully satisfied but where “blame and punishment are unwarranted because of the presence of culpability-reducing factors unspecified in the offence.”²⁹ Defences therefore play a “default role” by ensuring that “justice is done to defendants who would otherwise be convicted because their conduct satisfies the definition of an offence”,³⁰ and so represent the law’s exception to the rule that reasons for violating the norm are irrelevant. Through individual defences, the law selectively “opens its ears” to *some* reasons that *some* defendants may have had for not conforming with the law’s norms.³¹ In effect, defences are the law’s way of responding to and compensating for its own inadequacies. Defences, according to Norrie, fashion “a moral periphery” in which moral and political considerations can be integrated, “yet be insulated

²⁵ A. Norrie, ‘Simulacra of Morality?’ in *Philosophy and the Criminal Law*, A. Duff (ed.) (CUP, 1998), 120.

²⁶ Norrie, ‘Simulacra’, 123.

²⁷ The common law assesses ‘guilt’ in terms of liability that arises as a consequence of satisfying the elements of the offence; G. Fletcher, *Basic Concepts of Criminal Law*, (OUP 1998) 94.

²⁸ Fletcher, *Rethinking*, 567-68.

²⁹ A.P. Simester & G. R. Sullivan, *Criminal Law Theory and Doctrine*, (OUP, 2000), 638.

³⁰ *Ibid.*

³¹ John Gardner, ‘Fletcher on Offences and Defences,’ (2004) 39 *Tulsa Law Review*, 817, 822.

from the main categories of judgment, *actus reus* and *mens rea*, as the definitional elements of the offence.”³² And this is the very point that Fletcher is making when he suggests that in order to make out a complete case of responsible wrongdoing, whether in law or in moral discourse, the simple imperatives must be supplemented by taking account of justifications and excuses.³³ If articulating the precise basis on which the criminal law selects *who* it hears and *what* it hears proves challenging, this process is even more taxing at the international level. In extending the list of defences available to a soldier beyond those that are widely recognized at the domestic level, ICL recognizes and legitimizes other ‘reasons’ for non-compliance within its normative framework. All of these additional grounds, I suggest, have important gender implications because each inadvertently offers an additional layer of ‘protection’ to the combatant at the expense of the civilian. I shall return to develop this point in full in due course.

Structurally defences can take one of two forms. Either they are incorporated into an offence³⁴ or they can be free-standing affirmative defences that are provided in a separate provision. On what basis and why one format is preferred over the other has been the subject of much scholarly debate. Kenneth Campbell has suggested that the reason why it is difficult to know whether to assign something to the offence or defence side is not because the distinction is opaque but because the underlying value judgements are so nebulous. Using the example of consent to physical force, Campbell suggests that assigning consent to either the offence or defence side of the ‘equation’ promotes a different view. Assigning it to the offence side implies that the law considers that force consented to is, in law, no harm at all; by contrast, assigning it to the defence side implies that all use of force is in law harm but that such use is justified or excused if there is consent.³⁵ In other words, the significance

³² Norrie, *Punishment*, 166. Ashworth distinguishes between moral and legal responsibility noting that “in criminal law the behaviour has to be fitted into a pre-existing category which will specify certain elements and not others, whereas in moral discourse the blame may be expressed in a narrative and more individuated form”; A. Ashworth, ‘Taking the Consequences,’ in *Action and Value in the Criminal Law*, Shute, Gardner & Horder (eds.) (1993) 107, 113-14.

³³ Fletcher, *Rethinking*, 562.

³⁴ Claire Finkelstein refers to this type of defence provision as a ‘negative offense element’; ‘When the Rule Swallows the Exception,’ (2000) 19 *Quinnipiac Law Review*, 505.

³⁵ Kenneth Campbell, ‘Offence and Defence,’ in *Criminal Law and Justice, Essays from the W.G. Hart Workshop*, I.H. Dennis (ed.), (Sweet & Maxwell, 1987) 84. Fletcher offers a similar explanation when he suggests that where no separation between an offence and justification is accepted, the law is, in effect, conveying a message that “there is no harm relevant to the criminal law”. In other words, that “...an aggressor killed in self-defence, or a home destroyed as a matter of necessity, is not a relevant invasion of [a] protected legal interest”. By contrast, distinguishing between the definition of the offence and the justification is to acknowledge that there is some harm that should be registered in the criminal law, but that causing the harm is justified as a matter of principle; Fletcher, ‘The Nature of Justification,’ in *Action and Value in Criminal Law*, 178.

of such a determination lies in the nature of the value that society is seeking to protect.³⁶ While the prevailing view seems to be that a distinction between offence and defence needs to be maintained on conceptual grounds, some scholars have rejected this distinction as being merely a matter of classificatory expediency since there is no conceptual difference between the two, while a third view has been to treat them separately for reasons relating to policy.³⁷

Glanville Williams, one of the leading proponents of the view that no distinction is required, has suggested that “what we think of as the definition of an offence and what we call a defence can only be regarded as depending largely upon the accidents of language, the convenience of legal drafting, or the unreasoning force of tradition”.³⁸ Not convinced that accidents of legislative drafting (or judicial discretion) determine whether a matter falls within an inculpatory or an exculpatory issue, Fletcher rigorously defends the need for the criminal law to distinguish between offences and defences.³⁹ As Fletcher suggests, maintaining the distinction between offences and justifications is crucial because there are substantive and moral consequences at stake:

First, it is of critical importance in deciding when external facts, standing alone, should have an exculpatory effect. Secondly, it might bear on the analysis of permissible vagueness in legal norms. Thirdly, it might bear on the allocation of

³⁶ Distinguishing can become even more complex in conflict where the intentional killing of an enemy combatant is lawful but only to the extent that the killing has not violated other laws of war that have penal consequences.

³⁷ Campbell, ‘Offence and Defence,’ 73. See for example, Fletcher, *Rethinking*, 552-579 and Gardner, ‘Fletcher on Offences and Defences,’ 817. But for an alternative view, see G. Williams, ‘The Logic of ‘Exceptions’,’ (1988) 47 *Cambridge Law Journal*, 261 and ‘Offences and Defences,’ (1982) 2 *Legal Studies*, 233. For further useful commentaries and analyses, see Joseph Raz, ‘Legal Principles and the Limits of the Law,’ (1971) 81 *Yale Law Journal*, 823; Federick Schauer, ‘Exceptions’ (1991) 58 *University of Chicago Law Review*, 871 and Finkelstein, ‘When the Rule’.

³⁸ Williams, ‘Offences and defences,’ 233. Williams offers an example of two draft statutes by way of illustrating this point: “the first draft defines an assault as an intentional or reckless attack upon a person without his consent. Non-consent is then, presumably, a definitional element of the offence. The second draft defines assault as an intentional or reckless attack upon a person, but adds the proviso or qualification that the offence is not committed where the person attacked has consented. Consent now appears to be a matter of defence.” This example leads Williams to conclude that the difference is purely verbal, “a matter of convenience in expression” and as such, he asks, “is there any reason why rules of substantive law should hinge upon a draftsman’s convenience?”

³⁹ Fletcher argues: “Collapsing the distinction between definition and justification eliminates the distinction between conduct that is perfectly legal and conduct that nominally violates a norm but is justified by the assertion of a superior interest or right. It treats killing a human being in self-defense on par with hunting and killing a coyote. It suggests that a physician’s pounding a patient’s chest is of the same order as pounding a nail”; Fletcher, *Rethinking*, 561. As Duff points out, those theorists who subscribe to distinguishing between offence and defence “argue that if we are to grasp the logical structure of criminal liability, we must distinguish more firmly the elements that are necessary and sufficient for the commission of the crime as a criminal wrong ... from the conditions that bear on whether one who is proved to have committed that wrong should be held liable for it”; R. A. Duff, ‘Theorizing Criminal Law: a 25th Anniversary Essay,’ (2005) 25 *Oxford Journal of Legal Studies*, 353, 360.

power between the legislature and judiciary in the continuing development of the criminal law. And fourthly, it might be of importance in analyzing the exculpatory effect of mistakes.⁴⁰

But although Fletcher is able to show that there are moral consequences to the distinction, he also concedes that he is unable to offer a sufficiently precise methodology for distinguishing between the two since cases that fall in the borderline between the definition of the offence and justification remain unresolved.⁴¹

Following a critical examination of the different theoretical analyses developed by some leading scholars on the distinction between offence and defence Alan Norrie, like Fletcher, concludes that there is a real need to rationalize the legal separation of offence and defence since if there is any logical structure to criminal liability, it must be possible to distinguish the elements that are both necessary and sufficient to identify the conduct as a criminal wrong from those conditions that are relevant to holding the subject liable for the wrongful conduct. Norrie however concludes that this is ultimately an impossible task because what counts as an element of the definition as opposed to a justification is not a matter of conceptual analysis but “of the shifting sands of historico-political judgment”.⁴² As a matter of legal conceptualization, the distinction between offence and defence, Norrie suggests, has little to commend it. But as an account of the “inherently normative character of the criminal law, ... the blurred line between definition and justification is most instructive: what demarcates offence from defence is no more – and no less – than the evolving dialectic of social power, translated into a would-be independent conceptual differentiation”.⁴³ That we are unable to distinguish the legal core from the moral periphery – the offence from the defence – is of little surprise since the two inevitably collapse into one another. Criminal law scholars cannot speak about the definition of intention while ignoring the normative issues of culpability and blameworthiness and hence excuses, but neither can they separate a justification from a wrongful act because the latter seems to lie somewhere between being legally wrongful and morally wrong. This need to separate offence from defence, yet the inability to do so, also pervades ICL. Neither the criminal law

⁴⁰ Fletcher, *Rethinking*, 555; see also Fletcher, ‘The Nature of Justification,’ in *Action and Value*, 175, 178-82.

⁴¹ See also Fletcher, ‘The Unmet Challenge of Criminal Theory,’ (1986) 33 *Wayne Law Review*, 1439, 1433 in which he concludes: “the unmet challenge of criminal theory consists in working out the basis of the incriminating dimension of crime and relating this incriminating dimension to the exculpatory dimension of justification and excuse.”

⁴² Norrie, *Punishment*, 164. Gardner also identifies this to be problematic conceding that “the mere fact that one points to a reason in favour of one’s action does not mean ... that one asserts a justification as opposed to denying the application of the law to the case”; John Gardner, ‘Justification and Reasons,’ in *Harm and Culpability*, A.P. Simester and A.T.H. Smith (eds.) (Clarendon Press, 1996) 103, 118.

⁴³ Norrie, *Punishment*, 164.

nor ICL can resolve this internal paradox for in the process of legal judgment, moral inculcation, as revealed by Norrie, necessarily takes place across both offence and defence.⁴⁴

3.2 THE DOCTRINE OF DEFENCES: MORAL AND POLITICAL CONSIDERATIONS

Defences have been described as good reasons for violating prohibitory norms. But why should individuals who have breached a prohibitory norm ever be fully exculpated? Can the violation of some norms ever be considered 'justified'? And why do we recognise certain conditions as excusing the offender from criminal liability while rejecting others? As already suggested, the answers to these questions can be complex because defences are symbolic statements about a society's moral and political choices. Obviously these issues become even more difficult to unravel on the international level which is characterised, to a far greater extent, by moral and political pluralism.⁴⁵ If defences are determined by moral and political values, the question arises as to whose standards are being applied on the international level. To begin addressing these questions an understanding of the rationale that underpins defences in general is needed and because the doctrine of defences as formulated and developed by criminal lawyers within the domestic context offers a practical framework I rely on it as a useful starting point from which to explore individual defences in ICL.⁴⁶ It should however be noted that some feminist critiques have rejected this division on the grounds that justifications (which focus on conduct) and excuses (which focus on actor)

⁴⁴ Norrie concludes that "the general part is driven by an attempt to take moral and political issues out of the definition of the offence, leaving a 'technical' core to the law [but] ...this project is fundamentally flawed, for there is no factual, technical or amoral legal core that can do the work of judgment and inculcation that the law needs"; Norrie, *Punishment*, 192.

⁴⁵ Since even within liberal societies there are widely divergent views on fundamental issues of morality it is only to be expected that between different cultures and traditions views will differ. For example, to what extent can we expect societies that traditionally view intoxication as an aggravating factor to accept it as an absolute defence that negates criminal liability? See generally, Joseph Raz, *Engaging Reason*, (OUP 1999), chapter 7. Norrie also observes, "modern societies are structured by deep conflicts over social class, race, and gender, and this leaves society's 'normative conversations' plural, conflictual, and incomplete" in Norrie, 'Simulacra of Morality?' 143.

⁴⁶ In doing so, I am acutely aware of the opinion of some commentators who have resisted the formal categorisation of defences on the grounds, as they rightly point out, that the line between justification and excuse is often nebulous. See in particular, Kent Greenawalt, 'The Perplexing Borders of Justification and Excuse,' (1984) 84 *Columbia Law Review* 1897. Also see Michael Corrado 'Notes on the Structure of a Theory of Excuses,' (1991) 82 *Journal of Criminal Law & Criminology* 465, 467 who observes that while some scholars have questioned whether distinguishing between justification and excuse is useful others have questioned whether it is even possible.

are “inextricably social and inescapably gendered”.⁴⁷ I will return to consider this critique in due course.

Defences can broadly be divided into four different groupings: those that are based on the lack of the subject’s capacity, ‘failure of proof’ defences, excuses and justifications. I shall not concern myself with the first of these categories that include such defences as infancy or insanity since my primary interest lies in thinking about how ICL treats individuals who do have the capacity to choose.⁴⁸ Nor will I examine the plea of immunity, which is better treated as a bar to jurisdiction than a defence. I intend however to explore in some detail the defences of mistake⁴⁹ duress, necessity, and self-defence all of which presume that the defendant is a responsible moral agent with the capacity to choose.⁵⁰ The three other defences that I examine, and ones that are more commonly associated with international law, are reprisals, superior orders and military necessity.

3.2.1 Justification and excuse

According to the theory of defences, justified conduct is conduct that under ordinary circumstances is considered criminal but under the specific (justifying) circumstances is held not wrongful and, in some cases, might even be considered desirable.⁵¹ Justifications therefore act to negate the harm or wrongdoing. The underlying rationale of a justification is that there is a superior social interest at stake and society positively wants and/or permits⁵² the individual to perform the illegal act because it is either the lesser of the two evils or is

⁴⁷ Catherine MacKinnon, ‘Toward Feminist Jurisprudence,’ (1982) 34 *Stanford Law Review*, 703, 717-18.

⁴⁸ For a useful article on capacity and the criminal law, see R.A. Duff, ‘Who is Responsible, For What, To Whom?’ (2005) 2 *Ohio State Journal of Criminal Law* 441.

⁴⁹ Mistake of fact is sometimes described as a ‘failure of proof defence’ rather than a discrete defence.

⁵⁰ As Gardner points out, when raising an excuse or justification, individuals are ‘asserting their responsibility’. Justifications and excuses are “available only to those whose actions have intelligible rational explanations, i.e. whose actions properly reflected reasons for action that they took themselves to have, and this is the basic condition of our responsibility for our actions”; J. Gardner, ‘The Gist of Excuses,’ (1997) 1 *Buffalo Criminal Law Review* 575, 588-89. Simester and Sullivan distinguish between those defences that render the accused *morally* not responsible for his conduct, as for example, infancy, insanity, automatism and diminished responsibility and other affirmative defences which continue to hold the accused *morally* responsible but not *legally* responsible for his conduct. In the case of the latter, the law will focus on reasons or explanations for why the accused acted as he did or how he found himself in the situation in which he was and in doing so, not hold him legally responsible.

⁵¹ J. Dressler, *Understanding Criminal Law*, (Lexis, NY 2001), 206. I use ‘theory of defences’ and ‘doctrine of defences’ interchangeably.

⁵² See S. Yeo, *Compulsion*, 6; P. Robinson, ‘Criminal Law Defenses’ 220; and J. Dressler, ‘New thoughts about the concept of justification in the criminal law,’ (1984) 32 *UCLA*, 61, 65-92.

required by a separate law.⁵³ The focus is generally, though not always, on the *act*.⁵⁴ The 'lesser harm' theory serves both utilitarian and anti-consequentialist alike although each arrives at this theory based on distinct philosophical reasonings.⁵⁵ According to John Gardner a justificatory defence might be viewed as the law's way of conceding that a wrongdoer may sometimes have sufficient reason to perform the wrongful act "all-things-considered" where wrongs are regarded as 'legally recognised reasons against an action'. By granting a defence the law concedes that where a wrong has been committed, any regret or disappointment must be tolerated and that no liability can be attached to the wrongdoer and that at the time of his *prima facie* wrongful act the defendant had sufficient reason to perform it.⁵⁶ Rather than undermining or cancelling the reason against an action, justifications merely act to defeat the reason for the proscription since to do otherwise, Gardner argues, would be to extinguish the asymmetrical structure between reasons in favour of the justified action and the reasons against it. Because justifications are merely 'permissions' to defeat the prohibitory norm where a conflict of reasons for and against an action has arisen, the normative force of the prohibition remains in force.⁵⁷ By concluding that an act, which otherwise would be held criminal, is justified and therefore not wrongful, the criminal law simultaneously conveys the law's judgment that it continues to have confidence in the subject's capacity to conduct himself responsibly in the future.⁵⁸

Opinion continues to be divided on whether justifications should be conditioned on an objective 'truth' or a reasonable belief.⁵⁹ According to the former, a mistaken but reasonable belief that one was acting in self-defence would give rise to an excuse whereas in the case of the latter, the defendant would be justified. Some scholars insist however that both objective and subjective elements are necessary: in other words, the accused must have performed the

⁵³ Berman suggests that justifications constitute an exception to a norm and that specifically "it means that a *prima facie* violation of the criminal law is not a violation all things considered"; Mitchell Berman, 'Lesser Evils and Justifications: A Less Close Look,' (2005) 24 *Law and Philosophy* 681, 699-700. For further commentary, see also M. Berman, 'Justification and Excuse, Law and Morality,' (2003) 53 *Duke Law Journal* 1, 7.

⁵⁴ The focus is not always confined to external elements; for example, where the harm sought to be avoided is the harm as perceived by the actor and not the actual harm.

⁵⁵ Fletcher, *Rethinking*, 775. The Anglo-American approach has generally been to ask whether the defendant's conduct furthered an alternative superior interest. For example, the US Model Penal Code (MPC) states that responsibility is negated where "the harm or evil sought to be avoided by the actor's conduct is greater than that sought to be prevented by the law defining the offense charged."

⁵⁶ Gardner, 'Justification and Reasons,' 108.

⁵⁷ Opinion does however continue to divide on whether justifications are merely permissible (weak justification) or whether the conduct needs also to be commendable or right (strong justification). This distinction is important in that the defendant may have a permissible legal justification that might, in some circumstances, be morally wrong to exercise.

⁵⁸ Ann Coughlin, 'Excusing Women,' (1994) 82 *California Law Review* 1, 14.

⁵⁹ See generally Marcia Baron, 'Justifications and Excuses,' (2004) 2 *Ohio State Journal of Criminal Law* 387.

right deed for the right reason.⁶⁰ Also supporting a 'hybrid' view Gardner argues that for the moral justification of action, both guiding and explanatory reasons are required.⁶¹ The former provide external and objective reasons for acting while the latter are the internal and subjective reasons for which the subject has in fact acted.⁶²

Unlike justifications, excuses concern situations where the actor will not be blamed for his wrongful conduct, although the act is no less wrongful. This is because either the requisite mental element is absent or there is a special extenuating factor that needs to be taken into consideration that might be psychological or situational in nature or rest on the notion of involuntariness. Excuses are concerned with the *culpability* of the actor rather than the harm caused although the assessment of an excuse is not solely dependent on subjective criteria. In determining whether to excuse an individual, courts have normally taken into consideration the circumstances of the act and the actor's personal capacity to avoid either an intentional wrong or the taking of excessive risk.⁶³ Calls to expand the categories of excuses in order to take greater account of context specific considerations, as for example the harsh life that the defendant may have experienced, have met with resistance not only for reasons already discussed⁶⁴ but also because such factors are better regarded as partial *explanations* for the defendant's conduct rather than as reasons that severely impinge on the defendant's cognitive or volitional faculties.⁶⁵ In fact, as Dressler convincingly illustrates, the causal theory of excuses degenerates into the compassion theory of excuses which, as

⁶⁰ Fletcher, *Basic Concepts*, 103.

⁶¹ John Gardner, 'Justification and Reasons' 105. Basing his reasoning on J. Raz's analysis – that reasons may be either guiding or explanatory – Gardner suggests that to claim a justification is to claim that one has a reason for a certain conduct or belief.

⁶² It should also be noted that justifications appear to belong among the rules for citizens, in other words, they offer guidance while excuses seem to belong among the rules for courts; see Duff, 'Theorizing,' 361.

⁶³ Fletcher, *Rethinking*, 798. Contrasting the two categories of defences, Robinson succinctly concludes: "Justified conduct is correct behavior which is encouraged or at least tolerated. In determining whether conduct is justified, the focus is on the act, not the actor. An excuse represents a legal conclusion that the conduct is wrong, undesirable, but that criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him. ... Acts are justified; actors are excused"; P. Robinson, 'Criminal Law Defenses', 229.

⁶⁴ It has been suggested that the law's reluctance to enquire too deeply into the defendant's reasons for having violated the norm reflects the intrinsic nature of a defence – that it is an *exception* to the rule – and accordingly should be construed and applied sparingly since to broaden the scope of the exception is to risk undermining the normative force of the prohibition. But it is also worth noting that although the law treats justifications and excuses as though they are the 'exceptions to the rule' they are rather, as Norrie points out, "inherently constitutive elements of judgment that have been sidelined by a particular legal order"; Norrie, 'Simulacra', 129.

⁶⁵ As Moore suggests "[t]he law does not excuse actors whose behaviour is caused by just any threat, natural necessity, craving, or emotional disturbance. As threat, for example, must do more than cause an actor to do what his threatener wants". Referring to the standard in the Model Penal Code, Moore points out that "it asks whether the actor's choice was so difficult – his practical reasoning so constrained – that he should be excused"; Moore, 'Causation and the Excuses,' 1132.

already noted, is an inadequate explanation for why the criminal law excuses.⁶⁶ If there is a common rationale to excuses – both in law and in moral judgment – it is that, as Sanford Kadish concludes, justice requires the preclusion of blame where none is deserved.⁶⁷ But on what basis does the law assess ‘deserts’? Attempts to identify a single theory of excuses, as already noted, have not met with much success in that excuses seem to excuse in different ways. The two most popular theories of excuses – the character theory and the capacity theory⁶⁸ – have both been the subject of significant scholarly debate and criticism.⁶⁹ In attempting to develop a single theory of excuses, John Gardner argues that the ‘gist’ of an excuse is that the actor did live up to the standard of reasonableness for the particular role that he occupied.⁷⁰ Whether Gardner’s theory is a convincing one within the context of ICL will be explored in subsequent chapters.

Excuses, in the words of one commentator, “mop up where exemptions, offence definitions and justifications would lead to a conviction in inappropriate cases”.⁷¹ Implicit in this understanding of excuses is the presumption that the analysis of justification precede the analysis of excuse.⁷² This view is one to which the overwhelming majority of scholars and

⁶⁶ Joshua Dressler, ‘Excusing Wrongdoers,’ (1987) 19 *Rutgers Law Journal* 671, 688.

⁶⁷ Kadish, ‘Excusing Crime,’ 265.

⁶⁸ Claims based on the character theory run, “although I did it, I wasn’t myself” while those based on the capacity theory posit, “I did it but I didn’t have a choice”; Victor Tadros, ‘The Character of Excuse,’ (2001) 21 *Oxford Journal of Legal Studies*, 495.

⁶⁹ Gardner criticises both theories as being inadequate. The character theory, or ‘Humean’ view excuses when the subject acts ‘out of character’. That the excuse will be available to defendant to the extent that his action was no manifestation of his character is untenable because actions of the defendant constitute his character. Gardner suggests that because we cannot differentiate between the character of the defendant and his character displayed in the action, his ‘out of character’ conduct might deserve mercy but should not be the basis of an excuse. The capacity theory or ‘Kantian’ view holds that an excuse will be available to the defendant insofar as he did all that was within his capacity to conform with the law. The reason for excusing the defendant is that he could not have done more in the circumstances. But since the capacity to act virtuously at the crucial moment is no more nor less than the virtue that the defendant has, he cannot plead that he should be excused because we could not expect more of him given his lack of adequate virtue. In other words, the lack of capacity is no excuse if that incapacity is a manifestation of a character flaw; ‘The Gist of Excuses.’ Wilson has also criticised the capacity theory for having failed to draw a clear line between cases of moral frailty that are indicative of an anti-social disposition which should be subject to punishment and those that are embedded in what it is to be a human being; W. Wilson, ‘The Filtering Role of Crisis in the Constitution of Criminal Excuses,’ (2004) 17 *Canadian Journal of Law and Jurisprudence* 387, 388. Duff suggests that in recent years, criminal law theorists have turned from Hume to Aristotle for inspiration. In contrast to Humean accounts, in Aristotelian terms character traits which should ground criminal liability are those that constitute vices and that wrong action is partly constitutive of the character trait; R. Duff, ‘Virtue, Vice and Criminal Liability,’ 153-54.

⁷⁰ Some commentators have however questioned and rejected Gardner’s thesis on the basis that there is no single conceptual foundation for all available excuses since some go to questions of reasonableness, some to capacity or character and some go to questions of situation. See, for example, Tadros, ‘The Characters’, 518-19.

⁷¹ *Ibid.*, 498.

⁷² See George Fletcher, ‘The Right and the Reasonable,’ (1985) 98 *Harvard Law Review* 949, 958.

practitioners subscribe.⁷³ As Fletcher has made clear, when an individual is prosecuted for violating the law the first question that must be addressed is what wrong was committed. If there is no identifiable offence, the criminal law is not relevant. Seeking an answer to the question, 'is the accused justified?' is a natural consequence of identifying the wrong committed. If the accused is exculpated on the grounds that his act was justified, his conduct is regarded as not wrongful; only where the conduct is deemed wrongful does the issue of culpability and hence excuse, become relevant.

The practical benefit of differentiating between justification and excuse is that it helps to clarify the consequences that ensue for victims and third parties. Specifically, with respect to third party liability a justification provides a right to persons other than the primary actor to assist or defend the interests of the primary actor; consequently a third party would not be held liable for their participation in what would otherwise be considered unlawful conduct.⁷⁴ By contrast where the primary actor is excused, an aider and abettor or accomplice would continue to be liable for his conduct since excuses are always personal to the actor. In the case of victims, where the conduct in question is excused, the victim would be entitled to resort to self-defence on the basis that the conduct would still be considered unlawful; but where the conduct is justified, the victim would be expected not to resist.⁷⁵ Lawyers who support formal categorisation maintain that doing so would also aid in determining the appropriate remedy. For example, an excused actor may be required to pay compensation for any damages resulting from the conduct but where the conduct is justified, no such obligation arises.⁷⁶ But just as differentiating between offence and defence is both necessary but impossible, differentiating between justification and excuse can prove equally

⁷³ Husak questions whether there is any real basis for concluding that justifications take natural priority over excuses; Douglas Husak, 'On the Supposed Priority of Justification to Excuse,' (2005) 24 *Law and Philosophy* 557, 557-65. But see reply by Marcia Baron, "Is Justification (Somehow) Prior to Excuse?" (2005) 24 *Law and Philosophy* 595 (2005).

⁷⁴ These rules are useful generalisations but care is required because they are subject to exceptions; J. Dressler, 'New Thoughts About the Concept of Justification in the Criminal Law,' (1984) 32 *UCLA Law Review*, 62. 95-98.

⁷⁵ As Fletcher explains, "a valid justification, then, affects a matrix of legal relationships. The victim has no right to resist, and other persons acquire a right to assist ... Excuses, in contrast, do not affect legal relationships with other persons; the excuse is a claim to be raised only relative to the external authority that seeks to hold the actor accountable for the wrongful deed"; *Rethinking*, 762.

⁷⁶ But as Dressler has pointed out, justifications are not necessarily incompatible with liability in tort law; Dressler, 'New Thoughts', 95. Yeo suggests that categorisation would also assist in deciding whether a particular defence should exculpate or be relevant for the purpose of sentencing. According to Yeo, where a defence is viewed as justifying the conduct, it operates to exculpate; punishment needless to say, does not enter the equation. Where a defence is rejected as a justification the court may then consider whether it serves to mitigate punishment. Social compassion becomes the measure. Full compassion is exercised by regarding the plea as an excuse; partial compassion occurs when society regards the plea as only a mitigating factor in sentencing for then the accused is held blameworthy for the wrongful conduct and deserving of conviction and some punishment; *Compulsion in the Criminal Law*, 14.

challenging; as criminal law scholars have observed, attempts to distinguish may at times be unproductive or even misleading since in judging the individual, the law takes into consideration the subject's conduct in context where attitude is necessarily of some relevance.⁷⁷

3.2.2 Reconceptualising the doctrine of defences

Although my primary aim has been to concentrate on the theoretical debates that have focussed on defences, I have also endeavoured to demonstrate how the criminal law's general part has come under critical scrutiny from different theoretical directions in recent years. In particular, feminist and critical law theorists have exposed how the law is far from principled insofar as it is characterised by bias, inequities, false separations and conflicting assumptions and values. The doctrine of defences too, has come under attack for its artificiality in attempting to separate the universal (justifications) from the individual (excuses).⁷⁸ Catherine MacKinnon, for example, argues for the "telescoping" of the universal and the individual into the "mediate, group-defined, social dimension of gender" on the basis that because the social construction of 'male' and 'female' is such an intrinsic part of individual interaction neither justifications nor excuses fully reflect the realities of men and women within their social environments.⁷⁹ While remaining acutely aware of these critiques, I have nonetheless chosen to explore individual defences through the doctrine because it serves as a useful analytic framework.

Acutely conscious of the differences among people and therefore sceptical of all-embracing general principles that pervade the criminal law, feminist theorists have also drawn attention to the ways in which standards like 'reasonableness' are inherently biased⁸⁰ and although the move towards using the gender neutral 'reasonable person' has generally been welcomed, this modification is seen by some as merely a matter of superficial semantics since the

⁷⁷ Ashworth comments, "the idea that the communicative and labelling functions of the criminal law would be better served by special verdicts ('not guilty on grounds of justification'; 'not guilty because excused') seems to overlook the extent to which many defences contain element of both"; *Principles of Criminal Law*, 254. See also N. Lacey and C. Wells, *Reconstructing Criminal Law* (Butterworths, 1998) 53.

⁷⁸ Greenawalt, 'The Perplexing Borders' 1897.

⁷⁹ MacKinnon, 'Toward Feminist Jurisprudence,' 717-18.

⁸⁰ McColgan writes, "this concept has long been regarded as favouring men – maleness characteristically being associated with attributes such as rationality, forethought and strength, while femininity has traditionally been associated with irrationality, impulsiveness and weakness"; Aileen McColgan, 'General Defences,' in *Feminist Perspectives on Criminal Law*, D. Nicolson & L. Bibbings (eds.) (Cavendish, 2000).

reasonable person “frequently turns out to hold typically male attitudes”.⁸¹ That feminist scholarship has exposed how the biases that underpin the law need, at a minimum, to be revealed and more ambitiously remedied, has prompted vigorous scrutiny of other supplementary conditions inextricably linked to the reasonableness standard.⁸² While this work has produced important insights into the law, other scholars, not fully convinced by the theoretical direction preferred by some feminist scholars have articulated a preference for a more all-embracing approach that looks to the specific part or the offence as interpreted in the *context* of the general principle since “the contextual factors which may be normatively relevant to the application of a general standard to a particular case need to be understood in relation to the types of situation in which they arise”.⁸³ But apart from the groundbreaking work in the area of offences that disproportionately affect women, as for example the law on rape, the overriding purpose of much of the feminist scholarship has been to address the inequalities that pervade the law from the vantage of the woman defendant. By contrast, my concern is to ask whether the law, through legal defences, disproportionately protects the male soldier at the expense of the civilian, of whom the majority are women and children.

In recent years there has been an attempt by some academics to ‘reconceptualise’ the theory of defences by questioning the function that defences perform within the criminal law which has, in part, been prompted by the apparent lack of doctrinal consistency particularly where excuses are concerned. In concluding that defences cannot be fully explained by the standard inquiry into individual minds, characters, or virtues, Victoria Nourse locates defences within a political framework and, in so doing, offers an alternative conception of defences as reflecting the need for a liberal polity to control vengeance.⁸⁴ Rather than perceiving justifications as merely based on the ‘choice of evils’ theory, understanding that they function to reinforce the state’s legitimacy is to provide a far richer explanation that has

⁸¹ R. Ehrenreich Brooks, ‘Law in the Heart of Darkness,’ 43 *Virginia Journal of International Law* 861 (2003), 870. See also N. Lacey, ‘General Principles of Criminal Law? A Feminist View,’ in *Feminist Perspectives on Criminal Law*, 92, who writes: “feminists may question whether the abstract person is implicitly understood in terms of characteristics, contexts and capacities more typical of men’s than of women’s lives and, moreover, is so understood in generalised terms which render expose of sex/gender issues yet more difficult than in the days of sex-specific language.”

⁸²The requirement of imminence, for example, presupposes an evenly matched distribution of power between the parties. But where the power distribution is inherently unequal, satisfying the precondition of imminence may simply not be practicable. See generally A. McColgan, ‘General Defences,’

⁸³ Lacey, ‘General Principles’, 93. Lacey suggests that “[t]he effective deconstruction of criminal law’s real sexual inequities lie in the analysis of the substantive offences interpreted in the light of the supposed general principles rather than in that of the general principles themselves.”

⁸⁴ V.F. Nourse, ‘Reconceptualizing Criminal Law Defenses,’ (2003) 151 *University of Pennsylvania Law Review*, 1691. According to Nourse, defences both reflect and help to construct the liberal political order by incorporating elements that demand deference to majoritarian norms and by aiming to prevent private punishment.

hitherto been largely ignored.⁸⁵ What these alternative perspectives help to reveal is that defences are not merely a reflection of society's moral values but that they serve an important function in reinforcing very specific political and ideological values of a liberal society. The extent to which defences in ICL also disseminate and reinforce liberal theory's core political values forms an underlying theme throughout the following chapters.

In this chapter I have identified some of the theoretical challenges that have dominated the domestic debate as I believe they are of direct relevance to the future of ICL. That the Kantian heritage that shapes how criminal justice is understood in western liberal jurisdictions also colours our understanding of and approach to ICL is only to be expected since war crimes trials are the product of a western liberal tradition that, in the post-war period, opted for "a legalistic solution to a complex moral and political problem".⁸⁶ But in broadly replicating the domestic criminal justice paradigm, war crimes trials have taken on not only the norms and values that characterise liberal justice but have inadvertently adopted the inconsistencies and paradoxes that continue to trouble domestic criminal lawyers and scholars.⁸⁷ ICL's need to faithfully adhere to the free will paradigm that emphasises the autonomous individual can at times sit uneasily within the context of IHL that frequently refers to the collective and the state. Thus, through ICL, we are forced to confront and respond to what, we suspect, may be incommensurable interests including the need to hold *individuals* criminally responsible in the midst of collective violence and guilt.

By contrast to the backdrop in which the criminal law operates, ICL can sometimes seem inherently paradoxical because it operates in a setting where the violation of individual autonomy, albeit under specific conditions, is the norm. In an environment where the resort to violence is not only legitimate but the norm, and where the state actively authorises and encourages the use of deadly force in pursuit of its aims, the individual's normal moral parameters are thrown into turmoil. An inevitable consequence of this exceptional extension of legitimised violence is that the line that divides acceptable conduct – moral, social and

⁸⁵ See also M.D. Dubber, 'Toward a Constitutional Law of Crime and Punishment,' (2004) 55 *Hastings L.J.* 509 at 555 and Jeremy Horder, 'Criminal Law: Between Determinism, Liberalism, and Criminal Justice,' (1996) *Current Legal Problems* 159, 172-77.

⁸⁶ Bass, *Stay the Hand of Vengeance* (2000) New Jersey: Princeton University Press.

⁸⁷ In describing the scope of the trial process Fletcher explains that we limit the inquiry into wrongful conduct to the one at hand or single deed for which the accused is being prosecuted based on the principle of legality. This is of course, an artificial construct but underlying it is the principle of maintaining the suspect's privacy. The issue in the legal inquiry is not whether, all things considered, the actor is wicked, but whether a single instance of wrongful conduct warrants the inference that the actor deserves punishment. Disciplining the inquiry in this way restricts the range of relevant information, but it secures the individual against a free-ranging inquiry of the state into his moral worth – a core value of the liberal tradition; Fletcher, *Rethinking* 800-01.

legal – from that which is not, can become more difficult to determine, especially for the soldier caught in a hostile environment.

In peace time, through the criminalisation of the intentional taking another's life, the state conveys a powerful message about the moral and political value of human life itself. But in a single moment, as the state shifts into a conflict 'framework', the most fundamental prohibition in the penal code is deemed lawful and the killing of an enemy soldier becomes lawful to the extent that the killing does not violate other rules of war. The rules applicable during conflict therefore reflect a significantly transformed set of moral and political interests in which the value of human life itself is arguably treated as 'expendable' but certainly regarded as of secondary importance where the continued survival of the state is threatened.⁸⁸

It is particularly in times of crisis or conflict, when the natural order is threatened and the individual's perception of moral relevance are at its most vulnerable, that legal defences can play a vital role in not only reinforcing society's normative standards but in ensuring that the criminal law holds responsible individuals for their *criminal* behaviour. Just as domestic and international criminal law express the basic moral values of the community, defences mirror society's moral boundaries. But given the difficulties of delineating those boundaries in times of peace, setting the boundaries during conflict are apt to be that much more challenging.⁸⁹

In the final section, I examined in greater depth the theory of defences while remaining acutely aware that the doctrine has evolved within the context of defences on the national level. This begs the question as to how relevant or useful the doctrine might be in the context of ICL. But given that many of the defences that are found in the ICC statute have obviously been 'transplanted' from national criminal justice paradigm, it would seem necessary that that rationale of each defence is first understood within its broader theoretical framework for only then is it possible to critically assess whether a particular defence should

⁸⁸ For a revealing perspective see, for example, the ICJ's Advisory Opinion in the *Legality of the Threat or Use of Nuclear Weapons* when it is concluded (8 votes to 7) that "the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

⁸⁹ As Wilson comments, "...the basic defence formula operates largely as a reflection of limits placed upon excuses and justifications at the level of general morality. ...It feeds off deeply rooted moral assessments of what it is to be responsible human subject. Crisis upsets the natural order of things. It deprives rules of behaviour of their moral relevance. It deprives individuals of their susceptibility to control by rules. Far from being an unholy moral compromise with the demands of penal efficacy the formula sets the moral limits within which a workable system of norm enforcement can be achieved"; W. Wilson, *Central Issues in Criminal Theory*, 330.

apply equally to serious international offences. In the following chapters I rely on a modified form of the doctrine of defences primarily because the simple dichotomy seems too crude to serve as a basis for understanding legal defences in ICL. In addition to the traditional categories of justifications and excuses, I include a third category of defences which I refer to as 'hybrid' defences since these defences have been treated by different tribunals at different times as *both* justification and excuse.⁹⁰ I begin, however, by exploring the nature of excuses.

⁹⁰ I am of course acutely aware that in addition to necessity and duress, self-defence may equally be regarded as both justification and excuse.

CHAPTER 4

EXCUSING VIOLATIONS COMMITTED IN CONFLICT

Excuses in domestic criminal law function to negate the attribution of blame and in so doing they delineate between blameworthy and blameless conduct. They differ in one very fundamental way from justifications in that they are primarily directed at the adjudicator rather than to the legal actor since they do not tell us how we should behave but rather how we are to be treated for having engaged in the particular conduct.¹ Excuses act to exculpate individuals who violate society's norms usually because the wrongdoer lacks the capacity of an accountable legal agent or lacks the requisite knowledge that would allow him to avoid engaging in the proscribed act.² Excuses, Michael Moore suggests, reflect "the moral judgment that responsibility can only be ascribed to an individual who has both the capacity and the opportunity to exercise the practical reasoning that is distinctive of his personhood."³ Excuses can be sub-divided into four, albeit overlapping, categories⁴ including involuntary actions not willed by the actor,⁵ conduct that pertains to the psychological condition of the subject⁶, actions relating to cognitive deficiencies and actions related to volitional deficiencies⁷.

Attempts to explain excuses based on the utilitarian theory – that the law should permit a defence in cases where the prohibited conduct could not have been deterred⁸ – have proved

¹ See generally Meir Dan-Cohen, (1984) 'Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law,' 97 *Harvard Law Review*, 625 in which the author differentiates between decision rules (rules of attribution and excuses) and conduct rules (prohibitions and justifications). See also Sharon Byrd, 'Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction,' (1986) 33 *Wayne Law Review*, 1289, 1316.

² Robert Schopp, 'Justification Defenses and Just Convictions,' (1992) 24 *Pacific Law Journal*, 1233, 1321.

³ Moore, 'Causation and Excuses,' 1149.

⁴ For alternative classifications, see Robinson, 'Criminal Law Defenses', 222; Eugene Milhizer, 'Justification and Excuse: What they were, what they are, and what they ought to be,' (2004) 78 *St. John's Law Review* 725, 818; Cassese, *International Criminal Law*, 224.

⁵ This will include for example, reflex actions and convulsions.

⁶ As, for example, insanity or intoxication.

⁷ Cognitive deficiencies include mistake of fact or law while volitional deficiencies include the compulsion excuses – duress and necessity; see generally Michael Moore, *Placing Blame* (Clarendon Press, Oxford 1997) 59.

