

DEFENSIVE FORCE UNDER THE *ROME STATUTE*

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[It seems extremely incongruous that genocide, crimes against humanity and war crimes could ever be justified or excused by 'defensive force' — self-defence, defence of others and defence of property. Nonetheless, art 31(1)(c) of the Rome Statute of the International Criminal Court codifies defensive force as a ground for excluding criminal responsibility. This provision was controversial and extremely difficult to negotiate at the Rome Conference of 1998, largely due to the conceptual differences that exist in respect of criminal defences between the various domestic legal systems of the world. This paper analyses the drafting history and wording of art 31(1)(c) in order to clarify the precise scope of defensive force under the Rome Statute. It then seeks to ascertain the applicability of the provision to genocide, crimes against humanity and war crimes, and to thereby explore the nature of these crimes and the intended prosecutorial strategy of the International Criminal Court.]

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I INTRODUCTION

The *Rome Statute of the International Criminal Court*,¹ which opened for signature on 17 July 1998 at the Rome Diplomatic Conference after years of painstaking preparatory negotiations, represents a major breakthrough in the codification and enforcement of international criminal law. It creates a criminal legal order applicable to all human beings, coupled with an impartial international criminal jurisdiction over four categories of crime: genocide, crimes against humanity, war crimes and aggression. The adoption of the *Rome Statute* marks the end of a historical process that commenced after World War I, as well as the beginning of a new phase of international justice, in which the international community no longer tolerates impunity for perpetrators of these heinous crimes.²

The preamble to the *Rome Statute* describes the crimes within the jurisdiction of the International Criminal Court ('ICC') as 'unimaginable atrocities that deeply shock the conscience of humanity',³ so serious that they represent a 'concern to the international community as a whole'.⁴ The notion of 'defences' to these crimes inevitably evokes certain emotional reservations. Could there ever be an excuse for genocide — a justification for a crime against humanity? The instinctive answer is, of course, no. From a legal perspective however, these crimes cannot be exempted from the general principles of criminal law that apply in domestic jurisdictions to 'normal' crimes. These principles provide the fundamental framework within which the criminal responsibility of a defendant may be determined. Central to these general principles of criminal law is the notion that certain criminal defences may justify or excuse conduct that would otherwise constitute a criminal offence.⁵

Accordingly, art 31 of the *Rome Statute* codifies four substantive grounds for excluding criminal responsibility: mental disease, intoxication, defensive force, and duress or necessity.⁶ In addition, art 32 codifies mistake of fact and mistake of law, while art 33 codifies a limited defence of superior orders. The ICC also has the discretion under art 31(3) to consider other grounds for excluding criminal responsibility, where such grounds are derived from applicable law as

¹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('*Rome Statute*').

² See Kofi Annan, 'Ceremony for the Opening of Signature of the Treaty on the Establishment of an International Criminal Court' (Speech delivered at Il Campidoglio, Rome, Italy, 18 July 1998) as reproduced in M Cherif Bassiouni (ed), *The Statute of the International Criminal Court: A Documentary History* (1998) xiii, xiii.

³ *Rome Statute*, above n 1, preamble.

⁴ *Ibid.*

⁵ Albin Eser, "'Defences' in War Crime Trials' in Yoram Dinstein and Mala Tabory (eds), *War Crimes in International Law* (1996) 251, 253.

⁶ *Rome Statute*, above n 1, art 31.

set forth in art 21.⁷ As the first comprehensive codification of defences in international criminal law, this legislative framework represents a significant achievement. However, the unsystematic incorporation of rules from various national systems, which often overlap or contradict, has detracted from the coherence of these provisions.

Article 31(1)(c) recognises reasonable and proportionate self-defence, defence of others, and defence of property against an imminent and unlawful use of force as grounds for excluding criminal responsibility. This article will refer to the general principles underlying art 31(1)(c) as ‘defensive force’. The inclusion of this provision in the *Rome Statute* reflects a fundamental norm in civil society: that the use of defensive force is a legitimate expression of individual autonomy and sovereignty. If an unlawful attack compromises an individual’s autonomy, then that individual has the right to expel the intruder and restore the integrity of his or her domain.⁸ Moreover, the provision offers necessary protection to those persons who act reasonably and proportionately to defend other persons and property against unlawful invasions, thereby upholding the legal order or keeping the peace.

A closer examination of art 31(1)(c), however, reveals a vast array of complex legal technicalities and controversial moral and political concessions — a product of the ‘spirit of compromise’ of the Rome Conference. This article analyses these issues and thereby attempts to clarify the precise contours of defensive force under the *Rome Statute*. Part II examines the notion of defensive force in international criminal law and traces the history of art 31(1)(c), focusing particularly on the points of contention at the Rome Conference. Part III describes and critically analyses the elements of art 31(1)(c), while Part IV reviews the definitions of genocide, crimes against humanity and war crimes in order to ascertain the applicability of art 31(1)(c) in respect of each category of crime. In doing so, this article elucidates the deplorable nature of these crimes and considers the corresponding prosecutorial strategy of the ICC.

II THE ROAD TO ART 31(1)(C): CONTROVERSY AND COMPROMISE

Defensive force is a complex concept that encompasses self-defence, defence of others and defence of property. The primary component of defensive force — the right of self-defence — exists both on a ‘macro-state level’ and a ‘micro-individual level’. As Deane J of the High Court of Australia stated in *Zecevic v Department of Public Prosecutions (Vic)*,⁹ the right of self-defence sounds as readily in the voice of the schoolchild who protests that he or she was simply defending himself or herself from the attack of another child as it does in that of

⁷ Article 21(1) provides that the ICC shall apply: firstly, the ‘[*Rome*] Statute, Elements of Crimes and its Rules of Procedure and Evidence’; secondly, ‘where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict’; and finally, ‘general principles of law derived by the Court from national laws of legal systems of the world ...’. See Report of the Preparatory Commission for the International Criminal Court, *Finalized Draft Text of the Rules of Procedure and Evidence*, UN Doc PCNICC/2001/1/Add.1 (2 November 2000); Report of the Preparatory Commission for the International Criminal Court, *Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2001/1/Add.2 (2 November 2000) (‘*Elements of Crimes*’).

⁸ George Fletcher, *Rethinking Criminal Law* (1978) 860.

⁹ (1987) 162 CLR 645 (‘*Zecevic*’).

the sovereign state that claims it was merely protecting its citizens or territory against the aggression of another state.¹⁰

On the macro level, ‘self-defence’ refers to the international law notion of the collective defence of a state attacked by another state. Article 51 of the *Charter of the United Nations* provides that ‘nothing in the present *Charter* shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations’.

Traditionally, public international law attributes the acts of individuals acting as state organs exclusively to the state. However, as the Nuremberg Tribunal observed, crimes in international law are committed by individuals, not by abstract entities, and ‘only by punishing individuals who commit such crimes can the provisions of international law be enforced’.¹¹ Since international law can punish certain individuals — usually political and military leaders acting in their official capacity — for the acts of their state, it follows that the principle of collective self-defence enshrined in art 51 can also be used in a derivative fashion to exclude the individual responsibility of these actors.¹²

It is important to distinguish between this macro level international law notion of collective self-defence on the one hand, and the micro level criminal law notion of individual self-defence on the other. In the criminal law context, the notion of self-defence, together with the defence of other persons and property, relieves an individual of criminal responsibility for a violent act committed against another human being.¹³ Article 31(1)(c) of the *Rome Statute* concerns only this concept of individual defensive force. The rights of an individual, derived from the principle of collective self-defence, do not affect his or her liability under the *Rome Statute*, and participation in a collective defensive

¹⁰ Ibid 675.

¹¹ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946* (1947) vol 22, 466.

¹² For example, in 1954 the International Law Commission (‘ILC’), when dealing with crimes against peace for which individuals could be punished, recognised self-defence as an exception to the prohibition against the use of force by states: see ILC, *Draft Code of Offences against the Peace and Security of Mankind* art 2(1), as contained in *Report of the International Law Commission Covering the Work of Its Sixth Session, 3 June – 28 July 1954*, UN Doc A/2693 (1954), as reproduced in *Yearbook of the International Law Commission* (1954) vol II, 151. See also Massimo Scaliotti, ‘Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility — Part 1’ (2001) 1 *International Criminal Law Review* 111, 159; Eser, “‘Defences’ in War Crime Trials’, above n 5, 263.

¹³ See ILC, *Draft Code of Crimes against the Peace and Security of Mankind* art 14, as contained in *Report of the International Law Commission on the Work of its 48th Session, 6 May – 26 July 1996*, 73–80, UN Doc A/51/10 (1996) (‘1996 Draft Code’).

operation does not exclude criminal responsibility under the *Statute*. Individual defendants must still behave within the limits of art 31(1)(c).¹⁴

Prior to the enactment of the *Rome Statute*, there was no detailed codification of the individual right of defensive force in international criminal law. This deficiency was one symptom of the broader failure to develop the ‘general part’ of international criminal law.¹⁵ For example, early draft codes of the International Law Commission (‘ILC’), primarily developed by public international lawyers, contained virtually no rules of criminal law and completely failed to consider criminal defences.¹⁶ Even the ILC’s 1994 *Draft Statute for a Permanent International Criminal Court* included only one short provision dealing with ‘Applicable Law’.¹⁷ In light of this inadequacy, a group of criminal lawyers developed an alternative draft statute during 1995 and 1996, which contained comprehensive principles of criminal law, including criminal defences.¹⁸

Many of these proposals found their way into the 1996 *Report of the Preparatory Committee on the Establishment of an International Criminal Court*.¹⁹ Further sessions of the Committee led to the final draft of art 31,²⁰

¹⁴ This is made explicit by the last sentence of art 31(1)(c): ‘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 subparagraph’. See also Committee of the Whole Working Group on General Principles of Criminal Law, *Report of the Working Group on General Principles of Criminal Law*, 2 (fn 3), UN Doc A/CONF.183/C.1/WGGP/L.4/Add.3 (7 July 1998) (‘*Report of the Working Group Addendum 3*’); Committee of the Whole Working Group on General Principles of Criminal Law, *Report of the Working Group on General Principles of Criminal Law*, 4–5 (fn 12), UN Doc A/CONF.183/C.1/WGGP/L.4/Add.1 (29 June 1998); *Prosecutor v Kordić and Čerkez (Trial Chamber Judgment)*, Case No IT-95-14/2-T (26 February 2001) [452]: ‘military operations in self-defence do not provide a justification for serious violations of international humanitarian law’.

¹⁵ Significant international instruments that failed to include detailed rules of criminal law and criminal defences include: *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, opened for signature 8 August 1945, 82 UNTS 280 (entered into force 8 August 1945); *Statute of the International Criminal Tribunal for the Former Yugoslavia*, annexed to *Resolution 827*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993) (‘*Statute of the ICTY*’); *Statute of the International Criminal Tribunal for Rwanda*, annexed to *Resolution 955*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

¹⁶ See ILC, *Draft Code of Crimes against the Peace and Security of Mankind*, as contained in *Report of the International Law Commission on the Work of Its 43rd Session, 29 April – 19 July 1991*, 198, UN Doc A/46/10 (10 September 1991). See also Albin Eser, ‘The Need for a General Part’ in M Cherif Bassiouni (ed), *Commentaries on the International Law Commission’s 1991 Draft Code of Crimes against the Peace and Security of Mankind* (1993) 43.

¹⁷ ILC, *Draft Statute for an International Criminal Court* art 33, as contained in *Report of the International Law Commission on the Work of Its 46th Session, 2 May – 22 July 1994*, 23, UN Doc A/49/10 (1 September 1994).

¹⁸ For a discussion of this alternative draft statute see Kai Ambos, ‘Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint’ (1996) 7 *European Journal of International Law* 519, 520–1.

¹⁹ See Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume II (Compilation of Proposals)*, UN GAOR, 51st sess, Supp 22A, pt 3B, 94–104 (arts K–S), UN Doc A/51/22 (13 September 1996).

which was subsequently submitted to the 1998 Rome Conference.²¹ However, the sheer number of parentheses and footnotes present in this draft provision illustrated the enormity of the negotiating task that remained.²² Indeed, according to the Chairman of the Working Group on General Principles of Criminal Law, art 31 was ‘perhaps the most difficult one to negotiate ... because of the conceptual differences which were found to exist between various legal systems’.²³ The precise elements and wording of art 31 remained highly controversial until the final framing of the provision and, inevitably, the final version involved a number of sensitive compromises.

One such compromise concerned the role of the theory of justification and excuse. In all national jurisdictions the general principles of criminal law include substantive grounds excluding criminal responsibility, but different legal systems classify these grounds in different ways. Most civil law systems make a fundamental distinction between two categories: justifications and excuses. This classification provides the theoretical framework within which all subsequent analysis occurs. In contrast, most common law systems do not make a systematic distinction between justifications and excuses. Although the two categories are sometimes used in judicial and statutory formulations of defences throughout the common law world,²⁴ the rationale for the choice between them is not always apparent and, occasionally, the terms are even used interchangeably.²⁵

Claims of justification acknowledge individual responsibility for the act, but contend that it was done in circumstances that make it permissible in the eyes of society. Society determines whether such conduct is justifiable primarily on the basis of social utility. If the defendant’s conduct causes less harm than the harm which he or she thereby avoids, the conduct is justifiable.²⁶ Claims of excuse, on the other hand, concede that the act is wrongful, but seek to avoid the attribution of responsibility to the actor. In such cases, although the harm caused by the defendant’s act is greater than that which it avoids, some characteristic of the defendant makes it inappropriate for society to punish him or her.

Whatever the philosophical merits of the theory of justification and excuse, customary international law has hitherto drawn no practical distinction between the two categories of defence.²⁷ Delegates at the Rome Conference, anxious to

²⁰ Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at Its Session Held from 1 to 12 December 1997*, 17 (art L(1)(c)), UN Doc A/AC.249/1997/L.9/Rev.1 (18 December 1997).

²¹ Preparatory Committee on the Establishment of an International Criminal Court, *Draft Statute for the International Criminal Court*, as contained in *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 58 (art 31), UN Doc A/CONF.183/2/Add.1 (14 April 1998) (*‘1998 Draft Statute’*).

²² Per Saland, ‘International Criminal Law Principles’ in Roy Lee (ed), *The International Criminal Court: The Making of the Rome Statute — Issues, Negotiations, Results* (1999) 189, 207.

²³ *Ibid* 206.

²⁴ See, eg, *Perka v The Queen* [1984] 2 SCR 232; *Model Penal Code* (American Law Institute 1962).

²⁵ See, eg, Zecevic (1987) 162 CLR 645; Don Stuart, *Canadian Criminal Law: A Treatise* (2nd ed, 1987) 391.

²⁶ Fletcher, *Rethinking Criminal Law*, above n 8, 759.

²⁷ Antonio Cassese, ‘Justifications and Excuses in International Criminal Law’ in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) vol 1, 951, 953.

avoid a protracted philosophical debate about justifications and excuses, agreed to avoid any reference to the theory in the *Rome Statute*.²⁸ In accordance with the approach of the drafters, this paper will not rely upon the theoretical distinction between justifications and excuses in the analysis of art 31(1)(c), although it will refer to the theory where such reference provides analytical assistance.

In addition to rejecting the theory of justification and excuse, delegates at the Rome Conference made a fundamental choice regarding the conceptual classification of offences and defences. The *Rome Statute* does not treat the grounds for excluding criminal responsibility, or the absence thereof, as elements of the offences.²⁹ Instead, the *Rome Statute* requires a distinction between the elements of the offence and the grounds for excluding criminal responsibility, such that the defendant may commit an offence even though he or she has a valid defence. Commission of the offence is distinguished in this way from criminal responsibility for the offence.³⁰

III THE ELEMENTS OF ART 31(1)(C): A GENERAL ANALYSIS

Article 31(1)(c) recognises proportionate self-defence, defence of others and defence of property against an imminent and unlawful use of force. The provision provides:

In addition to other grounds for excluding criminal responsibility provided for in this *Statute*, a person shall not be criminally responsible if, at the time of that person's conduct:

...