⁸ According to Jeremy Bentham punishment is justified only insofar as it furthers the general good (deterrence) and where it fails to do so and inflicts pain without a commensurate benefit, it is wrong. Consequently, he argues, punishment should not be permitted in certain classes of cases; *Introduction to the Principles of Morals and Legislation* (Clarendon Press, Oxford 1879) 171-177.

to be fundamentally inadequate.⁹ H.L.A. Hart offers a more satisfying explanation when he suggests that by limiting liability to those instances where free choice was available, excuses serve to maximize “the efficacy of the individual’s informed and considered choice in determining the future and also his power to predict that future”.¹⁰ But as Sanford Kadish points out, what is missing from Hart’s explanation is “an account of the concern for the innocent person who is the object of a criminal prosecution” since the law’s primary concern is not with giving the wrongdoer a choice as to whether to comply with the law or suffer the consequences but with how to treat the wrongdoer who has acted without culpability.¹¹ As Kadish suggests, “to blame a person is to express a moral criticism, and if the person’s action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him. It is this feature of our everyday moral practices that lies behind the law’s excuses.”¹² But although excuses are relevant in circumstances when it is simply unjust to punish an individual who is neither culpable nor blameworthy¹³ this explanation fails to fully satisfy because excuses do not always correlate with blame. It seems that an individual’s right not be blamed for a wrongful act is also subject to – or tempered by – other moral and pragmatic considerations. Securing justice for the individual, albeit a *prima facie* objective, is obviously treated not as an absolute value but one that must be weighed against other social interests that might include, for example, order or security or the moral claims of other individuals within the society. And if that is the case, this raises the important question of whether a soldier can, or *should*, ever be excused for a war crime.

In this chapter I limit my analysis to mistake of fact and mistake of law, each of which forces us to consider the nature of culpability itself. For a mistake – whether of fact or law – requires us to confront the question of whether, and to what extent, we can fairly hold an individual *criminally* responsible for something he is unaware of having done. In other words, can we under any circumstance justify penal sanctions for an individual in the absence of volition?

⁹ Following Hart’s critical analysis of Bentham’s deterrence theory, it is now generally accepted that the theory does not adequately explain ‘excuses’ in the criminal law; H.L.A. Hart, *Punishment and Responsibility*, 40-53. The utilitarian explanation for excusing the wrongdoer (that punishing him will neither undo the harm nor deter future conduct) is questioned on the grounds that punishing those who lack control may in fact contribute to the general well-being. Punishing the wrongdoer not only restrains and/or incapacitates them so that they no longer pose a danger to society but also gives other potential wrongdoers an incentive to resist acting harmfully.

¹⁰ Hart, *Punishment and Responsibility*, 46.

¹¹ Kadish, ‘Excusing Crime,’ 264.

¹² *Ibid.* But in spite of its deficiencies, Anglo-American legal thought continues to be influenced by the utilitarian theory of excuses subject to some modifications; see generally John Lawrence Hill, ‘A Utilitarian Theory of Duress,’ (1999) 84 *Iowa Law Review*, 275.

¹³ Fletcher, ‘Criminal Theory in the Twentieth Century,’ 267.

4.1 MISTAKE

Death and injury as a consequence of mistakes in conflict probably occur far more frequently than any military would care to admit. Whereas in the past, the military may have had far more scope for dismissing such mistakes as ‘tragic accidents’, the unprecedented access by the global media to combat zones together the growing public awareness that ICL offers a potential remedy, has meant that such incidents have come under far greater public scrutiny than ever before. But do those who call for greater accountability and criminal prosecutions demand too much? Should the soldier who pulls the trigger in a high-pressure hostile environment on the orders of his commanding officer in the belief that his target is a legitimate one, be subject to a criminal prosecution? Yet equally, if he is not held responsible for the death of the innocent civilian, who is? In this chapter I first consider how the mistake of fact plea is interpreted and applied in a number of jurisdictions; my purpose is to better understand the rationale that sustains this defence. I pay special attention to the scope of this plea in the context of the offence of rape because of all the legal defences it is mistake of fact that is most commonly pled in response to the charge of rape, an offence that continues to be all too prevalent in conflict. I then turn my attention to the jurisprudence of war crimes trials and suggest that, contrary to popular belief, many of the post-war tribunals adopted what was essentially a context-sensitive approach. In light of this, I argue that there is a strong case for international tribunals to require that mistake of fact as to consent must be both honest and reasonable. In the second part of this chapter, I consider the defence of mistake of law to make some sense of the common law’s resistance to this plea. As with the mistake of fact defence, I suggest that because the post-war tribunals were far more willing to take account of the specific context of the case, the plea was admitted in a number of instances. In the final subsection I explore the relationship between mistake of law and superior orders and in doing so tentatively suggest an alternative way of understanding this dual plea.

In most jurisdictions, a mistake of fact has generally been regarded as capable of affording a full defence insofar as it negates intent.¹⁴ By contrast, mistake or ignorance of law has, by and large, been rejected as a valid defence in common law jurisdictions while in many civil law systems a mistake of law is recognized as capable of affording a full defence absent culpability. Although differentiating between a mistake of law and fact is straight-forward

¹⁴ Reasonable mistakes of fact have certainly been regarded by English courts since the nineteenth century as affording a full defence; see *Tolson* (1889) 23 QBD 168, *Rose* (1884) 15 Cox C.C. 54.

in the context of the descriptive element of the offence, where a mistake concerns a normative element, as for example, a mistake concerning the victim's protected status, it is often difficult to determine whether the mistake is more properly categorised as a mistake of fact or of law. The ability to differentiate becomes pivotal since the legal evaluation and consequences of that assessment can vary significantly.¹⁵

4.2 MISTAKE OF FACT

As with all legal defences mistake of fact raises important questions regarding the proper balance that a liberal polity attempts to strike between promoting a criminal justice system founded on individual responsibility and the pursuit of a society in which co-existence through legally sanctioned objective standards of care arrived at through majoritarian rule can be sustained.¹⁶ As far as liberal theory is concerned there is no moral basis for punishing the wrongdoer who has acted as a consequence of a mistake of fact since for punishment to be just, the *actus reus* and *mens rea*¹⁷ must coincide and clearly the mistake negates the *mens rea*. In other words, there would be little justice in punishing the wrongdoer for a mistake founded on a cognitive deficiency or error in the absence of any corresponding volitional element.¹⁸ But what continues to trouble both scholars and jurists alike is whether the defence is contingent on the mistake being reasonable and the extent to which, if at all, culpability might be properly integrated and evaluated in the process of judgment.

In common law jurisdictions a dual approach to mistake of fact has emerged according to which a mistake can act to negate the wrongdoer's *mens rea* in one of two discrete ways.

¹⁵ See Eser, 'Mental Elements,' in *A Commentary*, 935-37 for additional comments.

¹⁶ James Faulkner, (1991) 'Mens Rea in Rape: Morgan and the Inadequacy of Subjectivism,' 18 *Melbourne University Law Review*, 60, 61. See generally Celia Wells, 'Swatting the Subjectivist Bug,' [1982] *Criminal Law Review*, 209-220.

¹⁷ The element of *mens rea* introduces its own problems to the extent that as commonly understood, *mens rea* is limited to the notion of fault based on intention or recklessness; in other words, it fails to fully capture or reflect the normative element of moral culpability. For additional comments see G. Fletcher, 'The Theory of Criminal Negligence: a Comparative Analysis,' (1971) 119 *University of Pennsylvania Law Review*, 401, 412; also see Wells, 'Swatting', 209-10. Eser has criticised the Rome Statute for appearing to "adhere to a narrower psychological concept of the mental element (intent and knowledge according to Article 30 of the ICC Statute)..."; Eser, 'Mental Elements', 904.

¹⁸ See for example, Hale, *Pleas of the Crown* (1736) Vol 1, p. 42: "[b]ut in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary". See also *Gordon v The State*, Supreme Court of Alabama, 1875 WL 959 (Ala.): "[t]he criminal intention being of the essence of crime, if the intent is dependent on a knowledge of particular facts, a want of such knowledge, not the result of carelessness or negligence, relieves the act of criminality." This line of reasoning, according to Fletcher, can be traced back to Aristotle who argued that because mistakes negate the voluntariness of the actor's choice to engage in the proscribed act, the actor cannot be held responsible; Fletcher, *Basic Concepts*, 149.

Courts have either treated the mistake as an ‘independent’ defence which operates to *excuse* the actor for lack of culpability or have held that a mistake can act to negate the requisite mental element that forms the definition of the offence.¹⁹ Under what circumstances one approach is to be preferred over another has not always been clear. Some courts have tended to distinguish between ‘specific’ and ‘general’ intent offences²⁰ while others have distinguished between mistakes that relate to an element of an offence and those that relate to an element of an intervening defence. Insofar as the former is concerned, the standard approach has been that where the mistake pertains to a ‘specific intent’ offence the criminal law treats the accused as not having the requisite mental element.²¹ In other words, the ‘elemental’ aspect of the offence is simply not met;²² by contrast, where the offence is one of general or basic intent, the approach taken has been to assess whether the defendant’s mistake negates his moral culpability. Adopting an elemental approach to a mistake of fact is to treat the mistake not in the same manner as other defences – that justify or excuse – but to merely recognise that the prosecution has failed to prove its case.²³ It follows therefore that the reasonableness or otherwise of the mistake is irrelevant. Support for this analysis can be found in Lord Hailsham’s oft-cited opinion in *Morgan* (the leading English case on rape until the recent legislative changes). According to Lord Hailsham, it was “as a matter of inexorable logic” that once it is accepted that “the prohibited act in rape is non-consensual sexual intercourse, and that the guilty state of mind is an intention to commit it, ... there is no room either for a ‘defence’ of honest belief or mistake or of a defence of honest and

¹⁹ Faulkner, ‘Mens Rea in Rape’, 60. Dressler describes the first type of mistake of fact as negating the ‘*mens rea*’ in the ‘culpability’ meaning of the term while the second negates the ‘*mens rea*’ in the ‘elemental’ sense; Dressler, *Understanding Criminal Law*, 152. According to Dressler, once the relationship between mistake and *mens rea* is recognised, it is easy to see that the mistake of fact rule is not a special rule – in other words, either the actor had the *mens rea* for the offence or he did not. This is precisely the criticism that is levelled by Eser when he suggests that Article 32 of the ICC statute is ‘repetitious’ since it merely restates the mental element as a requirement of criminal responsibility according to Article 30(1); Eser, ‘Mental Elements’, 934.

²⁰ English law distinguishes between those offences that require intention or foresight and those offences that are satisfied by objective recklessness, negligence or strict liability; P. Murphy (ed.) *Blackstone’s Criminal Practice*, (2000), A3.2-3.5. An alternative suggested distinction has been between statutory and common law offences; see opinion of Lord Cross in *DPP v Morgan*.

²¹ Mistakes as to a mental element can occur in two ways: the actor may not recognise a fact or know about the circumstances that make up the offence or defence; alternatively he may make a wrong evaluation and falsely assume that certain circumstances exist.

²² This approach is sometimes merely referred to as failure of proof or failure of prima facie case. As Fletcher has explained, if the required intent is ‘the intent to do A’ and the actor believes that not-A is the case, then he cannot have the ‘intent to do A’. It follows from the logic of this argument that “any mistake – reasonable or unreasonable – precludes a finding of the required intent”; *Rethinking*, 687.

²³ According to the Supreme Court of Canada, “[m]istake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence”; *Pappajohn v The Queen*, [1980] 2 S.C.R. 120 para. 40.

reasonable mistake. Either the prosecution proves that the accused had the requisite intent, or it does not”.²⁴

The decision in *Morgan* came under severe criticism not only for its narrow construction of the offence of rape, but for its “vindication of subjectivism” in the determination of the mental element.²⁵ Criticism centred on the court’s exclusive reliance on the subjective principle for assessing the mental element on the grounds that the reasoning led to the absurd result that where a defendant acts on a mistaken belief, however unreasonable that belief, to the extent that it is an *honest* mistaken belief, the *mens rea* is negated and the wrongdoer cannot be held responsible for the commission of the specific offence. In the case of *Morgan*, this outcome was felt by many – and in particular, by feminist scholars – to be intuitively unsatisfactory. What concerned the critics was that subjectivism risked being under-inclusive to the extent that its focus is exclusively on the individual accused of the offence and his mental attitude of mind with little or no regard for the normative values or interests of the wider community.²⁶ Although it is self-evident that the more reasonable the mistake, the more persuasive it is as evidence of an honest belief the reasonableness of the mistake is not a precondition of the defence. As a matter of law, therefore, it would seem that when the mistake pertains to an element of the offence the only assessment that is relevant is whether or not the mistake negates the specific mental element of the offence.²⁷ It is perhaps unfortunate that the leading English case on mistake of fact involved the offence of rape since there are good policy reasons for treating the offence in a separate way as was recognised by the enactment of the Sexual Offences Act in 2003.²⁸

²⁴ *R v Morgan* [1976] A.C. 182. By treating the absence of consent as part of the *actus reus* of the offence of rape, the only relevant issue to be determined was whether the mistake was based on an honest belief which would negate the requisite *mens rea*.

²⁵ See in particular, Wells, ‘Swatting’ 209-220; Faulkner, ‘Mens Rea in Rape’, 60-82; Jeremy Horder, ‘Cognition, Emotion, and Criminal Culpability,’ (1990) 106 *Law Quarterly Review*, 469-486.

²⁶ Some critics have suggested that any harmful conduct taken on the basis of unreasonable mistakes should be criminalised. According to this view, interaction with other individuals in a social infrastructure necessarily means that our conduct is governed by moral obligations towards one another; it follows that any conduct based on unreasonable mistakes undermines the very fabric of those social duties.

²⁷ Although the accused cannot be held responsible for the *intentional* commission of the specific offence, this does not preclude the possibility of holding him liable for negligence. However, in common law jurisdictions the negligence must be deemed gross for criminal liability to arise. See Byrd, ‘Wrongdoing and Attribution’ 1329.

²⁸ The 2003 Act defines ‘consent’ to the extent that in s.74 it provides: “a person consents if he agrees by choice, and has the freedom and capacity to make that choice”. Under the Act the mental element required for rape was amended to take account of the criticisms following *DPP v Morgan*. Rape as defined by s 1(1) requires that a person intentionally penetrated the vagina, anus or mouth of the complainant where the latter does not consent and the defendant does not *reasonably* believe that the complainant was consenting. This change does not however reject a subjective test since under subsection (2) the test is whether the defendant had a reasonable belief in consent, having regard to all the circumstances.

In the case of 'general intent' offences courts have held that a mistake of fact acts to *excuse* the wrongdoer despite the elements of the offence being satisfied because, it is reasoned, the wrongdoer acted in a blameless manner and in so doing the element of culpability is absent.²⁹ This is, however, subject to the mistake being reasonable:³⁰ in other words an objective test also applies. However, as with the subjective test which risks being under-inclusive, the objective test also raises fundamental problems pertaining to culpability, in that it risks being over-inclusive and therefore unjust.³¹ Because the criminal law tends to only punish wrongdoers for gross negligence, the attribution of criminal liability on the basis of an unreasonable mistake – in other words for negligence – is resisted by advocates of the subjective test.³² The consequence of punishing a wrongdoer for a negligent mistake, it is reasoned, is to treat the negligent wrongdoer in the same way as a wrongdoer who acted with intention.³³ As Fletcher points out, situations might arise where there are insufficient objective criteria to conclude that any reasonable person would have made the mistake yet, because of considerations personal to the wrongdoer, he might be 'free' from culpability. In such cases, the objective test would act to preclude the consideration of the mistake even though the mistaken wrongdoer was "not fairly to blame under the circumstances".³⁴

The problem with the traditional approach adopted in some common law jurisdictions – of differentiating between specific and general or basic intent offences – is that it makes little sense in the context of an elemental analysis in the determination of liability. Whether the offence in question is one of specific or basic intent, the reasonableness of the mistake should be immaterial since the mistake negates the *mens rea*: either the accused had the requisite mental element as defined by the offence or he did not. However, where the

²⁹ Dressler, *Understanding Criminal Law*, 153.

³⁰ See for example, in *R v Tolson*, (a bigamy case) J. Cave held: "at common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which a prisoner is indicted an innocent act has always been held to be a good defence"; (1889) 23 Q.B.D. 168.

³¹ See also Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility,' (2001) 27 *Monash University Law Review* 197, 199.

³² See *R v Adomako* [1994] 3 All ER 79. See Canadian Criminal Code, RSC 1985, c C-46, ss 220-222 which contains the offence of criminal negligence causing death or bodily harm and manslaughter by criminal negligence which has been interpreted by the courts to require gross negligence (*R v Tutton* [1989] 1SCR 1329). For a useful commentary, see Colvin, 'Ordinary and Reasonable People', 205-207.

³³ Dressler, *Understanding Criminal Law*, 156.

³⁴ Fletcher, *Rethinking*, 708. The Sexual Offences Act 2003 arguably, adopted a 'compromise' position that lies somewhere between an objective and subjective standard. Section 1(2) states: "whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents"; in so doing, the provision focuses on the particular defendant rather than on the reasonable man.

mistake relates to a defence,³⁵ the reasonableness of the mistake becomes crucial because both the *mens rea* and *actus reus* are satisfied.³⁶ In such cases, the general rule is that the wrongdoer should be acquitted as long as the mistake was reasonable. While the general rule might be easily articulated, the real challenge – as already touched on³⁷ – lies in determining on what basis an offence or a defence requirement should be classified as either a definitional or a defence element.³⁸

Nonetheless, even if differentiating is straight-forward, the elemental approach continues to prove unsatisfactory to the extent that the element of culpability is not fully captured by the criminal law's concern with the defendant's *mens rea* (in the narrow sense). This invariably begs the question as to whether the determination of individual culpability for a wrongdoing, albeit due to a mistake of fact, *should* be limited merely to a question of ascertaining the existence or absence of intention. As Ashworth observes, "the belief principle ... includes no reference to the circumstances of the act, to the D's responsibility, or to social expectations of conduct in that situation": in other words, liberalism's partiality for subjectivism sustains the atomistic, decontextualised individual. Calling for a more context-sensitive approach to mistake, Ashworth suggests a better way of judging fairly may be to take account of both objective and subject considerations since "there may be good reasons for society to require a certain standard of conduct if the conditions were not to preclude it, particularly where the potential harm involved is serious".³⁹ Incorporating the objective test, which liberal theory has traditionally viewed with some scepticism if not hostility, into the process of judgment may better secure a just outcome for, as Lacey suggests, the objective reasonableness test "is, at root, all about a vision of the obligations which human beings owe to one another".⁴⁰ In fact, this dual context-sensitive approach to the reasonableness test is, I suggest, how some war crimes tribunals have interpreted and applied the mistake of fact plea. But before evaluating the relevant jurisprudence it would be useful to first consider how the plea has been treated in civil law jurisdictions.

³⁵ Opinion continues to divide on whether justificatory defences require the mistake to be reasonable or not; while some scholars maintain that justificatory defences are treated in the same manner as mistakes that go to the elements of the offence, not all agree.

³⁶ Simester maintains that English law at the time of *Morgan* did treat mistakes as to offences and those relating to defences differently and applied the subjective test to the former and an objective test to the latter; A.P. Simester, 'Mistakes in Defence,' (1992) 12 *Oxford Journal of Legal Studies* 295, 307.

³⁷ See 3.1.1.

³⁸ C. Clarkson & H. Keating, *Criminal Law: Text and Materials* (Sweet & Maxwell 2003), 200.

³⁹ Ashworth, *Principles of Criminal Law*, 242.

⁴⁰ Lacey, 'General Principles', 94-95.

In contrast to common law jurisdictions, criminal legal theory in civil law jurisdictions has developed to a “sophisticated level of perfectionism”⁴¹ insofar as formal conceptual frameworks have been established to aid in the assessment of liability. To fully appreciate how a mistake of fact plea is treated in civil law systems, it is useful to first understand the broader framework within which defences are evaluated and in doing so, I shall refer to the German criminal offence model (*Straftatsystem*).⁴² In determining liability, German criminal law recognises and distinguishes between three distinct stages of legal analysis or inquiry (tripartite model): satisfaction of the legal elements of the offence (*tatbestand*), unlawfulness or wrongdoing (*rechtswidrigkeit*) and culpability (*schuld*).⁴³ The legal elements of the offence comprise both objective and subjective elements of the offence, the latter of which can be further subdivided into intention (*vorsatz*)⁴⁴ and any additional mental elements. The German model therefore requires the defendant’s state of mind to be evaluated not only at the initial stage when considering the legal elements of the offence but also when culpability is addressed.⁴⁵

Under the German Criminal Code, where the defendant lacks the knowledge of a physical legal element of the offence he is entitled to the full defence of mistake of fact (*tatbestandsirrtum*) because the requisite intent is absent. Lack of knowledge requires that the accused did not even take into consideration the possibility that an objective element was not as perceived; in other words, it is contingent on an absolute ignorance. Anything short of full ignorance may, however, incur liability based on negligence⁴⁶ or *dolus eventualis*.⁴⁷ In

⁴¹ Otto Triffterer, ‘Article 32, Mistake of fact or mistake of law,’ in *Commentary on the Rome Statute*, Ambos & Triffterer (eds.) (1999).

⁴² See generally M. Dubber, ‘The Promise of German Criminal Law,’ [2005] 6 *German Criminal Law*.

⁴³ Although both German and Austrian penal codes explicitly refer to culpability, not all civil law systems (as for example, France and Spain) share this approach. For further details, see generally Eser, ‘Mental Elements’ in *A Commentary*.

⁴⁴ Intention entails both cognitive (*wissen*) or volitional (*wollen*) components.

⁴⁵ Mohamed E. Badar, ‘*Mens rea* – Mistake of Law & Mistake of Fact in German Criminal Law: A Survey for International Criminal Tribunals,’ (2005) 5 *International Criminal Law Review*, 203.

⁴⁶ Section 16(1) of the StGB provides: “whoever, while committing the criminal offence, has no knowledge about a circumstance being part of the legal elements, does not act intentionally. The criminal liability for negligent action remains unaffected”; Badar, ‘*Mens rea*,’ 203-246.

⁴⁷ Under civil law systems, there are five recognised levels of knowledge: *dolus directus* in the first degree, *dolus directus* in the second degree, *dolus eventualis*, conscious negligence or recklessness and unconscious negligence. The first level refers to a state of mind in which the defendant intentionally causes the harm he foresees and desires; by contrast, *dolus directus* (second degree) refers to the state of mind in which the defendant intentionally causes the harm he foresees although the harm caused may not have been his primary objective. *Dolus eventualis* is a state of mind where the defendant is aware that his conduct is likely to cause harm. Conscious negligence refers to a state of mind in which the defendant knowingly acts dangerously while the last state of mind involves dangerous conduct with no awareness of having acted dangerously; Eser, ‘Mental Elements 905-08. In *Prosecutor v Blaskic*, the Appeals Chamber noted that in civil law jurisdictions *dolus eventualis* may constitute the requisite *mens rea* for crimes; IT-95-14-A (29 July 2004) paras. 38-39. Although Article 30 of the ICC statute limits the Courts jurisdiction to offences committed with intention and

civil law jurisdictions a formal differentiation is also made between the descriptive and normative material elements.⁴⁸ As far as the descriptive element is concerned, the defendant's factual error negates the mental element and consequently, criminal responsibility is excluded. By contrast, the normative element requires more than mere factual knowledge in that the defendant must recognise "the socio-legal significance of the material element in question."⁴⁹ The standard of knowledge according to which the defendant is judged is, however, that of the reasonable person. Although this distinction might initially appear to be fairly straightforward, difficulties arise where an element of the definition requires a normative judgment. Where an accused misevaluates a situation, whether that mistake is more properly treated as a mistake of fact or one of law continues to divide scholars and jurists.

How putative justifications are to be properly treated also continues to be disputed under the German model. While there is general agreement that unavoidable or blameless mistakes should excuse the accused, whether such mistakes are better viewed as mistakes about the element of an offence or mistakes about legal norms remains unresolved. If they were to fall into the former category, section 16 of the Code would apply; however, the section is concerned with the elements of the offence and cannot therefore be directly applicable to the facts underpinning the defence.⁵⁰ The German code also expressly provides for cases of mistakes that go to the factual element of an excuse under section 35(2) which reads, "[i]f upon commission of the act the perpetrator mistakenly assumes that circumstances exist, which would excuse him under subsection (1), he will only be punished, if he could have avoided the mistake". In other words, the accused's mistaken belief must have been unavoidable. Because in neither common law nor civil law systems, mistakes about the factual element of an excuse are regarded as negating either wrongdoing or the requisite intent, mistakes of this type act to excuse the wrongdoer, absent culpability.⁵¹

knowledge, under customary international law, recklessness can form the requisite mental element for some offences; see ICRC Commentary (Additional Protocols) para 3474, *Prosecutor v Galic* (IT-98-29-T), para. 54, *Prosecutor v Struger* (IT-01-42-T) paras 235-36.

⁴⁸ This differentiation becomes crucial when assessing whether the mistake in question is more properly viewed as one of fact or one of law.

⁴⁹ Normative mistakes of this kind are treated as factual mistakes and do not fall into the category of mistake of law; see Gunter Arzt, 'The Problem of Mistake of Law,' (1986) *Brigham Young University Law Review*, 711, 716. See also generally Badar, 'Mens rea' and Triffterer, 'Article 32' at 566.

⁵⁰ This difficulty has sometimes been 'overcome' by German courts by way of analogy; see Fletcher, *Basic Concepts*, 160.

⁵¹ Fletcher, *Basic Concepts*, 165.

4.2.1 ICL and mistake of fact

As with excuses in domestic law, excuses in ICL function to negate the attribution of blame. Society, it would seem, is prepared to excuse a soldier even when the offence amounts to a war crime because he has engaged in the proscribed act without full knowledge of the pertinent facts: punishment absent volition would simply be unjust.⁵² But does ICL strike a proper balance between the rights of the defendant and the interests of the wider community since it is particularly in times of conflict that the potential harm done by the defendant could not be much greater and the most vulnerable at the greatest risk? Moreover, how does ICL treat the defendant who pleads mistake of fact as to consent in the case of rape given that rape in war continues to remain an all too prevalent 'feature' of conflict?

Mistakes, especially in highly volatile environments, can occur in a variety of different ways. They can involve the descriptive elements of an offence as, for example, where a soldier fires at what he believes to be a legitimate military target which in fact turns out to be vehicles engaged in humanitarian assistance; obviously because the soldier would lack the factual knowledge pertaining to an element for the *intentional* attack, it is only right that he is not held criminally responsible.⁵³ Of course this raises questions as to whether adequate precautions were taken prior to opening fire and whether the soldier's conduct was reckless in the circumstances but that is a separate issue.⁵⁴ Mistakes as to identity may in some instances preclude liability while in other cases not; if the victim falls within the same definitional category of the offence for which the defendant is charged, the mistake is irrelevant.⁵⁵ Mistakes that relate to the normative element of the offence are probably more likely to occur in conflict because those engaged in hostilities are constantly having to make normative judgments. One such example would be the failure by an accused to accord to a victim the protected status to which he was entitled due to a normative misevaluation. Although opinion continues to be divided as to whether such cases are more properly

⁵² Mistake of fact has traditionally been accepted as a valid plea in war crimes trials and is a defence that is generally recognised by international and hybrid tribunals. For recent examples, see *Prosecutor v Bere*, Special Panel for Serious Crimes, May 15, 2001 where the defendant raised the defence provided under United Nations Transitional Administration in East Timor Regulation 2000/15 amended by 2001/25 which states, "a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime".

⁵³ Under Article 8(2)(b)(iii) of the ICC statute, the intentional attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission may amount to a war crime. See also UK Military Manual (2004) at 16.45.1. Whether or not the Israeli air strike on a UN observation post in south Lebanon on 26 July 2006, was an act of deliberate targeting or a serious error is currently under investigation; for background see http://news.bbc.co.uk/1/hi/world/middle_east/5215366.stm

⁵⁴ The ad hoc tribunals have taken a cautious approach to finding criminal liability based on recklessness where combat offences are concerned; see footnote 47 above.

⁵⁵ See in particular, Badar, 'Mens rea' 238-9.

categorised as mistakes of law rather than fact, the post-war cases suggest that the better view is to regard them as falling within the latter category. In such cases the defendant would clearly lack the factual knowledge of elements material for a wilful deprivation of the protections that were available to the victim and could not fairly be held liable for the violation.⁵⁶ So, for example, in the case of *Re List (Hostages)* the US military tribunals treated the case as an ‘error of judgment’ that entailed a mistake of *fact* rather than of law when it held:

[i]n determining the guilt or innocence of any army commander when charged with a failure or refusal to accord a belligerent status to captured members of the resistance forces, the situation as it appeared to him must be given the first consideration. ...[W]here room exists for an honest error in judgment, such army commander is entitled to the benefit thereof by virtue of the presumption of his innocence.⁵⁷

What is significant about this ruling is that in assessing the credibility of the mistaken belief, the tribunal applied not only the subjective ‘honest belief’ test but also took note of the accused’s training and position; in other words, objective considerations were introduced into the process of judgment. That a higher standard might be expected of a commanding officer is made abundantly clear by the tribunal’s observations that the:

commander will not be permitted to ignore obvious facts in arriving at a conclusion. One trained in military science will ordinarily have no difficulty in arriving at a correct decision and if he wilfully refrains from so doing for any reason, he will be held criminally responsible for wrongs committed against those entitled to the rights of a belligerent.

This line of reasoning is also found in the 2004 edition of the UK’s military manual, in which explicit reference is made to Article 32 of the ICC statute and in doing so provides that a mistake of fact is a defence “if it negates the mental element required for a crime”.⁵⁸ While the provision retains the subjective test of ‘honest belief’⁵⁹ it also incorporates an

⁵⁶ See ICC statute, Article 8(2)(vi).

⁵⁷ The case arose in the context of the German occupation of Yugoslavia and Greece when guerrilla warfare was carried on against the occupying power. The issue involved one of whether the German authorities had correctly classified those who came under their control as unlawful belligerents (and not entitled to POW status) or whether those detained should have been treated as irregular troops (as defined under Article 1, Hague Regulations, 1907) and thus entitled to POW status; *The Hostages Case, TWC*, Vol VIII, 34, 57-58.

⁵⁸ Section 16.45, *The Manual of the Law of Armed Conflict*, UK Ministry of Defence (OUP), 2004. By way of clarification, the following example is given: “... if an artillery commander is ordered to fire at an enemy command post in a particular building and he does so believing that it is a command post but it later turns out that, unbeknown to him, it was a school, he would not be guilty of a war crime because he did not intend to attack a school.”

⁵⁹ The provision states, “the responsibility of the officer – and of the military commander who gave him the order – would be assessed in the light of the facts as he believed them to be, on the information reasonably available to him from all sources”. In line with the reasoning adopted by the

objective standard in further qualifying that an *officer* would be required to have taken “reasonable steps to verify [the] information” and the failure to do so “might give rise to criminal responsibility”.

Mistake of fact was regularly pled by defendants in the post-war trials in conjunction with the defence of superior orders and was most successfully raised in connection with allegations of unlawful executions carried out under the orders of a superior.⁶⁰ For example, in the *Almelo* trial⁶¹ while conceding that superior orders *per se* offered no excuse, the defence nonetheless suggested that taken together with the accused’s mistaken belief that the execution carried out was in fact lawful, the resulting absence of *mens rea* gave rise to liability for negligence.⁶² In summing up, the Judge Advocate however chose to focus exclusively on the plea of mistake of fact and advised the tribunal that the relevant question for the court to determine was whether the defendants “honestly believed” that the executed British officer had been tried according to law.⁶³ In other words, as long as the evidence supported the defendant’s contention that his mistake had been honest, that functioned to negate the requisite mental element for the offence charged. The subjective test was also applied in *re Grumplet*, a case involving a German naval officer who was charged with scuttling two submarines 24 hours after the German High Command’s instrument of surrender came into effect. The defendant, in seeking to rely on mistake of fact, maintained that at the time of scuttling the submarines he had not been aware that the order by his

post-war tribunals, objective factors would be taken into consideration to the extent that they are relevant in assessing the accused’s belief.

⁶⁰ In the summarised commentary of the *LRTWC* series, it was noted that a mistake of fact may constitute a defence in war crimes trials which was “illustrated by the fact that the executioners of allied victims have sometimes been found not guilty on the grounds of their having reasonably believed that the executions which they were carrying out were legal”; Vol. XV, 184. It was also specifically noted that a bona fide mistake of fact was held not to negative the applicability of other defences including military necessity and duress.

⁶¹ The trial of Otto Sandrock, *LRTWC*, Vol. I, 35, 41. In the trial of *Karl Buck*, also involving allegations of unlawful executions, the defence sought to rely on mistake of fact maintaining that in Germany there were two applicable judicial systems operating at the relevant time – the courts-martial and the “so-called S.S. and police courts for German persons and members of the S.S.” Claiming that the interrogations themselves constituted a trial by the Security Police, Defence counsel suggested that the defendants had “neither the sense for technicalities nor the mental abilities to look deeper into this case”. The tribunal, however, rejected the plea on the grounds that the evidence did not support the contention that the defendants were unaware of the unlawfulness of their actions; *LRTWC*, Volume V.

⁶² Yoram Dinstein has consistently maintained that “superior orders does not constitute a defence *per se*, but is a factual element that may be taken into account – in conjunction with other circumstances – within the scope of an admissible defence based on lack of *mens rea*”; ‘Defences’ in *War Crimes in International Law* at 379.

⁶³ The Judge Advocate however *also* referred to an objective test when he advised the members of the jury that if they “felt that the circumstances were such that a reasonable man might have believed that this officer had been tried according to law, and that [the accused were] carrying out a proper judicial legal execution, then it would be open to the court to acquit the accused”.

superiors to scuttle submarines had been countermanded. The tribunal held that the correct test was to ask:

[a]re you satisfied that the man's state of mind at the time in question was this: 'I honestly believed I had an order: I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command, and I cannot be held responsible'?'⁶⁴

Although the overriding question in all the post-war cases was "the credibility of the contention that the accused really believed in the existence of a fictitious state of affairs"⁶⁵ rather than whether the defendant's mistaken belief was reasonable, the tribunals did not entirely ignore the status of the defendant and seemed to expect the level of knowledge and standard of conduct of the commander to be higher than that of an ordinary soldier.

The shortcomings of the subjective test is no more clearly illustrated than by the controversial case of *R v Finta*⁶⁶ in which mistake of fact and superior orders were successfully pled by the defendant. Citing *R v Pappajohn* as authority, the Supreme Court held that the lower court's instructions regarding the subjective test of 'honest belief' had been correct but also added that "mistake of fact is applicable only in circumstances where the order or law is not manifestly unlawful".⁶⁷ While the Supreme Court's explication of the law was not disputed, its application to the facts came under widespread criticism. In evaluating the credibility of the defendant's mistaken belief, the Court's singular assessment of the evidence together with the weight it accorded it, proved highly contentious. In light of the gravity of the charges, that the Court was apparently satisfied that the evidence before it gave the defendant's mistaken belief an 'air of reality' has accurately been described as a "profoundly disturbing" proposition of law for if the logic of the argument is followed

⁶⁴ *Re Grumpelt*, British Military Court, February 13, 1946; 13 *I.L.R.*, 309-11. See also the trial of *Carl Rath and Richard Thiel* in which the Judge Advocate advised the court that "it would be a good defence to the charge of having unlawfully executed certain Luxemburg nationals if an accused could show that he honestly believed that he was participating in a lawful execution"; *LRTWC*, Vol. XV, 184, fn. 4.

⁶⁵ Y. Dinstein, 'Defences' in *War Crimes in International Law*.

⁶⁶ *R v Finta* [1994] 1 S.C.R. This was the first decision rendered by the Supreme Court of Canada under the 1987 Criminal Code of Canada that gave Canadian courts jurisdiction over alleged Nazi war criminals. At the relevant time Finta was a senior gendarme officer stationed at a concentration camp in Hungary and was charged with being responsible for the forced confinement of thousands of Jews, the confiscation of their property during their internment and their forced removal – under a Ministry of the Interior order – to other concentration camps where ultimately they were exterminated.

⁶⁷ *R v Finta*, 845. That the defence cannot succeed where the order is manifestly unlawful is widely accepted; see for example the UK Military Manual, 16.45.2 and *The Dover Castle* (1921) 2 AD 429 Case No 231 and *The Llandovery Castle* (1921) 2 AD 436 Case No 235.

through, anti-Semitism itself is transformed from the elements of an international offence to a defence.⁶⁸

The defence of mistake is not expressly provided for in any of the current U.S. military manuals although it is recognised as a defence under the Uniform Code of Military Justice (UCMJ).⁶⁹ Because the rules and procedures applicable to military commissions have generally closely followed the principles of law applicable in courts-martial and breaches of the laws of armed conflict committed by individuals subject to the military law of the U.S. will usually constitute violations of the UCMJ, an examination of the provision relating to mistake under the UCMJ is of some relevance.⁷⁰ The Manual for Courts-Martial (which offers guidance on the application of the UCMJ) provides an indication of how a plea of mistake might be assessed within the context of an international offence. Drawing on the common law, the Code expressly provides for separate and distinct tests based on the requisite *mens rea* of the offence in question. The rules state that “[i]f the ignorance or mistake goes to an element requiring premeditation, specific intent, wilfulness or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance of mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances”.⁷¹ The case law emanating from the war in Vietnam supports the principle that where the offence is one of specific intent, the mistake, if honestly believed, will offer a full defence in that the requisite mental element is not satisfied. *U.S. v McGhee*⁷² involved the killing of a Vietnamese civilian by the accused who sought to rely on the defence on the grounds that he was under the mistaken belief that the victim was a member of the Viet Cong. Although the plea was rejected on the facts, the tribunal held that McGhee could not be held liable for murder or manslaughter if his mistake

⁶⁸ For a useful case commentary see Irwin Cotler, ‘International Decisions,’ (1996) 90 *AJIL*, 460; see also Alvarez, ‘Crimes of States’, 427.

⁶⁹ The most recent publication – the Naval Warfare Pamphlet 1-14M – was issued in 1995, which given that it was produced prior to the Rome Treaty, explains why neither mistake of law or fact is included in the publication. The Army Manual, which dates back to 1956, is in the process of being updated. As with the U.S. manual the most recent edition of the German military manual – published some years prior to the Rome Statute – makes no explicit reference to specific defences.

⁷⁰ The *Manual for Courts-Martial*, Part I, section 2(b)(2) (2002) reads: “Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.”

⁷¹ The provision continues: “in some ‘specific intent’ crimes, the alleged ignorance or mistake may not go to the element requiring specific intent or knowledge, and thus may have to be both reasonable and honest. Consequently, the military judge must carefully examine the elements of the offense, affirmative defenses, and relevant case law, in order to determine what standard applies”; *Military Judges’ Benchbook*, Department of the Army Pamphlet 27-9, (September 2002), section 5-11.

⁷² 36 *C.M.R.* 785.

was honestly held.⁷³ Similarly, in *U.S. v Schwarz*, the ‘honest belief’ test as expounded by the military judge was upheld by the U.S. Navy Court of Military Review.⁷⁴

Given that war crimes tribunals have generally, though not exclusively, applied the subjective test to mistake of fact, how does ICL treat the plea of mistake as to consent in a charge involving rape?⁷⁵ In February 2001, Trial Chamber II of the ICTY rendered the groundbreaking judgment in the case of *Kunarac* in which the defendant was found guilty of rape and enslavement as crimes against humanity.⁷⁶ During the trial, Kunarac sought to rely on mistake of fact on the basis that one of his victims had consented to having sex with him despite the fact that the victim had been forcibly held in captivity by the defendant. In drawing on the elements of rape as articulated in *Furundzija*, the Trial Chamber concluded that the definition of rape under ICL should be more broadly defined by reference to the “non-consensual or non-voluntary”⁷⁷ aspect of the offence. According to the tribunal the “true common denominator” that unified the various national legal systems was the “more basic principle of penalising violations of sexual *autonomy*”.⁷⁸ Sexual autonomy, the tribunal ruled, is violated wherever the person subject to the act has not freely agreed to it or is otherwise not a voluntary participant: the crime of rape is constituted by sexual penetration without the consent of the victim.⁷⁹ Consent, the Trial Chamber further held, must be “given voluntarily, as a result of the victim’s free will” and “*assessed in the context of the surrounding circumstances*”. The *mens rea* is “the intention to effect this sexual

⁷³ *U.S. v Binegar*, US Court of Appeals for the Armed Forces, May 4, 2001, No. 32854. In *Binegar* the tribunal set aside the verdict of the lower court on the grounds that the military judge had misinstructed the jury in requiring the mistake of fact for larceny to be both honest and reasonable to afford a defence. The majority held that the “pertinent inquiry is whether the purported mistake concerns a fact which would preclude the existence of the required specific intent” and accordingly applied the subjective test requiring “an honest mistake of fact”.

⁷⁴ 45 *C.M.R.* 852. The Review tribunal citing the trial judge, stated, “...if the accused was of the honest belief that he and his teammates were being attacked by enemy forces he cannot be found guilty of any offense charged or the lesser included offenses thereto. Such belief no matter how unreasonable will exonerate the accused. ... consequently, unless you are satisfied beyond reasonable doubt that the accused was not under the belief that enemy forces were attacking him and his teammates you must acquit the accused of all offenses charged and the lesser included offenses thereto.”

⁷⁵ Under the UCMJ the offence of rape is categorised as a general intent offence and therefore mistake as to consent must be reasonable. In *U.S. v Watt*, US Court of Appeals for the Armed Forces, April 7, 1999, No. 98-0306, the court held that “an honest and reasonable mistake of fact as to consent is a defense in rape cases”. For mistakes going to the element of a defence and the appropriate test, see *U.S. v Schuler*, U.S. Court of Appeals for the Armed Forces, May 6, 1999, No. 98-0160 in which it was held that an ‘affirmative’ statutory defense to the offense of carnal knowledge was recognised where a reasonable mistake of fact can act to excuse the accused.

⁷⁶ *Prosecutor v Kunarac*, IT-96-23-T.

⁷⁷ *Ibid.*, para. 438.

⁷⁸ *Ibid.*, para. 440.