- (c) 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. 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 subparagraph.

Article 31(1)(c) has three basic requirements. Firstly, there must be a certain danger to a person or property from an imminent and unlawful use of force. Secondly, the defendant must act reasonably and proportionately against this use of force. Thirdly, in addition to the physical elements of art 31(1)(c), the provision has an implicit mental element: the defendant must act with the purpose of repelling the attack.

Furthermore, in accordance with art 21(1)(b), claims of defensive force must be considered in light of the applicable treaties and principles of international law, including the established principles of the international law of armed

²⁸ Scaliotti, above n 12, 118.

²⁹ See *Elements of Crimes*, above n 7, General Introduction [5].

³⁰ Cf *Criminal Code Act 1995* (Cth) ss 3.1, 3.2.

conflict. For example, if a protected person under the *Geneva Conventions*³¹ — such as a civilian — unlawfully uses force, that person may lose his or her status as a protected person.³² In such cases resort to art 31 by the defendant would be unnecessary, as the case-in-chief would lack an essential element. Claims of defensive force must also be consistent with internationally recognised human rights, as required by art 21(3).³³ It is important to bear this broader context in mind when considering the elements of art 31(1)(c).

A *The Triggering Condition: An Imminent and Unlawful Use of Force Producing a Danger to a Person or Property*

1 *Objective or Subjective?*

One of the most controversial issues in respect of art 31(1)(c) was whether the danger should exist objectively, or whether it should suffice that the defendant ‘reasonably believed’ or even ‘genuinely believed’ that it existed. Firstly, one might read ‘acts reasonably’ as meaning ‘reacts to a perceived threat reasonably’, thereby requiring only a *genuine belief* in the existence of a threat. This is the approach taken by UK common law, which permits an acquittal even where the defendant makes a wholly unreasonable mistake as to the existence of a threat.³⁴ This interpretation, however, is not open on the words of the provision and appears not to have been seriously contemplated by delegates at the Rome Conference. It seems that delegates intended that the ICC convict individuals who make unreasonable mistakes in assessing a threat, where those mistakes lead to the commission of genocide, crimes against humanity or war crimes.³⁵

Secondly, one might interpret ‘acts reasonably’ in a broader and more inclusive sense to include perception as well as reaction: the defendant must *reasonably believe* in the existence of an imminent and unlawful danger, and must act reasonably in response to that danger. This test is objective insofar as

³¹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (collectively ‘*Geneva Conventions*’).

³² See, eg, art 51(3) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978): ‘Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities’.

³³ *Rome Statute*, above n 1, art 21(3) states: ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights’.

³⁴ See, eg, *Beckford v The Queen* [1988] AC 130; *R v Oatridge* (1992) 94 Cr App R 367. This approach is also taken in South Australia: see *Criminal Law Consolidation Act 1935* (SA) s 15, as discussed in Michael Grant, ‘Self-Defence in South Australia: A Subjective Dilemma’ (1994) 16 *Adelaide Law Review* 309. New Zealand law is to the same effect: see *R v Ranger* (1988) 4 CRNZ 6.

³⁵ An exception to this exists in extreme cases of mental illness: *Rome Statute*, above n 1, art 1(1)(a).

the defendant's fear of impending attack must be reasonable, but subjective insofar as 'reasonableness' is gauged from the defendant's own perspective. This 'reasonable belief' standard is widely accepted in common law countries. The Australian test, for example, articulated in *Zecevic*, is simply whether the defendant 'believed on reasonable grounds that it was necessary in self-defence to do what he or she did'.³⁶

Thirdly, one might adopt a strict interpretation of the provision, requiring that the imminent and unlawful danger exist *objectively*. According to this interpretation, 'acts reasonably' pertains only to the defendant's reaction, not to his or her perception of the threat. The words of the provision seem to support this approach: '[t]he person acts reasonably to defend himself or herself or another person or ... property ... against an imminent and unlawful use of force'.³⁷ If this interpretation is correct, art 31(1)(c) would not apply where the defendant is mistaken, even reasonably mistaken, as to the existence of a threat. It might be thought that such cases of 'putative' defensive force, where the defendant is mistaken as to the existence of a threat, would be governed by art 32(1): 'mistake of fact'. This article provides that '[a] mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime'.³⁸ However, the limited scope of art 32 essentially renders it useless in such cases. The provision merely states the obvious — where a mistake negates the mental elements of an offence, there is no offence to which a defence could apply; only the physical elements exist and thus there is no crime.³⁹

A defendant who mistakenly believes in the existence of a threat necessitating defensive force may still possess the requisite mental element of the offences. Under the *Rome Statute*, the grounds for excluding criminal responsibility, or the

³⁶ *Zecevic* (1987) 162 CLR 645, 651 (Mason CJ); 666 (Brennan J); 672 (Deane J); 687 (Gaudron J).

³⁷ A number of eminent international law theorists support this interpretation: see, eg, Albin Eser, 'Grounds for Excluding Criminal Responsibility' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 537, 549; Kai Ambos, 'Other Grounds for Excluding Criminal Responsibility' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, (2002) vol 1, 1003, 1032; Cassese, 'Justifications and Excuses in International Criminal Law', above n 27, 953; Antonio Cassese, *International Criminal Law* (2003) 222.

³⁸ *Rome Statute*, above n 1, art 32(2) further provides:

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.

Article 33(1) constitutes an exception to the general rule under art 32(2). It provides:

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:

...

(b) The person did not know that the order was unlawful.

³⁹ For example, in the case of rape, the prosecution must prove that the defendant knew that the victim was not consenting to the sexual intercourse. A defendant who genuinely believed that the victim was consenting lacks the mental element for rape. There is no need for the defence to resort to art 32.

absence thereof, are not treated as elements of the offences.⁴⁰ Consequently, a mistake as to the existence of a threat under art 31(1)(c) does not negate the mental element of the crime, and is therefore not covered by art 32. This is despite the fact that a mistake as to the need for defensive force has the same effect as a mistake as to the existence of a material element of the crime, because in each case the mistake motivates the defendant to commit the offence.⁴¹

If art 32 is logically superfluous, then this objective interpretation of art 31(1)(c) effectively leaves no provision for reasonable mistakes. It thus appears unclear which of the latter two interpretations of art 31(1)(c) ought to apply. An examination of the legislative history provides some insight into this dilemma. The ‘reasonable belief’ test appeared in a number of earlier drafts of art 31(1)(c),⁴² but was ultimately rejected in favour of the current provision, which was apparently intended to operate objectively. It seems that the drafters intended that art 31(1)(c) exclude defendants who commit crimes within the jurisdiction of the ICC on the basis of mistaken beliefs in the existence of threats, irrespective of the reasonableness of those beliefs.

Accordingly, it is necessary to formulate an objective test that is more stringent than the ‘reasonable belief’ model rejected at the Rome Conference, but that nonetheless provides scope for the ICC to avoid absurd results in individual cases. For example, consider a situation in which prisoner of war A draws an unloaded gun on soldier B. B then shoots A in the mistaken belief that A is about to shoot B. According to the facts later established at trial, there was no actual threat, as the gun was not loaded. However, a reasonable person in this situation, without the benefit of hindsight, would have assumed that the gun was loaded. Clearly, this scenario would satisfy a ‘reasonable belief’ test, but would it satisfy art 31(1)(c)? Many observers would agree that it should.

We can solve this problem by reconceptualising the definition of an ‘objective threat’. The notion of a ‘threat’ does not require a *predetermined* negative result. The defendant need not necessarily prove that death or grievous bodily harm was a certainty in order to justify the use of defensive force. Rather, a threat involves a *potential* negative result. If A points a gun at B, then A represents an objective threat to B’s life. It makes no difference whether or not A’s gun is loaded, provided that the circumstances are such that the gun *could* be loaded. In the same way, if A aims at B and fires a shot, A endangers B’s life despite the fact that the bullet misses, for, had A’s aim been better, the shot could have hit B. If

⁴⁰ *Elements of Crimes*, above n 7, General Introduction [5]. See also Otto Triffterer, ‘Mistake of Fact or Mistake of Law’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 555, 561–2.