⁷⁹ *Ibid.*, para. 457.

penetration, and the knowledge that it occurs without the consent of the victim”.⁸⁰ Applying this definition to the facts, the tribunal rejected the defendant’s plea on the grounds that it was “highly improbable” that Kunarac could “realistically have been ‘confused’” by the victim’s behaviour “given the general context of the existing war-time situation” and “the specifically delicate situation of the Muslim girls”⁸¹ who had been held against their will by the defendant. In so concluding the Trial Chamber steered clear of expressly stating whether mistake as to consent is subject to an objective or subjective test. Was Kunarac’s plea rejected because the mistake was unreasonable given the circumstances or was the evidence such that Kunarac’s contention of honest – albeit unreasonable – belief simply not credible? It is more likely that the decision was contingent on the latter reasoning but far more preferable had the Trial Chamber taken the opportunity to determine that a mistake as to consent in rape – particularly in conflict – had to be both honest and *reasonable*. So how is mistake of fact treated in the ICC statute?

Although during the pre-Rome negotiations many of the participants expressed a strong view casting doubt on whether a provision on mistake was even necessary, this view was finally rejected in favour of express incorporation.⁸² Article 32, essentially adopts the common law approach to mistake of fact and reads “a mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime”. If there is one aspect of the above provision that most scholars agree on, it is that it is repetitious⁸³ yet at the same time inadequate, because it fails to set out when and how a mistake may negate the mental element.⁸⁴ A textual reading of the provision leaves little doubt that the prevailing view among those that drafted the Article was that rather than treating mistake as a discrete defence, a plea based on mistake was considered relevant only to the extent that it negated the mental element.⁸⁵ Consequently crucial considerations including, for example, the legal consequence of mistakes relating to grounds excluding

⁸⁰ *Ibid.*, para. 460.

⁸¹ *Ibid.*, para. 646.

⁸² See PREPCOM summary of the proceedings 25 March – 12 April 1996, U.N. document A/AC.249/1 found at <http://www.iccnw.org/> [last accessed 16 August 2005]. For a history of the drafting process, see Eser, ‘Mental Element’ and Scaliotti, ‘Defences before the ICC’.

⁸³ As Triffterer commenting on Article 30(1) observes, because “criminal responsibility and the liability for punishment depend on whether ‘the material element are committed with intent and knowledge’, a person who is not aware of these elements ... does not have the necessary mental element and therefore they are ... free from responsibility and liability for punishment, because culpability depends on the existence of such a mental element”; Triffterer, ‘Article 32’, 561; see also Roger Clark, ‘The Mental Element in International Criminal Law,’ (2001) 12 *Criminal Law Forum* 291, 308.

⁸⁴ Eser, ‘Mental Element’, 890-92 and 934; also see ‘Article 32’ in *Commentary on the Rome Statute*.

⁸⁵ See PREPCOM summary of the proceedings, U.N. document A/AC.249/1, Annex I.

responsibility are simply not addressed.⁸⁶ Faced with such a plea, the Court will no doubt, rely on its discretionary powers under Article 21 and seek to identify and apply the relevant general principles of law although in most jurisdictions it would appear that a mistake as to an element of the defence must be reasonable. There is also a strong case for arguing that if faced with a plea of mistake as to consent in rape, the Court should rely on its discretionary powers to distinguish the offence and require that the mistake must satisfy both subjective and objective tests.

As far as putative justifications are concerned, it may be that the ‘solution’ suggested by Triffterer offers the most suitable answer: that even though the accused is not mistaken about the material elements of the crime, because he is mistaken about a material *prerequisite for a justification* of the crime, he is mistaken in a comparable way.⁸⁷ It therefore follows that by reasoning based on the *similarity of the result*, it would be just to excuse him for such a mistake. Although some scholars have suggested that the accused would be excused subject to the mistake being unavoidable,⁸⁸ there is greater force to the argument that the mistake must be reasonable.⁸⁹ Likewise, for mistakes pertaining to a material prerequisite of an *excuse*, the Court should also use its discretionary powers to excuse the accused subject to the mistake being reasonable.⁹⁰

4.3 MISTAKE OF LAW

If the criminal law is first and foremost about holding individuals criminally liable for morally culpable behaviour, the mistake of law defence in common law jurisdictions appears incoherent.⁹¹ The common law treats the accused’s mistake, even if reasonable, as simply irrelevant. Moreover, by contrast to the plea of mistake of fact, mistake of law cannot serve as a failure of proof defence because in most instances knowledge that the act is forbidden

⁸⁶ In replicating the provision, the UK Military Manual also neglects to address situations in which the mistake relates to an element of an intervening defence. By contrast, the 1972 Military Manual applicable to members of the U.K. armed forces, does expressly deal with this particular issue and a distinction is made between mistakes that pertain to the elements of an *offence* giving rise to an absolute defence if honestly believed by the accused, and those that relate to an element of a *defence* requiring that the mistake be both honest and reasonable; *Manual of Military Law*, MOD (1972) at 142-143.

⁸⁷ Triffterer, ‘Article 32’, 562.

⁸⁸ Triffterer, ‘Article 32’, 567, para. 28. In suggesting that the mistake must have been ‘unavoidable’, Triffterer appears to be recalling Article 35(2) of the German Criminal Code which concerns mistakes about factual elements of excuses that are contingent on the mistake being unavoidable.

⁸⁹ See Fletcher, *Basic Concepts*, 158-63.

⁹⁰ For a fuller analysis, see Fletcher, *Basic Concepts*, 163-65.

⁹¹ A moral culpability model fails to explain why the common law distinguishes between mistake of law and fact because even a reasonable mistake of law is no defence.

by law does not form part of the element of the offence; as such, there is simply no *mens rea* capable of being negated by the defendant's mistake of law.⁹² In civil law jurisdictions however, a mistake of law, if unavoidable, excludes liability since the defendant has acted without culpability. Before considering how ICL has attempted to resolve these divergent approaches, I first assess on what basis commonwealth countries⁹³ continue to apply the maxim, *ignorantia legis non excusat* (ignorance or mistake of law is no excuse) despite finding it difficult to justify the retention of the maxim.⁹⁴

Advocates of the doctrine justify their stance on the basis that preference should be extended to collective social goals over and above claims based on individual justice⁹⁵ while opponents have tended to emphasise the criminal law's commitment to fair attribution of blame and punishment. One of the earliest justifications for the rule was based on the contention that because the law was definite and knowable anyone who made a mistake of law was necessarily culpable. But today, with the plethora of law, this rationale no longer stands up to scrutiny.⁹⁶ An alternative explanation suggested by J. Austin is based on the reasoning that "if ignorance of law, were admitted as a ground of exemption, the Courts would be involved in questions which were scarcely possible to solve, and which would render the administration of justice next to impracticable".⁹⁷ But however legitimate this concern might be, it is not an insurmountable problem; moreover, the refusal to recognise even reasonable mistakes of law calls into question the fairness of the criminal law itself.

Equally unconvincing is the normative argument that legal knowledge is immaterial to the determination of culpability since the criminal law is based, for the most part, on widely shared moral values. According to this view the accused is held culpable because he must have known his conduct was wrong. The weakness of this argument is self-evident for while on one level there may be a strong correlation between morality and legality the

⁹² Smith & Hogan, *Criminal Law* (Butterworths, 1996), 222.

⁹³ The principle, continues to be applied in both Italy and France; Scaliotti, 'Defences before the ICC,' 4.

⁹⁴ Blackstone merely states: "for a mistake in point of law, which every person of discretion not only may, but is bound and presumed to know, is in criminal cases no sort of defence. *Ignorantia juris, quod quique tenetur scire, neminem excusat*, is as well the maxim of our own law, as it was of the Roman"; Peter Brett, 'Mistake of Law as a Criminal Defence,' (1965) 5 *Melbourne University Law Review* 179, 184. Hall & Seligman note, "how the general principle that culpability is necessary for criminal liability grew up with the rule that mistake of law is not a general defence is a matter of history"; L. Hall and S. Seligman, 'Mistake of Law and Mens Rea,' (1940) 8 *University of Chicago Law Review* 641, 644.

⁹⁵ Laurence D. Houlgate, 'Ignorantia Juris: A Plea for Justice,' 78(1) *Ethics*, 32-42, 37. See also Brett, 'Mistake of Law' 194-5.

⁹⁶ Of course within the context of the ICC Statute, this reasoning has arguably more force. Moreover, there is a far greater correlation between morally unacceptable conduct and the legal proscriptions listed in the statute.

⁹⁷ J. Austin, *Lectures on Jurisprudence* (1869), 498 cited by Hall & Seligman, 'Mistake of Law', 646.

criminal law does not, in all circumstances, mirror morality. Consequently, it is at the margins of the most morally troubling cases that the rule risks doing injustice to the individual.⁹⁸

The most widely accepted rationale for the doctrine is the utilitarian argument – first developed by Oliver Wendell Holmes – that to admit the excuse would be to *encourage* ignorance of the law.⁹⁹ This is certainly an explanation that continues to be cited by the judiciary in common law jurisdictions as evidenced by, for example, the Court of Appeal’s dicta in *People v Marrero*¹⁰⁰:

[i]t is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.¹⁰¹

But this utilitarian reasoning is also unpersuasive particularly where a defendant has had no reasonable opportunity to know about the legal proscription or where they have been misinformed as to the legal scope and effect of a rule.¹⁰² Moreover, as the critics have repeatedly pointed out, the very refusal to recognise reasonable mistakes of law undermines the utilitarian rationale of the doctrine since individuals are better off not even attempting to know the law. In his dissenting opinion in *People v Marrero*, Judge Hancock in rejecting the majority’s “pragmatic and utilitarian” reasoning, maintained that punishing blameworthiness was the purpose of criminal justice system. Because punishment is conditioned on a showing of subjective moral blameworthiness, individuals are only deserving of punishment for intentionally engaging in conduct which they *know* is criminal. Where an individual acts on an honest belief in the lawfulness of his conduct and the conduct is reasonable – both as regards the facts and the social norms – it is difficult to rationally conclude that the individual acted with culpable intent or that he is deserving of punishment. As one scholar suggests, “where awareness of the law’s prohibition is the only element that might have alerted an otherwise law-abiding person to the illegality of his conduct – in other words, where the conduct would have been ‘apparently innocent’ to

⁹⁸ Proponents of the doctrine might equally argue that those who choose to live on the margins take on the risk that their conduct may violate the law.

⁹⁹ *The Common Law* (1881) (Belknap Press, 1963).

¹⁰⁰ 507 N.E.2d 1068 (N.Y. 1987); the court added: “mistakes about the law would be encouraged, rather than respect for and adherence to law”.

¹⁰¹ For a comprehensive analysis of Holmes’ argument, see B. Zupancic, ‘Criminal Responsibility Under Mistake of Law: The Real Reasons,’ (1985) 13 *American Journal of Criminal Law*, 37, 50-55.

¹⁰² Eric Colvin, ‘Exculpatory Defences in Criminal Law,’ (1990) 10 *Oxford Journal of Legal Studies*, 381, 404. In the case of *Marrero*, the defendant had gone out of his way to seek advice on the scope and effect of the law.

ordinary law-abiding people in the same situation – criminal punishment of the ignorant is an arbitrary and abusive exercise of governmental power”.¹⁰³

Since the consequence of rejecting even reasonable mistakes of law is to do exactly the opposite – to encourage individuals to rely on their moral intuition rather than their legal knowledge – Dan Kahan suggests that it may be that through the “prudent obfuscation” of the law, the doctrine acts to encourage moral rather than legal behaviour.¹⁰⁴ The criminal law’s insistence on retaining the maxim may therefore have more to do with condemning individuals for “an insufficient commitment to the moral values that stand behind the criminal law” than to encourage legal knowledge of the law.¹⁰⁵ But if the rule is about encouraging moral behaviour I suggest that it is just as much about governance and that a richer explanation can be developed by locating the doctrine in political theory. As John Diamond has suggested, where there is no fault in the process of institutional conveyance, a mistake of law is inexcusable because “it challenges the ideological indoctrination that is a fundamental component of the criminal law”.¹⁰⁶ From this perspective, the distinction between how the criminal law treats a mistake of fact and a mistake of law becomes far more clear for:

while ignorance of the law challenges the ideological role of criminal law, mistake of fact does not. The defendant is not denying the rule, but merely mistaking the facts upon which it is applied. The power of the state to define its boundaries is not directly challenged.¹⁰⁷

What is more, mistake of law hints at self-exemption and begs the question as to whether the offender is truly committed to being a responsible citizen.

But to suggest that the common law is governed by the maxim *ignorantia legis non excusat* without qualification is to mislead since this rather broad generalisation is subject to a

¹⁰³ Susan L. Pilcher, ‘Ignorance, Discretion and the Fairness of Notice: Confronting ‘Apparent Innocence’ in the Criminal Law,’ (1995) 33 *American Criminal Law Review*, 1, 2. For a utilitarian critique, also see Brett, ‘Mistake of Law,’ 202 who states “every criminal conviction should surely punish the defendant because he has acted wrongly, and should convey to him and to the community a lesson to be learned for the future.”

¹⁰⁴ In other word, by aspiring to be deliberately vague and complex, the law expects individuals to be guided by their knowledge of what is moral; see Dan Kahan, ‘Ignorance of the law is an excuse – but only for the virtuous,’ 96 *Michigan Law Review*, 127 (1997), 140-41.

¹⁰⁵ Kahan, ‘Ignorance of the law’, 144.

¹⁰⁶ John Diamond, ‘An Ideological Approach to Excuse in Criminal Law,’ (1999) 25 *New England Journal on Criminal and Civil Confinement*, 1, 7.

¹⁰⁷ Diamond, ‘An Ideological Approach’, 8.

number of exceptions.¹⁰⁸ Where the defendant lacks the requisite *mens rea* for the offence for which he is charged, mistake of law offers an absolute defence; however, as already noted, this exception is only relevant in very limited circumstances.¹⁰⁹ In the case of a handful of offences, knowledge that the prohibited conduct constitutes an offence is itself an express element of the offence;¹¹⁰ in such cases the mistake may act to directly negate the *mens rea*.¹¹¹ More common are the instances where the offence is defined in such a way as to include a legal concept and a mistake as to the legal concept can mean that the defendant lacked the relevant mental element. A regularly cited English case of this type is *Smith* in which the Court held if the defendant is charged with “intentionally or recklessly damaging property belonging to another, his honest belief, arising from a mistake of law, that the property is his own, is a defence”.¹¹² US case law also indicates that this type of mistake (referred to as different-law mistake) can afford a full defence but only to the extent that the offence is a specific-intent offence.¹¹³

The maxim is also subject to two other common law exceptions: the reasonable reliance doctrine¹¹⁴ and the fair notice principle.¹¹⁵ The former also functions to remind the citizen that *only* the state has the authority to interpret the law since any attempt on the part of the

¹⁰⁸ As Dan-Cohen observes, while the transmission of the maxim, “ignorance of the law is no excuse” to the general public might have met with great success, it is wrongly assumed to be an absolute rule.

¹⁰⁹ Cassese’s criticism of Article 32(2) is perhaps misdirected because it is based on a broad interpretation of the wording; Cassese, ‘The Statute of the ICC: Some Preliminary Reflections,’ 155-56.

¹¹⁰ Dressler, *Understanding Criminal Law*, 173.

¹¹¹ An example of this would be s. 2(1) of the Theft Act 1968 which provides that a person is not to be regarded as dishonest “if he appropriates the property in the belief that he has in law the right to deprive the other of it”; *Blackstone’s Criminal Practice*, 38.

¹¹² *Smith & Hogan, Criminal Law*, at 100, citing *Smith* [1974] QB 354. It must be stressed that such mistakes have been restricted to the *civil* law rather than the criminal law although some commentators have questioned this distinction. See *Blackstone’s Criminal Practice*, 38 for the former view and *Simester & Sullivan, Criminal Law Theory and Doctrine*, 551 for latter. For a comparable US case, see *Cheek v US* 498 U.S. 192 (1991).

¹¹³ As Kahan explains: “a reasonable mistake of law is a defense when the mistake relates to an issue of law ‘collateral’ to the ‘penal law’ and negates the mental element of the crime”; ‘Ignorance of law’, 132.

¹¹⁴ Reliance on one’s own interpretation of law (even if reasonable) is no defence (*Marrero*); nor is reliance on the advice of a lawyer a defence. However reliance on an official interpretation (although limited only to the public body charged with interpreting law) is a recognised exception to the rule. Hall’s explanation for this exception is that an “official declaration of the meaning of a law is what the law is”; Jerome Hall, *General Principles of Criminal Law* (1960) 382. See also Andrew Ashworth, ‘Testing Fidelity to Legal Values: Official Involvement and Criminal Justice,’ (2000) 63 *MLR* 633. Under English law the state also has the duty to publicize the law and where it has failed to do so, the mistaken defendant may be able to rely on the exception.

¹¹⁵ This is an exception recognised under U.S. law and is traced back to *Lambert v California*, 355 U.S. 225 (1957), in which the Supreme Court held that the doctrine could not be reconciled with the Due Process Clause of the Fourteenth Amendment where fair notice of the unlawfulness of the conduct is absent. Under the Model Penal Code (MPC), a mistake of law can excuse a defendant in four situations: when he relies on and is misled by the government pursuant to an incorrect judicial decision; when the law is unpublished; when he relies on a misstatement by an enforcement agency responsible for interpretation; and when the statute is found to be invalid.

individual to construe an alternative understanding would be to risk self-exemption and undermine the rule of law. Allowing these limited exceptions might be regarded as ‘a concession’ on the part of the state that it has failed to effectively communicate the substance of the law¹¹⁶ but it might equally be argued that were the state not to admit the exception its own legitimacy and authority would be called into question. Conceptually, a mistake of law defence pled within the framework of superior orders raises similar considerations. In such cases not only has the state failed to adequately convey the substance of a prohibition but the state itself may be directly responsible, through its military infrastructure, for *instructing* the individual soldier to violate the law. This may be one reason why we are not completely resistant to the superior order defence for, intuitively, we are uncomfortable with the idea of criminalising the individual soldier for conduct undertaken as a direct consequence of an instruction issued by the state unless the order is manifestly unlawful.

In contrast to the common law approach that adheres rigorously to a normative standard irrespective of individual culpability, in many civil law jurisdictions the individual is held criminally responsible only to the extent that he is culpable. The German Criminal Code, as already noted, distinguishes between mistakes that may be factual (descriptive) or normative in nature and those that relate only to mistakes of law which are always normative. Mistakes that fall into the latter category occur when the defendant has factual knowledge together with a minimum understanding of its normative significance but mistakenly believes that the criminal law does not apply to the act – in other words her conduct is not unlawful.¹¹⁷ Under section 17 of the Penal Code, mistakes of law may exclude liability but only if the mistake was *unavoidable*. The provision states,

“if upon commission of the act the perpetrator lacks the appreciation that he is doing something wrong, he acts without guilt if he was unable to avoid this mistake. If the perpetrator could have avoided the mistake, the punishment may be mitigated pursuant to Section 49 subsection (1)”¹¹⁸

Used in this context ‘unavoidability’ involves a normative assessment about whether under the circumstances and in light of her personal capacities, the accused could have been expected to be more diligent and careful before committing the unlawful act.¹¹⁹ If the

¹¹⁶ Diamond, ‘An Ideological Approach,’ 6.

¹¹⁷ Needless to say, mistakes that relates to a misinterpretation of a statute are considered irrelevant; Arzt, ‘The Problem of Mistake of Law,’ 717.

¹¹⁸ Section 17, German Penal Code; for further commentary, see Fletcher, *Basic Concepts*, 157-58.

¹¹⁹ Fletcher, *Rethinking*, 744. Describing the evolution of German criminal theory on mistake of law as having been a choice between the theory of intention and the theory of culpability, Fletcher notes

mistake was unavoidable, the accused is not held liable because the element of culpability (*schuld*) is absent. If the mistake was avoidable the punishment may still be reduced if the accused acted under an honest albeit unreasonable mistake of law.¹²⁰ Clearly, given the wording of the provision, mistakes about the scope of a justification also fall under section 17; in common law jurisdictions such mistakes are treated as irrelevant.

To the extent that culpability is fully integrated into the assessment of liability, the German paradigm seems preferable to the common law approach. Moreover, fears expressed by those who support the retention of the maxim – that recognising the mistake of law defence would undermine the rule – have proved unfounded; the German experience suggests that the defence has had little practical effect since most offences are plainly avoidable. It is therefore somewhat unfortunate that the ICC statute adopts the common law approach on mistake of law.

4.3.1 Mistake of law and superior orders: an uneasy relationship

Despite the fact that most jurisdictions subscribe to the maxim ‘ignorance of the law is no excuse’, the post-war cases tell quite a different story. In fact, compared with domestic courts, war crimes tribunals have, it seems, taken a far less rigid stance recognising that the accused could not be expected to be as familiar with provisions of international law as he would of his domestic law. This tolerant approach is perhaps most clearly exemplified by the statement made by the Judge Advocate in the *Peleus Case*, that “it is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject”.¹²¹

Similarly, in *Karl Buck and ten others*, a case concerning the mistreatment of POW’s, the Judge Advocate while stating that “it is a rule of English law that ignorance of the law is no excuse”, conceded “there are some indications that this principle when applied to the provisions of international law is not regarded universally as being in all cases strictly enforceable.”¹²² Thus, even the military tribunals comprised of lawyers exclusively from common law traditions were far more receptive to the plea than might otherwise be expected. The test applied by many of these tribunals was very much one that was sensitive

that within the context of the latter “the standard for assessing whether the mistake is free from culpability is whether it is ‘unavoidable’ or ‘invincible’.

¹²⁰ Fletcher, *Basic Concepts*, 163.

¹²¹ 13 *ILR* 248.

¹²² *LRTWC*, Vol. V, 39, 44.

to the context and guided by both objective and subjective considerations.¹²³ In assessing the accused's subjective knowledge, the tribunals generally referred to what a reasonable soldier would have known under the circumstances. For example in *Karl Buck*, the Judge-Advocate in his summing up instructed the Court that it must ask itself:

what did each of these accused know about the rights of a prisoner of war? That is a matter of fact upon which the Court has to make up its mind. The Court may well think that these men are not lawyers: they may not have heard either of the Hague Convention or the Geneva Convention; they may not have seen any book of military law upon the subject; but the Court has to consider whether men who are serving either as soldiers or in proximity to soldiers know as a matter of the general facts of military life whether a prisoner of war has certain rights and whether one of those rights is not, when captured, to security for his person. It is a question of fact for you.

Although occasionally the post-war tribunals adhered strictly to the maxim and were only prepared to consider the mistake of law plea in mitigation,¹²⁴ most displayed a reluctance to hold the accused criminally responsible without any corresponding evidence pointing to culpability.

For example, in the *Trial of Hans Paul Helmuth Latza and two others*¹²⁵ the Eidsivating Lagmannsrett (Norway's Court of Appeal) acquitted two of the defendants who, in their capacity as temporary judges, had sentenced four Norwegians to death in the mistaken belief that a German legal provision (Article 3 of the Verordnung) establishing the punishment for failure to impart information regarding activities against the occupying power was consistent with international law. The Court found the defendants' mistaken belief "a pardonable misconception" because they "had been summoned to act as judges at short notice and knew nothing about the background for the proceedings".¹²⁶ By contrast, the Court found guilty the third defendant, Latza – who had served as a judge with the S.S. und Polizeigericht Nord for some years – concluding on the evidence that the accused must have known that "the intention of the trial was to take reprisals and to clothe them in a cloak of legality".¹²⁷

¹²³ While theorists have questioned the practicability of whether adjudicators are able to determine the legal knowledge of the accused – and on that basis supported the retention of the maxim – in practice, courts have not been reluctant to make such assessments.

¹²⁴ In the *Flick Case* the tribunal held that "ignorance thereof will not excuse guilt but may mitigate punishment"; *LRTWC*, Vol. IX, 69-70.

¹²⁵ *LRTWC*, Vol. XIV, 49.

¹²⁶ *LRTWC*, Volume XIV, 49, 59.

¹²⁷ This decision can be reconciled with contemporary Norwegian law according to which ignorance of law is a defence except where the violations amount to "the general rules of society which apply to everybody" or those "special rules governing the business or activity in which the individual is engaged"; Smith & Hogan, *Criminal Law* (10th ed.) 99.

Although the above cases suggest that under ICL mistake of law may be a valid plea that is conditioned on both a subjective and objective test, some caution is required before categorically concluding that this is the case. Part of the problem can be attributed to the difficulty of determining whether a mistake concerning a normative element should be treated as a mistake of law or of fact and consequently, the relevant jurisprudence is not altogether consistent. In addition, mistake of law was more often than not pled jointly with superior orders and as a consequence, much of the judgments centre on the analysis of the latter with little reference to the former. But lastly, even within single jurisdictions the case law is often inconsistent primarily because the scope of the defence as provided in military manuals has been subject to constant revisions. For example, in *U.S. v Kinder*¹²⁸ the accused, charged with the killing of a Korean national who was in his custody, pled both mistake of law and superior orders. Referring to the 1951 Manual for Courts-Martial, the tribunal found that mistake of law was in principle an applicable defence “to negate the unlawfulness of the element of the specific intent to kill” as long as the mistake was “honest and reasonable”. The court however rejected the defendant’s plea on the basis that his view as to the legality of his action was not only unreasonable but “so absurd as to render unbelievable an honest belief by the accused”. By contrast, the scope of ‘mistake of law’ in the 2005 Manual for Courts-Martial is more narrowly defined and admits the defence only in the very limited circumstances of where there has been a mistake as to a separate nonpenal law or when the mistake results from reliance on a decision or pronouncement of an authorized public official or agency. As with mistake of fact, mistake of law is not expressly provided in either the U.S. or German military manual and nor was it referred to in the UK military manual until the publication of the 2004 edition that merely states: “ignorance of the law is no excuse, but if the law is unclear or controversial, an accused should be given the benefit of the that lack of clarity by the award of a lesser or nominal punishment”,¹²⁹ in other words its effect is relevant only in mitigation.

So can the post-war cases, which suggest a far more sensitive approach to both context and proof of culpability, be reconciled with the common law approach that remains loyal to the maxim? The answer, I suggest, is inextricably linked to the dual plea of mistake of law and superior orders. But before considering this relationship, it would be useful to briefly examine the mistake of law provision under the ICC statute.

¹²⁸ *United States v Kinder* 1954 WL 2209 (AFBR), 14 C.M.R. 742.

¹²⁹ *The Manual of the Law of Armed Conflict*, MOD, sections 16.43 – 16.43.1; the commentary also adds that the ICC statute “makes allowance for the possibility that a mistake of law may negate the mental element of a war crime.”

Article 32(2) has been subject to significant criticism, particularly by civil law scholars, for disregarding the growing sensitivity to the principle of culpability in the determination of liability.¹³⁰ It reads:

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.

That the objective of the first sentence is to preclude pleas founded on ignorance of or mistakes regarding the prohibitory nature of any of the offences listed under the Statute is not generally disputed. The second sentence, which relates to the scope of the exception, has however led to some disagreement among international law scholars. But what must be beyond dispute is that the second sentence does not introduce a broad exception to the rule.¹³¹

Sub-paragraph two articulates the approach that is generally applied in common law jurisdictions and represents a very narrow exception to the *ignorantia legis non excusat* maxim.¹³² This might be regarded as an unfortunate development since the common law approach fails to take into consideration the notion of culpability. A textual reading of the provision suggests that an exception to the general rule will only be recognised in situations where an express element of the offence includes knowledge that the prohibited conduct constitutes an offence and the accused has been able to demonstrate that he lacked that express knowledge. It is difficult to envisage a situation where a mistake of law plea of this type that directly negates the *mens rea* is available since none of the offences under the Statute are so drafted. However, there are a number of offences listed in the Statute that do contain a legal concept (requiring more than a mere normative analysis) as part of the *actus reus* and it is in the context of where the accused has made a mistake as to the legal evaluation of that element that the defence may be deemed by the Court as negating the

¹³⁰ Eser, 'Mental Element', 935. See also Ambos, 'General Principles of Criminal Law in the Rome Statute,' (1999) 10 *Criminal Law Forum*, 1, 29-31 and Neil Boister, 'Reflections on the relationship between the duty to educate in humanitarian law and the absence of a defence of mistake of law in the Rome Statute of the ICC,' in Burchill, R., N. D. White, (eds.) *International Conflict and Security Law, Essays in Memory of Hilaire McCoubrey*, (CUP 2005).

¹³¹ I suggest the section should not be interpreted as broadly as Cassese has suggested. Cassese, 'The Statute of the ICC', 155-56.

¹³² For a valuable critique of the common law approach, see Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law,' (1980) 33 *Stanford Law Review*, 591, 630-33. Nevertheless, what Kelman seems to discount is that there may be moral (and possibly political) reasons why mistake of law and fact in imperfect self-defence cases continue to be distinguished.

mental element.¹³³ More specifically, the misevaluation would relate to a collateral or separate legal issue which would have a direct bearing on how the intent required for the offence in question should be construed.¹³⁴ This suggested interpretation of the scope of the exception is, admittedly, a narrow one. Critics of the subsection, and in particular those who subscribe to the German doctrinal tradition, have attacked the provision in its entirety for being “too narrow from the point of view of a subjective theory of criminal liability”.¹³⁵ In an attempt to offer a practical remedy to ‘permit’ the Court wider discretionary powers of interpretation, Triffterer has therefore suggested that the use of the word ‘may’ as expressed in the Article was inserted to allow the Court to take into account situations in which the accused had made a legal misevaluation which would be ‘excusable’ if the error was deemed to be unavoidable – and through this rather circuitous route introduce the civil law test to take account of culpability.¹³⁶ But what is clear is that the provision, by adopting the common law approach, fails to adequately address mistakes that go to the elements of a defence leaving it in the hands of the ICC to decide whether such mistakes, if reasonable and unavoidable, function to excuse the defendant.¹³⁷

While much of the legal debate surrounding the mistake of law plea has focussed on the scope and legal effect of Article 32, the practical reality is that this plea will more likely than not be raised in conjunction with superior orders particularly since mistake of law is, as Ambos points out,¹³⁸ only explicitly recognized in the case of an erroneous assessment regarding the lawfulness of an order as articulated in Article 33(1)(b) of the ICC Statute.¹³⁹ Superior orders has been the subject of considerable scholarly analysis so there is little point

¹³³ A defendant charged with an offence under Article 8(2)(b)(xx) might very well be able to rely on a mistake of law plea if, under a mistaken belief that a particular weapon was not the subject of a comprehensive prohibition, he were to have used that weapon in combat operations.

¹³⁴ See for example, *Morissette v United States*, 342 U.S. 246 (1952). Clark notes, “the mistake of law that ‘works’ is normally a mistake about some law which is collateral to the central criminal proscription”; Clark, ‘The Mental Element in International Criminal Law’, 310.

¹³⁵ Boister, ‘Reflections,’ in *International Conflict and Security Law*, 40.

¹³⁶ Triffterer, ‘Article 32’, 570-71.

¹³⁷ For further commentary see Fletcher, *Basic Concepts*, 163. Mistakes that pertain to excusing norms are however, generally regarded as irrelevant mistakes in all jurisdictions.

¹³⁸ Ambos, ‘General Principles’, 29.

¹³⁹ 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.”

in re-tracing some of the debates that have engaged the international legal community.¹⁴⁰ Suffice to say, Dinstein's explication of the doctrine – that superior orders cannot constitute a defence *per se* but is a factual element that may be taken into account with other circumstances of the given case within the compass of a defence based on a lack of *mens rea*, that is, mistake of law or fact or compulsion – is the most compelling analysis that has been tendered. What makes the mistake of law/superior orders plea unusual is that the lawfulness or otherwise of the order was regularly treated by the tribunals as being analogous to a mistake of fact. As such, the relevant test was to ask the subjective question of whether the defendant knew the order was unlawful but only to hold him criminally culpable if, absent knowledge, the order was so obviously unlawful that any reasonable soldier would have known it to be so. If I am correct, this prompts two further questions: why, when domestic criminal law resists admitting a mistake of law defence because it represents a direct challenge to the state's authority, would ICL tolerate a more expansive defence? But if ICL does adopt a more flexible approach to the mistake of law plea, does a more expansive understanding of this defence disproportionately protect the male soldier at the expense of women as potential victims?

I suggest the answer to the first question might be located in a number of places. First, that the defendant might not have known that the order was unlawful may be a reflection of the state's *failure* to disseminate the law effectively or even adequately. This is particularly important because the state has a clearly defined responsibility under international law for disseminating the laws of war to their citizens.¹⁴¹ But second, a soldier is entitled to presume that an order by his superior will be lawful for it is only on that basis that the military can function effectively. And finally that the order is a legal obligation emanating from an official of the state might be regarded as equivalent to an official statement made by the state. As with the reasonable reliance doctrine, were the state not to admit the exception, its own legitimacy and authority would be called into question. For why would any soldier follow any orders if they could not rely on the state to issue lawful orders? But as with the mistake of law doctrine in domestic law, ICL draws a line at manifestly unlawful conduct because ultimately even the soldier who is under a legal obligation to follow orders is expected to be aware of society's moral boundaries and to conform with them. In the final analysis, ICL expects the soldier to make the morally right choice. A soldier who cannot judge right from wrong, who cannot appreciate the social and legal norms that bind the

¹⁴⁰ For useful recent commentaries see Zimmerman, 'Superior Orders' and Triffterer 'Article 33' in *A Commentary on the Rome Statute of the ICC*, 573; Gaeta, 'The Defence of Superior Orders', 172.

¹⁴¹ The Geneva Conventions as well as Protocol I requires State Parties to disseminate the laws of war to both the armed forces and civilian population (Article 47, GCI; Article 48, GC II; Article 127 GC III; Article 144, GC IV; Article 83, AP I)

majority poses a real threat to social cohesion. Any protection the law might have to offer through this dual plea is, it seems, restricted to the virtuous soldier.¹⁴²

But what consequences flow from a more context sensitive approach to this defence for women in conflict? Does the effect of this dual plea serve to disproportionately protect the male soldier to the detriment of women as part of the civilian population? It is self-evident that this dual plea is contingent on the soldier satisfying both a subjective and objective test with the former requiring the tribunal to ask whether the defendant knew that the order was unlawful. But it would seem that the objective requirement – that the order was not manifestly unlawful – is too low a threshold to accept given that in the case of mistake of fact, the objective test of reasonableness applies. Amending the objective test to a reasonable soldier's standard, I suggest, would not be to demand too much. Although fair attribution of blame calls for a tribunal to take into full account the particular context in which the violation has taken place, the soldier's responsibilities towards those with whom he comes into contact as well as society's expectations as to what those obligations might entail are considerations that must be fully assimilated into the process of judgment.

Both the mistake of fact and law defences seem to occupy the space between citizens, regulating their relationship with one another and demanding that individuals commit themselves to society's moral and political parameters. Although the state refrains from punishing those who cause harm as a consequence of a cognitive deficiency or an error absent volition, because that would come close to punishing the innocent which in the long run would function to undermine the state's legitimacy and authority, there are good reasons for requiring that in the context of certain relationships, mistakes must be reasonable. ICL seems to have accepted that given the particular context, officers *are* expected to have taken reasonable steps in verifying that the information on which they seek to rely is reliable and accurate. But it may be that soldiers, *because* they are armed with deadly weapons that have the capacity to cause significant harm, should also be held to a higher standard of care.

¹⁴² See generally Kahan, 'Ignorance of the law is an excuse'.

CHAPTER 5

JUSTIFIED CONDUCT IN CONFLICT

When an individual suggests that his conduct is justified, he is in effect saying that his behaviour, but for the specific circumstances, *would* be considered wrong and constitute a social harm; nonetheless, given the specific circumstances, his wrongful conduct should be regarded as acceptable, tolerable or permissible and therefore not deserving of punishment.¹ Justifications, it has been suggested, act to negate the social harm of an offence² and, in permitting what is otherwise prohibited behaviour, function as exceptions to the primary prohibitory norms.³ At the international level, justifications perform a similar function for the accused is suggesting that, but for the specific circumstances, his conduct – a war crime – would incur criminal responsibility. Where self-defence is pled, the subject seeks an acquittal on the grounds that the circumstances are such that the act in question should not be deemed *wrongful*. By contrast, in the case of military necessity and reprisals, the accused maintains that his conduct is *lawful* because it falls within the boundaries of recognised exceptions to unlawful conduct.

Attempts by scholars to locate a single ‘theory’ of justification that both supports and explains the different forms of justifications have generally proved unconvincing. While contemporary German theorists have suggested that “all justificatory arguments can be reduced to a balancing of competing interests and a judgment in favour of the superior interest” even this explanation is subject to exceptions.⁴ I suggest that if a common theory

¹ For a useful analysis, see J. Dressler, ‘New Thoughts About the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking,’ (1984) 32 *UCLA Law Review* 61.

² J. Dressler, ‘Justifications and Excuses: A Brief Review of the Concepts and the Literature,’ (1987) 33 *The Wayne Law Review*, 1155, 1161. According to Paul Robinson, “the existence of the justifying circumstances means that, while the harm prohibited by the offence does occur, it is outweighed by the avoidance of a greater harm or by the advancement of a greater good. In other words, there is no *net* societal harm”; ‘Competing Theories of Justification: Deeds v Reasons,’ in *Harm and Culpability*, Simester & Smith (eds.), 45. Whether justified conduct is better regarded as morally good or, alternatively, as not wrongful is a subject that continues to divide some scholars. See generally Marcia Baron, ‘Justifications and Excuses,’ (2004) 2 *Ohio State Journal of Criminal Law* 387, 395. The discourse on self-defence tends to refer to the use of deadly force as being permitted or tolerated by society rather than equating it to being ‘good’ or ‘desirable’; Dressler, ‘New Thoughts’ at 85-86. See also critiques by Fletcher, ‘The Right to Life,’ (1979) 13 *Georgia Law Review*, 1380 and ‘Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?’ (1979) 26 *UCLA Law Review* 1355 (arguing that justifications involve ‘right conduct’) and Sanford Kadish, ‘Respect for Life and Regard for Rights in the Criminal Law,’ (1976) 64 *California Law Review* 871, 883-84.

³ K. Greenwalt argues that the right to use otherwise illegal force in self-defense is a specific exception to the relevant rule, rather than a justified infringement of that rule; see *Conflicts of Law and Morality* (OUP 1983) 286.

⁴ Fletcher, *Rethinking* at 769; for further commentary, see 769-74. According to Albin Eser, this should be regarded as a *general* rule rather than as an absolute rule since ‘consent’ cannot be

can be located, it is first and foremost within the realms of political rather than moral theory. In this chapter I explore three pleas: reprisals, military necessity and self-defence; I do so, not only to understand the rationale that sustains each but to expose the gender biases that characterise each plea.

5.1 SELF-DEFENCE

The right to self-defence as a well-established principle that applies to *states* in international law must be distinguished from the concept of self-defence in ICL which applies to *individuals* acting in a personal or official capacity.⁵ As succinctly put in a report by the International Law Commission,

[t]he notion of self-defence in the criminal law context relieves an individual of responsibility for a violent act committed against another human being that would otherwise constitute a crime such as murder. In contrast, the notion of self-defence in the context of the Charter of the United Nations refers to the lawful use of force by a State in the exercise of the inherent right of individual or collective self-defence, and which would therefore not constitute aggression by that State.⁶

My interest lies exclusively with the notion of self-defence as pled by individuals rather than with self-defence as a right of states that derives from public international law. That the post-war tribunals rejected the pleas entered by those accused of war crimes who sought to justify their conduct in their capacity as officials acting in defence of the state, was only to be expected since a soldier's right to use force in self-defence of the state remains subject to the *jus in bello*⁷ and those who sought to rely on self-defence were, in essence, attempting to rely on the defence as a justification for a particular policy.⁸

explained under this theory; 'Justification and Excuse,' (1976) 24 *American Journal of Comparative Law* 621, 630.

⁵ Nico Keijzer, 'Self-Defence' in *War Crimes Law and the Statute of Rome: Some Afterthoughts*, Report of the Rijswijk Seminar of 22 October 1999 (International Society for Military Law and the Law of War) 33. See also M. Scaliotti, 'Defences before the International Criminal Court – Part 1,' (2001) 1 *ICLR*, 111, 158-59. This distinction is also expressly incorporated in the second sentence of subparagraph (c) of Article 31 which states: "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 provision.

⁶ Article 15, paragraph 7, 1996 *International Law Commission Report, on a Draft Code of Crimes Against the Peace and Security of Mankind*. The commentary also states: "a classic defence to a crime is self-defence. It is important to distinguish between the notion of self-defence in the context of criminal law and the notion of self-defence in the context of Article 51 of the Charter of the United Nations."

⁷ In the *Einsatzgruppen* case the defence attempted to rely on the defence of 'putativnothilfe' or self-defence for the benefit of a third party – the third party in the case being Germany – and further, to

Where an individual acts in self-defence and the resultant harm falls short of a war crime, the appropriate legal framework is to be found in the specific rules of engagement or in the criminal law of the relevant jurisdiction. Self-defence, in the context of ICL, is only relevant to the extent that the individual's response amounts to an international criminal offence. But given that such crimes are by their nature disproportionate acts, it will only be in very limited circumstances that a defendant might be able to claim the defence which is subject to the principle of proportionality. Nonetheless, self-defence was in principle accepted as a valid plea in several post-war trials which will be reviewed in sub-section two. First, I consider some of the theories that have been mooted by criminal law scholars to explain the rationale of the defence; my aim is to draw attention to the inherent problems that come with 'transplanting' a domestic law defence to the international level and also to identify some of the divides that have emerged between civil law and common law scholars. I conclude that in the context of conflict, it is the conditions of proportionality and necessity that can most effectively function to protect women in conflict.

5.1.1 Unravelling self-defence

One of the earliest theories promulgated in an attempt to explain self-defence was based on the reasoning that the violation of a prohibitory norm was justified whenever the conduct was the appropriate means to a proper end. General dissatisfaction with this explanation has led to a host of alternative theories being expounded including the 'moral forfeiture' theory. According to this theory the aggressor who *voluntarily* and *knowingly* chooses to engage in wrongful conduct, forfeits his right to expect that his life will continue to be protected by the legal system.⁹ This theory is morally troubling because it is premised on the notion that the

justify the policy towards the Jews within a wider context as a 'Bolshevik' threat; *TWC*, Vol. IV, 54-60 and 462-470.

⁸ See also Trial Chamber judgment in *Kordic and Cerkez* (IT-95-14/2) of 26 February 2001, para. 452 emphasising that "military operations in self-defence do not provide a justification for serious violations of international humanitarian law."

⁹ According to Ashworth, "if a legal system is to uphold the right to life, there must be a liberty to use force for the purpose of self-defence. The corollary of this is that an attacker may, by threatening the life of another, forfeit his own right to life"; A. Ashworth, 'Self-Defence and the Right to Life,' (1975) 34 *Cambridge Law Journal*, 282, 283. In Ashworth's opinion, the idea of forfeiture is not objectionable in itself although it should be circumscribed by the requirement of proportionality; Ashworth, *Principles of Criminal Law*, 137-38. See also Joel Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life,' (1978) 7 *Philosophy and Public Affairs*, 93.

aggressor's life has no social value – and nor for that matter does it account for the blameless aggressor.¹⁰

The more popular theory for explicating self-defence is located in the 'lesser harm' utilitarian explanation that entails balancing the different interests at stake with the objective of avoiding the greater harm. What is being compared is action versus inaction using both qualitative and quantitative criteria.¹¹ Strictly speaking, the 'lesser harm' theory does not offer an *explanation* of self-defence but a particular methodological approach.¹² This theory is open to two immediate criticisms: often the relevant choices, because incommensurable, simply cannot be compared;¹³ but especially where deadly force has been used, it is difficult to see how the law can objectively conclude that one life is intrinsically more 'valuable' than the other. *Why is it a lesser evil to kill the aggressor? And what if the aggressor is a child?*¹⁴ Fletcher's view, that the balance might be viewed as being tipped in favour of the attacked since the aggressor is culpable for starting the conflict, is not entirely convincing because this undermines the equality principle that recognises all lives to be of equal value irrespective of moral worth.¹⁵ What is more, this argument leads us back to the moral forfeiture theory.

Dissatisfied with the 'lesser harm' theory, scholars have increasingly embraced arguments that focus on the principle of individual autonomy and on the rights of the subject who acts

¹⁰ S. Uniacke asks, "can we plausibly claim that all person killed in self-defence have forfeited the right to life?"; *Permissible Killing*, (CUP, 1994) 2. See also Kadish, 'Respect for Life', 883-84 and Judith Thomson, 'Self-Defense and Rights,' *The Lindley Lecture*, 1976. This theory, according to Klaus Bernsmann, is still favoured by some German lawyers who maintain that since the aggressor has caused the conflict "it remains up to him to resolve it, even if that means sacrificing his legal interests"; 'Private Self-Defence and Necessity in German Penal law and tin the Penal Law Proposal – Some Remarks,' (1996) 30 *Israel Law Review* 171, 173.

¹¹ Eugene Milhizer, 'Justification and Excuse: What they were, what they are, and what they ought to be,' (2004) 78 *St. John's Law Review* 725, 844.

¹² Wasserman accurately concludes, "a lesser-evil approach can at most accommodate, but not explain, self-defense" because what the theory does is to offer a method without indicating the substance of what it is that is being assessed and balanced; David Wasserman, 'Justifying Self-Defense,' (1987) 16 *Philosophy and Public Affairs*, 356, 363.

¹³ For example, the value of personal autonomy cannot be weighed in any meaningful way against the saving of innocent lives since both moral values are equally valid; Colvin, 'Exculpatory Defences'. In addition, the lesser harm theory fails to offer a convincing answer in jurisdictions that allow for defensive killings where the protected interest is manifestly of a lower value (as for example property) or where the life of more than one 'attacker' has been taken. See also Larry Alexander, 'Lesser Evils: A Closer Look at the Paradigmatic Justification,' (2005) 24 *Law and Philosophy* 611, 614.

¹⁴ This is a serious concern especially in internal conflicts where the participation of children in hostilities is all too common.

¹⁵ Fletcher, *Rethinking*, 858

in self-defence.¹⁶ According to this rationale all individuals have a natural right of personal autonomy which is given legal form through the recognition of an affirmative legal right to resort to force in its defence.¹⁷ Susan Uniacke places much emphasis on the *positive right* of individuals to defend themselves against unjust aggression and concludes that the injured victim of legitimate self-defensive action is not wronged because the use of legitimate force in self-defence is “not within the scope of the rule ‘killing is wrong’”.¹⁸ The right of self-defence, Uniacke maintains, derives directly from the right of the subject under attack *not* to be the target of a harm.¹⁹ This theory too has been criticised since to focus exclusively on the rights of the defender is to ignore the interests of the aggressor which then leaves open the possibility of a disproportionate response.²⁰

The theoretical shortcomings of each of these approaches exposes the core problem underpinning the rationale of self-defence: that the law oscillates back and forth, seeking to accommodate the interests of the citizen under attack but needing to resist any expansive claims to self-help and the unilateral use of violence by the individual, creating an ever shifting space between citizens but also between the citizen and the state. In civil law jurisdictions greater emphasis is placed on the rights of the individual under threat on the basis that “right need never yield to wrong”.²¹ This ‘libertarian’ approach not only stresses the private interest of the individual to resort to force but also defines the right in terms of a public interest to the extent that law and order is maintained through the individual’s

¹⁶ But quite a number of scholars who support a ‘moral rights’ approach simultaneously resort to the moral forfeiture rationale for support. See for example, David Gauthier, ‘Self-Defense and the Requirement of Imminence,’ (1995) 57 *University of Pittsburgh Law Review* 615.

¹⁷ See generally Uniacke, ‘*Permissible Killing*’ and also Uniacke, ‘In Defense of Permissible Killing: A Response to Two Critics,’ (2000) 19 *Law and Philosophy*, 627.

¹⁸ Uniacke, *Permissible Killing*, 27-28. In contrast to the forfeiture theory that focuses on the aggressor and denies that a protected interest has been harmed when the aggressor is harmed, the moral rights theory focuses on the defendant – or victim of the aggression – recognising a positive right to resort to force when threatened.

¹⁹ For Uniacke there is no conceptual problem with the theory of forfeiture as long as citizens recognise that the right to life is conditional on conduct. Uniacke writes: “the permissibility of self-defense, as part of a broader right of defense against an unjust threat, is grounded in what is morally distinctive about such an action, namely that it directly resists, repels, or wards off an unjust threat. This is something which, within moral limits, we have positive right to do”; Uniacke, ‘In Defense’, 628.

²⁰ Kadish also favours an explanation based on a moral rights theory acknowledging that to have any content this right must at a minimum entail “a legal liberty to resist deadly threats by all necessary means, including killing the aggressor”; Kadish, ‘Respect for Life’ 884-85. But see Wasserman, ‘Justifying Self-Defense,’ 363-65 for a criticism of Kadish’s analysis in which Wasserman questions the treatment of the blameless aggressor.

²¹ This German maxim lies at the heart of the necessity defence; Fletcher, *Rethinking*, 865, footnote 33. See also Bernsmann, ‘Private Self-Defence’, 172-73. As Nourse has suggested, “the victim’s provocative violence constitutes an assertion of superiority over the defendant which must be answered if for no other reason than to support the notion of the ‘right’ – to acknowledge the defendant’s acts as those of the law-abiding”; V.F. Nourse, ‘Self-Defence and Subjectivity,’ (2001) 68 *University of Chicago Law Review* 1235, 1273.

response to unlawful violence.²² While this dual reasoning is not one to which the common law fully subscribes, neither does the Anglo-American criminal law adopt an understanding of self-defence that primarily defers to the state since, often, the common law appears equally committed to recognising the individual's right to stand her ground by not always requiring the defendant under threat to have retreated.²³ Nonetheless, as Victoria Nourse points out, the 'pacifist' position with its emphasis on the conditions of self-defence – namely imminence, necessity and retreat – in order that violence might be avoided, has become almost orthodoxy in common law jurisdictions.²⁴

Increasingly, scholars have also been turning to the realms of political theory to locate a richer explanation of self-defence.²⁵ What differentiates these approaches from previous explanations is that the role of the state is accorded far greater prominence in the reconceptualisation of the defence. In postulating a sentiment reminiscent of Hobbes' explication on self-defence, Sanford Kadish suggests that the individual does not surrender his fundamental freedom to preserve himself against aggression by the establishment of state authority.²⁶ Although the state asserts the right to dictate the terms that govern the lawful use of force, and in this way regulate the relations between citizens, self-defence itself is not a *derivative* right of the state.²⁷ But why does the liberal state which is so insistent on

²² Nourse, 'Self-Defence,' 1271-74. See also M. Kremnitzer and K. Ghanayim, who maintain that self-defence is based on two rationales: "defending autonomy and defending the legal order"; 'Proportionality and the Aggressor's Culpability in Self-Defense,' (2004) 39 *Tulsa Law Review* 875, 882.

²³ While German law may not necessarily require that the accused's conduct be proportionate, Anglo-American law *does* insist that the force be proportionate and necessary or even, in some cases, subject to the doctrine of retreat. Clearly, these conditions are difficult to reconcile with a theory that uncompromisingly insists on the *right* of individuals to respond to unlawful aggression.

²⁴ Nourse, 'Self-Defence,' 1271-74.

²⁵ See for example, C. Finkelstein, who examines the genealogy of the doctrine of self-defence in the works of Hobbes, St. Aquinas and Locke; 'On the Obligation of the state to Extend a right of Self-Defense to its Citizens,' (1999) 147 *University of Pennsylvania Law Review* 1361; G. Fletcher also speaks of self-defense falling "into the domain of political rather than moral theory"; 'Domination in the Theory of Justification and Excuse,' (1995) 57 *University of Pittsburgh Law Review* 553, 570; Nourse 'Reconceptualising,' who develops an alternative understanding of the defence through the prism of political theory.

²⁶ Kadish, 'Respect for Life' 885. Kadish also maintains that the individual's freedom to preserve himself against aggression "is required by most theories of state legitimacy, whether Hobbesian, Lockean or Rawlsian, according to which the individual's surrender of prerogative to the state yields a quid pro quo of greater, not lesser, protection against aggression than he had before." According to Waldron, what distinguishes Kadish from Hobbes is that for the former, the right to resort to force is limited to protection *from attack* in contrast to Hobbes who talks of the right to self-preservation; J. Waldron, 'Self-Defense: Agent-Neutral and Agent-Relative Accounts,' (2000) 88 *California Law Review* 711, 748.

²⁷ George Fletcher, on the other hand, talks of the privilege of necessary defense as being 'derivative of the state's monopoly of force'; from this premise he naturally concludes that the "regulation of the defense invariably reflects the interests both of the aggressor and the defender"; *Rethinking*, (2000), 867. But as I have argued, if self-defence is not regarded as a right that derives from the state but an inherent right that belongs to individuals but subject to conditions imposed by the state, the role of the

asserting its monopoly on violence because not doing so is to risk the domination of the strong over the weak, accept any unilateral resort to force by its citizens? This is, I suggest, because justifications function to sustain the State's normative authority and legitimacy. Where the State is unable to offer full protection to the individual it has failed in its most fundamental obligation to its citizen. But because no State can offer its citizens absolute protection from private violence a liberal State "that denies the opportunity for self-defence, that asks its citizens to die rather than protect themselves, recreates the very same fears that citizens will become the slavish victims of the strong".²⁸ Moreover, the conferring of a *legal* right of self-defence serves to redirect attention away from the State's failure and to conceptualise the issue as one that is situated exclusively in the criminal law which can then be assessed as a failure on the part of the *individual*.

If self-defence is a limited right that is only available in situations where the State is absent and is as much about a moral right that belongs to an individual as about a 'mechanism' through which the State regulates its relationship with its citizens and the relationship between its citizens, to what extent does this understanding of the defence apply in ICL?²⁹ As with justifications on the domestic level, I suggest that justifications in ICL also serve to sustain the State's normative legitimacy. It is especially in times of crisis when the State is least able to offer to its citizens the protection they have come to expect from it that the legitimisation of self-help will function to sustain the State's authority. Yet the very fact that the State is engaged in a conflict poses additional problems for neither can it afford to relinquish too much authority to the individual to resort to self-help for that is to risk any semblance of order and to threaten the rule of law. Therefore, just as the criminal law permits the private citizen to resort to self-help in emergency situations, ICL also permits the individual faced with an emergency to do likewise, although what continues to be disputed is how 'emergency' might be defined. In the context of conflict, however, it is probably more likely that the adjudicating tribunal will presume that the conditions of self-defence – a confrontational situation that posed a real and imminent threat leaving the subject little alternative but to have acted – did in fact exist. But these assumptions about the very nature

state deserves as much scrutiny as does the relationship between the aggressor and the defender. In civil law jurisdictions, self-defence is treated as a right that is derived from the state's right and duty to preserve the legal order. For further commentary, see Kremnitzer & Ghanayim, 'Proportionality,' 899.

²⁸ Nourse, 'Self-Defence and Subjectivity,' at 1300-01.

²⁹ Fletcher writes: "when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defence kicks in precisely because immediate action is necessary. Individuals do not cede a total monopoly of force to the state"; G. Fletcher, 'Domination in the Theory of Justification and Excuse,' at 570.

of warfare can risk undermining the already limited protection that the law offers women who find themselves in the midst of hostilities.

Although standard legal discourses tend to convey the impression that there is general agreement among criminal lawyers as to what constitutes the basic elements of self-defence, closer scrutiny soon reveals that the assumption that the doctrine of self-defence is a settled matter, is a misconception.³⁰ Criminal lawyers in common law jurisdictions continue to divide on both content of the doctrine as well as the proper legal standard that should apply in judging the defendant who pleads self-defence. Among the issues that continue to be fiercely contented are questions as to whether the defence is better regarded as a paradigmatic justification or an excuse, whether imminence is a requisite element and, if so, what precisely it signifies, and whether the proper standard by which the subject's conduct is assessed is an objective or subjective one. But perhaps the more challenging critiques are those that have exposed the defence to be intrinsically incoherent and based on assumptions that sustain a gender bias.

Before exploring some of these discrete doctrinal issues in greater depth, some comment is needed to attempt to dispel one of the most contentiously debated aspects of self-defence that continues to engage common law lawyers: whether the relevant legal standard by which to assess a defendant's conduct should be one grounded in objectivism or its subjectivism.³¹

In stark contrast to Continental systems, Anglo-American courts have tended to adopt a subjective or agent-relative test requiring only that the accused's belief need be honest or genuine for her to plead self-defence; this subjectification of self-defence creates a conceptual problem for the law in that it eliminates the difference between real self-defence

³⁰ Most texts on the subject cite the following elements: that the threatened harm was imminent and the defendant's response necessary and proportionate (sometimes articulated as reasonable because not excessive). In some jurisdictions the subject may be barred from pleading the defence if he fails to satisfy the doctrine of prior fault and/or the requirement to retreat.

³¹ Scholars continue to disagree on what grounds a given act is regarded as a justification. Objectivists or 'deeds' theorists argue that the accused should be entitled to rely on a justification regardless of whether he knows of the justifying circumstances. Since justifications are objective assessments, they do not require a subjective intention; see P. Robinson, 'A Theory of Justification: Societal Harm as a Prerequisite to Criminal Liability,' (1975) 23 *UCLA Law Review* 266 and 'Competing Theories of Justification: Deeds v. Reasons,' in *Harm and Culpability*. Subjectivists on the other hand argue that the defendant is justified as long as he had a good reason for acting; see K. Greenawalt, 'The Perplexing Borders' at 1903. Most theorists however hold the view that both subjective and objective elements are required. For example, some subjectivists require the accused's belief to have been reasonable; see in particular G. Fletcher, *Basic Concepts of Criminal Law*, (OUP, 1998) 103 and John Gardner, 'Justifications and Reasons,' in *Harm and Culpability*, 105. For an engaging exchange on this topic, see K. Ferzan, 'Justifying Self-Defense,' J. McMahan, 'Self-Defense and Culpability,' and Paul Robinson, 'Justification Defenses in Situations of Unavoidable Uncertainty: A Reply to Professor Ferzan,' (2005) 24 *Law and Philosophy* 711.

and putative self-defence.³² German legal theory, as with most European systems, adopt an objective or agent-neutral account that requires the threat to be *genuine* and *unlawful* which explains, in part, why their view of self-defence is so expansive. It therefore logically follows that where force has been used in the absence of an unlawful threat the accused can only rely on the defence of mistake or necessity.³³ English courts have been especially reluctant to move towards an objective test with the Court of Appeal in *R v Williams (Gladstone)*, upholding the subjective test established in *R v Morgan*, in which it was concluded that in a case of self-defence:

if the defendant's alleged belief [as to the threat occasion] was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected. Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely upon it.³⁴

The Australian courts have however taken a slightly different view and in confining the *Morgan* test to cases only involving rape, have established that the accused's honestly held belief must also have been reasonable. In *Zecevic v DPP*, the High Court of Australia stated: "the question to be asked in the end is quite simple. It is whether the accused believed upon reasonable grounds that it was necessary to do what he did".³⁵ Distinguishing between the definitional elements of an offence and that of a defence, the High Court concluded that where the mental state of the accused is part of the definition of the offence, a subjective test was applicable while a mental state belonging to the defence warranted an

³² Fletcher, *Basic Concepts*, 137. J.C. Smith discusses whether the external facts alone – irrespective of what the accused may have believed at the time – constitutes a legal justification. Whether actual knowledge is indeed required, is for Smith, a matter of policy; Smith, *Justification and Excuse in the Criminal Law* (Stevens & Sons, 1989) 28-44. Whether or not the original threat need be *unlawful* has also been the subject of some dispute in common law jurisdictions. For a fuller commentary, see generally S. Uniacke, *Permissible Killing* and Judith Thomson, 'Self-Defense,' 20 *Philosophy and Public Affairs*, 283 (1991).

³³ Kremnitzer & Ghanayim conclude that self-defence requires a culpable aggressor; 'Proportionality' 875. Also see K. Bernsmann, 'Private Self-Defense', 174.

³⁴ Per Lord Lane C.J. in *R v Williams (Gladstone)* (1983) 78 Cr. App. R. 276 at 281. In *Beckford v R* [1987] 3 W.L.R. 611 the Privy Council pursued the reasoning in *Morgan* to its 'logical conclusion', in applying the subjective test; for a critical analysis, see Stanely Yeo, 'The Element of Belief in Self-Defence,' (1989) 12 *Sydney Law Review* 132 and Simester, 'Mistakes in Defence,' (1992) 12 *OJLS* 295. Under US law, a valid claim of self-defence is contingent on the defendant having a reasonable belief where reasonableness is assessed from the defendant's perspective, taking into account his subjective peculiarities and past experiences. In *State v Wanrow*, 559 P.2d 548 at 555 (1987) the court held that the defendant's actions "are to be judged against her own subjective impressions and not those which a detached jury might determine to be objectively reasonable"; cited by C. Finkelstein, 'Self-Defense as a Rational Excuse,' (1995) 57 *University of Pittsburgh Law Review* 621, 630.

³⁵ (1987) 162 CLR 645, 661. As with *Beckford*, *Zecevic* was concerned with murder at common law and self-defence in both cases were treated as an independent defence rather than as an issue that would negate the element of the offence.

objective test. The accused's belief as to the existence of a threat justifying the use of force by way of self-defence was, according to the common law reasoning, an element of the defence and therefore had to be both honest and reasonable.³⁶

As already discussed, the common law's general antipathy towards judging the subject by reference to an objective standard is grounded in liberalism's concern for the individuation of justice. The critics of objectivity have revealed that the objective test conceals a particular perspective conditioned and determined by the specific social and political context and that the standard is gendered because it necessarily incorporates social meanings and assumptions about relationships between men and women.³⁷ The subjective standard, which is associated with a more progressive stance because it requires the criminal law to focus on the individual, has therefore gained far greater legitimacy and support within liberal circles and, in particular, among feminist theorists.³⁸ But subjectivity, as *Morgan* illustrates, is also laden with preconceptions about social relations and has, at times, led to decisions that are either absurd or worse, morally indefensible. By contrast, the objective standard, because it reflects community values, provides an important threshold and guiding function for citizens.³⁹ But the preoccupation among common law lawyers as to whether an exculpatory element is more properly located in the elements of the offence rather than the defence and whether the appropriate test is subjective or objective is both necessary yet artificial since adjudicators in practice tend to adopt an amalgamation of both standards in judging the accused.

That different legal systems emphasise different conditions that need to be satisfied for an accused to rely on the defence is only to be expected given the divergent theoretical rationales that underpin self-defence among the different traditions. Although Fletcher has suggested that most legal system focus on four characteristics of self-defence, namely, the objective criteria of imminence, necessity, proportionality as well the subjective requirement of an intention to repel the attack, the content, scope and relevance of each one of these

³⁶ For example, see Canadian Criminal Code, ss. 34 – 35 or Crimes Act 1961 (NZ) s.48.

³⁷ See generally Nourse, 'Self-Defense'.

³⁸ See in particular Nourse, 'Self-Defense', 1294-99.

³⁹ See for example, *People v Goetz*, 497 N.E.2d 41 (N.Y. 1986) where, reversing the lower court's decision to apply a subjective standard, the Court of Appeals of New York stated: "we cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law".

characteristics have been called into question albeit to different degrees.⁴⁰ Paul Robinson convincingly argues that there is no reason for retaining the condition of imminence if the necessity requirement is applied appropriately⁴¹ while other scholars have expounded a view that necessity takes priority over imminence.⁴² Why, contend those who want to abandon the imminence requirement, is there a reason to require the defendant to wait until the last possible moment to avert an attack if they can credibly show that the harm was not avoidable?⁴³ But for those who insist on the retention of the imminence requirement, what is of paramount importance is that the criminal law discourages the private use of violence. The requirement of 'imminence' goes to the heart of the normative relationship between the individual and society and is simply about the proper allocation of authority between the two.⁴⁴ And because 'imminence' falls into the domain of political rather than moral theory, Fletcher concludes that it must be both objective and public.

While German law requires the threatened harm to be imminent, it does not demand that the force used in defence is necessary, nor does it subscribe to the retreat rule since "self-defence is intended to deter potential aggressors."⁴⁵ The emphasis on the absolute right to autonomy also means that self-defence under German law, in contrast to common law jurisdictions, has

⁴⁰ Fletcher, 'Domination', 562. Fletcher does however concede that the central debate on self-defence has been whether the element of imminence should be retained. This debate was, of course, prompted by the emerging recognition that battered women were being precluded from pleading self-defence on the grounds that they failed to satisfy the condition of imminence.

⁴¹ Paul Robinson argues: "If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be 'necessary'. The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defense. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self defense must permit him to act earlier – as early as is required to defend himself effectively"; cited by Richard Rosen, 'On Self-Defense, Imminence, and Women Who Kill their Batterers,' (1992) 71 *North Carolina Law Review*, 371, footnote 10.

⁴² Rosen argues that imminence is merely a 'translator' of necessity. The criminal law insists on the accused meeting the imminence element only because of the fear that without it there is no assurance that the defensive action was necessary to avoid the harm. Rosen therefore suggests that imminence might be retained in cases in which it is a translator of necessity but that it would be removed when it acts as a potential inhibitor; R. Rosen, 'On Self-Defense' 380 and 405.

⁴³ See Finkelstein, 'Self-Defense,' 628-29. For a useful critique of the 'imminence' rule, see also Aileen McColgan, 'In Defence of Battered Women who Kill,' (1993) 13 *Oxford Journal of Legal Studies* 508, 518-21.

⁴⁴ David Gauthier, 'Self-Defense and the Requirement of Imminence,' (1995) 57 *University of Pittsburgh Law Review* 615, 616.

⁴⁵ Kremnitzer & Ghanayim, 'Proportionality', 886. The authors reject any notion of retreat because that would mean "granting to criminals an unlawful right to take over certain areas and deny entry to law-abiding citizens, which would not be consistent with the criminal law's purpose of ensuring peace and tranquillity." German law does recognise an exception for attacks by children and the mentally ill. The common law also concedes that a person may be justified in resorting to force where the threat emanates from a non-culpable aggressor; Simester & Sullivan, *Criminal Law, Theory and Doctrine*, 619.

not been contingent on meeting the element of proportionality.⁴⁶ Nonetheless, to limit the scope of self-defence, German law has integrated the civil law doctrine of “abuse of rights” thus tempering the level of force that might legitimately be used in self-defence.⁴⁷ By contrast, most other jurisdictions expressly demand that the force used must be proportionate to the threatened harm,⁴⁸ in other words, the force used in response must be “no more than is necessary to enable him to defend himself”.⁴⁹ Of course, the level of permissible force used in response to the threat is a question of balance rather than absolutes.⁵⁰ In English law the proportionality requirement plays an integral role in determining whether the accused’s response to the threat was reasonable under the circumstances.⁵¹ In *R v Clegg*⁵² the Law Lords held that the defence would fail if the force used was considered unreasonable, because excessive. But if a valid self-defence plea requires the accused’s response to be proportionate to the threat, is it conceivable that committing a war crime in self-defence will ever satisfy the requisite criteria?⁵³ But more pertinently does the rationale of self-defence as understood in peace time translate into the understanding of self-defence in conflict? For it would appear that if the use of force in self-defence is a limited right that is only available in situations where the state is absent and is a means through which the state regulates its relationship with its citizens as well as the relationship between its citizens in a bid to control the private use of violence, this rationale simply fails to fully capture what is going on in ICL. And this is because conflict fundamentally alters not only the context – in which violence is pervasive – but the relationships between the different parties as well as that

⁴⁶ Section 32 of the German Penal Code on ‘Necessary Defense’ provides: “(1) Whoever commits an act, required as necessary defense, does not act unlawfully; (2) Necessary defense is the defense which is required to avert an imminent unlawful assault from oneself or another.” This provision reflects the libertarian approach to self-defence as discussed above.

⁴⁷ Fletcher, *Basic Concepts*, 136-137 and ‘The Right and the Reasonable,’ 98 *Harvard Law Review* 949 (1984)

⁴⁸ Kremnitzer & Ghanayim list the jurisdictions in which the proportionality element must be satisfied including, the UK, US, Canada, France, Switzerland, Spain, Austria, Norway and Finland; ‘Proportionality’, 893.

⁴⁹ See J. Horder, ‘Self-Defence, Necessity and Duress’, 143.

⁵⁰ William Wilson, *Central Issues in Criminal Theory*, 302. Fletcher also suggests that proportionality “requires a balancing of competing interests, the interests of the defender and those of the aggressor”; Fletcher, ‘Domination’, 560.

⁵¹ There is little guidance for decision-makers as to how proportionality might be measured and so much is left to judicial discretion; Ashworth, ‘Self-Defence’, 297. But also see *R v McKay*: “we take one great principle of the common law to be, that though it sanctions the defence of a man’s person, liberty, and property against illegal violence, and permits the use of force to prevent crimes, to preserve the public peace, and to bring offenders to justice, yet all this is subject to the restriction that the force used is necessary; that is, that the mischief sought to be prevented could not be prevented by less violent means; and that the mischief done by, or which might reasonable be anticipated from, the force used is not disproportionate to the injury or mischief which it is inflicted to prevent”; cited by S. Uniacke, *Permissible Killing*, 33.

⁵² [1995] 1 AC 482. Clegg was a serving soldier who while on duty with a patrol in Northern Ireland shot and killed a civilian passenger in a stolen car.

⁵³ William Fenrick, ‘War Crimes Law and the Statute of Rome: Some Afterthoughts,’ *Report of the Rijswijk Seminar*, 22 October 1999 (International Society for Military Law and the Law of War), 39.

between the individual and the state. *So, what is the rationale of self-defence in ICL?* And if the rationale that sustains self-defence in peace time and in conflict diverge, it also seems likely that the elements which limit the defence in the criminal law may not necessarily comport with those that apply in ICL.

5.1.2 Self-defence under customary law and the ICC statute

The plea of self-defence is simply irrelevant where a soldier uses force against lawful targets. Thus, it would seem that self-defence is only relevant in the context of conduct taken in response to an unlawful use of force by civilians or any persons who are entitled to protected status or alternatively where the threat itself entails an unlawful means or method of warfare. Obviously, if a civilian or protected person were to take an active part in hostilities they would lose their protected status and become legitimate targets and once again, self-defence would be irrelevant; the pivotal issue in such cases would be whether or not the conduct of the individual amounted to taking an active or direct part in hostilities.⁵⁴

By contrast to domestic courts in common law jurisdictions, which will only allow the defendant to claim the right to resort to self-help in emergency situations, war crimes tribunals often presume that the conditions of an emergency *are* satisfied because a state of conflict exists. As a consequence, tribunals seem to place far less emphasis on the defendant having to show that the threat was imminent. Moreover, if 'imminence' is understood as functioning to deter private violence⁵⁵ as well as demarcating the distribution of power between the state and individual, in conflict, it loses its purpose. And as with the imminence requirement, war crimes tribunals have also not always insisted on the soldier having to show that the original threat was unlawful.

The post-war decisions indicate that when pled, self-defence was more often than not rejected on the grounds that the force used in response to the perceived threat had clearly

⁵⁴ Article 3, Geneva Conventions. As the post-war cases such as *Erich Weiss and Wilhem Mundo* suggest, self-defence is relevant only in very exceptional circumstances where, for example, a soldier resorts to force under circumstances in which he believed that the protected person in his custody presented a serious and imminent threat, leaving him no alternative but to act.

⁵⁵ Describing the function of imminence in the criminal law Fletcher explains: "when an attack against private individuals is imminent, the police are no longer in a position to intervene and exercise the state's function of securing public safety. The individual right to self-defense kicks in precisely because immediate action is necessary. Individuals do not cede a total monopoly of force to the state"; Fletcher, 'Domination' 570.

been disproportionate.⁵⁶ In the case of *Chusaburo Yamamoto* the British military tribunal found the defendant guilty of the war crime of killing a civilian in spite of being “compelled to retaliate in self-defence” since even the accused had conceded during his trial that his reaction had been disproportionate.⁵⁷ Likewise, the Reviewing Authority in the case of *Wilhelm Dieterman* also upheld the military commission’s finding rejecting the defendant’s plea of self-defence on the grounds that, in the circumstances, the killing of the US POW had been both unnecessary and disproportionate.⁵⁸

By contrast, in *Erich Weiss and Wilhem Mundo*, self-defence was successfully pled by the defendants who were police officers charged with the shooting and killing of an American POW airman in their custody. In assessing the decision, the U.S. reviewing authority upheld the finding of the tribunal on the basis that, under the circumstances, the defendants’ response had been proportionate to the perceived threat. It added: “as guards [the accused] would be authorized to use force, but only that force reasonably necessary under all the circumstances either to secure the custody of the prisoner or to protect themselves from an attack by their prisoner. Under these rules, and considering all the surrounding circumstance – the war, the air raid, the hostile crowd, the fact the prisoner was an enemy alien – the court must have concluded the sudden motion of the captive in reaching in his pocket did in fact constitute sufficient threat to justify the shooting; that the force used was not unreasonably excessive.”⁵⁹

In the trial of *Willi Tessmann and others*, the tribunal was concerned with whether the defendant’s response had been reasonable, because necessary. Advising the court, the Judge Advocate conceded that while the law allowed a man to save his own life by taking that of another, “it must be in the last resort”.⁶⁰ But in arriving at any conclusions, the tribunal was

⁵⁶ In the review proceedings for *US v Josef Hangobl*, Case No: 5-67, US Army & East Military District the tribunal upheld the verdict affirming that the accused had wilfully and wrongfully killed an unarmed US soldier who had been in the act of surrendering. The court concluded: “it was clear that he [the accused] had used more force than necessary in view of the fact that the victim was going away at the time the second shot was fired”; <http://www.hhs.utoledo.edu/dachau/flyerr&r.html> (last accessed 02/06).

⁵⁷ The trial of Sgt. Yamamoto Chusaburo, Southeast Asia Military Court, Kuala Lumpur, January 1946; WO 235-823, PRO.

⁵⁸ *U.S. v Wilhelm Dieterman and Andreas Ebling*, Case No. 12-643, <http://www.hhs.utoledo.edu/dachau/flyerr&r.html> (last accessed 03/06). In *US v Josef Hangobl*, the reviewing authority rejected the plea of self-defence on the basis that the accused “had used more force than necessary” in the circumstance; Case No: 5-67 & 5-72 (for link see as above).

⁵⁹ *US v Erich Weiss and Wilhelm Mundo*, Case No: 12-1538; <http://www.hhs.utoledo.edu/dachau/flyerr&r.html> (last accessed 02/06).

⁶⁰ He further elaborated that self-defence required the accused “to retreat to the uttermost before turning and killing his assailant”; *LRTWC*, Vol. XV (1949), 177. As far as English law is concerned, it is probably safe to conclude that there is no longer a hard and fast rule of retreat; see *Blackstone’s Criminal Practice* (2000), Peter Murphy (ed.), A3.34.

advised that it would need to take into consideration “the nature of the weapon in the hands of the accused and whether the assailant had any weapon”. Taken together, these cases suggest that as far as war crimes are concerned the plea of self-defence is contingent on the use of force as having been both *necessary* in the circumstances and *proportionate* to the threat. In other words, ICL’s concern is not with deterring violence but with *detering unnecessary and disproportionate violence*. If this is the case, self-defence in ICL offers very limited protection for the civilian and seriously undermines the already partial protection that the law offers women who find themselves in the midst of hostilities.

The provision on self-defence in the ICC statute is one of the most controversial in the statute and provides a defence 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.

As already indicated, in the context of ICL it is difficult to see what function ‘imminence’ might serve other than as providing evidence to support the defendant’s claim that his response was necessary in the circumstances; but if it is to operate to restrict the operation of self-defence, it is an intrinsically weak condition. The failure to expressly incorporate the element of necessity is a significant omission and although Ambos suggests that ‘reasonable’ might be interpreted to require that the force was necessary, it would have been preferable had the provision explicitly mentioned the subsidiarity principle for that would have provided far greater express protection to civilians and more accurately reflected customary international law. For what matters in conflict is not whether the soldier believed the threat was *imminent*, but whether his response to that perceived threat was *necessary* in the circumstances and whether the force deployed was *proportionate* to the threat.

The more scathing criticisms have been directed at the provision for extending a defence to war crimes where a person acts reasonably to defend “property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission” on the grounds that it falls outside the *lex lata*.⁶¹ A variety of explanations as to the origins and purpose of this provision have been floated by scholars. According to Eser, the provision stems from a 1998 U.S. proposal to include “military necessity as a

⁶¹ Cassese, ‘The Statute of the International Criminal Court,’ 154-55.

separate ground for excluding criminal responsibility”, but why the U.S. should have proposed an additional defence of military necessity over and above what is already a widely accepted understanding of the defence, remains unanswered.⁶² M. Scaliotti, on the other hand, concludes that the U.S. promoted a text in which “property was conceived not as means to protect further superior interest, such as human life, but rather as an object to be protected as such”.⁶³ Scaliotti however offers little primary evidence of this reasoning and what is more, the 2004 U.S. *Military Judges’ Benchbook* specifically notes that this defence “likely does not apply to violations of the law of war”.⁶⁴ Ambos’ observation that the text was one promoted by both the U.S. and Israel, with the former “invoking constitutional provisions and insisting that ‘the defence of one’s home can be perfectly legitimate’” seems to hint at a more convincing political explanation for this provision for it may be that, what was in fact being ‘protected’ was the right to invoke self-defence in relation to property and land in disputed territories.

Whatever the true intent behind this provision, the compromise wording that was finally agreed is a highly unsatisfactory one because it risks misleading the combatant to the extent that it conveys the impression that the defence of property which, in the combatant’s view, is essential for accomplishing a military mission, justifies the commission of war crimes. Moreover, in widening the scope of self-defence unnecessarily – for the evidence indicates that this wording is a compromise text⁶⁵ – it places the civilian who finds herself in ‘disputed’ territory at greater risk in conflict and represents an unacceptable regressive step insofar as the protection of women are concerned.

In practice however disputes as to the true interpretation of Article 31 are more likely to come from a different quarter.⁶⁶ It is of note that civil law scholars who have commented on Article 31 are united in their opinion that the text that was finally agreed at Rome adopted the civil law objective standard on self-defence.⁶⁷ In other words, the only defence open to a

⁶² Eser, ‘Article 31,’ 548. For further analysis, see section 5.2.

⁶³ Scaliotti, ‘Defences before the ICC,’ 169.

⁶⁴ Department of the Army Pamphlet 27-9-1, 4 October 2004, Section 5-7 and 5-A-6.

⁶⁵ For the difficult negotiation history of this provision, see Eser, ‘Article 31’ in *Commentary on the Rome Statute*, K. Ambos & O. Triffterer (eds.) 548.

⁶⁶ In determining the elements of self-defence the Trial Chamber in *Prosecutor v Kordic* referred to Article 31 for guidance but in so doing, regrettably, avoided many of the more difficult questions raised by this provision; *Kordic and Cerkez* (IT-95-14/2), 26 February 2001, paras. 448-52.

⁶⁷ For example, Eser, ‘Article 31,’ 548-49 and Ambos, ‘Other Grounds,’ 1032, point to the drafting history of the provision citing the change in the text that was adopted between the Zutphen Draft and the Rome Treaty. The Zutphen Draft (29 January 1998) read: “(c) the person [, provided that he or she did not put himself or herself voluntarily into a position causing the situation to which that ground for excluding criminal responsibility would apply,] acts [swiftly and] reasonably [, or in the reasonable belief that force is necessary,] to defend himself or herself or another person [or property] against an [imminent .../35/ use of force] [immediate .../36/ threat of force] [impending .../37/ use of

defendant who mistakenly resorts to force in self-defence, even though his belief was *reasonable*, would be to plead mistake under Article 32. But because acting in self-defence is *necessarily* a predictive process the purely objective viewpoint is not without its critics.⁶⁸

This ‘discrepancy’ was side-stepped in the most recent *Military Judges’ Benchbook for Trial of Enemy Prisoners of War* issued by the US Army in 2004 which (noting that the provision on self-defence in the ICC statute was based on customary international law) states:

for self-defence to exist, the accused must have acted reasonably to defend (himself/herself) against an immediate and unlawful use of force. Further, the accused must have done so in a manner that is proportional to the degree of danger presented.⁶⁹

The commentary continues:

the test here is whether, under the same facts and circumstances present in this case, an ordinary prudent adult person faced with the same situation would have believed that there were grounds to fear immediate death or serious bodily harm and would have reacted similarly in defending himself/herself.

This suggests that by contrast to the interpretation favoured by civil law scholars, US military lawyers have interpreted the provision in accordance with the common law test of ‘reasonable belief’.

Although civil law scholars who have commented on Article 31 locate the rationale of self-defence squarely within the libertarian civil law conception that “right does not have to give way to wrong”⁷⁰ this understanding is not easily reconciled with the requirements of reasonableness and proportionality found in the provision that serve to restrict the use of violence and which are more traditionally associated with the common law doctrine. It would therefore appear that self-defence under the statute is more accurately described as a

force] and [[unlawful] [and] [unjustified]] use of force in a [not excessive] manner[.] [[not disproportionate] [reasonably proportionate] to the degree of danger to the person [or liberty] [or property] protected];”. By contrast, the ICC statute does not refer to the “reasonable belief” of the accused.

⁶⁸ P. Westen & J. Mangiafico have also observed that “there is a sense in which every adjudication of justification is an adjudication of belief. ...every adjudication of justification is a counterfactual judgment by a court as to what would have happened if the actor had not done what he did. ...no one knows, and no one can ever know, whether if the actor had not shot first, his enemy would have otherwise killed him. No one can know that for certain because that is counterfactual determination based upon probabilities, including probabilities regarding human nature”; ‘The Criminal Defense of Duress: A Justification, Not and Excuse – And Why It Matters,’ (2003) 6 *Buffalo Criminal Law Review* 833, 879-80.

⁶⁹ Department of the Army Pamphlet 27-9-1, 4 October 2004, Section 5-A-2, found at and last accessed March 2006 http://www.army.mil/usapa/epubs/27_Series_Collection_1.html

⁷⁰ Nico Keijzer, ‘Self-Defence’ 39.

conditional right. Whether the soldier's response was reasonable would be contingent on a whether his conduct was proportionate to the threat. But it would seem that before such an assessment could be made, what needs to be determined is whether the response was necessary in the circumstances. Unless it is shown that the use of force was *necessary*, the issue of *proportionality* does not even arise.

The proportionality requirement – that the harm inflicted be proportionate to the harm threatened⁷¹ – turns self-defence from an absolute right to individual autonomy into a conditional right that must be balanced against other interests. The principle of proportionality has the potential to offer a crucial measure of protection for the civilian who finds herself in the midst of conflict. For example, if a combatant were to come under sniper fire from a hospital he would be entitled to return fire on what would otherwise be a 'protected' building as the hospital would have 'lost' its protected status.⁷² Nevertheless, the force used in response must be proportionate to the threat. The use of disproportionate force would preclude a soldier from successfully pleading self-defence. The principles that limit the right to self-defence offer, in theory, some measure of protection to the potential victims in conflict; nevertheless, the preference of some courts to assess proportionality by reference to 'excessive' force, is concerning since not all disproportionate force is necessarily excessive. But the real question must be whether in practice these limits will temper the conduct of a soldier in the midst of hostilities and in the event that they do not, whether a tribunal will be willing to give full weight to the interests of those who the soldier, acting in self-defence, puts at risk and thus judge the soldier's conduct by reference to an objective rather than subjective standard.⁷³ While a soldier may honestly have believed that his conduct was both necessary and proportionate to prevent some perceived harm, to deem his conduct permissible, where he has clearly 'overreacted' is to convey a powerful message about the value of life of those who he has harmed.

5.2 MILITARY NECESSITY

⁷¹ Ashworth, 'Self-Defence,' 285 and Fletcher, 'Domination', 559.

⁷² This is subject to Article 21, Geneva Convention I that states: "protection may ... cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded".

⁷³ For example, see CPS decision concerning the fatal shootings of Sgt Steven Roberts and Zaher Zaher, 27 April 2006; www.lslo.gov.uk (last accessed 08/06). In concluding that there was insufficient evidence for a realistic prospect of conviction on the basis that "although a jury might conclude that the soldiers misjudged the degree of danger and overreacted, it is much more likely that a jury would find that the soldiers did not more than what they instinctively believed to be necessary and reasonable in the circumstances", the reviewing lawyer's assessment is not altogether convincing.