⁴¹ See *Beckford v The Queen* [1988] AC 130, 144–5; Andrew Simester, ‘Mistakes in Defence’ (1992) 12 *Oxford Journal of Legal Studies* 295, 297. The Supreme Court of Canada has made a similar objection to distinguishing between elements and defences with respect to the allocation of the burden of proof: see *R v Holmes* [1988] 1 SCR 914, 963–4; *R v Whyte* [1988] 2 SCR 3, 15–16. Similarly, Glanville Williams argues that no distinction should be drawn between A who shoots his wife believing her to be a rabbit, and B who shoots his wife thinking she is a burglar about to attack: Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 138.

⁴² See, eg, *Report of the Preparatory Committee on the ICC*, above n 19, 99 (art N: Proposal 1); *1998 Draft Statute*, above n 21, 58 (art 31(1)(d)). See also M Cherif Bassiouni (ed), *The Statute of the International Criminal Court: A Documentary History* (1998) 319–20, 377.

the shot misses, it necessarily follows that the gun was not pointing at B; the gun may as well have been unloaded.

The following hypothetical scenario proves more problematic. Soldiers manning a military checkpoint are warned to look out for a red sedan carrying three terrorists. Coincidentally, a red sedan carrying three civilian males stops at the checkpoint and the soldiers order the men out of the car. The civilians misunderstand the instructions and drive off. The soldiers shoot at the back of the departing car, killing the civilians in the mistaken belief that they are the terrorists.⁴³ The case later comes before the ICC and the soldiers plead defensive force. Although the soldiers' belief may well have been reasonable, it seems that their case would nonetheless fall outside the scope of art 31(1)(c). There was no *real* threat, only three innocent men whom the soldiers mistook — albeit reasonably — to be terrorists.

Thus art 31(1)(c) requires a *real* threat, but the result is not predetermined and hindsight may reveal that it was an empty threat — for example, because the gun was not loaded or the suicide bomber was carrying a defective bomb. This approach broadens the scope for the use of defensive force in circumstances where there was not, in hindsight, a real danger, but where there was a very real potential danger. It does not, however, downgrade the test to one of 'reasonable belief'. Reasonableness is still judged by the objective standard of what a reasonable person would have believed, not what the individual defendant believed in the circumstances.

2 *Imminent*

The requirement of imminence expresses the sense of urgency inherent in situations requiring defensive force. As George Fletcher notes, 'the time for defence is now! ... Legitimate self-defence must be neither too soon nor too late'.⁴⁴ Delegates at the Rome Conference selected the requirement of an 'imminent ... use of force' ahead of three other proposals: an 'impending use of force', an 'immediate threat of force' and simply a 'use of force'.⁴⁵ The latter two phrases appear to require the actual presence of the danger, whereas the adjectives 'impending' and 'imminent' provide some scope for anticipatory defensive force. These two adjectives are essentially synonymous, meaning 'about to happen' or 'likely to happen soon'.⁴⁶

Article 31(1)(c) therefore provides some scope for anticipatory defensive force. As the Privy Council stated in *Beckford v The Queen*, 'a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the

⁴³ Similar scenarios can be found in news reports from the Iraq war: see, eg, Bradley Graham and Marian Wilkinson, 'Civilian Deaths Rock Campaign', *Sydney Morning Herald* (Sydney, Australia), 2 April 2003, 1; BBC News (UK Edition), *Checkpoint Deaths* (17 April 2003) <http://news.bbc.co.uk/1/hi/world/middle_east/2929411.stm#checkpoint> at 1 May 2005; Jamie McIntyre et al, CNN, *Iraqis Killed in US Checkpoint Shooting* (28 September 2003) <<http://www.cnn.com/2003/WORLD/meast/09/27/sprj.irq.main>> at 1 May 2005.

⁴⁴ George Fletcher, *A Crime of Self-Defense: Bernhard Goetz and the Law on Trial* (1998) 19–20.

⁴⁵ Bassiouni, *The Statute of the International Criminal Court*, above n 42, 320.

⁴⁶ A Delbridge et al (eds), *The Macquarie Dictionary* (3rd ed, 1997) 1069, 1071.

first shot'.⁴⁷ Rather, an 'imminent ... use of force' encompasses both threatened and attempted physical attacks, in addition to tangible preparations for a physical attack — such as loading a gun — provided that the attack in question is 'likely to happen soon'. Furthermore, the threat need not necessarily be new-found, but may extend to a past threat, provided that threat is ongoing. A threat will only be ongoing if there is a continuing climate of fear — a real threat of attack at any moment — that creates a sense of urgency requiring defensive action.

It is important, however, to distinguish between 'anticipatory' defensive force and 'pre-emptive' defensive force. Although these terms are sometimes used interchangeably, they have different meanings and different legal consequences. Anticipatory defensive force may be legitimate in some circumstances,⁴⁸ but a pre-emptive strike is always illegal, both in international law⁴⁹ and in most domestic legal systems. A pre-emptive strike is not based on a clear manifestation of aggression or a tangible 'use of force', but merely a prediction that the enemy is likely to engage in hostile behaviour in the future.⁵⁰ The inclusion of the word 'imminent' in art 31(1)(c) excludes the legitimacy of such attacks.

While a pre-emptive strike against a feared attack is illegal force used too soon, retaliation against a successful attack is illegal force used too late. A retaliatory attack is not a legitimate use of defensive force, but an attempt to even the score, to inflict harm because harm has been suffered in the past.⁵¹ The longer the delay between the initial aggression and the response, the more likely that the response will constitute a retaliatory attack. A delayed response may, however, constitute legitimate defensive force if the initial threat is ongoing, such that there is a real likelihood of imminent recurrence of the past violence.

The following hypothetical scenario, a slight variation of an earlier example,⁵² serves to illustrate the operation of these distinctions. Soldiers stop a motor vehicle at a military checkpoint and order the passengers out of the car. Unlike the passengers in the earlier example, these passengers are in fact terrorists, who ignore the soldiers' instructions and drive off. The soldiers shoot the back of the departing car, killing the terrorists. Assuming that the terrorists constitute an objective threat, the next question that arises is whether the threat posed by the apparent terrorists is imminent. On the one hand, the fact that they are driving away arguably negates any claim of imminence. On the other hand, the classification of the passengers as terrorists may automatically render them an ongoing threat, liable to attack soldiers at any time in the future.

The House of Lords considered a similar factual scenario in *R v Clegg*.⁵³ The defendant, a soldier, was on patrol duty in Northern Ireland. As a stolen car

⁴⁷ [1988] AC 130, 144. See also *R v Chisam* (1963) 47 Cr App R 130, which held that the law of self-defence requires an accused to have reasonably apprehended an 'imminent' attack: at 134.

⁴⁸ See generally Ronli Sifris, 'Operation Iraqi Freedom: United States v Iraq — The Legality of the War' (2003) 4 *Melbourne Journal of International Law* 521, 537–40.

⁴⁹ See, eg, Alex J Bellamy, 'International Law and the War with Iraq' (2003) 4 *Melbourne Journal of International Law* 497, 513–15.

⁵⁰ Fletcher, *A Crime of Self-Defense*, above n 44, 20.

⁵¹ *Ibid* 2.

⁵² See above Part III(A)(1).