By contrast to self-defence, military necessity is a derivative defence that can only be pled by an individual who has acted in the capacity of a state official since the right itself belongs to the state.⁷⁴ Although prior to the codification of the rules of war defendants were able to plead military necessity, today the plea is regarded as not generally applicable since the rules of IHL already incorporate and reflect “a compromise between military and humanitarian requirements”.⁷⁵ Nonetheless, it is generally agreed that the defence is available in some very limited circumstances but only to the extent that the conduct in question falls within one of the exceptions embodied in a convention.⁷⁶

My primary interest in exploring the scope and content of this plea is to expose the rationale of the defence where it forms part of the definition of an offence and to reveal the normative values it serves to protect.⁷⁷ In light of the recent ICTY case law I also propose to explore whether military necessity might be distinguished from military advantage since both courts and commentators have, in referring to ‘military necessity’, accorded it with different meanings. Attaining some clarity is crucial because the concepts of ‘necessity’ and ‘advantage’ are pivotal elements that form the definition of offences in charges involving the conduct of hostilities which have more often than not entailed large scale harm to civilians and civilian property and, as such, have serious implications for women.

5.2.1 The rationale of military necessity

⁷⁴ As such, military necessity has generally been pled by commanding officers for conduct pursued in the course of hostilities. Military necessity must also be distinguished from necessity in that the former is a limited defence, invoked by a belligerent as a reason for derogating from specific rules of war in the course of a military operation.

⁷⁵ Christopher Greenwood, ‘Historical Development and Legal Basis,’ in *The Handbook of Humanitarian Law in Armed Conflicts* 1, 32 (D. Fleck, ed., 1995). Roberts & Guelff state, “[i]n general, military necessity has been rejected as a defence for acts forbidden by the customary and conventional laws of war because such laws have, in any case, been developed with consideration for the concept of military necessity”; A. Roberts & R. Guelff, *Documents on the Laws of War*, 10.

⁷⁶ O’Brien comments: “in addition to serving as the basic principle of the customary law of war, the term ‘military necessity’ is used in the conventional law of war as an exceptional justification for deviation from the law or as an elastic clause”; W. O’Brien, ‘The Sixth Annual American Red Cross-Washington College of Law Conference on IHL,’ (1987) 2 *American University Journal of International Law and Policy*, 415, 501. The UK Military Manual states: “since the conventional laws of armed conflict have been drafted with the concept of military necessity in mind, it is not open to a person accused of a war crimes to plead this as a defence unless express allowance is made for military necessity within the provision allegedly breached”. The defence therefore remains relevant within the context of a handful of convention provisions including Articles 23, 75 and 126 of GC III, Articles 5, 42, 53 and 147 of GC IV; CPC Art 4(2) and Article 23(g) of the Hague Regulations, and Article 54(5) of Additional Protocol I. The German Military Manual also refers to Art. 50, GCI and Art. 147 GC IV by way of example; *The Handbook of Humanitarian Law in Armed Conflict*, D. Fleck (ed.) OUP, 536 rule 1209.

⁷⁷ Military necessity is provided the ICC statute through a handful of offences including Article 8(2)(a)(iv), 8(2)(b)(xiii), 8(2)(e)(viii) and 8(2)(e)(xii).

The contemporary conception of military necessity and its limited scope of application in ICL first became apparent through the jurisprudence of the post-war trials with the criminalisation, in Article 6 of the IMT Charter, of the prohibition contained in Article 23(g) of the 1907 Hague Convention IV.⁷⁸ In raising the plea of military necessity in response to the charge of the war crime of “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”⁷⁹, the defendants in the *High Command Case* gave the U.S. military tribunal the opportunity to consider in some depth the scope of the defence. Rejecting the plea, the tribunal noted that:

It has been the viewpoint of many German writers and to a certain extent has been contended in this case that military necessity includes the right to do anything that contributes to the winning of a war. ...[S]uch a view would eliminate all humanity and decency and all law from the conduct of war and is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations. Nor does military necessity justify the compulsory recruitment of labor from an occupied territory either for use in military operations or for transfer to the Reich, nor does it justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the state.⁸⁰

Likewise, in *Re Rauter*, the defendant’s attempt to invoke military necessity based on the German doctrine ‘*Kriegsraison geht vor Kriegsmanier*’ – that in case of necessity, the laws of war must yield – was rejected by the Special Court of Cassation on the basis that the laws of war had been codified for the precise purpose of incorporating the ‘*Kriegsraison*’ within the rules.⁸¹ In denying the applicability of the defence to charges involving mass

⁷⁸ The prohibition in Article 23(g) is: “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”; Roberts & Guelff, *Documents*, 78. The Report of the Secretary-General has declared this convention to be part of customary international law; <http://www.un.org/icty/basic/statut/S25704.htm#I> para. 35 (last accessed 02/06). See also *Prosecutor v Kordic*, IT-95-14/2-A, paras. 74-75.

⁷⁹ Article II, 1(b) Control Council Law No. 10.

⁸⁰ *High Command Case*, TWC, Vol. XI, 541; here, military necessity is obviously treated as a principle of limitation by the tribunal.

⁸¹ *In re Rauter*, Special Court of Cassation, January 12, 1949, in *ILR* (1955) 526-48, 543. In *US v Klueggen*, the defendant had been charged with the shooting of two POWs who had been in his custody. The Reviewing authority rejected the defendant’s plea of military necessity on the grounds that “to concede that military necessity goes as far as contended by the defense would destroy most of the elementary restraints on war handed down from antiquity. More specifically, it would permit governments and commanders to deliberately confuse military necessity with strategical interest and military convenience”; case No. 12-1502, 20 October 1947; <http://www.hhs.utoledo.edu/dachau/flyerr&r.html> (last accessed 02/06). The doctrine of *kriegsraison* was criticised by the President of the American Society of International Law, Elihu Root, as early as 1921 when he concluded that for there to be any substance to international law itself, the doctrine had to be abandoned since its effect was to extend an absolute right to the belligerent to decide when and whether it was necessary to violate the law to secure the success of a military operation and in so doing, deem that violation permissible; W.G. Downey, Jr., ‘The Law of War and Military Necessity,’ 47 *AJIL* 251 (1953) 253.

deportations and abductions, the Special Court upheld the reasoning of the lower court that “[e]very war has given rise to a state of necessity, constantly or occasionally, for either or both of the belligerents. The laws of war purporting to lay down what actions are prohibited in warfare would be useless if the belligerents were allowed to deviate from them on the ground of a state of necessity.”⁸²

Although quite a number of defendants prosecuted during the post-war period attempted to justify their war-time conduct on the grounds of military necessity, it was only where the plea was raised in the context of an offence, which expressly provided for an exception based on military necessity in its definition, that the tribunals were willing in principle to consider its application.⁸³ In finding General Lothar Rendulic’s conduct involving the whole-scale destruction of property in occupied territory to fall within the exception as provided in Article II, 1(b) of Control Council Law No. 10, the tribunal in the *Hostages Case* held:

military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations. It permits the destruction of life of armed enemies and other persons whose destruction is incidentally unavoidable by the armed conflicts of the war; it allows the capturing of armed enemies and others of peculiar danger, but it does not permit the killing of innocent inhabitants for the purposes of revenge or the satisfaction of a lust to kill. The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of international law. There must be some reasonable connection between the destruction of the property and the overcoming of the enemy forces.⁸⁴

Several pertinent points emerge from this judgment. First, there must be some reasonable nexus between the harm caused and the military objective that is being sought because without that connection, the destruction is merely wanton and therefore unlawful.⁸⁵ This presupposes that the commanding officer is able to identify precisely the anticipated military objective and to justify his decision to violate the prohibitory norm by reference to that objective; an inability to do so would automatically preclude the defence. But even where a precise military objective can be articulated, recent case law suggests that the harm caused

⁸² *In re Rauter*, Holland, Special Criminal Court, The Hague, May 4, 1948; *ILR*, 1955, 526-48, 533.

⁸³ *Re Altstotter and Others*, 6 *TWC* (1948) 63.

⁸⁴ *Hostages Trial (Re List)*, *TWC*, Vol. XI, 1253.

⁸⁵ See also Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (CUP) 18.

may not be excessive or disproportionate.⁸⁶ Third, the requisite mental element is a subjective one for what is required of the adjudicating tribunal is “to judge the situation as it appeared to the defendant at the time”.⁸⁷ Observing that “the course of a military operation by the enemy is loaded with uncertainties” while also noting that there had in fact been no need to engage in the wanton destruction, the Tribunal continued, “[w]e are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time”. In summing up the court noted that although the defendant may have erred in the exercise of his judgment, he could not be found liable for a criminal act on the basis of his reasonably held but mistaken belief that urgent military necessity warranted the decision taken.⁸⁸

By contrast, in the case of Field-Marshal von Manstein⁸⁹ which also involved charges relating to the ordering of a ‘scorched earth’ policy and the mass deportation of the civilian population, the defence of military necessity was rejected. Citing Article 23(g) of the Hague Convention, the Judge Advocate emphasised that the requisite condition was one of ‘necessity’ and not ‘advantage’; moreover, the necessity had to be an imperative one. In an attempt to distinguish necessity from advantage, the Judge-Advocate explained: “for the retreating army to leave devastation in its wake may afford many obvious disadvantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in this article mean anything at all, cannot afford a justification.”⁹⁰ The evidence indicated that “so far from this destruction being the result of imperative necessities of the moment, it was really the carrying out of a policy planned a considerable time before, a policy which the accused had in fact been prepared to carry out on two previous occasions and now was

⁸⁶ In *Prosecutor v Kordic* (IT-95-14/2-A), paras. 424-26, the Appeals Chamber upheld the findings of the Trial Chamber on the basis that although in ordering the attack on Busovaca the defendant might have been pursuing a legitimate military purpose, the wilful and large scale destruction of Muslim shops and houses could not be justified by reference to military necessity. However, the Appeals Chamber overturned the Trial Chamber’s findings pertaining to the destruction in the village of Merdani on the basis that there was no evidence allowing conclusions as to whether the shelling of Merdani was or was not justified by military necessity (see paras. 427-429)

⁸⁷ *Hostages Trial, TWC*, Vol. XI, 1255-56. See also, *The UK Manual of the Law of Armed Conflict*, 16.44, footnote 199 “any assessment must be based on information available to the commander at the time and not on a distortion arising from hindsight.” The Judge-Advocate in *von Manstein*, also espoused a subjective test. The proper standard of judgment was from the standpoint of the accused “having regard to the position in which he was and the conditions prevailing at the time acted under the honest conviction that what he was doing was legally justifiable”; *Von Lewinski, ILR* (1955) 509, 522.

⁸⁸ *The International Committee of the Red Cross, IV Commentary: Geneva Convention Relative to the Protection of Civilian Persons* states: “various rulings of the courts after the Second World War held that such tactics were in practice admissible in certain cases, when carried out in exceptional circumstances purely for legitimate military reasons. On the other hand the same rulings severely condemned recourse to measures of general devastation whenever they were wanton, excessive or not warranted by military operations”; Jean Pictet (ed.), 1958, 302.

⁸⁹ *Von Lewinski* (called *von Manstein*), *ILR*, (1955) 509-25.

⁹⁰ *Ibid.*, 522.

carrying out in its entirety and carrying out irrespective of any question of military necessity".⁹¹ As in the *Hostages Case*, the defence argued that the mass evacuations were a necessary corollary to the devastation; nonetheless, this argument was rejected as inapplicable given the documentary evidence showing that the deportations had been pursued principally for other purposes.

The jurisprudence of the post-war tribunals and the subsequent codification of the law has left little doubt that the belligerent is entitled to conduct his operations according to military necessity provided that the act does not exceed the bounds of legitimacy pursuant to the laws of war.⁹² As a legal *principle* military necessity proscribes indirectly certain conduct during hostilities on the grounds that "no more force, no greater violence, should be used to carry out an operation than is absolutely necessary in the particular circumstances".⁹³ And as a *principle* of law, military necessity needs to be understood as a limitation rather than authorization.⁹⁴ The *principle* of military necessity cannot serve to justify the violation of a rule since IHL represents a compromise between military necessity and humanitarian considerations;⁹⁵ however where a rule expressly so provides, violations of some proscribed behaviour may be justified.⁹⁶ But on what basis are these particular proscriptions defeasible by the *defence* of military necessity? In other words, what normative values does the law seek to protect through these exceptions? And what are the gender implications of these exceptions?

As with other defences, the plea of military necessity serves to 'contextualise' the *prima facie* violation and operates to allow a tribunal to take into consideration broader contextual considerations to determine whether, in the circumstances, the individual should be held

⁹¹ *Ibid.*, 523.

⁹² Dinstein, *The Conduct of Hostilities*, 18.

⁹³ N.C.H. Dunbar in 'Military Necessity in War Crimes Trials,' (1952) 29 *BYIL*, 442, 444 citing Phillipson, *International Law and the Great War* (1915). Schmitt explains: "military necessity prohibits destructive or harmful acts that are unnecessary to secure a military advantage"; M. Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict,' (1997) 22 *Yale Journal of International Law* 1, 52.

⁹⁴ Schmitt, 'Green War', 54. In the most recent edition of the U.S. Naval manual, military necessity is described as "a fundamental concept of restraint designed to limit the application of force in armed conflict to that which is in fact required to carry out a lawful military purpose". The explanation continues, "often, it is misunderstood and misapplied to support the application of military force that is excessive and unlawful under the misapprehension that 'military necessity' of mission accomplishments justifies the result"; *U.S. Naval Warfare Pamphlet 1-14M* (1997) para.6.2.5.5.2.

⁹⁵ In *re Von Lewinski* the British Military Court stated: "the rules themselves have already made allowance for military necessity. Military necessity has already been taken into consideration in the framing of these laws."

⁹⁶ Greenwood, 'Historical Development' 32.

criminally liable for a violation of the laws of war.⁹⁷ Understood in this way military necessity can be viewed not as a legal *principle* but rather an *exception* that allows the tribunal to take into consideration the context within which the commander has decided not to comply with the rule. In accounting for the insertion of express exceptions in some provisions, some scholars have suggested that those who negotiated the terms of the treaties were of the opinion that the rules could not be drafted so as to accommodate or predict all possible situations in conflict and that some measure of flexibility had to be reflected in certain provisions to allow the belligerent to respond in an appropriate manner.⁹⁸ H. McCoubrey has identified a tri-partite body of concerns – humanitarianism, property protection and security – that may be overridden, explicitly and implicitly, by considerations of military necessity of which the most ‘sensitive’ are those that pertain to humanitarian obligations.⁹⁹

McCoubrey’s suggestion that the plea is available where the circumstances are such that “strict compliance upon rational analysis impractical rather than impossible”¹⁰⁰ is, however, not fully convincing. While most of the relevant treaty provisions may implicitly recognise that compliance would in some circumstances be impractical rather than impossible, a more accurate account is not that compliance is impractical but that in the particular circumstances, and in the opinion of the commanding officer, compliance with the rule would more likely than not have resulted in graver consequences than non-compliance.¹⁰¹ Where the defence has been upheld by a tribunal the harm avoided has generally been viewed as having posed a greater immediate threat than the harm perpetrated; this has certainly been so in cases involving defensive measures. Although in the process of retreat, General Rendulic did order his forces to destroy all public and private property that would have aided the advancing enemy his intention in pursuing a ‘scorched earth’ policy seems to

⁹⁷ See A.P.V. Rogers, *Law on the Battlefield*, (Manchester University Press, 2004) 3-7 and also M.N. Schmitt, ‘Book Review: Law on the Battlefield,’ (1998) 8 *U.S. Air Force Journal of Legal Studies*.

⁹⁸ Yet it did not go unnoticed that to do so risked what Jean Pictet referred to as “bad faith” in the application of the reservation; J. Pictet, *The International Committee of the Red Cross, IV Commentary: Geneva Convention Relative to the Protection of Civilian Persons* (1958) 302.

⁹⁹ H. McCoubrey, ‘The Nature of the Modern Doctrine of Military Necessity,’ (1991) 30 *Revue de Droit Militaire et de Droit de law Guerre*, 215, 229. As McCoubrey suggests, while these provisions do admit the possibility that considerations of military necessity may create difficulties in the “precise details of implementation” the rules still continue to retain the fundamental humanitarian principle *per se*.

¹⁰⁰ McCoubrey, ‘The Nature of the Modern Doctrine,’ 237.

¹⁰¹ For example, under article 18 of Geneva Convention II, there is an obligation after each engagement on parties to the conflict to “without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick...” However, if in the opinion of the commanding officer, compliance with the obligation would mean subjecting his forces to a serious and unacceptable risk of an attack, the implicit recognition of military necessity in the phrase “all possible measures” would serve to justify the decision not to comply; McCoubrey, ‘The Nature of the Modern Doctrine,’ 225-26.

have been to avoid subjecting his forces to an unacceptably high level of risk through a direct confrontation with the advancing Allied forces: his intention was to slow the enemy rather than to reek devastation and destruction.¹⁰² In effect what was being intimated was that the harm that would be caused (the destruction of property) was adjudged to be less than the harm avoided (the anticipated casualties).¹⁰³ Moreover, Rendulic's decision to authorise the involuntary evacuation of the local population, taken together with evidence suggesting that there was no direct loss of life as a result of these tactics, seems to have convinced the adjudicating tribunal that his intention had been to protect the safety not only of his own troops but also that of the civilian population. By contrast, in the case of *von Manstein*, the justification for the mass evacuation of the civilian population had been primarily to deprive the enemy of potential labour, a reason that was deemed by the tribunal to be insufficient to justify the *prima facie* wrong. Certainly as far as mass deportations or evacuations of the civilian population are concerned, the post-war cases suggest that military necessity can provide an absolute defence where the commanding officer has judged that the safety of the civilian population required their removal but no defence at all where the removal conceals a policy that offers a military advantage.¹⁰⁴ What these post-war cases clearly illustrate is the difficulty of assessing military necessity by reference to general principles alone. But what is also abundantly clear is that military necessity is only available in exceptional circumstances since what the commander is in effect suggesting is that he had good reasons for violating what are otherwise clear legal obligations to comply with or desist from certain conduct; satisfying the high evidential thresholds implicit in most of the provision will preclude most pleas.¹⁰⁵ More specifically whether or not the defence is conditioned on a requirement of imminence – in other words, the commander was faced with a situation in

¹⁰² As Schmitt suggests, “the difficult in understanding whether an act is militarily necessary is compounded by the fact that it cannot be assessed in the abstract”; ‘Green War’, 53.

¹⁰³ The UK military manual concludes that it will be up to the tribunal to “assess whether military necessity required the specific acts committed, bearing in mind the rules of proportionality in which the military need for the operation has to be weighed against humanitarian interests”.

¹⁰⁴ See also Jean-Marie Henckaerts, ‘Deportation and Transfer of Civilians in Time of War,’ (1993) 26 *Vanderbilt Journal of Transnational Law* 469, 475. In *Prosecutor v Krstic*, the tribunal considered the defence of military necessity in the context of the deportation and forcible transfer of the Bosnian Muslim civilian population from the UN-designated ‘safe-haven’ of Srebrenica in July 1995. In response to Krstic’s contention that not all forcible transfers of civilians were criminal *per se*, the Tribunal conceded that under Article 49 of GC IV and Article 17 of AP II, the total or partial evacuation of a given area may be allowed “if the security of the population or imperative military reasons so demanded”. But in rejecting the plea, the Tribunal found that the exception was subject to the condition that “persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased”; this condition had not been satisfied on the facts; (IT-98-33) Trial Chamber Judgment of 2 August 2001, para. 524-532.

¹⁰⁵ ‘Wanton’ conduct implies the absence of intent to secure a specific military objective as will the requirement that the violation was imperative.

which immediate action had to be taken – does not appear to be an entirely settled matter given the inconsistent jurisprudence.¹⁰⁶

Although the principle of military necessity has been the subject of considerable analysis in numerous cases at the ICTY, many of these judgments have, regrettably, confused rather than clarified this area of law. The principle of military necessity was addressed by the ICTY in the trial of General Blaskic, the first post-World War II commander convicted of crimes pertaining to the conduct of hostilities in ground operations, who was found criminally liable for, *inter alia*, “unlawful attacks on civilians and civilian objects and wanton destruction not justified by military necessity”.¹⁰⁷ In assessing the elements of the charge the Trial Chamber accepted the Prosecution’s submissions and concluded that:

...the attack must have caused deaths and/or serious bodily injury within the civilian population or damage to civilian property. The parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity.¹⁰⁸

Seeming to concur with this analysis, the Trial Chamber in *Prosecutor v Kordic & Cerdez*, also held that:

... prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity. ... such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.¹⁰⁹

But the Trial Chamber in *Galic* disagreed, and in so doing, expressly departed from *Blaskic* and *Kordic* on the grounds that Article 51(2) expressly prohibits making the civilian

¹⁰⁶ Downey examines the elements of military and identifies “*an urgent need admitting no delay*” to be an essential element; ‘The Law of War’ 254-56. Following a review of the treaty provisions and jurisprudence on the defence, McCoubrey also concludes that military necessity “connotes an immediate and overwhelming circumstance in military action”; McCoubrey, ‘The Nature of the Modern Doctrine,’ 237. See also Robert Gehring, ‘Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I,’ (1980) 90 *Military Law Review* 49, footnote 8.

¹⁰⁷ *Prosecutor v Tihomir Blaskic* (IT-95-14-T). The relevant Counts had been drafted in a manner as to rely on Article 3 of the statute of the ICTY as well as customary international law as provided in Article 51(2) of AP I and Article 13(2) of AP II, for two specific reasons. First, it was initially unclear as to whether or not the prosecution would be able to establish that the law for an international conflict was applicable; and second, “the prosecution wished to further the development of a common core of law applicable to all conflicts” – an initiative that had been envisaged by the *Tadic* Appeals Chamber; W. J. Fenrick, ‘A First Attempt to Adjudicate Conduct of Hostilities Offences: Comments on Aspects of the ICTY Tribunal Decision in *Prosecutor v Tihomir Blaskic*,’ (2000) 13 *Leiden Journal of International Law* 931, 937.

¹⁰⁸ *Blaskic* (IT-95-14-T) para. 180.

¹⁰⁹ (IT-95-14/2) para. 328. Although it is conceded that this extract can be read in two ways, the fact that it is possible to infer two quite contradictory interpretations is in itself a cause for concern. See also commentary in Knut Dormann, *Elements of War Crimes* (C.U.P.) 132-33.

population the object of attack.¹¹⁰ This interpretation of Article 51 was indirectly endorsed by the Appeals Chamber in *Blaskic* when the court stated: “the Appeals Chamber deems it necessary to rectify the Trial Chamber’s statement, contained in paragraph 180 of the Trial Judgment, according to which ‘[t]argeting civilians or civilian property is an offence when not justified by military necessity.’ The Appeals Chamber underscores that there is an absolute prohibition on the targeting of civilians in customary international law”.¹¹¹ To some regret, rather than concurring with the *Blaskic* Appeals Chamber’s analysis and reinforcing the interpretation of Article 51 as an absolute prohibition against targeting civilians, the Appeals Chamber in *Kordic* reiterated the position as set out by the Trial Chamber.¹¹² This wording implies that there may be circumstances under which the intentional targeting of civilians, as opposed to an attack against a legitimate military objective that unintentionally results in civilian casualties as collateral casualties, would be legally justified.¹¹³ I suggest that this is not an accurate statement of the *lex lata* and that the better account of the law as it currently stands is the position as articulated by the *Galic* Trial Chamber and subsequently endorsed by the *Blaskic* Appeal Chamber.¹¹⁴ Moreover, if the

¹¹⁰ The tribunal reasoned: “...this provision states in clear language that civilians and the civilian population as such should not be the object of attack. It does not mention any exceptions. In particular, it does not contemplate derogating from this rule by invoking military necessity”; *Galic*, para. 44. The charges against Galic were based on violations of Article 3 of the ICTY statute and Articles 51(2) of Protocol I and 13(2) of Protocol II; this contrasts with the charges against Blaskic and Kordic which related specifically to actions by an occupier against a civilian population in contravention of GC IV. Article 51(2) states: “the civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”

¹¹¹ *Blaskic*, para. 109.

¹¹² Although the *Kordic* Appeals Chamber expressly states at paragraph 54 that “the prohibition against attacking civilians and civilian objects would not be a crime when justified by military necessity” the court then refers to and cites legal instruments and judgments that support the absolute prohibition of attacks on civilians and civilian objects. The tribunal’s reluctance to talk in terms of an absolute prohibition might be explained by reference to the *Kupreskic* Trial Chamber’s articulation of three exceptions to the rule on the prohibition of attack on civilians; *Kupreskic* (IT-95-16-T), para. 521-536. Where the charges related to wanton destruction of civilian property, the Appeals Chamber generally upheld the Trial Chamber’s findings on the basis that the defendant had failed to identify a specific military advantage that justified the violation of the rule (see paras. 389-391) or that the evidence clearly showed that the destruction had been targeted predominantly at the properties belonging to the Muslim population (leaving Croat properties untouched) which led the Tribunal to conclude that the defendant’s conduct had not been motivated by military necessity. The Appeals Chamber did however reverse some of the findings of the Trial Chamber in respect of charges relating to wanton destruction on the basis that there was either no evidence “allowing conclusions as to whether the shelling of ... was or was not justified by military necessity” (para. 429) or that there was sufficient evidence to suggest that there were legitimate military objectives in the area in question as to give doubt to the Trial Chamber’s presumption that the targets of attack were civilian in nature (paras. 430-450).

¹¹³ M. Epstein & R. Butler, ‘The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the ICTY,’ (2004) 179 *Military Law Review* 68, 101. See also *Prosecutor v Oric*, IT-03-68-T (30 June 2006), paras. 580-89.

¹¹⁴ Although the *Kupreskic* Trial Chamber identifies three circumstances when the ‘protection’ to which civilians are entitled may cease entirely or be reduced or suspended, whether it is possible to extrapolate from this analysis a rule that the intentional targeting of civilians might be justified by

law is to have any intrinsic guiding value, expressly introducing the exception of military necessity to the proscription on targeting civilians is to seriously undermine one of the central principles that characterises IHL. Assigning the defence of 'military necessity' to the definition of the offence in the case of wanton destruction or mass evacuations or transfers, is to suggest that while there are always reasons against such conduct, there may be situations in which countervailing considerations provide enough of a reason for engaging in the proscribed act. It is also to deem that such destruction, or evacuations or transfers are no harm at all if justified by military necessity; given the realities of conflict, this is a fair 'concession' particularly since circumstances may be such that, what would otherwise be unlawful conduct may not only be an inevitable corollary of an imperative military need but in fact a preferable course of conduct to have pursued. However, it is difficult to see how the same reasoning can be applied to targeting civilians since that is to suggest that such attacks are no harm at all if justified by military necessity. Rather, alleged violations of Article 51 require a tribunal to judge the defendant's conduct by reference to the principle of proportionality since the claim being proffered is that the anticipated military *advantage* outweighed the risk posed to the civilian population.¹¹⁵

If articulating what is meant by military necessity is challenging, defining the customary law principle of proportionality is even more so since whether a particular conduct is or is not proportionate requires comparing incommensurable values: military advantage and humanitarian considerations.¹¹⁶ The application of this principle in practice is apt to prove hugely problematic and the consequences for women as civilians is often disturbing. Moreover, in the context of Articles 48 to 58 of Protocol I words such as 'incidental' and 'excessive', as Judith Gardam points out, involve judgments about the value of lives and it would seem naïve not to imagine that decisions taken by belligerents would reflect the

reasons of military necessity is questionable. The first example identified by the Trial Chamber concern civilians who abuse their rights (Article 51(3) AP I). I suggest that it is misleading to describe such situations as falling into the exception of 'military necessity' since the civilians have lost their protective status because they have chosen to take a direct part in hostilities; the civilian becomes a legitimate military objective but only to the extent that he/she poses a real military threat to the belligerent. In the second example, while civilians might be the victim of hostilities, they are certainly not the direct object of attack. The third example cited concerns the doctrine of belligerent reprisals which raises separate questions from that of military necessity.

¹¹⁵ It is noteworthy that throughout its judgment, the Appeals Chamber in *Prosecutor v Kordic & Cerkez* (IT-95-14/2-A) continued to emphasise the distinction between attacks directed at civilians – for which the defendants had been charged – and indiscriminate attacks or attacks that were deemed disproportionate to the anticipated military advantage. Likewise, whether the bombing of Qana in July 2006 by the Israeli air force was lawful or not must therefore be assessed by reference to whether the force used was excessive or disproportionate to the anticipated military advantage with regard to the information that was available at the time; for background see

http://news.bbc.co.uk/1/hi/world/middle_east/5232434.stm

¹¹⁶ According to Schmitt, the principle prohibits injury or damage disproportionate to the military advantage sought by an action; 'Green War', 55.

priorities of the decision makers themselves, of whom the vast majority are military men.¹¹⁷ But while the empirical studies following the conflicts in 1991-92 Gulf War and the NATO bombing campaign against Yugoslavia in 1999 produced dismal readings for civilians despite the practical application of the rule of proportionality, the recent decisions by the ICTY have proved a welcome development as far as how the principles of proportionality and distinction affect women are concerned.¹¹⁸ Within the context of the conduct of hostilities, the judgments generally reflect greater than ever obligations on commanders to take all practical and reasonable measures to secure accurate information concerning the civilian population and property before and during military operations. In addition, they require restraint by the commander if the information indicates that operations can be reasonably expected to cause 'disproportionate' civilian casualties and any such disproportionate acts "may give rise to the inference that civilians were actually the object of attack".¹¹⁹ Although the judgements cannot in and of themselves establish new binding standards of conduct since they are only subsidiary means through which the law is identified rather than a source of law in their own right, they can certainly play a vital role in paving the way for the crystallisation of customary international law principles. But in attempting to pave the way for even greater protection of civilians during hostilities, some of the tribunals' pronouncements have incurred criticism particularly where the courts have declared a rule to have acquired customary status in spite of the absence of state practice – as in the case of belligerent reprisals.

5.3 BELLIGERENT REPRISALS

The law on belligerent reprisals has proved to be a contentious subject primarily because opinion has divided on the extent to which such conduct is now prohibited under customary international law. Although no reference is made to this defence in the ICC statute, the doctrine of reprisals deserves comment if only because the ICTY's handling of this doctrine in respect to pleas entered by several of the defendants has stimulated considerable debate

¹¹⁷ Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *ICLQ* 55, 71. As Gardam reveals, it is not the inherent limitations of law that are the problem but "who makes it and what result it is intended to achieve". Thus, it is not the concept of proportionality but the application of the principle that is a cause for concern.

¹¹⁸ For example *Galic* (IT-98-29-T) and *Blaskic* (IT-95-14-T) and *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, IV(A)(iv)(d); <http://www.un.org/icty/pressreal/nato061300.htm#IVA64d> (last accessed 03/06).

¹¹⁹ *Galic*, paras. 60 and 58; *Blaskic*, paras. 627-630.

within the scholarly community.¹²⁰ But my interest in critically examining this plea is principally rooted in the fact that the doctrine of reprisals has very serious gender implications that demand such attention. As with military necessity, this defence is also a derivative one that belongs to the state and can therefore only be pled by an individual who has acted in an official capacity.¹²¹ The defendant who seeks to rely on reprisals justifies his conduct on the basis that his conduct was lawful *per se* because the requisite conditions for lawful reprisals were satisfied.

5.3.1 The Rationale of Belligerent Reprisals

The rationale that underpins this doctrine is above all utilitarian in character for its primary purpose is to serve as a deterrent. Reprisals function to extend to a belligerent a temporary and limited right to take what would otherwise be unlawful measures against an adversary who is violating the laws of war with the sole purpose of coercing that adversary into complying with the relevant rules. In the absence of a higher authority responsible for overseeing compliance with the rules that bind the parties to a conflict, reprisals act to 'remind' the violator of their obligations under international law and to deter them from further violations. Simply put, reprisals are a means of law enforcement.

For a violation of the laws of armed conflict to be considered a lawful reprisal, the conduct must satisfy certain stringent conditions. First, reprisals may *only* be taken in response to a prior violation of international humanitarian law by an adversary to the conflict and must be for the sole purpose of inducing the violator to comply with the rules of war.¹²² Reprisals, because of their specific and limited intent, are usually held in marked contrast to retaliatory

¹²⁰ See for example, the recent pleadings at the ICTY in the cases of *Kupreskic*, (IT-95-16-T) and *Martic*, Trial Chamber Decision (IT-95-11-R61) of 8 March 1996. Some scholars, including D. Turns, have suggested that belligerent reprisals (which should not be confused with armed reprisals) are better regarded as a doctrine of IHL rather than a defence *per se*. Nonetheless, in a handful of post war cases – and more recently at the ICTY – this plea has been raised as a defence (albeit as an exception to a prohibition) to charges for offences committed in the course of hostilities and has been treated as such by the respective tribunals. Moreover, numerous scholars including Bassiouni, Ambos and Fenrick have also treated this plea as a potential defence to international criminal offences.

¹²¹ The individuals in whom the legal authority to resort to reprisals has been vested has altered over the years. In the inter-war and WWII period the right was generally accepted as extending to local commanders but there has been a trend towards limiting this authority to only the highest military or political levels. See A.R. Albrecht, 'War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949,' (1953) 47 *AJIL* 590, 599-600. *Customary International Humanitarian Law*, Volume I, (J. Henckaerts & L. Doswald-Beck, eds.) (CUP, 2005) 518.

¹²² For evidential material, see *Customary International Humanitarian Law*, Vol. I, 515, fn. 31-32. See also case notes from the trial of *Von Mackensen and Maelzer*, in *LRTWC*, Vol. VIII, 1.

measures that amount to violations which are considered unlawful *per se*.¹²³ As the *Einsatzgruppen* tribunal made clear, “reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future.”¹²⁴ What this implies, according to Greenwood, is that the reprisal must be taken openly for “otherwise it cannot be expected to influence the conduct of the adversary”; moreover, it requires that notice of the reprisal be given to the adversary.¹²⁵ This point was emphasised by the tribunal in *re Bruns and others* when, in rejecting the defendant’s plea, it held:

[i]t was generally understood that the purpose of reprisals was to compel the adversary to modify his method of carrying on hostilities and to respect the laws and usage of war. If that purpose was to be achieved it was necessary that reprisals should be publicly announced.¹²⁶

But most significantly, the reprisal must be proportionate to the original unlawful act for otherwise the conduct is likely to be viewed as a war crime.¹²⁷ And it is perhaps this aspect of reprisals that has most troubled tribunals since proportionality is a principle that too often seems to defy definition let alone precise measurement. In the post-war case of *Kesselring* the tribunal had to determine whether the shooting of 335 Italian nationals, following an order from Hitler to kill 10 Italian hostages for every German policeman who had died as a result of a bomb attack, was a legitimate reprisal or a war crime. Although the tribunal deemed the conduct to constitute a war crime, the basis on which it reached its decision remains unclear. It may have been on the grounds that the conduct was judged to be

¹²³ As Justice Jackson made clear, given their limited purpose, “a deliberate course of violation of international law cannot be shielded as a reprisal” and nor can a defendant “vindicate a reign of terror under the doctrine of reprisals”; *Nuremberg Trial Proceedings*, Volume IX (15 March 1946). By contrast, retorsion involves the taking of serious measures but which do not amount to violations of the rules in response to similar conduct by the adversary.

¹²⁴ Trial of *Ohlendorf and others*, *TWC*, Vol. VIII, 86. See C. Greenwood, ‘Belligerent Reprisals in the Jurisprudence of the ICTY,’ in *International and National Prosecution of Crimes Under International Law*, (H.Fischer, C. Kress, R. Luder (eds.)) (Berlin: Berlin Verlag, 2004) 539, 542 for a concise analysis of conditions.

¹²⁵ Greenwood, ‘Belligerent Reprisals,’ 542. See UK *Military Manual* (2004) section 16.17 on Conditions for Reprisal Action.

¹²⁶ *Re Bruns and others*, *Eidsivating Lagmannsrett* (Court of Appeal), March 20, 1946 in *ILR*, 1946, 391, 393.

¹²⁷ Françoise Hampson, ‘Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949,’ (1988) 37 *ICLQ*, 818 at 823. Kalshoven also takes the view that the reprisal must be proportionate to the original unlawful act while Greenwood’s view is that reprisals “should exceed neither what is proportionate to the prior violation nor what is necessary if they are to achieve their aim of restoring respect for the law”; Kalshoven, *Belligerent Reprisals*, 341 and C. Greenwood, ‘The Twilight of the Law of Belligerent Reprisals,’ (1988) 20 *Netherlands Yearbook of International Law*, 35, 44.

disproportionate but equally, it may have accepted the Judge Advocate's reasoning that "whatever you may think about International Law and reprisals, clearly five of these 335 Italians were murdered. That was a war crime and you cannot get away from it. There was no Fuhrer order to cover it and it was quite outside the reprisal".¹²⁸ In respect of the same incident, in *re Kappler*, an Italian military tribunal ruled the conduct unlawful because disproportionate; proportionality it held, could be assessed by reference to qualitative and quantitative criteria.¹²⁹ By contrast, in the case of *List*, the tribunal condemned the reprisals taken under the authority of the Keitel order – that the death penalty for 50 to 100 communists must be in general deemed appropriate as retaliation for the life of a German soldier – as "clearly excessive".¹³⁰

Procedurally, the decision to resort to reprisals is generally regarded as only available to individuals at the highest political or military level.¹³¹ Moreover, given the objective of reprisals, as soon as the adversary desists in its violations and begins to comply with the law the reprisal action must be terminated. While there is little dispute as regards the requirements so far addressed, the extent to which virtually all forms of reprisals are, in light of the 1977 Protocols, prohibited under international law is an issue that has caused significant discord among commentators particularly in the wake of the judgment of the ICTY Trial Chamber in the case of *Kupreskic* and the decision in the case of *Martic*. Because this matter is inextricably linked to whether reprisals can ever be taken against an adversary's civilian population – a question that is of fundamental significance to women as

¹²⁸ Trial of *Albert Kesselring*, British Military Court, *LRTWC* Vol. VIII, 9, 13.

¹²⁹ The Tribunal held, "the executions in the Ardeatine caves were quite disproportionate to the attack in the Via Rasella, both from the point of view of the number of victims and of the ensuing damage." The tribunal continued: "the measures remain disproportionate, not only as regards numbers, but also for the reason that those shot in the Ardeatine caves included five generals, eleven senior officers, among them Colonel Montezemolo who was the head of an important secret organization, twenty-one subalterns and six non-commissioned officers. All these persons were known to the Germans for their rank and for the positions of command exercised by them"; *ILR* (1953) 471 at 476. Albrecht also argues that there is a general principle that there should, wherever possible, be some connection between the victims of reprisals and the illegal act which has given rise to the reprisals. In the context of occupied territory, this condition is determined by geographical proximity; 'War Reprisals'.

¹³⁰ *The Hostage Case, TWC*, Vol. XI, 1270. The tribunal added, "an order to take reprisals at an arbitrarily fixed ratio under any and all circumstances constitutes a violation of international law. Such an order appears to have been made more for purposes of revenge than as a deterrent to future illegal acts which would vary in degree in each particular instance. An order ... which fixes a ratio for the killing of hostages or reprisal prisoners, or requires the killing of hostages or reprisal prisoners for every act committed against the occupation forces is unlawful. International law places no such unrestrained and unlimited power in the hands of the commanding general of occupied territory."

¹³¹ *UK Military Manual* (2004) section 16.17 and 16.19.2. See also U.S. Naval Warfare Pamphlet 1-14M (1997) para.6.2.3.3. providing that the President alone may authorize the taking of a reprisal action by U.S. forces. According to the German Manual the decision to take such action lies exclusively at the political level: "A military leader does not have the right to decide to answer an unlawful act of his opponent with an unlawful act of his own. Such measures constitute violations or grave breaches of humanitarian law and may result in disciplinary or criminal proceedings"; *The Handbook of Humanitarian Law in Armed Conflict*, D. Fleck (ed.) OUP, 528, rule 1206.

potential victims – an examination of persons against whom reprisals are absolutely prohibited requires some comment.

If there is one defence that most vividly reveals the profoundly gendered narratives of IHL and ICL it is the history of reprisals. The first treaty to proscribe reprisals against a particular category of persons was the 1929 Geneva Convention on Prisoners of War.¹³² The codification of this express prohibition with respect to POWs may, in part, explain why there were so few instances of such action during the second World War.¹³³ But the consequence of *failing* to provide a comparable proscription for the civilian population, the majority of whom were women and children, meant that during the second world war “the civilian population found itself exposed to those atrocities to a far greater extent than were the members of armed forces” with thousands being taken as hostages and subsequently executed in occupied territories under the doctrine of reprisals.¹³⁴ Furthermore, because reprisals were not expressly prohibited (apart from against those who were entitled to POW status) as long as the belligerent satisfied the prerequisites to lawful reprisals he was entitled to rely on the defence.¹³⁵ There is little doubt that the jurisprudence of the post-war tribunals did much to pave the way for the categories of persons against whom reprisals were absolutely prohibited to be extended to all ‘protected groups’ falling within each of the 1949 Geneva Conventions.¹³⁶ However, as Kalshoven points out, one particularly vexing

¹³² The earliest attempt to codify the use of reprisals is found in the Lieber Code which attempted to regulate or limit the recourse to retaliatory measures while the Oxford Manual adopted by the Institute of International Law in 1880, also dealt with the regulation of reprisals.

¹³³ Kalshoven, *Belligerent Reprisals*, 213. See intervention by Dr Franz Exner (counsel for Jodl) in the *Nuremberg Trial Proceedings*, Vol. IX of 15 March 1946 in which he stated: “one can say that only on one point there is absolute certainty, namely that point, which Mr. Justice Jackson mentioned first – ‘measures of reprisals against prisoners of war are prohibited.’ Everything else is matter of dispute and not at all valid as international law.” In the *Dostler Case*, the U.S. Military Commission found that that prohibition of reprisals against prisoners of war as provided in the Geneva Convention of 1929 on Prisoners of War, allowed no exception; *TWC* Vol. I, 22, 31. In the *Naulilaa Incident case*, Germany was found to have exceeded the limits of legitimate reprisals when it retaliated disproportionately against Portugal in response to minor damage caused by the Portuguese in Germany’s colonial territory in Africa; *Portugal v Germany* (1928) 2 R.I.A.A. 1026, cited by D.J. Harris, *Cases and Materials on International Law* (5th ed.) 12.