⁵³ [1995] 1 AC 482.

approached at high speed, the defendant fired three shots at its windscreen. After the car had passed him, he fired a fourth shot into the back of the car, killing a passenger. The House of Lords accepted that the defendant fired the first three shots in self-defence, but rejected his plea of self-defence in relation to the fourth shot — as the car had passed, he was no longer in any danger. There was no suggestion in the defendant's evidence, however, that he thought that the driver was a terrorist, or that the driver might carry out terrorist offences in the future (the applicable law imposed a subjective test, requiring only that the defendant *believe* that the deceased posed an imminent threat).⁵⁴

The threat of terrorism adds a further dimension to the question of imminence. The defendant's plea of self-defence in *R v Clegg* may well have succeeded if he had believed that the deceased was a terrorist or, at the very least, his belief would have been relevant to the question of imminence.

The House of Lords had previously considered the relationship between terrorism and imminence in *Attorney-General's Reference (No 1 of 1975)*.⁵⁵ In that case, the defendant was a soldier engaged in the suppression of terrorist activities in Northern Ireland. While patrolling an area in which terrorists were believed to be active, the defendant saw the deceased and ordered him to halt. The deceased fled, whereupon the defendant fatally shot him in the belief that he was a member of the Irish Republican Army ('IRA'). At trial, evidence was presented to show that an IRA attack on the defendant's patrol was highly likely.⁵⁶ This was sufficient to demonstrate the imminence of the threat, thus the defendant was acquitted of murder on the basis of self-defence.

Although these cases do not conclusively resolve the question of imminence raised in the previous example, they nonetheless serve to illustrate the factors that may be relevant. The fact that a terrorist organisation exists does not necessarily mean that the threat it poses is imminent. The mere act of labelling a person a 'terrorist' does not automatically justify the use of defensive force against that person; rather, there must be some tangible evidence that he or she actually poses a threat and that this threat is ongoing. In the absence of such evidence, the 'terrorist' label constitutes a mere prediction of an attack, such that the use of force against that person constitutes an unlawful pre-emptive strike. Ultimately, imminence will be a question of fact to be resolved by the ICC on a case-by-case basis.

3 *Unlawful*

The defendant's right to use defensive force also depends upon the unlawfulness of the imminent attack. In some contexts, the term 'unlawful' may identify a form of culpability in addition to a form of conduct; it may require a guilty mind as well as a guilty act. In the context of art 31(1)(c), however, 'unlawful' may be taken to refer merely to conduct, requiring only a guilty act. It would be odd to deny the defence to a person who uses force in warding off the attack of an insane or intoxicated person, or a person acting under duress or pursuant to a superior order, simply because the attacker is covered by a defence.

⁵⁴ Ibid 491.

⁵⁵ [1977] AC 105.

⁵⁶ As in *R v Clegg* [1995] 1 AC 482, 491, the applicable law required only a genuine belief in the existence of a threat: *Attorney-General's Reference (No 1 of 1975)* [1977] AC 105, 135.

In many civil law systems, where the theory of justification and excuse is central to the analysis of criminal defences, an attack is deemed unlawful only if it is ‘unjustified’ in the technical legal sense. The requirement that the attack be unjustified was contained in one proposal debated in Rome, but was ultimately rejected.⁵⁷ The preferable approach is to require the attack to be objectively unlawful. This separates the wrongfulness of the act from the blameworthiness of the actor, yet avoids the terminology of justifications and excuses. Moreover, it produces a fair and logical result in cases of third party rescue.⁵⁸ If D intervenes in a fight between A and B, D need not determine which party was unjustified or blameworthy in starting the fight. Since the conduct of both A and B is objectively unlawful, D may choose which party he or she attempts to rescue.⁵⁹

A more complex question arises in cases of provoked attacks. Courts are usually reluctant to accept a plea of self-defence where the defendant launched the initial attack. This does not constitute a specific exception to the use of defensive force, but simply an application of the broader requirement of an unlawful threat.⁶⁰ If A attacks B, and B responds by attacking A in self-defence, it necessarily follows that B’s attack is not objectively unlawful. There is no right to exercise self-defence against lawful self-defence. However, if A clearly withdraws from the encounter, such that he no longer poses an imminent threat to B, and B renews the struggle by attacking A, then B’s conduct is objectively unlawful. Similarly, if B’s response is not reasonably proportionate to A’s initial attack, then B’s attack is objectively unlawful and A may be covered by art 31(1)(c).

4 *Danger to Oneself, Another Person or Property*

Article 31(1)(c) permits the defendant to use force in self-defence, defence of another and defence of property. Since the provision does not require a personal relationship between the defendant and the person or property that he or she defends, the right of defensive force extends to the protection of strangers and

⁵⁷ Any formal assessment of the justified or unjustified nature of an attack necessitates the classification of each defence as either a justification or an excuse, a classification that the drafters of the *Rome Statute* deliberately avoided. This classification would prove particularly difficult in cases of duress or necessity, given the hybrid nature of art 31(1)(d). This provision combines duress, which is generally classified as an excuse, and necessity, which can be classified as either a justification or an excuse. It also adopts the ‘choice of evils’ approach traditionally associated with justifications.

⁵⁸ See Miriam Gur-Ayre, ‘Should the Criminal Law Distinguish between Necessity as a Justification and Necessity as an Excuse?’ (1986) 102 *Law Quarterly Review* 71, 84–8.

⁵⁹ In contrast, some proponents of a systematic distinction between justifications and excuses argue that D is entitled to intervene only to assist the justified party: see, eg, Fletcher, *Rethinking Criminal Law*, above n 8, 766–7.

⁶⁰ An earlier draft of art 31 included a footnote explicitly stating that art 31(1)(c) should not encompass cases of provoked attacks: see *Report of the Working Group Addendum 3*, above n 14, 2 (fn 5). Ultimately, however, delegates at the Rome Conference decided not to insert any express requirement to this effect. Instead, it was agreed to leave this issue to be considered under the general question of unlawfulness, in conjunction with art 31(2), which provides that the ICC will determine the applicability of the grounds for excluding criminal responsibility to the case before it: see *1998 Draft Statute*, above n 21, 58 (art 31(1)(c)). See also Scaliotti, above n 12, 171.

their property.⁶¹ Furthermore, the provision does not specify the magnitude of force or the nature of the ‘danger’ required to trigger its operation. In view of the gravity of the crimes under consideration, a threat of death or serious bodily harm to the person, or substantial or complete destruction of property, will presumably be required to trigger art 31(1)(c). In any event, the requirements of reasonableness and proportionality will exclude the use of defensive force in response to minor threats.

The inclusion of the defence of property in art 31 was extremely controversial.⁶² Some delegates felt that the defence of property should be included without qualification (provided that the principle of proportionality applied), whereas others were adamantly opposed to its inclusion under any circumstances. The United States and Israel were the strongest proponents of the inclusion of the property defence. The US even proposed equal treatment of defence of life and physical integrity, on the one hand, and property on the other,⁶³ but this proposal attracted scant support from other delegates. This stalemate became the ‘cliff-hanger’ of the Working Group negotiations.⁶⁴

The staunch opposition of many delegates to the inclusion of the defence of property is understandable. Society ascribes different moral and ethical values to life and physical integrity on the one hand, and property on the other, justifying a clear distinction in the legal protection afforded to these interests.⁶⁵ Although most domestic systems recognise the legitimacy of the protection of property, domestic legal concepts should not be automatically imported into the *Rome Statute* — rather they should first be carefully assessed to determine if they are appropriate.⁶⁶ International criminal law is intended to be the ultimate normative stage in the protection of human rights. It is, therefore, strongly arguable that it should not sanction the sacrifice of human life solely for the protection of property.

In view of these considerations, delegates made numerous attempts to narrow the scope of the ‘property’ defence, but no single qualifier was satisfactory to all. Eventually, the defence was restricted to property ‘essential for the survival of the person or another person’ or ‘essential for accomplishing a military mission’.⁶⁷ Notwithstanding these limitations, many delegates considered it

⁶¹ While some of the older common law authorities suggested that force could not be used to defend others unless they stood in a special relationship to their protector, such as that of spouse, child, parent, master or servant, this requirement has since been abolished: see *R v Duffy* [1967] QB 63, 67–8. See also *Model Penal Code* §§ 3.05–3.06 (American Law Institute 1962).