¹³⁴ Stanislaw Nahlik. ‘Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva, 1974-1977,’ (1978) 42 *Law and Contemporary Problems* 36, 40.

¹³⁵ This obviously posed some conceptual difficulties for the post-war tribunals which sought to impose criminal liability for the execution of civilian hostages under the doctrine of reprisals. See also Albrecht, ‘War Reprisals’ 603-04. In its judgment concerning the defendant von Leyser in the *Hostages Trial*, the tribunal noted, “the killing of hostages and reprisal prisoners is entirely lawful under certain circumstances”; *TWC*, Vol XV, 179.

¹³⁶ Article 4(1) GC IV reads: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”; *Documents on the Laws of War*, Roberts & Guelff, 302.

problem remained: “whether the civilian population and civilian objects in enemy, non-occupied territory could and should be afforded similar protection.”¹³⁷

The shift, since 1949, in global opinion in support of an absolute prohibition on reprisals against all civilian populations has been evidenced by a number of developments including, the adoption of General Assembly Resolution 2675 in 1970 reaffirming the principle that “civilian populations, or individual members thereof, should not be the object of reprisals”, the condemnation in 1983 by the Security Council for the escalation in reprisals targeting civilians during the Iran-Iraq conflict¹³⁸ and finally, but not least, the express prohibition against targeting civilians encapsulated in Article 51(6) of Protocol I of 1977.¹³⁹ But despite these developments, the question still remains as to whether the prohibition is binding under customary international law given the rejection of a comprehensive prohibition by some states¹⁴⁰ and only a conditional recognition by others.¹⁴¹

The reaction among the scholarly community to the Trial Chamber’s observations in the *Kupreskic* judgment, support the view that a customary rule specifically prohibiting reprisals against civilians during hostilities has not yet crystallised although there is strong evidence to suggest that such a rule is in the process of emerging.¹⁴² Acknowledging that “opinions differ as to the efficacy, as well as the morality, of reprisals”¹⁴³ Greenwood has questioned the Trial Chamber’s conclusions that there already exists a customary rule of international law prohibiting reprisals against civilians citing the lack of state practice together with the inconsistent *opinio juris*.¹⁴⁴ These criticisms are convincing and even the most ardent

¹³⁷ F. Kalshoven, ‘Belligerent Reprisals Revisited,’ (1989) 21 *Netherlands Yearbook of International Law*, 43, 47.

¹³⁸ Security Council Resolution 540 (1983).

¹³⁹ The provision reads: “attacks against the civilian population or civilians by way of reprisals are prohibited.”

¹⁴⁰ See for example the reaction of the US Joint Chiefs of Staff to the prohibition of reprisals as encapsulated in Protocol I in Kalshoven, ‘Belligerent Reprisals Revisited,’ 54.

¹⁴¹ T. Meron, ‘The Humanization of Humanitarian Law,’ (2000) 94 *AJIL*, 239, 249-251. On ratification of A.P. I the UK made the following statement: “If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, ... the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government.” Whether the provisions in the Protocol prohibiting reprisals against the civilian population are reservable or not has been the subject of much debate among commentators; Kalshoven, ‘Belligerent Reprisals Revisited,’ 63-67.

¹⁴² *Kupreskic*, (IT-95-16-T) paras. 527-536, 531.

¹⁴³ Greenwood, ‘The Twilight’, 56.

¹⁴⁴ Greenwood, ‘Belligerent Reprisals,’ 539. Greenwood does not dispute the outcome of the judgment (“it is impossible to dissent from the conclusion that the conduct of the Defendants could not be justified as belligerent reprisals”) but the court’s reasoning. A more satisfactory approach

supporters of a prohibition remain not fully persuaded by the Trial Chamber's invocation of the Martens clause to justify their reasoning.¹⁴⁵ Nevertheless the reaction to the *Kupreskic* judgment invariably begs the question as to why some states continue to reject an absolute prohibition on civilians and civilian objects being the target of reprisals. Advocates for the preservation of such a right have, first and foremost, justified their view on the grounds that reprisals are the only sanction and/or remedy available against an adversary who systematically and persistently targets *their* civilians.¹⁴⁶ Maintaining the right to do likewise, it is argued, while obviously not a desirable course of action may be the only way to influence the enemy's behaviour.¹⁴⁷ Proponents of the doctrine, in favouring regulation over prohibition, emphasise two limiting features of reprisals: that they are a *last resort* enforcement mechanism and that any recourse to reprisals must be *proportionate*. Moreover, they stress the value of retaining the right to *threaten* the use reprisals, which, it is suggested, can act as a significant deterrent. Greenwood has expressed the view that because Articles 51-56 of Additional Protocol I are too restrictive it is likely that they will be ignored in a conflict marked by large-scale violations by one or more parties. While Greenwood's prediction might prove to be all too accurate, it cannot serve as an adequate justification in support of a belligerent's right to take reprisal measures against civilians.¹⁴⁸ That a belligerent is likely to violate a rule cannot be the basis for not having such a rule.¹⁴⁹

would have been to point out that since both belligerents were parties to API they were bound by the obligation not to conduct reprisals against civilians. Alternatively, Greenwood suggests, the facts were such that the civilians were protected under GC IV which prohibited reprisals being taken against them in any event.

¹⁴⁵ Meron, 'The Humanization', 250. Even Kalshoven concludes that the Trial Chamber failed to show convincingly that customary international law prohibits reprisals against the civilian population; Kalshoven, 'Two Recent Decisions' of the Yugoslavia Tribunal,' in *Man's Inhumanity to Man*, Cassese & Vohrah (eds) 2003 (The Hague: Kluwer Law International)

¹⁴⁶ The U.S.'s rationale for deciding not to ratify Protocol I is, in part, due to the prohibition on reprisals as provided under the Protocol. As A. Safaer, Legal Adviser at the Department of State, explained: "it eliminates significant remedies in cases where any enemy violates the Protocol. The total elimination of the right to reprisal, for example, would hamper the ability of the United States to respond to an enemy's intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard". 82 *AJIL* 784 (1988) at 785.

¹⁴⁷ E. Kwakwa, argues that reprisals serve a crucial role in the absence of a centralized law enforcement mechanism. In the present world order, he suggest, "it is to the politically independent constituent states that is entrusted the task of enforcing respect for the rules of international law"; *The International Law of Armed Conflict: Personal and Material Fields of Application* (Kluwer Publishers, 1992), 152. Kwakwa's attempt to justify the doctrine on theoretical grounds is, however, unconvincing. While he is critical of Kalshoven's argument as to the effectiveness of reprisals (or threat to use reprisals), this is a cyclical argument for both opponents and proponents of the doctrine are engaged in a process of second-guessing what a belligerent may or may not do. Ultimately, I suggest, this argument leads us nowhere.

¹⁴⁸ I refer here to Article 51(6) which states: "attacks against the civilian population or civilians by way of reprisals are prohibited" but also to Article 54(4) on the *protection of objects indispensable to the survival of the civilian population* which reads: "these objects shall not be made the object of reprisals".

¹⁴⁹ Nor is Greenwood's argument that the reprisals provisions in Protocol I impose upon governments a moral stance which public opinion will not sustain since Greenwood himself maintains that the

Critics of the doctrine emphasise the ineffectiveness of reprisals as a means of law enforcement, and question the military efficacy of resorting to such tactics particularly because such conduct risks the escalation of violations by all parties to the conflict.¹⁵⁰ As one commentator has observed,

[T]he bombardment of London and other British cities in the early years of the Second World War, resulted only in the total destruction of Dresden and Leipzig in 1945. Neither the Allies nor the Axis powers were deterred by such losses and Germany surrendered only when further resistance was effectively impossible. Since 1945, so-called 'internal conflicts' have merely served to confirm what we already knew: even 'justified' attacks on the civilian population in no way affect the outcome of a war. Their sole consequence is the further spread of barbarity.¹⁵¹

Above all, such conduct is difficult to reconcile with our basic moral instinct and understanding of responsibility since reprisals represent "an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty".¹⁵² Even proponents of the doctrine have conceded that reprisals during armed conflict "normally destroy the property, health and lives of civilians who almost invariably are innocent of the initial wrongful acts".¹⁵³ Thus, at the root of our discomfort with this doctrine is a sense of moral ambiguity if not outright hostility particularly in respect of reprisals that are intentionally directed at the innocent. That this feature of the laws of war pose a serious threat to the protection of women in conflict is self-evident and while Kalshoven concludes that reprisals are "a complete anachronism", I would suggest that reprisals, certainly in respect of civilians, are

purpose of reprisals is to alter the conduct of the adversary, not to punish it. Taking reprisals in response to public pressure comes very close to retaliatory action; Greenwood, 'The Twilight' 58 and 45.

¹⁵⁰ As Kalshoven suggests, reprisals are virtually useless in instances where the original violator demonstrates a total disrespect for the rules of war or where the interests at stake are so great as to make it utterly improbable that a belligerent would change his policy in response to such measures; Kalshoven, *Belligerent Reprisals*, 214. Moreover, reprisals often lead to counter-reprisals and an escalation in the overall level of violence. Given the lack of evidence to support the rationale for the recourse to reprisals against civilians, the utilitarian value for preserving the rule vanishes.

¹⁵¹ Konstantin Obradovic, 'The prohibition of reprisals in Protocol I: Greater protection for war victims,' *International Review of the Red Cross*, 31 October 1997.

¹⁵² *Institute of International Law, Oxford Manual* (1880)

<http://www.icrc.org/ihl.nsf/FULL/140?OpenDocument>. (last accessed 03/06). S. Darcy in 'The Evolution of the Law of Belligerent Reprisals,' points out that reprisals "by their nature allude to the notion of collective responsibility"; (2003) 175 *Military Law Review* 184, 245. By contrast, Kwakwa argues that war has always been based on the principle of collective responsibility and that this idea is rooted in the idea of "solidarity – of holding members of a community jointly and severally liable for the acts and omissions of some of the members in armed conflict". Nevertheless, Kwakwa also concedes that the principle of collective responsibility undermines the distinction between combatants and non-combatant, a fundamental principles that underpins the laws of war; Kwakwa, *The International Lawt*, 151.

¹⁵³ Kwakwa, *The International Law*, 140.

an anathema and, as such, should be outlawed.¹⁵⁴ Reprisals taken against a civilian population is to treat that population as a means to an end and, in doing so, it is to deny that civilian population their individuality; but, above all, what is most disturbing is that reprisals disproportionately harm women. When the law allows the innocent to be used as a legitimate tool of the state to secure an objective, it threatens to undermine the very foundations of the human rights project. In condoning the treatment of civilians – and as part of that population, women – as objects, the doctrine of reprisals perpetuates the gendered hierarchy that characterises the laws of war generally but more specifically it is to render meaningless the significant progress witnessed over the last decade with respect to the treatment of women as victims in conflict.

Although the focus of critical analysis in respect of reprisal measures has centred on the efficacy and morality of such action, a further damaging aspect of reprisals that is often overlooked concerns the effect that it has upon the soldier engaged in the operation. When the principle of distinction has been a core guiding principle in a soldier's training, to require him to target civilians – albeit in exceptional circumstances – is to undermine the bedrock on which his training has been based. And if there is one overriding characteristic that sets apart the professional soldier from the criminal participant in conflict, it is that the former, in the course of hostilities distinguishes at all times between the innocent civilian and the lawful military target.

When an individual who has been charged with war crimes is acquitted on the grounds that his conduct was permissible, it sends a powerful message about the interests and values the law is seeking to protect. While a soldier has a positive right to use force to defend himself – derived from a natural right of personal autonomy to which all individuals are entitled – his right to use such force in conflict is not without limits because even in the midst of violence, the state through the law seeks to deter unnecessary and disproportionate violence. Having said that, both these limitations are nebulous concepts which involve judgments about the value of lives and it is inevitable that assessments as to what action was required in the circumstances and how much force was appropriate to deflect the threat would necessarily reflect the interests and priorities of the soldier as the decision-maker. If necessity and proportionality were to be judged by reference to a subjective test, it would be to allow the individual soldier to set their own standard for permissible force with minimal consideration for the interests of the wider community or the rights of those who he has harmed. Moreover, by declaring his conduct *not wrongful*, the law would function to sustain the

¹⁵⁴ Kalshoven, *Belligerent Reprisals*, 377.

value-judgment that characterised the soldier's decision and the preferences that underpinned that judgment. As far as the plea of military necessity is concerned, the case law indicates that tribunals have treated this exception with some sensitivity and where a commander has deemed that the violation of the norm in the circumstances was the right course of conduct to have taken, and in doing so displayed a genuine concern for the welfare of civilians in arriving at that decision, tribunals have been disposed to finding in favour of the defendant. By contrast, the history of belligerent reprisals is a dismal record of the indefensible gendered bias that continues to characterise IHL in general.

CHAPTER 6

HYBRID DEFENCES

Opinion divides among scholars and adjudicators alike as to whether to treat duress and necessity as archetypal excuses or justifications and consequently a single theory that adequately explains the rationale of these defences continues to prove elusive.¹ This rift in opinion is replicated on the international level where the discourse has become even more confused as war crimes tribunals have sometimes distinguished between duress and necessity while in other instances used the terms interchangeably, thus adding to the doctrinal indeterminacy.

In most jurisdictions duress is regarded as an excuse although some legal opinion continues to maintain that the defence is better viewed as a sub-species of necessity and therefore a justification.² This latter view was most clearly enunciated by Lord Hailsham when he stated:

there is, of course, an obvious distinction between duress and necessity as potential defences; duress arises from the wrongful threats or violence of another human being and necessity arise from any other objective dangers threatening the accused. ...[T]his, however, is, in my view a distinction without a relevant difference, since on this view duress is only that species of the genus of necessity which is caused by wrongful threats.³

And while international lawyers have also differentiated along similar lines – that duress is brought about by another individual whereas necessity arises as a consequence of ‘natural’ forces – because this distinction is merely descriptive rather than analytic, it fails to inform us as

¹ Schopp, ‘Justification Defenses’ 1302. For different views on this issue see R.A. Duff, ‘Do We Want an Aristotelian Criminal Law?’ (2002) 6 *Buffalo Criminal Law Review*, 147 and Colvin, ‘Exculpatory Defences’.

² Those commentators who view duress as an excuse include Fletcher, *Rethinking*, 798; Joshua Dressler, ‘Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits,’ (1989) 62 *Southern California Law Review*, 1350; Moore ‘Causation and the Excuses’; Yeo, *Compulsion in the Criminal Law*, 45; Alan Brudner, ‘A Theory of Necessity,’ (1987) 7 *Oxford Journal of Legal Studies*, 339; Claire Finkelstein, ‘Duress: A Philosophical Account of the Defense in Law,’ (1995) 37 *Arizona Law Review*, 251; John Gardner, ‘The Gist of Excuses,’; Eugene Milhizer, ‘Justification and Excuse’. Those who maintain that duress is a justification include W.R LaFave & A. W. Scott, *Criminal Law* (1986) 433; Glanville Williams, *Criminal Law, The General Part* (1961) 755; Rupert Cross, ‘Murder under Duress,’ (1978) *University of Toronto Law Journal*, 372; Alan Wertheimer, *Coercion*, (1987), 166; Westen & Mangiafico, ‘The Criminal Defense of Duress’.

³ *R v Howe* [1987] A.C. 429.

to the different rationales that sustain each defence.⁴ Articulating clearly and precisely the reasons for an acquittal is of vital conceptual importance for ICL. Whether the tribunal has exculpated on the grounds that, all things considered, the conduct was not wrongful or whether in spite of the wrongful conduct the accused should not be held criminally responsible is to convey distinct messages not only about the fundamental values that are at stake during a conflict but also about the specific obligations that the different participants in conflict owe to one another.

The seemingly irresolvable dispute as to whether duress and necessity are better viewed as justifications or excuses has resulted in some commentators concluding that a more satisfactory approach might be to distinguish between justifying and excusing forms of the defences because the simple dichotomy is too crude to serve as a foundation for the orderly development of the law.⁵ For this reason, I suggest, duress and necessity are better viewed as ‘hybrid’ defences insofar as each is capable of being treated as either justification or excuse. The conditions that apply to both duress and necessity in their justificatory form are identical for irrespective of the form of the threat where the harm avoided is greater than the harm inflicted, the defendant’s conduct is considered justified.⁶ The challenge is determining what is to be judged a lesser harm. Similarly, in their excusatory form, both defences share common preconditions. But, as excuses, what is being determined is where to delineate the boundaries of reasonableness.

Starting with duress, I first aim to expose the rationale that sustains the defence and in doing so focus primarily on duress in its excusatory form. This is followed by a critical analysis as to

⁴ Eser suggests, “...it seems preferable to emulate an old distinction in German law, that seems to have been preserved in the international law literature in the German language, that distinguishes between states of necessity or pressure that are caused by other human beings, as in cases of coercion, compulsion or duress ..., and those resulting from natural causes or dangers not caused by human beings, as perhaps fairly described by necessity”; ‘Defences in War Crimes Trials’, 213. See separate and dissenting opinion of Judge Cassese in *Erdemovic*, para. 14.

⁵ Colvin ‘Exculpatory Defences’ 386. If, however, justifying and excusing forms of duress and necessity are to be recognized, the only element that does differentiate one defence from another *is* the nature of the threat. Yeo also seems to treat necessity as a ‘hybrid’ defence although he regards duress as exclusively an excuse; Yeo, *Compulsion*.

⁶ For a different view, see generally Horder, ‘Self-Defence, Necessity and Duress’. Horder distinguishes between necessity cases where the key issue is the “moral imperative to act” and duress cases where the key issue is “the personal sacrifice D is being asked to make”. Based on this analysis, Horder suggests that if C threatens to kill V unless D complied with the demand to commit a minor harm to V, D’s defence would become one of necessity rather than duress. While I agree that D would have a good defence in that the lesser harm would have been inflicted (in other words D’s conduct is all things considered justified) because D did not voluntarily choose to engage in the unlawful act, his conduct cannot be described as anything but coerced.

how duress has been interpreted and applied by war crimes tribunals. In the second section my focus shifts to the defence of necessity in its justificatory form. In exposing its rationale in ICL I question whether, as with duress, the defence conceals any biases that indirectly undermine the protection of women in conflict. In the final section I look at Article 31(1)(d) of the ICC statute which has come under considerable criticism by civil law scholars for having failed to distinguish between justification and excuse by incorporating both defences under one subsection.

6.1 DURESS

More than any other defence, duress continues to capture the interest of scholars from a wide range of disciplines stimulating a vast array of commentaries by lawyers, philosophers, sociologists, political scientists and historians. It is a defence that has led to some of the most vitriolic exchanges both among scholars and adjudicators with opinions dividing not only on relevant conditions that govern the defence but its scope of application particularly with respect to the fundamental question of whether it should, in principle, be available as a defence to the killing of innocents. This fascination with duress should come as no surprise since the defence compels us to declare our position on some of the most fundamental questions about what it is to be a human being. It requires that we articulate the value that we place on life itself – not just objectively but in a very real subjective sense – for it demands us to declare how we value our own lives against the lives of others and what expectations we have as to how individuals should treat one another in the most extreme and adverse situations. It raises difficult questions about character, choice and moral luck, about responsibility, and more fundamentally about good and evil, right and wrong. And, on a political level, it demands that we stipulate what the purpose of the criminal justice system might be and to justify that stated objective.

In conflict, duress becomes a far more immediate and pressing concern as the hierarchical military structures function to create an environment in which conduct under duress – whether in response to orders or to peer pressure – is that much more prevalent. Moreover, the very fact that the participants in the conflict are armed with deadly weapons necessarily means that the threats are that much more serious. For civilians, who are all too often the victims of the defendant who has acted under duress, how a tribunal defines the scope of the defence is of paramount concern. The majority of legal opinion suggests that duress – both in domestic and

international law – should be regarded as a paradigm example of an excuse. In the next section I explore why this should be so, and consider what this means for women in conflict.

6.1.1 Understanding duress

Deciding whether the plea of duress is justificatory or excusatory in nature is important because how the court characterises the defence can determine the success or failure of that plea.⁷ A tribunal's failure to adequately address this issue is one reason why judgements like that of *R v Howe*, where duress was raised as a defence to murder, have come under criticism.⁸ As J.C. Smith has commented, the premise in *Howe* was that duress could never be a defence unless the conduct of the accused could be justified; but had the question involved one of considering whether the accused deserved to be punished or not – in other words, had the focus been on assessing the *culpability* of the accused and not the conduct – the Law Lords may well have reached another conclusion.⁹

If duress is treated as a justification, the 'lesser harm' theory would apply and post-war cases such as *Jepsen*, can be better accommodated.¹⁰ But despite examples of defendants successfully pleading duress based on the 'lesser harm' doctrine, this reasoning fails to explain why the defence has been allowed in instances where a *greater* harm has been caused; nor does it explain the moral reasoning that underpins the defence in jurisdictions where the plea is recognised as a defence in the killings of innocents.¹¹ Thus, by treating duress simply as a

⁷ J.C. Smith, *Justification and Excuse in the Criminal Law*, (1989) The Hamlyn Trust, London at 12.

⁸ Referring to both the law and legal literature, Dressler suggests, "such disagreement may be the result of confusion about, or insensitivity to, the differences between the concepts of justification and excuse generally"; 'Exegesis', 1350. Also see Smith, *Justification and Excuse*, chapter 1; see generally Ian Dennis, 'Duress, Murder and Criminal Responsibility,' [1980] 96 *The Law Quarterly Review*, 208-238. But see *R v Z* [2005] 2 AC 467, 489 in which the court held "duress is now properly regarded as a defence which, if established, excuses what would otherwise be criminal conduct".

⁹ Smith, *Justification and Excuse*, 12-13.

¹⁰ The Judge Advocate in his summing up stated: "duress can seldom provide a defence; it can never do so unless the threat which is offered as a result of which the unlawful act is perpetrated is a threat of immediate harm of a degree far, far greater than that which would be created if the order was obeyed"; the Trial of Gustav Alfred Jepsen, *TWC*, Vol. XV, 172.

¹¹ The problem with holding that duress is a justification – even in the case of the killing of innocents – is that it entails balancing harms. Lord Hailsham is quite right when he reasons that if the choice is between death or a fortiori of serious injury and deliberately taking an innocent life, "a reasonable man might reflect that one innocent human life is at least as valuable as his own or that of his loved one. In such a case a man cannot claim that he is choosing the lesser of two evils"; *R v Howe* [1987] A.C. 417. The

justification, it is in the most morally troubling of circumstances – such as Erdemovic’s case – that the theory fails to “adequately capture our moral intuitions”.¹² Moreover, the practical consequences of categorising duress as a justification particularly in relation to third parties would be quite absurd.¹³ I suggest, therefore, that duress is better understood as a ‘hybrid’ defence and consequently can be treated as either justification or excuse. In both forms, the coerced individual commits an offence that, but for the human threat, he would not have chosen to commit. When the subject violates a prohibitory norm as a direct consequence of a serious threat by another human being, and the harm avoided is, all things considered, greater than the harm inflicted the defence being pleaded, irrespective of terminology, is a justificatory form of duress.¹⁴ The law treats the defendant’s conduct as justified because his response was the appropriate course to have taken in the circumstances.¹⁵

My primary interest is however with understanding duress in its excusatory form since the question I seek to answer is on what basis the law might excuse a defendant who has, albeit under pressure by a third party, either killed an innocent or seriously injured his victim/s in order to avoid the same fate being inflicted on himself by that third party.¹⁶ The most popular account of duress is found in the voluntarist conception of the defence according to which the law excuses when “the will of the accused has been overborne by threats of death or serious personal injury so that the commission of the alleged offense was no longer the voluntary act of the

problem here is not with the reasoning but the presumption that only the lesser harm theory applies to duress.

¹² Dressler, ‘Exegesis’, 1352-3.

¹³ Fletcher, *Rethinking*, 830. For analysis of practical consequences, see 3.2.1.

¹⁴ In most instances the criminal law is not generally interested in the defendant as for example in the classic case of the bank teller who, under threat, hands over the bank’s money. But sometimes, as in *R v Steane* [1947] KB 997, the criminal law will prosecute the subject. In *Steane*, the defendant, a British subject, was charged with assisting the German army but claimed duress on the grounds that he did so to protect the safety of his family. Of course, in this particular case duress might equally be said to be an excuse. It would also be possible to interpret cases like *State v Toscano* (74 N.J. 421, 378 A.2d 755) as an example of duress in its justificatory form. *Toscano*, a chiropractor who owed a gambling debt to some gangsters, was coerced into signing medical reports to facilitate an insurance fraud. In such a case, any successful duress plea might equally be interpreted as the application of the lesser evil theory. For a useful commentary, see Kyron Huigens, ‘Duress is not a Justification,’ (2004) 2 *Ohio St. J. of Criminal Law* 303.

¹⁵ Dan Kahan & Martha Nussbaum, ‘Two Conceptions of Emotion in Criminal Law,’ (1996) 96 *Columbia Law Review* 269, 336. Kahan & Nussbaum however emphasise that their explanation of duress does not mean that it should be viewed as a justification since from a consequentialist perspective, criminal conduct taken in response to a threat cannot result in a preferred state of affairs.

¹⁶ Duress is, of course, a valid defence where the threat is directed at an individual in a close relationship with the defendant as for example a family member.

accused".¹⁷ But as scholars have revealed this theory is doctrinally unsustainable since duress is contingent on the fear being objectively reasonable.¹⁸ Moreover, it is a descriptively inadequate account since the actor under duress *does* have a choice: he chooses to commit the unlawful act rather than accept the consequences of not complying with the threat.¹⁹ Of course, but for the threat, he presumably would not have chosen to commit the offence. But what cannot be denied is that even while the choices may have been thoroughly abhorrent, self-interest dictated his decision to comply with the threat.²⁰ The actor, as Dressler reminds us, may be unwilling but the act is not unwilled.²¹ So how might we better explain why we excuse the actor?²²

Although some commentators have suggested that duress is a concession to human frailty this is not an entirely convincing explanation for why we excuse the accused.²³ We might sympathise and empathize with the coerced actor because of the terrible choice he faced, but ultimately, the reason for excusing him cannot be, and nor should it be, based on sentiment since that is not what the criminal law is about. If we excuse the coerced actor, it should be because it is *just* to do so.²⁴ The question is therefore one of whether the accused deserves punishment for the wrongful conduct and whether, given the circumstances, to express moral criticism and to hold

¹⁷ *R v Hudson* [1971] 2 All ER 244, 246. As Duff has explained: "the threat might be so terrifying that its victim's rational agency is in effect undermined: he is so terrified, so destroyed, by the threat of further torture that he is no longer capable of the kind of practical reasoning that would ground a rational decision to resist, or to give in; all he can think of is how to prevent further agony"; Duff, 'Do We Want an Aristotelian Criminal Law?', 177.

¹⁸ See Finkelstein, 'Duress', 268 and Kahan & Nussbaum, 'Two Conceptions', 334-35. Kahan and Nussbaum point out that since a person can legitimately be held accountable for acting on morally inappropriate fears, however intense, "an account that stresses volitional impairment cannot explain this normative limitation".

¹⁹ Dressler also refers to duress as "an atypical excuse"; 'Exegesis', 1356. Robinson also speaks of excuses being contingent on the absence of meaningful choice; P. Robinson, *Structure and Function in Criminal Law* (1997, Clarendon Press, Oxford), 81.

²⁰ The Canadian Supreme Court emphasised this point when it stated: "in using the expression 'moral involuntariness', we mean that the accused had no 'real' choice but to commit the offence. This recognizes that there was *indeed* an alternative to breaking the law, although in the case of duress that choice may be even more unpalatable – to be killed or physically harmed"; *R v Ruzic* [2001] S.C.C. 24 para. 39. For a fuller account of the notion of moral or normative involuntariness, see Fletcher, *Rethinking*, 802-04.

²¹ Dressler, 'Exegesis', 81; see also Lawrence 'A Utilitarian Theory of Duress', 286-7.

²² Duff suggests that duress can excuse in two ways – either the defendant is so overcome by fear that his rational agency is undermined or the threat was such that resistance would have required a greater degree of courage or commitment than the law can properly demand of us. In both cases the reasonable person sets a normative standard which the law expects the accused to have satisfied; Duff, 'Do We Want an Aristotelian Criminal Law?', 177.

²³ Of course, duress is in a very broad sense, a concession to human frailty insofar as society cannot expect the defendant to have behaved as the saint or hero. However, the criminal law refuses to excuse the defendant who fails to satisfy the standard of the reasonable person.

²⁴ Dennis writes: "the basis of the 'excusatory' theory of duress is a direct appeal to principles of justice"; Dennis, 'Duress, Murder and Criminal Responsibility,' 232.

the him criminally responsible is both fair and just.²⁵ This view was articulated by Lord Morris in *Lynch* who stated:

If ... what a person has done was only done because he acted under the compulsion of a threat of death or of serious bodily injury it would not in my view be just that the stigma of a conviction should be cast on him.²⁶

The deontological approach is most clearly developed and expressed by Joshua Dressler who suggests that duress excuses when the available choices are not only hard but also unfair and society recognises that the individual of reasonable (“non-saintly”) moral strength lacked a fair opportunity to avoid acting unlawfully.²⁷ Integral to this understanding of duress are several stringent pre-conditions for while the criminal law might be prepared to recognise the defence it does so only within narrowly defined parameters *because* the actor has, rationally and with full knowledge, *chosen* to commit an offence.²⁸

First, duress is subject to the doctrine of prior fault; this is a pre-condition that is well established in comparative criminal law and functions as a limitation on any expansive deterministic claim by redirecting the focus back to the question of choice.²⁹ Second, the threat

²⁵ As Lord Edmund-Davies in *Lynch* rightly reminded the court, “to allow a defence to crime is not to express approval of the action of the accused person but only to declare that it does not merit condemnation and punishment”; *D.P.P. v Lynch (H.L. (N.I.))* [1975] AC, 653, 716.

²⁶ Per Lord Morris of Borth-y-Gest, *D.P.P. v Lynch* [1975] AC, 671. The Canadian Supreme Court also reasoned, “depriving a person of liberty and branding her with the stigma of criminal liability would infringe the principles of fundamental justice if the accused did not have any realistic choice”; *Ruzic*, para. 47. Dienstag writes: “it is unfair and hypocritical to punish someone for conduct that is the result of pressure to which his very judges would likely to have succumbed”; Abbe Dienstag, ‘Fedorenko v United States,’ (1982) 82 *Columbia Law Review*, 120, 144.

²⁷ Dressler, ‘Exegesis’, 1365-1367.

²⁸ Lawrence, ‘A Utilitarian Theory of Duress’, 276. Duress is particularly problematic for the criminal law because it allows, to a far greater extent than any other defence, for the element of moral luck. As Kelman has observed, “ordinarily we judge criminal liability at the moment the crime occurs. A defendant is guilty if he performs a harmful act in a blameworthy fashion. The origin of a decision to act criminally is ordinarily of no concern”; M. Kelman, ‘Interpretive Construction in the Substantive Criminal Law,’ (1980) 33 *Stanford Law Review* 591, 643.

²⁹ For example the Law Lords have held that duress is “excluded when as a result of the accused’s voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence”; *R v Z* [2005] UKHL 22, para. 39. In *R v Sharp* [1987] QB 853 the Court of Appeal ruled that duress is unavailable to anyone who voluntarily joins a gang “which he knows might bring pressure on him to commit an offence and was an active member when he was put under such pressure”. This is also the case under Australian law; *R v Lawrence* [1980] 1 N.S.W.L.R. 122 (Australia C.A.) 130. A similar provision is incorporated under section 35(1) of the German Penal Code which provides that the accused is not entitled to rely on the defence if he caused the danger. Article 54 of the Italian Penal Code 1930 (amended 1987) also requires that the accused not voluntarily have caused the threat; Scaliotti, ‘Defences before the ICC,’ 144.

directed at the coerced actor must be sufficiently serious to warrant the response.³⁰ Third, the threat must be imminent so as to deny any opportunity for escape.³¹ In assessing whether the element of imminence has been satisfied common law courts have generally been willing to take into consideration the specific context within which the defendant acted and consequently the focus of analysis has revolved around whether the defendant's response was necessary in the circumstance.³² What is significant about this condition – whether defined in terms of immediacy of threat or necessity of action – is that by contrast to other excuses the subject is first and foremost required to defer to the state before resorting to unilateral action. In other words, as with other *justifications*, this condition functions to regulate the distribution of power between the state and the citizen for despite recognising that the individual's unlawful conduct was not fully voluntary, the liberal state nonetheless cannot afford to accommodate or tolerate any hint of self-exemption.

The most conceptually challenging aspect of duress is determining the proper standard by which the criminal law is to judge the defendant's conduct. The relevant standard under German law is codified in section 35(1) of the Criminal Code which states:

Whoever, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply to the extent that the perpetrator could be expected under the circumstances to assume the risk, in particular, because he himself caused the danger or stood in a special legal relationship; however the punishment may be mitigated pursuant to Section 49 subsection.

Accordingly, the assessment as to when a risk is sufficiently great as to allow the defence requires an inquiry about what can reasonably be expected of the perpetrator under the

³⁰ In English law only death or serious bodily injury suffices (*DPP v Lynch, R v Z*); German law is broader in scope with the threat including "life, limb, or liberty, either to himself or to a dependent or someone closely connected with him" (section 35(1)). For a comprehensive break-down in comparative law, see Joint Separate Opinion of Judges McDonald and Vohrah, *Erdemovic*, para. 59.

³¹ While some criminal codes refer to an "imminent danger" others set a higher threshold of "instant death"; see Joint Separate Opinion of Judge McDonald and Judge Vohrah, *Erdemovic*, para. 59. Citing *R v Hudson* as a case in point, Simester & Sullivan observe that English courts have "shown a degree of sensitivity and realism in applying this criterion"; *Criminal Law, Theory and Doctrine*, 589. In Canada the operative test is "whether the accused failed to avail himself or herself of some opportunity to escape or render the threat ineffective"; *Ruzic*, para. 66.

³² In *Hudson & Taylor* [1971] 2 QB 202, the Court of Appeal interpreted 'imminent' so as to preclude the defendant who had "failed to avail himself of some opportunity which was reasonably open to him to render the threat ineffective" from relying on the defence of duress. For a useful feminist critique, see McColgan, 'In Defence of Battered Women who Kill,' 518-20.

circumstances (Zumutbarkeit).³³ Of particular significance is that German law expressly provides for a higher standard of endurance or tolerance where the subject has taken on a specific role that puts him at a greater risk than the average person; in other words, the standard is agent-relative. Commenting on section 35, Fletcher concludes that there is little that separates the common law test – that of the reasonable person – from the German test since “the doctrine of Zumutbarkeit permits German law to transcend the particularities of threats in cases of duress and locate duress in a broader normative theory of fair social demands”.³⁴

In most common law jurisdictions duress is contingent on the accused meeting an objective reasonableness test.³⁵ Society exonerates the accused only if a person of reasonable firmness would likewise have succumbed to the threat and reacted in the same way as the accused.³⁶ Although ‘reasonableness’ is a well-established standard against which nearly all legal liability is measured it has come under critical scrutiny by scholars from different schools of thought, most notably feminist and critical race scholars, who have revealed the inherent biases that characterise the concept.³⁷ This revelation has prompted a shift in how reasonableness is viewed by the criminal law with courts displaying a far greater willingness to judge the defendant in the context of his own circumstances. In effect, the concept of reasonableness functions to allow the court to take account of factors that might otherwise be considered irrelevant. And because it seems able to accommodate both objective and subjective considerations in the process of

³³ See generally Fletcher, *Rethinking*, 832-34 and Eser, *Rechtfertigung und Entschuldigung*, 59-61. In some civil law jurisdictions the test appears to be one of proportionality: duress is available on to the extent that the harm inflicted does not outweigh the harm avoided. But there are comparatively few jurisdictions that apply this test.

³⁴ Fletcher, *Rethinking*, 833-34; Eser, *Rechtfertigung und Entschuldigung*, 59-60.

³⁵ Ashworth, *Principles of Criminal Law*, 228. The Model Penal Code also states: “a person of reasonable firmness in [the] situation would have been able to resist”.

³⁶ Yeo, *Compulsion*, 17. Rosa Ehrenreich Brooks distinguishes between ‘reasonable’ in a weak sense and a strong sense of the word. The former is to measure the defendant’s conduct by what an average or typical person with the defendant’s characteristics *would* have done in a similar situation while the latter measures the average person against what he *could* or *should* have done; ‘Law in the Heart of Darkness: Atrocity & Duress,’ (2002) 43 *Virginia Journal of International Law* 861, 869-73. Because the criminal law expresses a view of ethics which is *minimalist* it generally applies reasonableness in its weak form.

³⁷ Ehrenreich Brooks explains: “feminists and critical race theorists have drawn attention to the ways in which the ‘reasonableness’ demanded by the law is often merely the typical attitudes of well-nourished white males. Even the gender neutral ‘Reasonable Person’ frequently turns out to hold typically male attitudes”; ‘Law in the Heart of Darkness’, 870. See also Naomi Cahn, ‘The Looseness of Legal Language: the Reasonable Woman Standard in Theory and in Practice,’ (1992) 77 *Cornell Law Review*, 1398. Lee has revealed that despite the adoption of the ‘reasonable person’ test by courts, gender, race and homophobic bias continues to dominate the criminal law; Cynthia Lee, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom* (New York University Press, 2003).

judgment, as Nourse suggests, it might more accurately be described as a hybrid standard.³⁸ Since society will be prepared to render blameless the accused's wrongful conduct if it falls within the boundaries of reasonableness, the challenge has been to articulate more precisely where, and on what basis, those lines are drawn. But as Dressler reminds us in setting those boundaries we need to be both honest and realistic about our weaknesses yet, at the same time, optimistic about our strengths.³⁹ While the criminal law might guard against excusing too readily neither should the standard be that of the hero for then we are being hypocritical and we risk being unjust.⁴⁰

The general consensus among criminal law scholars is that the determination of the boundaries within which we expect the coerced individual to behave is solely a matter of moral intuition and judgment.⁴¹ The willingness of the law to excuse the subject recedes as the magnitude of the offence escalates and at some point on our moral scale, excusing the subject is no longer possible because the offence is so abhorrent. But although the criminal law does refer predominantly to morality, political considerations that pertain to the allocation of power and responsibility are not irrelevant since what is considered reasonable is very much determined by,

³⁸ Nourse has suggested that the criminal law aims, with a single concept – reasonableness – to “respond to what are conflicting normative impulses – to protect majorities’ desire for common standards and at the same time to respect the individuality of defendants”. Given these contradictory aims, it is of little surprise that coherent answers have not been forthcoming; V.F. Nourse, ‘Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person,’ 2 *Ohio State Journal of Criminal Law* 361, 373. The Canadian Supreme Court has held: “the test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse”; *Ruzic*, para. 61.

³⁹ See Yeo, *Compulsion*, 20 and Dressler, ‘Exegesis’, 1368-9.

⁴⁰ While some courts have taken a more sympathetic approach, other have set significantly more demanding standards. For example, in *R v Ruzic* (para. 40) Lebel J opined, “the law is designed for the common man, not a community of saints or heroes”; for a similar view, see also Rumpff J.A. in *S. v Goliath* 1972 (3) S.A. 1, 465, 480. By contrast, Lord Hailsham argued, “...I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest ... that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own”; *R v Howe*, [1987] A.C. 417, 432. This reasoning is not only unpersuasive but fundamentally flawed for in referring to the defendant as a man of reasonable fortitude, Lord Hailsham then suggests that the reasonable man *not* act as the reasonable man but as the hero.

⁴¹ Fletcher argues that determining the threshold of reasonableness is “patently a matter of moral judgment about what we expect people to be able to resist in trying situations”. The requirement of reasonableness is not about the commission of the lesser harm since in the case of excuses, that is immaterial. As Fletcher has persuasively argued, “a valuable aid in making [the judgment about what we expect people to be able to resist in difficult situations] is comparing the competing interests at stake and assessing the degree to which the actor inflicts harm beyond the benefit that accrues from his action. It is important to remember however, that the balancing of interests is but a vehicle for making a judgment about the culpability of the actor’s surrendering to external pressure”; Fletcher, *Rethinking*, 804.

and contingent on, the role the individual is expected to satisfy within his social setting. Where the subject has taken on a socio-legal role that by its nature puts him at greater risk, the law does expect him to meet a higher threshold. By contrast, the threshold appears to decrease where the threat is not directed at the defendant himself, but at loved ones.⁴² The criminal law in such cases treats the subject's lower tolerance level not only as inevitable but even "morally appropriate"⁴³ for if the law were to punish the parent who prefers her child over the well-being of strangers, it is to come close to punishing the subject for defending the basic values that govern family life in a liberal state. Moreover, punishing those that seek to protect the innocent poses an immediate threat not only for the defendant but for the rest of the liberal polity.⁴⁴ But even though the threshold may be lower, as the gravity of the offence escalates, majoritarian concerns begin to loom and eventually dominate. But if this is the case, does it then follow that duress can *never* function as an absolute defence in the killing of innocents?

Common law jurisdictions have generally retained the murder exception despite the numerous recommendations by the respective law reform bodies to extend the defence to homicide.⁴⁵ Explanations for this seemingly intransigent position are most often located in the deeply held moral arguments that centre on the sanctity of life and the Kantian principle that "a human being can never be manipulated merely as a means to the purposes of someone else ... His innate

⁴² As Lord Lowry in *R v Gotts* points out, where the threat is not directed at the individual being coerced but to others, in particular a spouse or children, the moral problem is fundamentally altered; *R v Gotts* [1992] A.C. 412, 436. Also see, *R v Brown and Morley* (1968) S.A.S.R. 467, 498; *R v Hurley and Murray* [1967] V.R. 526; and *Abbott v The Queen* [1977] A.C. 755, 767.

⁴³ See generally Kahan & Nussbaum, 'Two Conceptions', 336.

⁴⁴ Nourse has argued that "once one punishes the innocent, one not only harms the individual punished but also creates collateral effects for the law-abiding and for those who govern the practice of punishment"; 'Reconceptualizing Criminal Law Defenses,' 1694.

⁴⁵ Duress is not available to a charge of murder in most Australian jurisdictions; see D. O'Connor and P.A. Fairall, *Criminal Defences* (3rd ed. 1996), 154-55. However, following recommendations by the Model Criminal Code Officers Committee, the Commonwealth and ACT Criminal Codes now include provision that recognise the defence to murder. For a useful analysis, see Victorian Law Reform Commission, *Defences to Homicide Final Report* (October 2004); <http://www.lawreform.vic.gov.au> (last accessed 04/06), section 3.135. Under the US Model Penal Code, duress is a defence of general applicability and so may be pled in response to a murder charge. Section 2.09(1) requires that the defendant was compelled to commit the offence by the use, or threatened use of unlawful force by the coercer on herself or another and that a person of reasonable firmness in her situation would have been unable to resist the coercion. The Commentary adds: the law is "ineffective in the deepest sense, indeed .. it is hypocritical if it imposes on the actor ... a standard that ... judges are not prepared to affirm that they should and could comply with...". The position taken by the Law Commission (England & Wales) since 1977 (*Criminal Law: Report of General Application*, Law Com No. 83, paras. 2.39-2.45) and until 1993 (*Legislating the Criminal Code*, Law Com No 218, paras 30.1-31.8) was that duress should provide a defence to murder; see *A New Homicide Act for England and Wales?* (Consultation Paper No. 177, Part 7) for recent developments.

personality [that is, his right as a person] protects him against such treatment”.⁴⁶ This moral imperative echoes through Lord Coleridge’s judgment in *Dudley & Stephens* when, in rejecting the plea, he added:

Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defence of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die. The duty, in case of shipwreck, of a captain to his crew, of the crew to the passengers, of soldiers to women and children, as in the noble case of the Birkenhead; these duties impose on men the moral necessity, not of the preservation, but of the sacrifice of their lives for others, from which in no country, least of all, it is to be hoped, in England, will men ever shrink, as indeed, they have not shrunk.⁴⁷

And the same moral postulates resonate throughout Lord Hailsham’s opinion in *Howe*⁴⁸ and simmer just below the surface in Judges McDonald and Vohrah’s separate opinion in *Erdemovic*.⁴⁹ But the common law’s apprehension with extending the defence to murder is also rooted in a political fear: that to do otherwise would be to risk conveying a misperception about the basis on which the defendant has been acquitted. Particularly in respect of defences that stem from compulsion, the criminal law is acutely cognizant of the “quasi-justificatory” effect that excuses risk engendering.⁵⁰ For the criminal law, excuses pose no threat because they do not modify the prescriptive aspect of the norm; but the moment that an excuse is misperceived as being a justification, serious political concerns surface. Once *Dudley & Stephens* is understood within the context of this concern, the reasoning of the court is more satisfactorily explained. As one scholar elucidates:

⁴⁶ I. Kant, *The Metaphysical Elements of Justice* (1785) cited by J. Dressler, in ‘Exegesis’, 1279.

⁴⁷ 14 Q.B.D. 273 at 287. This case has shaped the common law theory of necessity and duress for nearly a century and has managed to generate a host of conceptual and doctrinal difficulties which will be explored in full in the following section on necessity. Although the courts could have treated this case as necessity in its excusatory form, for political reasons the plea was treated as a classic justification.

⁴⁸ “While there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure, and, in the present case, the overriding objects of the criminal law must be to protect innocent lives...” per Lord Hailsham, *R v Howe* [1987] A.C. 417, 430. For Lord Griffith, too, the murder exception is based on “the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another’s life”.

⁴⁹ “We must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered”; para. 75.

⁵⁰ Simon Gardner, ‘Instrumentalism and Necessity,’ (1986) 6 *Oxford Journal of Legal Studies* 431, 433.

throughout the proceedings the line taken by the Crown and by most of the more sophisticated commentators was that the men's action might, in principle, be excused, but not justified; and that their conviction for murder – i.e. the denial of their excuse – was necessary in order that its unjustifiability might be unmistakably proclaimed.⁵¹

The killing of innocents, if perceived as being justified, poses considerable political problems for liberal states because it challenges one of the most fundamental tenets of liberal political theory. Lord Coleridge's first instinct may have been to reject the defence on grounds of morality but his concerns are also deeply political when he states:

It is not needful to point out the awful danger of admitting the principle which has been contended for. Who is to be the judge of this sort of necessity? By what measure is the comparative value of lives to be measured? Is it to be strength, or intellect, or what? It is plain that the principle leaves to him who is to profit by it to determine the necessity which will justify him in deliberately taking another's life to save his own. In this case the weakest, the youngest, the most unresisting, was chosen.⁵²

These are issues that pertain to the rule of law, to governance, to equality, to liberty, to the separation of powers and to democracy. Coleridge's worries are about the damage that self-exemption poses to a liberal order and the risks that the rule of the strong over the weak pose to liberalism's core values. Extending the defence to murder represents a danger that the law might be abused to condone tyranny; for in the hands of a despot, duress and necessity become powerful tools. It is these political concerns that continue to pervade the opinion of those adjudicators who fear the wider consequences of extending the defence of duress to murder.⁵³ But the inadequacy of this reasoning is self-evident since all justifications generate concerns of "countermajoritarian" rule. Since duress – or for that matter necessity – pled as an excuse does not threaten the normative value of the criminal law, any discomfort that is felt were the

⁵¹ Gardner, 'Instrumentalism and Necessity,' 435. Commenting on the case *Fletcher* points out that *Dudley & Stephens* is "a textbook example of the wrongful killing of an innocent person that might properly be excused on grounds of necessity"; he adds that while Continental scholars would agree that the killing of innocents could never be justified, "they condemn the judgment for failing to examine more carefully whether the wrongful killing was excusable"; *Rethinking*, 826.

⁵² 14 Q.B.D. 273 at 287.

⁵³ Delivering majority judgment in *Abbott v The Queen* Lord Salmon concludes: "what has been suggested is the destruction of a fundamental doctrine of our law which might well have far-reaching and disastrous consequences for public safety to say nothing of its important social, ethical and maybe political implications"; (P.C.) [1977] A.C. 755 at 767. Ward LJ also resorted to the same line of reasoning in holding that: "the policy of the law is to prevent A being judge in his own cause of the value of his life over B's life or his loved one C's life, and then being executioner as well. ...the sanctity of life and the inherent equality of all life prevails"; *re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147, 200.

defendant's conduct to be excused (because all things considered his conduct *did* fall within the boundaries of reasonableness) is located not with the defendant's conduct but with the context within which that conduct might be regarded as reasonable. Clearly the fear here is that what should be manifestly unreasonable becomes reasonable given the context. When duress can function to excuse the atrocity, our concern no longer lies with the criminality of the *individual* but with the lawless *context* in which evil has become banal and so atrocity can seem both reasonable and excusable. But it cannot be reasoned that the common law rule is there to "draw our attention to the slipperiness of the descent into the [heart of] darkness" because by then, it no longer matters whether or not duress is a defence to murder. The criminal justice system in liberal states should be able to accommodate a defence of duress to homicide *because* they are liberal democracies. Duress, understood as an excuse, merely allows the law to do justice. Of course this still leaves open the question as to whether duress should function as a complete defence to the killing of innocents under ICL. While it would seem inconceivable that it can ever provide a defence to genocide – and equally doubtful that it can do so for crimes against humanity – it may be that in some very limited circumstances duress might serve as a defence to war crimes.

6.1.2 Duress and ICL

Contemporary legal scholars who have critically examined the jurisprudence of the post-war tribunals in order to identify a single doctrine on duress are acutely aware of the difficulties that the task poses principally because duress and necessity were often conflated by the tribunals.⁵⁴ Nonetheless in most cases where the defendant sought to rely on duress or necessity (often invoked with superior orders) the plea was treated as an excuse since the focus of the tribunals' deliberations were often on whether or not the defendant had had a 'moral choice' rather than on whether the harm inflicted was greater or less than the harm avoided.⁵⁵ But accounting for why duress functions to excuse in ICL based exclusively on the absence of a 'moral choice' or voluntarist conception of duress is, as with the criminal law, both doctrinally unsustainable and descriptively inaccurate since duress in ICL is also contingent on the threat being objectively

⁵⁴ Howard Levie also describes this area of the law as 'confused' in *Terrorism in War: The Law of War Crimes*, Vol. III, (Oceana Publications Inc. 1993), 478. See for example, *US v Krupp et al*, *TWC*, Vol. IX, 1435-36.

⁵⁵ The 'moral choice' concept was developed by the IMT in the context of superior orders. In the *US v Krauch (Farben Case) TWC* Vol. VIII, 1179 the tribunal stated that necessity (duress) had to "deprive the one to whom it is directed of a moral choice as to his course of action".

reasonable while the coerced defendant did have a choice, however abhorrent it may have been. While Ambos suggests that the defence was applicable only in situations in which the actor's freedom of will and decision were limited to such an extent that the attribution of criminal liability was considered unjust⁵⁶ it may be more accurate to describe duress in ICL as having functioned to excuse when – to borrow from Dressler – the available choices were not only hard but also unfair and the *soldier* of reasonable moral strength lacked a fair opportunity to avoid acting unlawfully.

An examination of the post-war jurisprudence reveals a deep reluctance among tribunals to excuse a soldier on grounds of duress save in exceptional circumstances. In the vast majority of cases the plea was rejected on the grounds that there simply was no evidence to support the contention that the defendant had acted as a consequence of a threat. In fact, far from being coerced, there was usually ample evidence to show that many of the defendants had willingly chosen to participate in the commission of the offence for which they had been charged.⁵⁷ What is also apparent is that for a successful plea, the threat must be sufficiently serious with nothing short of death or serious bodily harm sufficing.⁵⁸ This limitation on the scope of the defence is

⁵⁶ Ambos, 'Other Grounds' 1005.

⁵⁷ In *US v Krauch (Farben Case)* TWC Vol. VIII, 1179 the tribunal made clear that "the defence of necessity is not available whether the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof...". This point was also emphasised in *The Krupp Case*, TWC Vol. IX, 1439: "if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct". Likewise, in *The Ministries Case*, TWC Vol. XIV, 399, the Tribunal in rejecting the defendants' plea held: "we have considered the claims made by certain of the defendants that they carried on certain activities because of coercion and duress, and that therefore they were forced to act as they did and could not resign or otherwise avoid compliance with the criminal program. ...the fact is, that for varying reasons each said as little as he could, and when he expressed dissent, did so in words which were as soft and innocuous as he could find". The Supreme Court in *Attorney-General of Israel v Eichmann* also found that the accused "was not coerced into doing what he did and was not in any danger of his life, since, as we have seen above, he did far more than was demanded or expect of him by his superiors in the chain of command"; 36 *ILR* (1961) 5, 340-341. In the *Prosecutor v Joni Marques and 9 others (The Los Palos Case)* March 2002, the Special Panel for Serious Crimes also rejected the plea of duress on the basis that the defendants were willing participants; <http://www.jsmp.minihub.org/index.htm> (last accessed 04/05).

⁵⁸ In the *Bruns Case*, the Supreme Court of Norway rejected the defendants' plea because they "would have been in no serious danger had they refused to perform such acts of alleged duty"; *LRTWC*, Vol. III, 15-22. In the *High Command case* the tribunal described the threat as having to amount to "imminent physical peril"; TWC Vol. XI, 509. In the *Papon Case* the plea of duress was rejected by the Bordeaux Court of Appeal which held: "although the German demands may have been expressed with energy and determination, and in certain cases accompanied by threats of reprisals against French police officers, it cannot be concluded from the investigation that the pressures so exerted were of an intensity as to constitute duress abolishing the free will of Maurice Papon"; Cour d'appel de Bordeaux, cited by Judge Cassese in *Erdemovic*. Likewise, in *Prosecutor v Julio Fernandez*, the Special Panel for Serious Crimes

of vital importance to the potential victims in conflict and tribunals have generally set a high threshold *because* the offences in question have been of such a gravity.

ICL also demands that the threat must be imminent insofar as it denies the defendant any opportunity for escape.⁵⁹ Although this condition functions in the criminal law to regulate the distribution of power between the individual and the state requiring the citizen to defer to the state rather than to commit the offence, this explanation fails to fully capture the distinctive context within which a soldier operates since the coercer is often linked to the state and usually derives his authority from the state.⁶⁰ This may explain why in ICL far greater emphasis has been placed on the choices made by the soldier prior to the final moment and before a gun is placed at his head.

In fact, of all the limitations that govern duress it is probably the doctrine of prior fault that most severely curtails the availability of the defence in ICL. In practice war crimes tribunals have used the requirement of “no other adequate means of escape” to situate the soldier in a significantly extended temporal context and to treat his prior record of participation in a series of events as evidence of choice that functions to prevent him from invoking the defence. For example, in *Klein*, the Reviewing Authority rejected the plea of compulsion adding:

[T]he picture presented is much more of men who for years had been killing without right to do so, and in almost incomprehensible numbers. They were so deeply entangled in a web of guilt that they had no longer an incentive to escape.

rejected duress on the grounds that “there was no evidence of a serious threat of imminent death or bodily harm against the accused”, February 27, 2001; <http://www.jsmp.minihub.org/index.htm>.

⁵⁹ In *US v Klein & others (Hadamir Case)*, file no. 12449, the Reviewing Authority upheld the guilty verdict rejecting the defence of compulsion, noting that: “nowhere does it appear that [the] accused were under any immediate compulsion or irresistible force. And if there was a present danger to life and limb ... it is fair to say ... that it could have been averted by their running away...”; <http://www.hhs.utoledo.edu/dachau/flyerr&r.html> (last accessed 03/06). See also *US v Dominikus Thomas* (Case No. 12-48) in which the Reviewing Authority upheld the tribunal’s decision to deny the defence of superior orders and compulsion on the basis that the threat was not ‘immediate’; <http://www.hhs.utoledo.edu/dachau/flyerr&r.html> (last accessed 03/06). In the trial of *Gustav Alfred Jepsen* the Judge Advocate stated: “duress can seldom provide a defence; it can never do so unless the threat which is offered as a result of which the unlawful act is perpetrated is a threat of immediate harm... So far as we know, and Jepsen had an opportunity of telling us but he did not, there might have been many steps which he could have taken to avoid himself being shot rather than submit to the threat and carry out a massacre of this nature”; *LRTWC* Vol. XV, 172. In *US v Fedorenko*, 455 F.Supp. 893 (1978), 913-14, the District Court found that the accused had limited opportunity for escape.

⁶⁰ The Tribunal in *The Einsatzgruppen Case*, required the threat to be “imminent, real and inevitable” although it further added “nor need the peril be that imminent in order to escape punishment”; *TWC*, Vol. IV, 480. This seems to indicate that the court was willing to display a degree of sensitivity when interpreting this condition.

There was nothing for them to do but go on with their deeds. They could not cut themselves off from their bloody pasts. In the face of this situation, the fear of the consequences upon which they now seek to rely, becomes a monster of their own creation.⁶¹

Although there is little reference to the doctrine of prior fault as comprising an *express* limitation on duress, tribunals have consistently treated the defendant's participation or membership in certain military organisations and groups as a decisive fact upon which to reject the plea. For example, in *The Einsatzgruppen Case* the tribunal, in conceding that "no court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever", went on to add that duress could not be invoked by those who had participated in the Nazi Party program with its anti-Semitic policy since "one who embarks on a criminal enterprise of obvious magnitude is expected to anticipate what the enterprise will logically lead to".⁶² Time and again, this reasoning has formed the basis of a tribunal's refusal to allow the defendant to rely on duress as demonstrated by the recent decisions of the Special Panel for Serious Crimes in which duress was rejected on the grounds that when the defendant "joined the militia, [he] obviously knew about the purposes of the group" and therefore "prior to the very last moment of duress, [the accused] could avoid that circumstance".⁶³

In seeking to do justice to the accused, ICL does allow for some measure of circumstantial luck yet it does so reluctantly for conceding too much to luck would prevent the law from imposing any liability; consequently circumstantial luck is tempered by reference to choice within a wide temporal scope. This condition has two significant consequences for the soldier: first, it means that duress is unavailable to the soldier who has failed to take evasive action prior to the final moment of engaging in the unlawful act; but second, the soldier is likely to be denied the defence if he has taken a voluntary part – actively or passively – in a military organisation or group whose objectives and/or conduct in pursuing those objectives are considered criminal

⁶¹ *US v Klein*; <http://www.archives.gov/research/captured-german-records/war-crimes-trials.html>.

⁶² *The Einsatzgruppen Case*, *TWC*, Vol. IV, 481. See also Report to the President by Justice Jackson of June 6, 1945 in which Jackson made clear that "the defense of superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or the S.S."; <http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm> (last accessed 05/06)

⁶³ *Prosecutor v Joseph Leki*, (TC) Case No. 05/2000, Dili District Court, Special Panel for Serious Crimes (SPSC); <http://www.jsmp.minihub.org/Court%20Monitoring/spscaseinformation2000.htm> (last accessed 04/06). In *Prosecutor v Tavares* the Trial Chamber ruled that "duress can be assessed not only the day the accused attacked Paulino Lepes Amaral, ... but also along his whole activity in the militia group. The accused joined the militia some time before the attack. ... From the time he joined until the moment of the attack, he could escape"; Case no. 02/2001, SPSC, para. 44,

insofar as they violate the laws of war or amount to serious human rights violations.⁶⁴ The problems that are apt to arise are self-evident for while certain objectives and measures taken in pursuance of those objectives will be manifestly criminal, not all will be patently so and, what is more, the very fact that soldiers are trained to comply with the commands of their superiors is an important factual element that needs to be taken into full consideration if ICL is to judge the soldier fairly particularly in circumstances where disobedience entails serious consequences.⁶⁵ At the same time though, this condition functions to provide the potential victims of conflict with significantly more 'protection' in that it requires the soldier, at a minimum, to consider the lawfulness of his conduct during hostilities but also to take some note of the lawfulness of the objectives of the organisation of which he is a member.

In deciding whether or not to excuse the accused, tribunals have adopted one of two possible rationales: that the nature of the threat was such that the defendant was incapable of rational thought, or alternatively, that resistance would have required a greater degree of courage or commitment than the law could properly demand of the subject.⁶⁶ In the *Von Leeb case* it was clearly the first line of reasoning that was preferred by the tribunal which held:

to establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.⁶⁷

But implicit in both reasonings was the reasonable person – or rather, the reasonable soldier – not simply as the “statistically or empirically ordinary”⁶⁸ soldier but as the normative standard against which the defendant’s conduct was judged. The post-war jurisprudence indicates that this normative standard was very much moulded on and defined by the *role* of a soldier with the

⁶⁴ See also Matthew Lippman, ‘Humanitarian Law: The Development and Scope of the Superior Orders Defense,’ (2001) 20 *Pennsylvania State International Law Review* 153, 204.

⁶⁵ By contrast to the domestic model where it is probably far easier to both identify a ‘criminal enterprise’ and to show evidence of the individual’s choice to participate in such an enterprise, it is far more difficult to do so in ICL. This must be so for the soldier who has over an extended course of time participated in hostilities amid escalating violence.

⁶⁶ Duff, ‘Do We Want an Aristotelian Criminal Law?’, 177. Richard Wasserstrom suggests that there are three ways to interpret the concept of ‘moral choice’: to focus on the degree of choice (or rather lack of choice) available to the actor; to focus on the poignancy of the dilemma in which the actor finds himself (people are not to be blamed for failing to behave heroically); or finally to focus on the moral character of the choice itself (was the result of the choice morally acceptable?). R. Wasserstrom, ‘The Relevance of Nuremberg,’ in *War and Moral Responsibility* (M. Cohen, T. Nagel & T. Scanlon, eds.) 1974, 134, 144-46.

⁶⁷ *US v Von Leeb (High Command Case)* TWC Vol. XI, 509.

⁶⁸ See Duff, ‘Do We Want an Aristotelian Criminal Law?’, 175.

level of 'fortitude' that was expected of him being set at a higher level than that of the reasonable person to the extent that the conduct in question was directly related to the soldier's functions.⁶⁹ The inevitable consequence of defining the normative standard by reference to the role of the soldier was that the law's expectations in respect of resilience and bravery in the face of a threat increased concomitantly with seniority in rank based on the presumption that the more senior the soldier the more likely it was that he had some measure of discretion.⁷⁰ Obedience to orders was treated as a factual element of significant import particularly for the junior ranks although tribunals continued to remain sensitive to the principle that "the obedience of a soldier is not the obedience of an automaton".⁷¹

This still leaves unaddressed the question of whether, under ICL, duress can afford a defence in the killing of innocents.⁷² If the *Erdemovic* Appeals Chamber decision is anything to go by, the answer must be in the negative. Nevertheless, the provision dealing with duress in the ICC statute indicates otherwise. The post-war jurisprudence is inconsistent but there seems to be no

⁶⁹ Colvin examines and compares the different tests applied by common law courts in determining the boundaries of reasonableness and concludes that while some courts have relied on a normative standard – what *could be expected* of the ordinary person – others have applied a predictive test – what the ordinary person *would* or *could* do. When the question is put normatively, as Colvin suggests, it tends to drive up the standard against which the accused is measured; 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility,' (2001) 27 *Monash University Law Review* 197, 212-15. If the conduct relates to the soldier's functions, it would seem that the test should be normative – what could be expected of the soldier in the circumstance. An example of this would be the German Military Criminal Code which in section 6 states: "Fear of personal danger is no excuse if the soldier's duty requires assumption of the danger." Similarly, the special position of a soldier was considered in *Attorney-General for Northern Ireland's Reference (No. 1 of 1975)* in which Lord Diplock articulated the view that a soldier on active duty is under an obligation "to risk his own life should this be necessary in preventing terrorist acts" (136-7). However, where the conduct falls outside the scope of a soldier's role, it would seem that justice requires that the relevant test be predictive.

⁷⁰ Where a defendant did have a moral choice insofar as he had some measure of discretion, but failed to consider exercising that discretion, duress was unavailable to him. In *The Einsatzgruppen Case*, for example, the defendant admitted that even absent serious consequences, as a soldier he had "surrendered ... [his] moral conscience" and was a "wheel in a low position ... of a great machinery"; *TWC*, Vol. IV, 305. Gardner reveals that as far as the criminal law is concerned, different people are subject to different normative expectations when their excuses are assessed. He adds, "for each soldier and for each person the relevant normative expectations, including expectations of capacity itself, vary not according to capacity but according to role"; 'The Gist of Excuses,' 579 and 585.

⁷¹ *The Einsatzgruppen Case*, *TWC* Vol. IV, 470.

⁷² According to the UK *Manual of the Law of Armed Conflict* (2004) 16.42.2. it would seem that duress cannot afford a defence in the case of the killing of innocents as the commentary expressly states: "an individual is not permitted to avoid suffering or even to save his own life at the expense of the life of another". The US *Military Judges' Benchbook for Trial of Enemy Prisoners of War*, Pamphlet 27-9-1 at 5-A-5 specifically states that duress is "only available if the harm that the accused intended to cause is not greater than the harm that he/she sought to avoid" indicating that duress cannot be a defence to the killing of innocents. Recent US military case law also suggests that duress is only recognised in its justificatory form. In *US v Rockwood*, 52 MJ 98 (1999), for example, the court held that for duress to apply, "the crime committed must have been of lesser magnitude than the harm threatened".

good reason why, as Judge Cassese forcefully argued that where no special rule had evolved, the general rule should not apply. Accordingly the soldier who is threatened with serious consequences unless he participates in a war crime – whether under orders or not – should in principle be entitled to plead duress even where the charge involves the killing of innocents.⁷³ Although some tribunals have judged a defendant’s conduct by reference to the lesser evils test, this would seem an inappropriate test for duress in its excusatory form.⁷⁴ As far as excuses are concerned, the more widely accepted test is one of proportionality which does not necessarily require that the harm avoided be greater than the harm inflicted as long as the two are of a comparable gravity.⁷⁵ Proportionality functions to help the adjudicator reach a judgment about the culpability of the soldier for yielding to the threat where the harm inflicted is of a significant magnitude.⁷⁶ At some point on our moral scale, we can no longer excuse the defendant because the offence is simply inexcusable; as Dinstein rightly suggests, “no amount of compulsion, be it as imminent, real and inevitable as events may prove it to be, can relieve the perpetrators of heinous and diabolical crimes of responsibility”.⁷⁷ And so it would seem highly unlikely that duress could ever afford a defence to crimes against humanity since such offences are “no longer directed at the physical welfare of the victim alone but at humanity as a whole”.⁷⁸

⁷³ Dienstag suggests that there are both practical and philosophical reasons for disallowing the duress defence to be extended to include war crimes and moreover, that “sacrificing one’s life to avoid complicity in the murder of innocents... should be deemed normative in a military framework”; *Fedorenko v United States*’ 157 and 151. Dinstein supports the view that duress should afford an absolute defence to war crimes short of murder; *The Defence of ‘Obedience to Superior Orders’*, 80.

⁷⁴ Judge Cassese, for example, states that proportionality means “that the remedy should not be disproportionate to the evil or that the lesser of two evils should be chosen”; *Prosecutor v Erdemovic*, para. 42. The UK military manual is not entirely satisfactory in that it provides: “persons acting under duress have a defence if they act necessarily and reasonably as a result and do not intend to cause greater harm than the one sought to be avoided”; 16.42.

⁷⁵ While referring to the defendant’s plea as one of necessity the military tribunal in *Krupp Case* did in fact treat the plea as an excuse. Holding that the defence of necessity was contingent on the act being both “to avoid an evil both serious and irreparable” and that the harm avoided was not disproportional to the harm inflicted, the tribunal proceeded to compare the ‘harms’ in question. The harm faced by the defendant included certain loss of property rights together with the possibility of other “dire consequence” but that had to be assessed against the harm inflicted by Krupp by the employment of prisoners of war, forced labour, and concentration camp inmates in “a state of involuntary servitude” during which time Krupp had been responsible for “exposing them daily to death or great bodily harm under conditions which did in fact result in the deaths of many of them; and working them in an undernourished condition”. On the facts, the tribunal held that the defence was unavailable to Krupp because “the remedy was disproportioned to the evil”; *The Krupp Case, TWC*, Vol. IX, 1443, 1435, 1444-45, 1439.

⁷⁶ The defendant’s responsibility is assessed in the light of how his conduct, and his reasons for it compare morally in relation to the harm of what he in fact did.

⁷⁷ Dinstein, *The Defence of ‘Obedience to Superior Orders’* 80.

⁷⁸ *Erdemovic*, Sentencing Judgment (29 November 1996) para. 19. It is inconceivable that duress can ever provide a defence to genocide given the gravity of the offence, and nor for that matter, crimes against humanity. Having said that there may be exceptional circumstances that may warrant allowing the plea in principle involving for example, the offence of deportation or forcible transfers.

But what conclusions might be drawn from this understanding of duress for women as the potential victims in conflict? That ICL is reluctant to allow the defence even in its excusatory form where the offence amounts to a crime against humanity is to convey a strong and positive message about the value of lives in conflict. While the 'moral choice' test occupies a central space in the process of judgment that allows the law to concede that it would be unjust to hold a soldier criminal responsible absent choice, the jurisprudence reveals a tendency among adjudicators to severely restrict the scope of duress primarily through the doctrine of prior fault. In asking whether he had an opportunity to avoid acting unlawfully, ICL situates the soldier in an extended temporal scope, and holds him criminally responsible for his conduct even when, in the moment immediately preceding the violation, there is obviously no opportunity for escape. Thus, harsh though it may seem, the law demands the soldier to take responsibility for the choices he makes up to and including the final moment. As far as war crimes are concerned, determining exactly where to draw the line is very much located in our moral and absolutist intuitions about good and evil which, as Nagel points out, are "often the only barrier before the abyss of utilitarian apologetics for large-scale murder".⁷⁹ The post-war cases reveal a deep unease on the part of the adjudicators to exculpate the defendant based on duress, even taking into consideration the fact of obedience to orders, which suggests that war crimes, as with crimes against humanity, also transcend the boundaries of morally excusable behaviour. But while the tribunals may have been unwilling to exculpate a defendant on the basis of the superior orders/compulsion defence, the plea was often taken into full consideration in mitigation of punishment. This was particularly so for the junior ranks where disobedience to a superior's order would have resulted in death or a considerable period of incarceration or alternatively, where there was clear evidence to show that the subordinate, by contrast to his superior, had no measure of discretion or choice in the matter.⁸⁰ The jurisprudence of the

⁷⁹ Thomas Nagel, 'War and Massacre,' in *War and Moral Responsibility* (M. Cohen, T. Nagel & T. Scanlon, eds.) (Princeton: Princeton University Press, 1974) 3, 6. As Nagel also makes clear, absolutism operates as a limitation on utilitarian reasoning, not as a substitute for it.

⁸⁰ This distinction is clearly evidenced by the wide disparity in punishment meted out by the tribunals that more often than not corresponded to the rank of the individual defendant. For example, in the case of *Major-General T. Sato & others*, involving the ill-treatment and killing of civilians, the higher ranking defendants were either sentenced to lengthy periods of imprisonment or to death while the lower ranks were given extraordinarily short sentences. In passing sentence, the tribunal commented: "you [Ishida and Baba] are very much the junior of the officers charged in this case. The Court feels that you are very little to blame for the crimes which has been committed. In your position you carried out orders which were dictated to you from your superior officers. The Court has therefore decided to be lenient in your case, and the sentence, which is subject to confirmation, is that you will suffer one year's imprisonment"; WO 235-814, PRO. For further evidence of this pattern, see *Capt S. Gozawa & others*, WO 235-813, *Major C.*

military tribunals responsible for prosecuting Japanese defendants also seems to suggest that the courts were far more sensitive to cultural differences than is commonly acknowledged as evidenced by the lengthy exchanges that took place during the trials on the social, cultural, historical and political context within which superior orders was interpreted and understood by the respective defendants.⁸¹ While superior orders was never accepted as a defence *per se*, where there was evidence to indicate that a soldier of junior rank had acted as a consequence of orders, and disobedience would have incurred serious consequences, considerable weight was accorded by way of mitigation.⁸²

Although in practice it is highly unlikely that a soldier would be excused for the killing of innocents even when threatened with death, I have argued that in principle the defence should be available to him. But can the killing of innocents ever be regarded as *justified*? For it is one thing to excuse a soldier for a war crime but quite another to suggest that the violation was not wrongful.

6.2 NECESSITY

The classic example of necessity involving a charge of murder is, of course, *Dudley and Stephens*, which suggests that necessity can never provide a defence to murder. In rejecting the plea, Lord Coleridge reasoned:

Sotomastu & others, WO 235-822, *Sjt. Major S. Hasegawa & others*, WO235-828. Divergences from this general pattern emerge where there is evidence to show that the junior went beyond his orders and displayed a particular callousness or cruelty towards the victims.

⁸¹ See for example, *Capt. S. Tamura* (WO 235-816), *S/Sjt T. Terada & others* (WO 235-819), *Capt. H. Okamura* (WO 235-820), *Sjt. Major S. Hasegawa & others*, WO235-828, PRO. Disobedience to orders – that, in effect, originated from the Emperor – was an option that seemed not to even occur to the average soldier.

⁸² Regrettably, some of the sentences that were handed down seem to have singularly failed to fully reflect the gravity and magnitude of the offences for which the defendants had been found guilty. The case of *Capt. S. Tamura*, who was found guilty of the ill-treatment and killing of 152 civilians and sentenced to two years imprisonment is a particularly disturbing one. Reviewing the verdict and sentence, Brigadier Davis commented: “the accused admitted all the fact ... [and] his defence was the usual one of being compelled to carry out the orders of his superior officers. ...is it clear that in the circumstances of the present case the court did not exercise a proper discretion as to the sentence. This accused executed the civilians, including women and children, in cold blood and even though he did so in obedience to orders he should not have been dealt with so lightly for his share in that revolting crime”; WO 235-816, PRO. See also M. Lippman, ‘Humanitarian Law: The Development and Scope of the Superior Orders Defense,’ 209

We are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.⁸³

Over a century later, both the scope of necessity and its rationale continues to divide commentators and jurists alike. In civil law systems necessity is generally regarded as a justification although some jurisdictions treat it as an excuse while still others reject it altogether.⁸⁴ In the following sub-section, I examine the different doctrinal theories that have been relied on to explain the defence and suggest that, as with duress, necessity can be better comprehended as both justificatory and excusatory in nature.⁸⁵ The focus of my analysis will be on necessity in its justificatory form as I also explore in greater depth why it is that justifications present particular problems for liberal theory. In the second sub-section I consider some of the leading cases involving necessity decided by the post-war tribunals and question whether necessity can ever provide a defence to war crimes and the implications of this determination for women in conflict.

6.2.1 Understanding necessity

The defence of necessity, because it seems to embrace *ad hoc* decision-making, poses serious theoretical challenges for the criminal law which strives to promote and sustain a notion of legal culpability based on certainty and formal rules of conduct that are binding on its citizens without exception. Necessity is problematic for liberal theory not only because it has the potential to “validate decisions according to conscience or prejudice rather than according to law”, but by blurring the line between legislative, executive and judicial responsibilities it seems to condone self-exemption which liberalism cannot sustain.⁸⁶ Nonetheless, as with other legal defences, the criminal law needs to admit the plea because it seeks to do justice to the individual. Necessity has been described by some scholars as a residual justification defence – or a defence of last resort – since it functions as a “corrective device” by allowing exculpation, whether out of a

⁸³ Per Lord Coleridge, *Dudley and Stephens* (1884) 14 QBD 273.

⁸⁴ Colvin, ‘Exculpatory Defences’, 384. To what extent the defence is available in English law is uncertain; see generally Smith & Hogan, *Criminal Law*.

⁸⁵ Yeo illustrates how early jurists and commentators, including East, Sir Francis Bacon and Blackstone, distinguished between justificatory and excusatory forms of necessity; *Compulsion*, 45-56.

⁸⁶ John Parry, ‘The Virtue of Necessity: Reshaping Culpability of the Rule of Law,’ (1999) 36 *Houston Law Review*, 398, 407.

sense of justice or utilitarian concerns, that legitimises technically unlawful conduct.⁸⁷ As a “residual corrective device” it allows the adjudicator the flexibility to adopt a more expansive approach towards what would otherwise be criminal conduct for the purpose of securing an outcome that more closely coincides with public morality.⁸⁸ As expounded by Mortimer and Sanford Kadish, necessity allows for ‘legitimated disobedience’ in which the breach of the specific rule can be deemed justified by reference to the overall objectives of the criminal law. Accordingly,

one who breaches a rule and defends on the lesser-evil principle ... is in the position of arguing not that he did not depart from the rule of the criminal law – even taking the rule comprehensively to include its defined exceptions and qualifications – but that his departure should be found consistent with the laws ends.⁸⁹

In a bid to appear rule-like, the common law theory of necessity is generally expressed in a neutral disguise: that despite having violated the law with the requisite *mens rea* the defendant was justified in doing so because the wrong done by him was for the purpose of avoiding the lesser of two harms.⁹⁰ By articulating both the objective and the rule that governs necessity in the language of utilitarianism – that necessity is about achieving welfare-maximization conduct rather than slavishly following the letter of the law and that this can be best achieved by comparing harms – the criminal law attempts to convey the impression that the defence does not in any way introduce arbitrary decision-making.⁹¹ But the law’s attempt to limit the defence by reference to the ‘lesser evils’ test further compounds existing problems because the balance of harms test is both doctrinally inadequate and fundamentally incoherent.⁹² A “thin” consequentialist analysis that focuses exclusively on the net social effect of the relevant harms is

⁸⁷ Robert Schopp, ‘Verdicts of Conscience: Nullification and Necessity as Jury Responses to Crimes of Conscience,’ (1995) 69 *Southern California Law Review* 2039, 2082.

⁸⁸ Schopp, ‘Verdicts of Conscience’, 2079.

⁸⁹ M. Kadish & S. Kadish, *Discretion to Disobey* (Stanford University Press, California, 1973) 124.

⁹⁰ Alan Brudner, ‘A Theory of Necessity,’ (1987) 7 *Oxford Journal of Legal Studies*, 339, 341-2. According to Fletcher the violation of the prohibitory norm must be undertaken to save an interest greater than the harm entailed in the violation and the violation of the norm must be the cheapest means available for avoiding the threatened harm; Fletcher, *Rethinking*, 774-75. Glanville Williams suggests that necessity involves the assertion that “the conduct promotes some value higher than the value of literal compliance with the law”; *Criminal Law: The General Part*, (1961) 722.

⁹¹ A.P. Simister & G. R. Sullivan, *Criminal Law*, 629. In *US v Schoon*, Fernandez J observed, “I do not mean to be captious in questioning whether the necessity defense is grounded on pure utilitarianism, but fundamentally, I am not so sure that this defense of justification should be grounded on utilitarian theory alone rather than on a concept of what is right and proper conduct under the circumstances.”

⁹² Brudner, ‘A Theory of Necessity,’ 341-44.

inadequate in that it seems to ignore moral issues pertaining to culpability.⁹³ But in addition, by focusing on the *balancing of the harms* two assumptions are made: that the harms are commensurable and that there is general consensus on what counts as a social harm. The lesser harm test cannot satisfactorily explain how an objective comparison can be made of harms that are plainly not quantifiable or where the values being compared are manifestly incommensurable because qualitatively so different.⁹⁴ That the lesser harm test fails to adequately capture and account for certain decisions suggests that where courts have applied the test they are doing so based on “a set of normative decisions that are already grounded in a particular scale or group of values”.⁹⁵ In other words the ‘balance of evil’ test already conceals normative assumptions about what counts as a harm, perhaps best exemplified by civil disobedience cases in domestic law and the way in which IHL and ICL treat some harms in conflict as a matter of concern while others as inevitable consequences of conflict or simply as irrelevant.⁹⁶

Of course not all cases involving necessity are contentious. In the ‘easy’ cases necessity can be explained by reference to “overriding reasons for action” based on an all-things-considered judgment, that trigger what J. Horder describes as “a moral imperative to act in a way that will

⁹³ In practice, however, courts appear to take into consideration the defendant’s character to the extent that his conduct is assessed by reference to whether he acted in a manner that comports with the values shared by the rest of the community.

⁹⁴ As Alexander comments, “in the absence of some common denominator for evils such as disutility, or a method for measuring the disutility particular evils cause, the notion of greater and lesser evils is highly indeterminate once we move beyond the simple rankings of bodily integrity over property, and death over injury”; L. Alexander, ‘Lesser Evils: A Closer Look at the Paradigmatic Justification,’ (2005) 24 *Law and Philosophy* 611, 614-15. The commentary to 3.02 of the Model Penal Code recognises that: “deep disagreements are bound to exist over some moral issues, such as the extent to which values are absolute or relative and how far desirable ends may justify otherwise offensive means”.

⁹⁵ Parry, ‘The Virtue of Necessity’, 415-20. See for example the court-martial of Flight Lieutenant Malcolm Kendall-Smith for refusing to obey an order to be deployed to Basra, Iraq on the grounds that the war was unlawful. Confining the question to one of whether at the relevant time the occupation was lawful or not under international law automatically precluded the defendant’s claim because the *occupation* had been sanctioned under a Security Council resolution. For background information to the case see <http://www.timesonline.co.uk/article/0,,2087-1828054,00.html> (last accessed 05/06).

⁹⁶ If comparing harms that have been formally recognised by the law prove challenging, the problem becomes even more acute when one harm is not even classified as a harm as for example, death and serious injury that is traditionally classified in conflict as ‘collateral damage’ and which disproportionately affect women and children. For a useful analysis see C. Chinkin, ‘Rape and Sexual Abuse of Women in International Law,’ (1994) 6 *EJIL* 1 and ‘Human Rights of Women: Global Status and Key Challenges,’ *Catalyst* 2005, University of Essex, 6 May 2005, found at <http://www.essex.ac.uk/catalyst/Catalyst%202005-Christine%20Chinkin.pdf>. (last accessed 05/06). See also 1.2.1.

involve wrongdoing”.⁹⁷ In other words, all rational persons would have concluded that the moral imperative to violate the law governed that particular situation.⁹⁸ Horder however suggests that the defence might equally apply to a wider category of situations including those that accord with the best moral conception of persons within their particular social milieu.⁹⁹ Extending the necessity defence to a further class of conduct, albeit in limited circumstances, raises the more challenging question as to how the law might properly treat hard cases and, in particular, those involving the taking of innocent lives – a scenario that arises far too often in conflict.

From a purely utilitarian perspective, numbers do count since the taking of one life to save more is to maximize the aggregate sum of society’s welfare. However opinion continues to divide on whether we can really conclude that choosing to kill one to save many is a lesser evil.¹⁰⁰ But even were it to be a matter of numbers, a normative distinction is generally made between the taking of lives as a *means* to saving others and choosing to save many rather than the few.¹⁰¹

⁹⁷ Horder, ‘Self-Defence, Necessity and Duress’, 151. Citing the example of the citizen who sets a house on fire to create a fire-break that could save a whole city, Horder explains, “the owner’s legal rights are infringed by the citizens’ attempts to burn down the house, but there is an overwhelming moral justification for the infringement”. A “moral imperative”, Horder suggests, is an overriding reason that outweighs contrary reasons or rights where there are competing priorities. Alexander argues that there are times when citizens have a positive obligation to act; Alexander, ‘Lesser Evils’, 618.

⁹⁸ Feinberg offers an alternative description when he comments: “disobedience can be morally justified, but only when the weighty reasons that tend to support a moral duty of obedience are outweighed in a particular set of circumstances by even weightier reasons that support a moral duty (or at least a moral right) to do something inconsistent with obedience”; J. Feinberg ‘The Right to Disobey,’ (1988) 87 *Michigan Law Review* 1690, 1690-91.