⁶² See, eg, Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court: Volume I (Proceedings of the Preparatory Committee during March – April and August 1996)*, UN GAOR, 51st sess, Supp 22, 46–7, UN Doc A/51/22 (13 September 1996).

⁶³ Committee of the Whole Working Group on General Principles of Criminal Law, *Proposal by the United States of America for Single Provision Covering Issues Currently Governed by Articles 31, 32, 33 and 34*, 1 (art 1(b)), UN Doc A/CONF.183/C.1/WGGP/L.2 (16 June 1998).

⁶⁴ See Saland, above n 22, 207–8.

⁶⁵ Ambos, ‘Other Grounds for Excluding Criminal Responsibility’, above n 37, 1033.

⁶⁶ Scaliotti, above n 12, 169.

⁶⁷ *Rome Statute*, above n 1, art 31(1)(c). In earlier drafts, this clause conceived military necessity as a separate ground excluding criminal responsibility: see *Report of the Preparatory Committee on the ICC*, above n 19, 103 (art R).

inconceivable that the protection of property could ever be a defence to genocide and crimes against humanity. Consequently, the property defence was restricted to cases of war crimes. This constitutes a dubious drafting decision, which runs contrary to the notion of a coherent set of general principles applicable to all crimes within the jurisdiction of the ICC.⁶⁸ Nonetheless, delegates were willing to overlook this problem in the ‘spirit of compromise’ present at the Rome Conference.

Most commentators accept the inclusion of the protection of property ‘essential for the survival of the person or another person’,⁶⁹ as it relates to the defence of people. The precise scope of this category turns on the interpretation of ‘survival’. If the ICC construes this word narrowly, in terms of the bare physical survival of persons, it would presumably be limited to homes, communal shelters, hospitals and similar forms of property. Alternatively, if the ICC adopts a broad interpretation of ‘survival’, also encompassing the spiritual and cultural survival of persons, this category could potentially extend to religious buildings and cultural monuments such as the Wailing Wall or the Dome of the Rock. Arguably, both interpretations of the term ‘survival’ are open on the wording of the provision.

While the inclusion of the first category of property has been relatively uncontroversial, the inclusion of the second category of property — that which is ‘essential for accomplishing a military mission’⁷⁰ — has provoked sharp criticism from some quarters. William Schabas notes that, in the opinion of Eric David, this inclusion jeopardises the philosophy underlying international humanitarian law by allowing military necessities to prevail over necessities of humankind.⁷¹ David calls the exception ‘a Pandora’s box that is rigorously incompatible with the law of armed conflict’,⁷² and even contends that the provision constitutes a violation of *jus cogens* and is consequently null and void pursuant to the *Vienna Convention on the Law of Treaties*.⁷³

Professor Antonio Cassese is also highly critical of the property defence, arguing that it is ‘manifestly outside *lex lata*’.⁷⁴ According to Cassese, a norm of international humanitarian law has effectively been created, via international criminal law, whereby a servicemember may lawfully commit war crimes ‘for the purpose of defending any “property essential for accomplishing a military mission” against an imminent and unlawful use of force’.⁷⁵ Until now, such force ‘against the “property” at issue has not entitled the military to commit war

⁶⁸ Saland, above n 22, 208.

⁶⁹ *Rome Statute*, above n 1, art 31(1)(c).

⁷⁰ *Ibid.*

⁷¹ William Schabas, *Introduction to the International Criminal Court* (2001) 90.

⁷² Eric David, *Principes de droit des conflits armés* (2nd ed, 1999) 693, as cited in *ibid.*

⁷³ Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). See David, above n 72, 693, as cited in Schabas, *An Introduction to the International Criminal Court*, above n 71, 90. See also Scaliotti, above n 12, 170. According to art 53 of the *Convention*, *jus cogens* is constituted by peremptory norms of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

⁷⁴ Antonio Cassese, ‘The *Statute of the International Criminal Court*: Some Preliminary Reflections’ (1999) 10 *European Journal of International Law* 144, 154.

⁷⁵ *Ibid.*

crimes'.⁷⁶ Servicemembers 'could only react by using lawful means or methods of combat', or by subsequently 'resorting to lawful reprisals against enemy belligerents'.⁷⁷ Finally, Cassese contends that this category of property 'is very loose and may be difficult to interpret'.⁷⁸

It is certainly disturbing that a defendant may lawfully commit a war crime in the protection of property, and it is even more disturbing when the property concerned is not essential for human survival, but merely for the accomplishment of a military mission. The exclusion of criminal responsibility under art 31(1)(c) for acts committed in the defence of property 'essential for accomplishing a military mission' arguably represents one of the most disappointing compromises of the Rome Conference. In a practical sense, however, the property defence is unlikely to have any significant effect. The jurisdiction of the ICC is limited to 'the most serious crimes of concern to the international community as a whole'.⁷⁹ War crimes that meet this demanding threshold will generally fail the tests of reasonableness and proportionality when committed in defence of property.

B *The Response: A Reasonable and Proportionate Act, Directed against the Attacker*

1 *Reasonably Necessary*

The right to use defensive force is not absolute — rather it is limited at the outset by the concept of reasonableness. This is widely recognised in domestic law,⁸⁰ but impossible to define conclusively in the abstract. It is clear that the standard of reasonableness is concerned with the social acceptability of conduct, rather than its moral correctness. The question is what is permissible, not what is ideal.⁸¹ Permissible conduct ranges from that which might be commended, through to that which might be quietly approved, to that which might be accepted with regret as an unfortunate but natural consequence of the interaction of circumstance and human proclivity.⁸² In assessing the reasonableness of the defendant's actions in respect of defensive force, the ICC must always allow for the agony of the moment: '[d]etached reflection cannot be demanded in the presence of an uplifted knife'.⁸³

The question of reasonableness first arises in respect of the mode of action adopted by the defendant. When faced with an imminent and unlawful threat the defendant may have a choice between submission, retreat and counter-attack. Submission may include the resignation of property to an aggressor, passive

⁷⁶ *Ibid.*

⁷⁷ *Ibid* 154–5.

⁷⁸ *Ibid* 155.

⁷⁹ *Rome Statute*, above n 1, art 5(1).

⁸⁰ In Australia, for example, see *Zecevic* (1987) 162 CLR 645.

⁸¹ George Fletcher, 'The Right and the Reasonable' (1985) 98 *Harvard Law Review* 949, 977.

⁸² Eric Colvin, 'Exculpatory Defences in Criminal Law' (1990) 10 *Oxford Journal of Legal Studies* 381, 395.

⁸³ *Brown v United States*, 256 US 335, 343 (1921) (Holmes J).

endurance of physical violence or humiliating surrender.⁸⁴ Similarly, counter-attack may encompass a range of possible responses varying in magnitude. The defendant may draw a weapon without firing, for example, or may fire a warning shot. It is implicit in art 31(1)(c) that the response must be *reasonably necessary* to repel the threatened harm. Furthermore, art 31(1)(c) imposes no explicit duty on the defendant to attempt to retreat before launching a counter-attack. Where retreat is possible, the failure to do so is simply one factor to be considered in determining whether the defendant's actions were reasonably necessary.⁸⁵

2 Reasonably Proportionate

The requirement of proportionality imposes an additional constraint on the use of defensive force, beyond the mere necessity of the defendant's response. Proportionality demands that the magnitude of the response be reasonably proportionate to the threatened harm. The harm inflicted upon the aggressor, even if reasonably necessary to repel the attack, must not be excessive or disproportionate relative to the threatened harm. As Williams notes, the proportionality requirement depends 'on the view that there are some insults and hurts that one must suffer rather than use extreme force'.⁸⁶ This notion leads to a rather difficult legal and moral issue: when should the law compel the defendant to submit to violence rather than use disproportionate force?

It is clear that certain sacrifices must be made in respect of minor threats to a person or property. In such cases, when safe retreat and resort to lesser force are not reasonably open to the defendant, he or she effectively has a legal duty to submit to the harm rather than use excessive force. The defendant cannot commit a war crime, for example, in order to avoid a petty interference with his or her autonomy — in such cases the law requires submission to the threatened harm. As the costs of the defendant's sacrifice rise, however, there exists a point beyond which the law can no longer expect the defendant to forfeit his or her own interests, or the interests of another innocent party in the fray, in order to save the culpable aggressor.

In determining this critical point, the Court must weigh the personal interests of the aggressor, which are significantly diminished due to the aggressor's culpability in launching the attack, against the interests being defended (the defendant, another person or property) and the interests of society as a whole in maintaining the legal order.⁸⁷ 'Our thumb is on the scale in favour of the defender',⁸⁸ such that the magnitude of the response may exceed the degree of

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⁸⁴ Ian Leader-Elliott, 'Women Who Kill in Self-Defence' (1993) 15 *Sydney Law Review* 403, 435–6.

⁸⁵ This is also the approach adopted in Australia: see *Zecevic* (1987) 162 CLR 645, 663.

⁸⁶ Williams, above n 41, 506.

⁸⁷ Gur-Ayre, above n 58, 82.

⁸⁸ Fletcher, *A Crime of Self-Defense*, above n 44, 24.

danger created by the initial attack.⁸⁹ Nonetheless, as the magnitude of the defendant's response increases, there comes a point at which the basic human interests of the aggressor will take effect and outweigh those interests being defended. Beyond this point, the defendant's response will not satisfy the requirement of proportionality.

The law clearly requires that the defendant submit to a minor threat of harm rather than commit a crime within the jurisdiction of the ICC. However, when faced with a serious threat — such as a threat of death or serious injury to a person or the significant destruction of essential property — it might arguably be reasonable for the defendant to commit an isolated war crime to repel the threat, in which case art 31(1)(c) will apply. Nonetheless, the plausibility of defensive force rapidly decreases with the increasing severity of the defendant's conduct, and it becomes highly improbable in respect of genocide, crimes against humanity and large-scale war crimes.

3 *Directed against the Attacker*

There is a further requirement, implicit in art 31(1)(c) and the legislative structure of art 31(1), that the unlawful user of force must be the target of, and not merely the reason for, the defendant's act. Article 31(1)(c) requires that the defendant act *against* an imminent and unlawful force, not simply 'in response to' such a force. Defensive force requires that the defender repel the attacker; the word 'defence' necessarily entails action directed at the original offender.⁹⁰ Consequently, the defendant must not commit an offence against an innocent third party in order to repel the attack by the aggressor.⁹¹ One example of such a scenario is where the defendant, faced with an imminent and unlawful attack, takes an innocent third party hostage.⁹² Article 31(1)(c) would not apply as the defendant's crime is not directed against his or her attacker.

Situations in which the defendant's response is not directed against the original attacker are more appropriately assessed within the framework of duress and necessity, outlined in art 31(1)(d) of the *Rome Statute*. This provision provides that a person shall not be criminally responsible if, at the time of that person's conduct:

⁸⁹ Compare English law, where equality between threat and response seems to be a strict requirement: *R v Oatridge* (1992) 94 Cr App R 367, 369. However, this requirement is offset by the purely subjective test for the existence of a threat; the response need only be commensurate with the threat *as perceived by the defendant*: see Leader-Elliott, above n 84, 441. Australian law does not require strict equality between threat and response, but gauges the threat with respect to the defendant's *reasonable* belief: *Zecevic* (1987) 162 CLR 645, 651 (Mason CJ); 666 (Brennan J); 672 (Deane J); 687 (Gaudron J).

⁹⁰ This approach was upheld in *Trial of Yamamoto Chusaburo*, Case No 20 (30 January – 1 February 1946) British Military Court, Kuala Lumpur, Law Reports TWC III, 76–7, 80. The defendant, a Japanese officer, had detained the victim attempting to steal some rice. He then killed him with a bayonet, in rage and fear for his life because of threats by a crowd. Although the Tribunal stated that a person is justified in using proportionate force against an assailant in defence of himself or herself, self-defence did not apply in these circumstances since the threat did not emanate from the victim.

⁹¹ In this sense, the 'aggressor' should be broadly defined as any person who *contributes* to the threat of harm, and should not be limited to the person directly threatening the harm.

⁹² The taking of hostages constitutes a war crime under *Rome Statute*, above n 1, art 8(2)(a)(viii).

- (d) 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.⁹³

This is not intended to suggest that art 31(1)(d) would necessarily apply to the taking of hostages. A detailed analysis of this provision and its application to hostage situations is beyond the scope of this paper. Nonetheless, it may be helpful to make a few brief observations regarding the nature of defensive force, duress and necessity in order to clarify the boundaries of art 31(1)(c).

These defences have much in common. In each case the defendant claims to have been compelled to commit the crime by an external threat, which presented the defendant with a choice of harms.⁹⁴ In the case of defensive force, the choice is between injuring the aggressor and allowing the aggressor to carry out the attack. In the case of duress, the choice is between committing the offence demanded by the party making the threat and allowing the threat to be carried out. Finally, in the case of necessity, the choice is between committing an offence to avoid the peril and allowing the peril to occur. While the common law traditionally limited necessity to threats originating from natural sources, in recent times most courts and commentators have rejected this limitation,⁹⁵ and it is not stipulated in the *Rome Statute*.

If we compare duress/necessity under art 31(1)(d) with defensive force under art 31(1)(c), some interesting comparisons emerge in relation to the question of proportionality. Suppose A threatens to kill B unless B kills C. B has various choices open to him: He may simply say no, and be killed; he may comply with A's demand, kill C and plead duress; or he may turn on A and kill A, in which case he may plead defensive force. This hypothetical scenario enables us to examine the nature of the distinctions between defensive force and duress. It seems logical that the defences should be structured in such a way as to ensure that B is discouraged from attacking C. Stated otherwise, the criteria for defensive force should be more accommodating than the tests for duress.

Article 31 of the *Rome Statute* adopts this approach. If B chooses to kill A, he may plead defensive force pursuant to art 31(1)(c). This requires B to act 'reasonably ... in a manner proportionate to the degree of danger'.⁹⁶ This requirement is relatively elastic, and does not demand precise equality between threat and response. Rather, the ICC must balance A's personal interest, which is significantly reduced due to his blameworthiness in initiating the attack, against both B's personal interest and the interest of society as a whole in deterring

⁹³ *Ibid* art 31(1)(d).

⁹⁴ Stanley Yeo, *Compulsion in the Criminal Law* (1990) 25.

⁹⁵ See, eg, *R v Loughnan* [1981] VR 443, 458 (Crockett J); *R v Rogers* (1996) 86 A Crim R 542, 546–7; Michael Bayles, 'Reconceptualising Necessity and Duress' (1987) 33 *Wayne Law Review* 1191, 1191.

⁹⁶ *Rome Statute*, above n 1, art 31(1)(c).

unlawful conduct.⁹⁷ Accordingly, the magnitude of B's response may exceed that of A's initial attack, yet still fall within the requirement of proportionality.

Conversely, if B chooses to kill C, he may plead duress pursuant to art 31(1)(d). This imposes a far more stringent test of proportionality, requiring that B 'does not intend to cause greater harm than the one sought to be avoided'.⁹⁸ Unlike acts of defensive force, acts committed under duress do not uphold any broad societal interest in the maintenance of legal order. The Court must simply balance the interests of two innocent victims, B and C, and must therefore demand equality between threat and response. Thus the statutory framework contained in arts 31(1)(c) and 31(1)(d), particularly the differing standards of proportionality incorporated therein, sanctions the defendant committing an act of defensive force against the culpable attacker, rather than an act of duress against an innocent third party.