⁹⁹ Horder, ‘Self-Defence, Necessity and Duress’ 156. Horder offers the example of a soldier who kills his badly wounded colleague in order to save him from further torture by the enemy and adds, “an adequately rich conception of human flourishing, one more sensitive to the ... relevance of consequentialist reasoning (focused here on the avoidance of unnecessary pain in a special kind of emergency), can generate the view that there is an overriding reason to kill the wounded soldier, albeit a reason on which not all could bring themselves to act”. We might equally, under this rubric, include the hypothetical mountaineer, D, who is connected by a rope to his colleague who, having lost his footing, will drop to his certain death pulling D with him if D does not cut the rope. Under such circumstances, D might successfully plead necessity given the very specific situation in which mountaineers may find themselves. For a comparable US case, see *US v Holmes*, 26 F. Cas. 36 (15,383) (C.C.E.D. Pa. 1824).

¹⁰⁰ Taurek convincingly argues that numbers should be immaterial since the death of many cannot be treated as an aggregate that can be compared in any meaningful way against the death of one since each suffers his own death. According to Taurek, our duties should be determined by considering individual claims separately rather than as a collective claim; J. Taurek, ‘Should Numbers Count?’ (1977) 6 *Philosophy and Public Affairs* 293. For an instructive analysis see the three articles published as part of the ‘The Case of the Speluncan Explorers: A Fiftieth Anniversary Symposium’ in (1999) 112 *Harvard Law Review*, 1834. Under German law, necessity is not generally available to murder; s.34, German Penal Code.

¹⁰¹ In other words, there is a distinction to be made between the Trolley Problem and the Surgeon; see Alexander, ‘Lesser Evils’, 615-16.

This is because determining what is a lesser evil depends not only on comparing the net *results* but also on *how* those consequences were brought about.¹⁰² So while a utilitarian methodology does on one level dominate the analysis of necessity and the defence might initially appear to entail a straight-forward assessment of net social welfare, in practice, it is clearly subject to deontological constraints.

As with other legal defences necessity is subject to a range of preconditions that serve to restrict its scope of application.¹⁰³ There is widespread agreement that the defence requires that an 'emergency' situation existed leaving the defendant with no lawful option from which to choose.¹⁰⁴ In some jurisdictions there is a requirement that the evil threatened be imminent although in others, imminence is treated as a factual element to support the contention that no available legal alternative was available to the defendant at the relevant time.¹⁰⁵ Clearly this allows a starving mountaineer to break into a remote cabin as a last resort to obtain food but would preclude the defence where a citizen resorts to self-help if other options were available to him at the material time;¹⁰⁶ and, as with duress, this condition functions to delineate the allocation of power between the state and the citizen. A further precondition and one that is uniformly cited in most jurisdictions is the principle of proportionality. The term 'proportionality' in the context of necessity is, however, apt to mislead since the defence is usually admitted only where the harm avoided would have been significantly more damaging than the harm inflicted.¹⁰⁷ Moreover, in common law jurisdictions, the defendant must have

¹⁰² Kenneth Simons, 'Exploring the Intricacies of the Lesser Evils Defense,' (2005) 24 *Law and Philosophy* 645, 651. This is the distinction that Jeremy Horder also emphasises in 'Self-Defence, Necessity and Duress', 159. See also Smith & Hogan, *Criminal Law*, 257-58 on the comments made by the coroner in the Zeebrugge ferry disaster.

¹⁰³ E. Arnolds and N. Garland state: "the cases and the literature suggest three essential elements of the defense of necessity: (1) the act charged was done to avoid a significant evil; (2) there was no other adequate means of escape; (3) the remedy was not disproportionate to the evil to be avoided"; 'The Defense of Necessity in Criminal Law: the Right to Choose the Lesser Evil,' (1974) 65 *Criminal Law and Criminology* 289, 294.

¹⁰⁴ Dickson J in *R v Perka* held that "the defence of necessity covers all cases where non-compliance with law is excused by an emergency or justified by the pursuit of some greater good"; [1984] 2 S.C.R. 232 para. 24.

¹⁰⁵ S. 34 of the German Penal Code requires the danger to have been imminent. By contrast, the American Law Institute's *Model Penal Code* (MPC) does not insist on an 'imminence' requirement. Moreover, following the Court of Appeal decision in *Re A (Children)* [2000] 3 FCR 577, the condition of imminence is not necessarily required under English law.

¹⁰⁶ See generally *Southwark London Borough v Williams* [1971] CH 734. In *United States v Bailey*, 444 U.S. 394, 410 (1980) the Supreme Court held: "if there was a reasonable, legal alternative to violating the law, 'a chance both to refuse to do the criminal act and also to avoid the threatened harm'" the defence would fail.

¹⁰⁷ Under German criminal law, "the averted harm has to be significantly greater than the harm caused by the actor"; Bernsmann, 'Private Self-Defence', 181. Section 3.02 MPC refers to necessity as being based

intended to choose the lesser harm. The issue is not whether the defendant *believed* that he made the right choice, but whether the defendant's value judgment, as evidenced by the choice he made, correlates with the values shared by the rest of his community. What remains unclear is whether the value judgment is made on utilitarian grounds or on the basis of what was reasonable under the circumstances.¹⁰⁸

The reluctance by courts to recognise the defence¹⁰⁹ is located in the fact that necessity necessarily infringes on the state's exclusive authority to legislate for – and enforce – certain behaviour.¹¹⁰ By pleading necessity, the defendant is in effect offering an alternative narrative and in doing so seeks society's approval for having unilaterally set aside a set of pre-determined norms to replace them, under the circumstances, with his own set of values.¹¹¹ Necessity is therefore hugely problematic for a liberal state because it is based on an appeal to a right that hints strongly at self-exemption and it inadvertently undermines the rule of law by preferring an individualistic calculus of net societal benefit so that "right action becomes indistinguishable in principle from criminality".¹¹² Necessity invites the judiciary to 'condone' *ex post facto* a unilateral decision taken by the individual to violate a legally binding norm at the expense of majoritarian rule; but it also seems to invite the judiciary to 'legislate' rather than adjudicate.¹¹³ That the military justice system is deeply hostile of this defence is only to be expected since allowing it would risk undermining the normative value of the rule which would pose serious

on a 'choice of evils' where the actor is justified if he believes the conduct to be "necessary to avoid a harm or evil to himself or to another" on condition that the harm avoided is "greater than that sought to be prevented by the law defining the offense charged". Similarly, Article 122-7, The French Penal Code of 1994 (as amended as of January 1, 1999), states: "A person is not criminally responsible if that person, facing an actual or imminent danger threatening himself, herself, or another, or property, performs an act necessary for the preservation of person or property, unless there is a disproportion between the means employed and the seriousness of the threat"; cited by B. Berger, 'A Choice Among Values: Theoretical and Historical Perspectives on the Defence of Necessity,' (2002) 39 *Alberta Law Review*, 848, 858.

¹⁰⁸ *Nelson v State*, 597 P.2d at 979-80, cited by J. Dressler, *Understanding Criminal Law* at 288.

¹⁰⁹ It is predominantly in cases involving third parties as decision-makers that necessity has been deemed a valid justification. See also George Fletcher, 'The Individualization of Excusing Conditions,' (1973) 47 *South California Law Review*, 1269, 1278.

¹¹⁰ In other words necessity in its most fundamental form is viewed as a threat to the rule of law. This critique of the defense is clearly articulated by Edmund Davies LJ in *Southwark London Borough v Williams* when he states "[t]he law regards with the deepest suspicion any remedies of self-help, and permits these remedies to be resorted to only in very special circumstances. The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy"; [1971] Ch 734, 740.

¹¹¹ Parry, 'The Virtue of Necessity', 436.

¹¹² Brudner, 'A Theory of Necessity,' 342.

¹¹³ In *US v Schoon*, 971F.2d 193 (9th Cir. 1991) at 196, the court stated: "in some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances".

problems for the military that depends on the strict adherence to rules if it is to function effectively.¹¹⁴ But what this understanding of necessity also reveals is that when courts engage in an analysis of the values and interests at stake, what is being compared is not confined *only* to the two immediate harms in question. In addition to the harm inflicted, the defendant's conduct indirectly functions to undermine the rule of law and the prohibition on self-exemption and this is why the harm avoided *must necessarily* be far greater than the harm inflicted.¹¹⁵ That necessity as a justificatory defence is regarded in many jurisdictions with deep suspicion and that states are reluctant to admit the defence unless as an excuse is hardly surprising.¹¹⁶

In *Perka* Justice Dickson rejected necessity as a justification on the basis that "no system of positive law can recognize any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value".¹¹⁷ As with Lord Coleridge's concerns in *Dudley & Stephens*, the Supreme Court's anxiety was governed by political concerns: that to treat necessity as a justification would risk conflating the role of the judiciary with the legislature and encourage self-exemption that would inexorably pose a threat to a liberal system of governance. Conceptualised as an excuse, the defence posed little political threat since the focus of judgment remained with the *defendant's* culpability leaving the normative value of the law itself intact. As an excuse, necessity could be admitted on the basis of humanitarian considerations particularly since it was available only in limited "situations of emergency where normal human instincts, whether of self-preservation or of altruism,

¹¹⁴ See for example, *US v Olinger*, where the Army Court in rejecting a plea of necessity noted: "in no other segment of our society is it more important to have a single enforceable set of standards." For a commentary, see 'The Defense of Necessity,' *The Army Lawyer*, April 2000, DA PAM 27-50-329, 89-92. See also, Eugene Milhizer, 'Necessity and the Military Justice System: A Proposed Special Defense,' (1988) 121 *Military Law Review*, 95.

¹¹⁵ John Parry however argues that necessity does not necessarily 'trample' on the rule of law values and that far from undermining the rule of law, necessity provides a further means by which the law can take note of the multiplicity of human goals and values to more fairly assess criminal conduct and culpability; Parry, 'The Virtue of Necessity', 446-457.

¹¹⁶ German law does however recognise both sub-doctrines in its Penal Code. Section 34 declares that someone who commits an act to avoid "an imminent and otherwise unavoidable danger" to himself or another does not act unlawfully if, taking into account all the conflicting interests, the interest protected "significantly outweighs the interest which he harms" while section 35 provides that "whoever commits an unlawful act in order to avert an imminent and otherwise unavoidable danger to his own life, limb, or liberty, or to that of a relative or person close to him, acts without guilt". Although the Canadian Law Reform Commission also identified both rationales in its Working Paper 29 (1982), The General Part – *Liability and Defences*, 93, the legislature and courts have been reluctant to accept necessity as a justification.

¹¹⁷ Per Dickson J. [1984] 2 S.C.R. 232, para. 32. By contrast, Wilson J., in her minority opinion, made clear her unease with the majority's approach on the basis that necessity as a justification should have been left to stand.

overwhelmingly impel disobedience”.¹¹⁸ As with the reasoning associated with duress, the court concluded that it was clearly unjust to punish the defendant for “violations of the law in circumstances in which the person had no other viable or reasonable *choice* available”. This rationale of course raises the same doctrinal problem already explored in some detail in the context of duress since the actor *has* acted with intention. The courts have generally attempted to explain this anomaly by emphasising the absence of *true* choice. The wrongful act is equated to being involuntary because the actor was deprived of a meaningful free choice and since the act is ‘normatively involuntary’ the wrong cannot justly be attributed to him.¹¹⁹ Necessity, according to the Supreme Court, was subject to three constraints: the existence of an imminent danger that would leave no reasonable legal alternative to the defendant and the harm inflicted must be proportionate to the harm avoided;¹²⁰ proportionality required that “the two harms must, at a minimum, be of a comparable gravity”.¹²¹ The defendant is excused only if his conduct falls within the boundaries of what is considered appropriate and reasonable conduct under the circumstances as measured against society’s expectations. As with duress, “evaluating the nature of an act is fundamentally a determination reflecting society’s values as to what is appropriate and what represents a transgression. ... evaluating the gravity of the act is a matter of community standards infused with constitutional considerations”.¹²²

6.2.2 Necessity and international criminal law

That the vast majority of post-war tribunals – if not all – treated the plea of necessity as an excuse seems to suggest that war crimes can never be justified whatever the circumstances.¹²³

However, in the case of Paul Touvier it appears that the defendant did attempt to invoke “a state of necessity susceptible of constituting a justification” since it was argued that despite having participated in the offences under pressure exerted by the Germans, he had nonetheless managed to save a greater number of lives at the expense of a few.¹²⁴ Although, on the facts, the Court of

¹¹⁸ *R v Perka* [1984] 2 S.C.R. 232, para. 33.

¹¹⁹ Brudner, ‘A Theory of Necessity,’ 347.

¹²⁰ *R v Perka*, paras. 38-43. See also *R v Latimer* [2001] 1 SCR 3 paras. 27-31.

¹²¹ *R v Latimer*, para. 31.

¹²² *R v Latimer*, para. 34.

¹²³ See for example, *The I.G. Farben Case*, TWC, Volume VIII, 1174; *The Flick Case*, TWC, Volume VI, 1200-02; *The High Command Case*, TWC, Volume XI, 509.

¹²⁴ Cited by Judge Cassese in his dissenting opinion, *Prosecutor v Erdemovic*, FN 68. The Court of Appeal’s decision was confirmed by the Court of Cassation (decision of 21 Oct. 1993) (see *Bulletin Criminel* (1993), No. 307, pp. 770-74).

Appeal rejected the defence since there was considerable evidence showing that Touvier had played an active role in the commission of the alleged crimes, the Court also dismissed the plea *in principle* on the basis that “a balancing of life against life is not possible since all lives are of equal value and no life prevails over another”. While the Court may have been right to reject Touvier’s plea on the facts, in some circumstances it may be that the application of absolute moral norms are inappropriate; as suggested by some scholars, a purely deontological approach may lead to morally abhorrent outcomes where, for example, by declining to participate in a wrong significantly worse consequences are likely to follow.¹²⁵ But utilitarianism proves equally problematic because it does not necessarily correlate with our moral intuitions since instinctively a distinction is made between intentionally causing a death and failing to intervene to prevent a death; and what is more, we do feel some unease with the idea of being the instrument of wrong.¹²⁶ Nevertheless, the Supreme Court of Israel did seem to embrace a utilitarian methodology when, in *Hirsch Berenblat v Attorney-General*, it considered in some depth whether an individual could successfully rely on the statutory defence of necessity whereby his conduct would be deemed justified despite having facilitated the killing of innocents.¹²⁷

The defendant, Berenblat, had been convicted under the Nazi and Nazi Collaborators (Punishment) Law for his part, as a member of the Jewish militia, in the “delivery of persecuted persons to an enemy administration” for an incident that had taken place in August 1942. Following an order by the Judenrat (Jewish Council) to the Jewish population of Bendin to report to two sports grounds for registration, approximately 15,000 Jews gathered at the respective locations and were subsequently separated into three groups comprising “(a) holders of work permits, who were to be released; (b) people who appeared physically fit to be sent to work camps; (c) elderly people, children and the physically weak who were destined for

¹²⁵ Greenawalt suggests that “most people’s intuitive sense lies somewhere between the absolutist and the straightforward consequentialist position, assigning a wrongful quality to intentional killing that counts heavily against it, but allowing that in extreme enough cases intentional killing may be the morally better choice”; ‘Natural Law and Political choice: the General Justification Defense – Criteria for Political Action and the Duty to Obey the Law,’ (1986) 36 *Catholic University Law Review*, 1, 25-6

¹²⁶ Greenawalt, ‘Natural Law and Political choice’, 3. Alexander offers a satisfying explanation for why we intuitively distinguish between the defendant in the classic Trolley Problem scenario from the Surgeon scenario. In the case of the former, the defendant has not used the victim to ‘save’ the lives of more, while in the latter, the surgeon has; determining what is a lesser evil depends not only on the consequences themselves but also on how those consequences are brought about; L. Alexander, ‘Lesser Evils’ 615-16.

¹²⁷ *Hirsch Berenblat v Attorney-General*, in the Supreme Court of Israel sitting as a Court of Criminal Appeal [May 22, 1964] Crim. A. 77/64, 11; <http://elyon1.court.gov.il/eng/home/index.html> (last accessed 08/05).

expulsion, which meant extermination”.¹²⁸ The task of the Jewish marshals, under the command of the defendant, was to prevent any movement of people once they had been allocated to the respective groups. After considering the evidence, the Court ruled that the defendant was entitled to rely on section 10(b) of the Law on the basis that at the material time, had order not been maintained by the defendant, the German soldiers surrounding the sports grounds would have opened fire into the crowds and far more serious consequences would likely have followed.¹²⁹ The relevant test, according to the Supreme Court, was that the defendant *intended* to prevent the more serious consequence and that he *had prevented* the more serious consequence. What is perhaps most revealing about this judgment was the Court’s inclination to ‘separate’ the relevant elements because it was by separating that the Court was able to acquit the defendant. By contrast to most post-war cases Berenblat’s choice to participate in the activities of the Jewish militia was treated as a separate and irrelevant fact in the process of judgment. But the Court also placed significant emphasis on distinguishing the immediate harm avoided from the prospect of future harm, both of which required some degree of speculation. Perhaps the most surprising aspect of the judgment was the Court’s willingness to embrace a utilitarian methodology that allowed it to conclude that:

the question of what is a more serious consequence and what a less serious one, is primarily an objective question: and objectively, it is obvious that the death of ten is a more serious consequence than the death of nine people and that the death of one is a more serious consequence than the injury of ten.¹³⁰

What is clear is that *Hirsch Berenblat* is a highly unusual judgment insofar as necessity in its justificatory form was accepted as a defence to a war crime. That tribunals have generally refused to admit necessity in its justificatory form is a positive signal, for it would seem to suggest that war crimes can very rarely, if ever, be *justified*. And while a utilitarian reasoning can offer a valuable methodological approach, ultimately even the defence of necessity is very much tempered by deontological constraints for it would seem that intuitively, judgments that involve human lives cannot be measured by numbers alone. In the context of conflict, necessity is a profoundly troubling defence for what will be considered an interest of a significantly greater value by a soldier will in all likelihood not generally correlate with what women as

¹²⁸ *Hirsch Berenblat*, 11.

¹²⁹ Section 10(b) of the *Nazi and Nazi Collaborators (Punishment) Law*, 1950 states: “if a persecuted person has done ... any act, such act ... constituting an offence under this Law, the Court shall release him from criminal responsibility... (b) if he did ... the act with intent to avert consequences more serious than those which resulted from the act ... and actually averted them...”.

¹³⁰ *Hirsch Berenblat v Attorney-General*, 19.

civilians will perceive to be of equivalent, let alone greater, value. As such, necessity is a defence that should be treated with great scepticism.

6.3 DURESS AND NECESSITY UNDER THE ICC STATUTE

Most scholars who have examined Article 31 in any great depth have voiced some regret at the drafters' decision to combine duress and necessity under one sub-section b because this has resulted in a provision which has failed to distinguish between justification and excuse that threatens to perpetuate the doctrinal inconsistency that so characterised the post-war jurisprudence.¹³¹ Why this decision was taken by the drafters is difficult to explain since duress and necessity were initially treated as separate and distinct defences in the original PREPCOM proposal and it was only in the final draft, which formed the basis of Article 31, that the defences were combined under subparagraph (d).¹³² The sub-section provides that a person shall not be criminally responsible 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 provision encapsulates the established constraints on duress and necessity in their excusatory form as generally accepted under international law but the addition of a further subjective test – that the person does not intend to cause a greater harm than that avoided – has prompted some criticism among civil law scholars. That duress is subject to the doctrine of prior fault, is implicit in the wording of subparagraph (d)(ii) with the insertion of the phrase “circumstances beyond that person’s control”.¹³³ Compared with the original PREPCOM draft which expressly precluded duress where the defendant knowingly exposed himself to the threat, the implicit incorporation of the doctrine of prior fault is less satisfactory particularly since in a

¹³¹ See for example, Eser, ‘Article 31,’; Scaliotti, ‘Defences before the ICC,’ 155; Ambos, ‘Other Grounds’, 1036-37.

¹³² See Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II, GA Official Records, 51st Session, Supplement No. 22A (A/51/22), New York, 1996, Articles ‘O’ and ‘P’.

¹³³ See Ambos, ‘Other Grounds’, 1038.

significant proportion of post-war and contemporary cases, duress is rejected on the basis that the defendant chose to participate in the activities of the particular military organisation. That the threat must be both serious and imminent and that the defendant must show that there were no means of escape (as the person acts “necessarily”) also reflect generally accepted principles in ICL. The ‘extension’ of the defence to allow it where the threat is directed at another person generally conforms with the common law rule although it will probably be necessary for the court to limit the condition to those who are in some kind of ‘special’ relationship with the defendant.

The inclusion of the “subjective conception of the ‘lesser evil’ principle” in the provision is perhaps the most conceptually problematic aspect of the sub-section for the reason that, as drafted, the defence “requires less than justifying ‘necessity’ would afford, and on the other side requires more than excusing ‘duress’ would be satisfied with”.¹³⁴ This wording sits uneasily with duress in its excusatory form as under both comparative and ICL the test is generally one of whether the reasonable person would have acted in the same way as the defendant even where a greater harm has been inflicted.¹³⁵ The only subjective test associated with duress is whether the accused held an honest or genuine belief that the threat was real although even this condition contains an objective element in that the defendant’s perception must have been reasonable.¹³⁶ The wording of the provision is equally difficult to reconcile with the traditional test associated with the justificatory form of necessity because the intention of the accused *alone* is an inadequate basis on which to allow the defence; necessity also involves an objective assessment, however predictive that process.

Criticisms of this provision are however based on the presumption that the sub-section does provide for the defence of necessity as a justification. Both Dinstein and Ambos accurately describe the defence encapsulated in the sub-section as one of ‘duress of circumstances’; as such, what the provision does is to recognise duress and necessity as potential *excuses* to war crimes.¹³⁷ While it is unlikely that this was the intention of the drafters, the provision as currently worded conveys a very strong message about the nature of the offences as provided under the

¹³⁴ Eser, ‘Article 31’, 552. Citing the Rome Statute, the UK’s 2004 *Manual of the Law of Armed Conflict* (OUP), unfortunately also adopts this novel wording; 16.42.

¹³⁵ Ambos describes this ‘compromise formula’ as ‘unprecedented in comparative law’; ‘Other Grounds for Excluding Criminal Responsibility,’ 1041.

¹³⁶ In the *Krupp Case*, the tribunal held “the mere fact that such a danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual”; *TWC*, Volume IX, 1438.

¹³⁷ Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 246.

ICC statute: that the gravity of the offences are such that an individual who commits any of the listed offences will be precluded from pleading that his actions were justified because necessary.

At the heart of both duress and necessity lies the difficult question concerning the extent to which the law can fairly hold an individual responsible for the choices he has made in an adverse situation. In admitting these defences, the law concedes that in some situations because the choice made by the individual was not one that was freely chosen, holding the individual criminally responsible would be unjust. The question of free choice particularly in respect of the soldier in a combat zone is an even more complex and contentious issue but it would seem that in judging the soldier ICL judges him not only for the actual transgression itself but for his conduct leading up to and including the violation. That war crimes tribunals have only in very exceptional circumstances *excused* a soldier for violations that amount war crimes sends a powerful message to the soldier about the obligations he owes to those with whom he comes into contact in conflict. ICL, it would seem, will excuse the soldier but only to the extent that he lived up to the standard of reasonableness expected of a soldier in his position. If the law is to have any guiding function and is to safeguard the most vulnerable in conflict of whom the vast majority are women and children, it is only right that a soldier is held accountable for all the choices he makes for ultimately, he is the one who has his finger on the trigger.

CHAPTER 7

CONCLUDING COMMENTS

The last months of the year 1811 saw the sovereigns of Western Europe beginning to reinforce their armies and concentrate their strength, and in 1812 these forces – millions of men, reckoning in those concerned in the transport and victualling of the army – moved eastwards towards the Russian frontiers, where the Russians, too, had been massing since 1811. On the 12th of June 1812 the forces of Western Europe crossed the frontiers of Russia, and war began: in other words, an event took place counter to all the laws of human reason and human nature. Millions of men perpetrated against one another such innumerable crimes, deceptions, treacheries, robberies, forgeries, issues of false monies, depredations, incendiarisms and murders as the annals of all the courts of justice in the world could not muster in the course of whole centuries, but which those who committed them did not at the time regard as crimes.

What brought about this extraordinary occurrence? What were its causes? The historian, with naïve assurance, tells us that behind this event lay the wrongs inflicted on the Duke of Oldenburg, the non-observance of the Continental System forbidding trade with England, the ambition of Napoleon, the firmness of Alexander, the mistakes of the diplomats, and so on.

...[W]e can understand how these and an incalculable and endless number of other reasons – the number corresponding to the infinite variety of points of view – presented themselves to men of that day; but for us of posterity, contemplating the accomplished fact in all its magnitude, and seeking to fathom its simple and terrible meaning, these explanations must appear insufficient. To us it is incomprehensible that millions of Christian men killed and tortured each other either because Napoleon was ambitious or Alexander firm, or because England's policy was astute or the Duke of Oldenburg wronged. We cannot grasp the connexion between these circumstances and the actual fact of slaughter and violence: why because the Duke was wronged thousands of men from the other end of Europe slaughtered and pillaged the inhabitants of Smolensk and Moscow, and were slaughtered by them.

... We are forced to fall back on fatalism to explain the irrational events of history (that is to say, events the intelligence of which we do not see). The more we strive to account for such events in history rationally, the more irrational incomprehensible do they become to us.

Every man lives for himself, using his freedom to attain his personal aims, and feels with his whole being that he can at any moment perform or not perform this or that action; but, so soon as he has done it, that action accomplished at a certain moment in time becomes irrevocable and belongs to history, in which it has not a free but a predestined significance.¹

¹ Leo Tolstoy, *War and Peace*, translated with an introduction by Rosemary Edmonds, Penguin, London 1978, 716-17. Although Tolstoy refers to 'fatalism' in this extract, in the rest of the work his concern is with the notion of free will and determinism.

One of the most enduring accounts of the Napoleonic War is to be found in Tolstoy's depiction of the conflict in his novel *War and Peace* in which the author strove, as had countless philosophers since Aristotle had done, "to penetrate to first causes, to understand how and why things happen as they do and not otherwise".² Tolstoy's desire to write a historical novel was in part to challenge the popular accounts of history that were presented as comprehensive series of events which could be explained by reference to the actions, decisions and commands of 'great men' and to expose the delusion that any individual can control the course of events.³ Thus, at the centre of *War and Peace* are two inter-locking themes: the challenge that determinism presents and the search for the 'truth' through alternative narratives. As historical and fictional characters interact with one another Tolstoy explores what is meant by free will and choice and, through his protagonist, seems to suggest that because all actions are in some sense fated there can be no real question of choice.⁴ The extent to which individuals are truly free to choose continued to intrigue Tolstoy because, in the end, no action can be completely dissociated from the conditions of place, time and cause.⁵ As Berlin explains:

freedom of the will is an illusion which cannot be shaken off, but, as great philosophers have said, it is an illusion nevertheless, and it derives solely from ignorance of true causes. ...the more closely we relate an act to its context, the less free the actor seems to be, the less responsible for his act, and the less disposed we are to hold him accountable or blameworthy.⁶

Yet through other characters Tolstoy maintains that individuals *do* have the capacity, albeit limited, for moving history and because they do have some measure of control over their actions and therefore the consequences of their actions and how they affect others, they can be held morally responsible for their choices. What both links and separates his characters is the idea of moral responsibility and the significance of moral choice because only then is an understanding of the causes of all things possible.

But the paradox that is also at the heart of the novel is the oscillation between historical 'truth' and literary fiction where characters from history intermingle with characters from Tolstoy's imagination and finally we are left with "a narrative exemplifying the falsity of all narratives".⁷ For what is revealed is that accounts of history are, like the novel, merely

² Isaiah Berlin, *The Hedgehog and the Fox* (Widenfeld & Nicolson: London 1953), 10.

³ *Ibid.* 19.

⁴ Gary Morson, *Hidden in Plain View: Narrative and Creative Potentials in 'War and Peace'* (Stanford UP, 1987) 230.

⁵ Tolstoy, *War and Peace*, 1432-33.

⁶ Berlin, *The Hedgehog*, 26.

⁷ Morson, *Hidden*, 131.

viewpoints of ‘a blank succession of unexplained events’⁸ that are given meaning and form by the narrator. And the power of the narrative, whether in literature, history or the law, lies not only in the conclusions that are drawn but *how* that narrative is conveyed. Tolstoy’s version of ‘the truth’, and one that offered a radically different viewpoint from that of his contemporaries, lay not in the major events but in the ‘unnoticed’ and ‘unimportant’ moments that ultimately determined the course of history. Life was about a series of choices – mostly disguised in small decisions – and it was the aggregate of those seemingly minor choices that shaped the individual and his identity.⁹ The truth lay not only in those apparent critical moments but in the ordinary moments that comprised daily life: true understanding was being able to see both the positive and negative spaces.

In this thesis I have attempted to understand why the law is the way it is, limiting the field of inquiry to legal defences in ICL. In seeking to offer a different way of seeing and understanding defences in ICL that would be more sensitive to, and conscious of, alternative views and interests, I directed my attention to understanding the rationale that lies behind the rule and to think about what and whose interests the rule was serving to protect. I began this project by considering the relationship between the liberals and realists – and focussed in particular on the immediate post-war years – exploring those ‘critical’ moments in history which were to shape the future of ICL. I juxtaposed those events that were dominated by men against the silent ‘empty’ spaces that were occupied by women to ask whether defences in ICL, as with offences, had evolved in such a way as to prefer the interests of men above women particularly since the origins of the discipline were located in IHL which scholars have exposed to be inherently discriminatory.¹⁰ I concluded that the post-war trials were dominated by narratives of harm as perceived and defined by men and hence fundamentally gendered narratives; but I also went on to suggest that war crimes trials are essentially about confrontations among the more powerful for the control over the narrative and as such what is *not* conveyed and what is *omitted* is all too often as significant as what is included. I concluded that powerful states assert ownership over war crimes trials involving their own nationals primarily because only by doing so can the state’s participation be excluded from judgment.

⁸ Berlin, *The Hedgehog*, 13.

⁹ Morson, *Hidden*, 269

¹⁰ Gardam & Charlesworth, ‘Protection of Women in Armed Conflict’, 160.

My purpose, however, has not been to dismiss such trials for if done properly, war crimes trials have the potential to offer significant rewards. Throughout the rest of the work I endeavoured to show how ICL, because it has expropriated so heavily from the liberal criminal justice paradigm, subliminally conveys core liberal values that are imbedded in the law and in legal defences. But because *how* those normative values are conveyed through the law is as relevant as the final decision itself, that the ICL narrative does not conceal any bias and thereby inadvertently perpetuate any gendered assumptions must be of paramount importance. This theme, which essentially involves one of competing methodologies, is one that I pick up in Chapter Two and forms the backbone of the remainder of this work since it is self-evident that ICL is primarily, if not exclusively, a product of the dominant western liberal methodologies.

If the Appeals Chamber decision in *Erdemovic* teaches us anything, it is that all legal methods have the potential to determine substance. And because method “organizes the apprehension of truth” and “determines what counts as evidence and defines what is taken as verification”¹¹ the particular methodological approach favoured by a decision-maker – as adjudicator, policymaker or scholar – has very real consequences in practice and in prompting legal reform. But methods, as K. Bartlett suggests, also shape substance through the hidden biases they contain;¹² so, for example, because the traditional approach to identifying customary international law necessarily favours the maintenance of the *status quo* this serves to reinforce existing power structures but by contrast because the modern approach is far more amenable to assimilating different viewpoints and interests it is an approach that is more likely to recognise new rights and obligations.¹³ The law, as with history, has evolved as a consequence of positive choices – both made and avoided – and as a consequence of ‘critical’ and ‘ordinary’ choices although none, if Tolstoy is right, is any less significant than another. But, as I argued, these choices have largely been dominated by male voices that reflect men’s interests, priorities and perspectives. Throughout this project I have attempted to ask the ‘woman question’¹⁴ and to discover whether any rule conceals a bias that disadvantages women particularly since ICL, like its counter-part the criminal law, claims to be gender-neutral. Before turning my attention to a number of specific defences in ICL, I first considered some of the more recent theoretical debates that have engaged the

¹¹ Catharine MacKinnon, ‘Feminism, Marxism, Method, and the State: An Agenda for Theory,’ 7 *Signs* (1983) 515, 527.

¹² Katharine Bartlett, ‘Feminist Legal Methods,’ 103 *Harvard Law Review* (1989) 829, 845.

¹³ This does not mean that a modern approach to custom in international law is always the ‘preferable’ option for that would be to ignore the substance of the emerging rule being claimed.

¹⁴ Bartlett, ‘Feminist Legal Methods,’ 831.

criminal law community given ICL's willingness to readily expropriate from the western liberal criminal justice paradigm.

In Chapter Three I suggested that liberal theory's commitment to the individuation of justice and with it its emphasis on the 'choice theory' and a predilection for distinguishing between the private and public has been expropriated into the domain of ICL.¹⁵ 'Choice theory' sits comfortably within liberal theory's conception of the criminal law because the state's authority to punish its citizens is thereby confined only to situations in which the individual has *chosen* to violate the law which also accounts for the criminal law's traditional resistance to judge a defendant by reference to his character or beliefs. But choice theory runs into significant problems because in focussing on choice, a necessary pre-requisite to blame, the criminal law must 'separate' the defendant from his context and in doing so it faces, and needs to account for, the all-prevalent notion of determinism. Scholars who defend compatibilism¹⁶ concede that a definitive answer to whether responsibility is consistent with determinism is impossible, but they nonetheless maintain that an individual can be held responsible when he acts intentionally by either complying with or breaching an accepted moral or legal obligation to the extent that he is capable of grasping and of being guided by *reason* in the context.¹⁷

For ICL these challenges are even more acutely felt because the condition of conflict creates an environment in which the notion of free will and choice is that much more suppressed: soldiers are trained to operate in groups and to follow orders while violence is itself usually – though not exclusively – associated with a group component. But although conflict might significantly inhibit free will, and the choices faced by an individual be that much more hard, what also needs to be borne in mind, I argued, is that the consequences of those choices are far more likely to be catastrophic in war than in peace time. Defences might be viewed as alternative narratives introduced by the defendant to explain and to offer reasons for why he made the choice he did and why he should not be punished for having made that choice: justifications exculpate because the defendant has 'chosen' the socially preferable option

¹⁵ Although both these characteristics incorporate a gendered component, as neither was directly relevant to my central argument, I have only touched upon them in brief.

¹⁶ According to Morse, 'compatibilism' or 'soft determinism' concedes that determinism is probably true but that responsibility is still possible in a determined universe; Stephen Morse, 'Reason, Results and Criminal Responsibility,' (2004) *University of Illinois Law Review*, 363, 380.

¹⁷ *Ibid.*, 441. Strawson makes the point that, "when it comes to questions of responsibility, we tend to feel that we are somehow responsible for the way we are. Even more importantly, perhaps, we tend to feel that our explicit self-conscious awareness of ourselves as agents who are able to deliberate about what to do, in situations of choice, suffices to constitute us as morally responsible free agents in the strongest sense, whatever the conclusion of the Basic Argument"; G. Strawson, 'The Impossibility of Moral Responsibility,' (1994) *75 Philosophical Studies* 5, 16.

while excuses exculpate because, under the circumstances, the defendant claims he had no *real* choice.¹⁸ Nonetheless, as I argued in Chapter Six, although choice is a necessary condition of liability, it serves as an insufficient explanation because even the defendant with no real choice is expected to meet a certain normative standard of behaviour. Judgments as to responsibility and blame involve assessing the defendant's conduct by reference to the standard as defined by the reasonable person – or soldier – and to that extent the law *is* concerned with the defendant's character for what is being evaluated is his character traits and judgment as manifested in his conduct against society's normative expectations. And, as the jurisprudence of war crimes trials clearly indicates, different participants in conflict are subject to different normative expectations that are very much dictated by the role they assume in a conflict situation; an officer who seeks to rely on a legal defence, it would seem, *is* expected to satisfy a higher standard of conduct than his subordinates.

As I examined individual defences through Chapters Four to Six, I considered in greater depth some of the more nebulous concepts that litter ICL including, for example, reasonableness, proportionality, and necessity with the aim of assessing the extent to which each conceals assumptions that perpetuate gendered preferences. Most defences in ICL are contingent on defendant having to satisfy a 'reasonableness' standard and although common law lawyers continue to divide on whether the requirement is more appropriately assessed by reference to a subjective or objective standard,¹⁹ the case law, I concluded, indicates that tribunals have in practice been prepared to apply what V. Nourse has described as a 'hybrid' standard that takes into account both objective and subjective considerations in the process of judgment. In ICL what exactly is meant by 'reasonableness' is, however, further complicated by the expectations society has of the 'reasonable soldier' in conflict. But if the reasonableness standard is in fact merely a legal device that creates space for ordinary moral reasoning allowing the decision-maker to consider the facts of the *specific* rather than the *usual* case,²⁰ what is really at issue are the assumptions that are made by the adjudicator about the defendant's relationship with those whom he comes into contact and about his role and responsibilities in a given environment. And it is these assumptions that are most likely to import an indirect gender bias.

¹⁸ On this analysis, mistake of fact is simply about the absence of the requisite cognitive capacity and should therefore be treated separately.

¹⁹ And of course feminist scholars have revealed how despite the adoption of the 'reasonable person' test, gender and race bias continues to characterise the criminal law.

²⁰ H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1997) 132-3.

It would seem perfectly natural were military prosecutors and adjudicators to accord greater weight to such facts as a soldier's training and his inclination to prioritise the interests and safety of himself and his colleagues in securing the success of his military mission when assessing whether or not the defendant's conduct was reasonable in the circumstances;²¹ likewise, it is equally likely that the adjudicator in an international tribunal, with a predisposition to prioritise the normative function of the law, would place greater emphasis on the principle of distinction and the soldier's obligation to take precautions during hostilities in determining whether the defendant's conduct was reasonable in the circumstances. I am not, of course, suggesting that decision-makers are incapable of fair judgment but merely pointing out that the emphasis that each may place on the relevant factual considerations in coming to grips with concepts like reasonableness, proportionality, excessive, necessity and incidental is likely to be coloured by a specific viewpoint that already makes assumptions about the relations between individuals in conflict and about the relative value of lives.

On first appraisal, defences in ICL seem to be concerned solely with judging the individual who has violated the law; nevertheless, on closer scrutiny defences appear to also provide an important mechanism through which the state reinforces specific institutional interests in the process of governing the relationship between citizens as well as helping to define the space between the individual and the state. In Chapters Four to Six I argued that defences in ICL, as with defences in the criminal law, play a vital role in legitimating, redefining and endorsing the state's normative authority and integrity because a liberal state that denies its citizen the right to defend himself when he has no other choice or does not permit him to violate a rule for the purpose of avoiding a significantly worse fate, or which criminalises those who act without culpability comes close to punishing the innocent. Yet at the same time liberal criminal law cannot concede too much because, particularly where justifications are concerned, it risks conveying the impression that the law will tolerate the rule of the strong over the weak. In attempting to reconcile these positions the law admits a legal defence but controls its applicability by insisting on restrictive conditions; nonetheless, through this process what 'disappears' from view is the state itself and its failure to meet its responsibilities is re-defined in the criminal law in the form of a defence. Defences, I finally argued, serve one further function insofar as they subliminally convey and advance a number of core liberal values including the prohibition on self-exemption and the maintenance of the rule of law and because each contains elements that defer to majoritarian

²¹ See for example comment on the killing of women and children in Karbala, Iraq in March 2003 by US military forces; Phillip Carter, 'Why the Recent Civilian Shootings Near Karbala, While Tragic, Were Probably Lawful,' http://writ.news.findlaw.com/commentary/20030405_carter.html

rule defences indirectly transmit to individuals the importance of being both responsible *and* good citizens.

If the purpose of the law is simply to deter certain behaviour – whether in peace time or in conflict – defences would make little sense for the optimum form of deterrence would be for the law to offer no defence. Yet defences form an integral aspect of the general part in both the criminal law and ICL and function to ensure that justice is done because in some circumstances it would simply be wrong to hold the individual criminally responsible even when he has satisfied the definition of the offence in question. Defences therefore occupy a space that allows the criminal law, and likewise ICL, to compensate for its inadequacies by permitting the inclusion of moral and political considerations into the process of judgment. But while defences serve to delineate society's moral boundaries, because war crimes generally define conduct that transcends the boundaries of morally acceptable behaviour in the midst of violence, it would seem that a defence would serve to exculpate the individual only in very exceptional circumstances. So even had Erdemovic been entitled to plead duress in principle, as Judge Cassese convincingly argued, his participation in the killings in Srebrenica could not have been excused because the gravity of the offence far eclipsed the moral parameters of excusable conduct.

When I initially undertook this project, I strongly suspected that any gender bias in ICL defences would manifest itself through the application of the rule rather than in the defence itself; I was however mistaken. Of the defences that were considered in some depth, that belligerent reprisals against a civilian population and objects indispensable to the survival of a civilian population, remains a legitimate defence in ICL is disturbing. The moral arguments against such reprisals have been aired fully and far more eloquently by others so I shall not attempt to retrace those arguments. Nonetheless, the case that has not been made before is that reprisals against a civilian population that are not proscribed under the Geneva Conventions are measures that involve violence that disproportionately targets women and as such are an unacceptable face of ICL. That international law legitimates “the use of violence by accepting it as an inevitable aspect of international relations”²² should cause all lawyers concern; but that *international criminal law* should tolerate and allow a defendant to plead that no wrong has been committed when force has been used that disproportionately targets women on the basis that the conditions of lawful reprisals have been satisfied, and the state has sanctioned the use of such violence is simply shameful. This is to treat violence

²² Hilary Charlesworth, 'Feminist Methods in International Law,' 394.

that disproportionately injures women as a legitimate means of attaining a necessary objective as defined by men.

I conclude on a note that I suspect will leave the reader feeling dissatisfied for I offer no grand theory nor an authoritative conclusion. I do so deliberately for three reasons. On reflection, I am unconvinced that a single theory that might explain defences in ICL is possible, let alone desirable. Second, I view this entire project as merely another narrative to add to the plethora of narratives that will *begin* to tell the ICL story. But finally, my aim is to start a conversation which I believe is best facilitated not by offering a definitive conclusion but by posing a series of questions and provocative comments.

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