C *Mental Element*

A further requirement of art 31(1)(c) — not specified in the provision itself but derived from the general principles of law of various domestic legal systems in accordance with art 21(1)(c) of the *Rome Statute*⁹⁹ — is the mental element of defensive force. The defendant may rely on defensive force only if he or she knows of the imminent and unlawful attack, and acts with the purpose of repelling that attack.¹⁰⁰ If the defendant commits a crime and it later transpires that the defendant's act fortuitously repelled an attack of which he or she had no knowledge, the defence will not apply. He or she cannot be privileged by accident.¹⁰¹

IV ARTICLE 31(1)(C) AND SPECIFIC CRIMES UNDER THE *ROME STATUTE*

Article 5 names only four categories of crime to which the *Rome Statute* applies: genocide, crimes against humanity, war crimes and aggression. The jurisdiction of the ICC is further limited by the fact that it can try only 'the most serious crimes of concern to the international community as a whole',¹⁰² and that the 'admissibility' of a case will be denied if '[t]he case is not of sufficient gravity to justify further action by the Court'.¹⁰³ Given this high prosecutorial

⁹⁷ Gur-Ayre, above n 58, 82.

⁹⁸ *Rome Statute*, above n 1, art 31(1)(d).

⁹⁹ Article 21(1)(c) upholds the applicability of the 'general principles of law derived by the court from national laws of legal systems of the world'. It was necessary for international criminal law to take this approach because classic international law did not offer sufficient rules of criminal law.

¹⁰⁰ See, eg, *Model Penal Code* §§ 3.04–3.06 (American Law Institute 1962); American Law Institute, *Model Penal Code and Commentaries: Part I* (1985) 39; *R v McKay* [1957] VR 560, 562; *R v Falla* [1964] VR 78, 81; *Morgan v Coleman* (1981) 27 SASR 334, 336; Paul Fairall and Desmond O'Connor, *Criminal Defences* (3rd ed, 1996) 184; Peter Gilles, *Criminal Law* (3rd ed, 1993) 313; *Conroy v Patterson* [1965] NZLR 790, 793; *R v Dadson* (1850) 4 Cox CC 358.

¹⁰¹ Note that this view is not unanimously approved: see, eg, Williams, above n 41, 506. If the ICC adopts Williams' view (which is in the minority), the analysis of defensive force in respect of specific crimes, particularly genocide and crimes against humanity, may differ from that presented in this paper.

¹⁰² *Rome Statute*, above n 1, art 5(1).

¹⁰³ *Ibid* art 17(1)(d), in conjunction with the preamble and art 1.

threshold, most claims of defensive force that come before the Court will fail the tests of reasonableness and proportionality contained in art 31(1)(c). Where the acts of an individual do constitute a reasonable and proportionate response to an imminent and unlawful threat, sufficient to satisfy art 31(1)(c), the case will rarely be ‘of sufficient gravity’ to come before the Court.

In addition, the physical and mental elements of specific ICC crimes may be logically incompatible with the notion of defensive force. While the physical elements of the crimes necessarily vary, the mental element applicable to all offences ‘unless otherwise provided’¹⁰⁴ is articulated in art 30:

- (1) Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
- (2) For the purpose of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
- (3) For the purposes of this article, ‘knowledge’ means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. ‘Know’ and ‘knowingly’ shall be construed accordingly.¹⁰⁵

Motive and desire are irrelevant to demonstrating this intent. Furthermore, as the grounds for excluding criminal responsibility, or the absence thereof, are not treated as forming part of the definition of crimes themselves,¹⁰⁶ the defendant need not intend to carry out the elements of the crime *unlawfully* in order to satisfy the definition of the crime in question.

Consequently, with respect to many crimes within the jurisdiction of the ICC, the defendant’s objective of repelling an imminent and unlawful threat — the mental element of art 31(1)(c) — can coexist with the ‘intention’ to commit the offence itself under art 30. He or she can act for the lawful purpose of repelling an imminent and unlawful use of force, yet nonetheless ‘intend’ to carry out the elements of the crime. Consider examples derived from domestic law where a defendant can commit murder in self-defence. The defendant’s intent to kill is combined with the will to defend himself or herself, such that the defendant possesses the requisite mental elements of both murder and self-defence.

Some offences, however, incorporate an alternative mental element to that contained in art 30, such as the war crime of ‘wilful killing’.¹⁰⁷ Other offences, such as genocide, incorporate a second layer of ‘specific intent’, which must

¹⁰⁴ By virtue of art 9, alternative or additional mental elements may be found in the *Elements of Crimes*, above n 7, or other provisions of the *Rome Statute*, above n 1.

¹⁰⁵ *Ibid* art 30.

¹⁰⁶ *Elements of Crimes*, above n 7, General Introduction [5].

¹⁰⁷ *Rome Statute*, above n 1, art 8(2)(a)(i).

exist in addition to the general intent articulated in art 30.¹⁰⁸ Where a crime requires an additional or alternative mental element to that contained in art 30, the question arises as to whether the mental element of the crime can logically coexist with the mental element of defensive force. This is a complex question, necessitating an analysis of each category of crime. Accordingly, this Part examines the definitions of genocide, crimes against humanity and war crimes, in order to determine the applicability of art 31(1)(c) in each case. It will not, however, consider aggression, as the definition of this crime has not yet been settled.¹⁰⁹

A Genocide

Intuitively, it seems inconceivable that art 31(1)(c) could ever exclude criminal responsibility for genocide. The notion that a defendant could escape conviction for genocide on the basis of defensive force goes against common conceptions of genocide as the ‘crime of crimes’¹¹⁰ and the ‘nadir of human evil’.¹¹¹ Scholars and jurists consistently emphasise the need to reserve allegations of genocide for the most egregious atrocities so as to avoid trivialising the crime.¹¹² It may be feared, therefore, that the acceptance of pleas of defensive force in cases of genocide could downgrade the magnitude of the offence itself.

In addition to these policy arguments, there exist compelling legal arguments for the exclusion of defensive force in cases of genocide. These legal arguments are founded on the definition of genocide itself, articulated in art 6 of the *Rome Statute*:

For the purpose of this *Statute*, ‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

¹⁰⁸ Under *Rome Statute*, above n 1, art 6, genocide is only committed where there is an ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’. See also the crimes against humanity of ‘apartheid’ in art 7(2)(h) and ‘enforced disappearance of persons’ in art 7(2)(i).

¹⁰⁹ While delegates at the Rome Conference agreed that aggression should be part of the subject matter jurisdiction of the ICC, it proved impossible to agree upon either the definition or the appropriate mechanism for judicial determination of whether or not the crime had actually occurred: see Schabas, *An Introduction to the International Criminal Court*, above n 71, 26. Accordingly, the definition of the crime of aggression and the conditions of its prosecution require a formal amendment, in accordance with arts 121 and 123 of the *Rome Statute*, above n 1.

¹¹⁰ See, eg, *Prosecutor v Kambanda (Trial Chamber Judgment)*, Case No ICTR-97-23-S (4 September 1998) [16]: ‘the Chamber is of the opinion that genocide constitutes the crime of crimes’; William Schabas, *Genocide in International Law: The Crime of Crimes* (2000).

¹¹¹ David Alonzo-Maizlish, ‘In Whole or in Part: Group Rights, the Intent Element of Genocide, and the “Quantitative Criterion”’ (2002) 77 *New York University Law Review* 1369, 1402.

¹¹² Malcolm Shaw, for example, warns that ‘[t]he offence can only retain its awesome nature if the strictness of its definitional elements is retained and not in any way trivialized’: Malcolm Shaw, ‘Genocide and International Law’ in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 797, 806. See also Matthew Lippman, ‘Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium’ (2001) 23 *Houston Journal of International Law* 467, 526–30.

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children out of the group to another group.¹¹³

The provision reproduces the text of art II of the *Convention for the Prevention and Punishment of the Crime of Genocide*.¹¹⁴ According to the Working Group on the Definition of Crimes, when interpreting art 6 the ICC may consider the interpretation applicable to art II of the *Genocide Convention*, as well as other relevant provisions contained in the *Genocide Convention* and other sources of international law.¹¹⁵ An analysis of the physical and mental elements of genocide, as defined in the *Rome Statute* and the *Genocide Convention*, indicates that the crime is incompatible with the notion of defensive force under art 31(1)(c).

1 *Physical Elements*

Genocide is committed against a national, ethnical, racial or religious group ‘as such’.¹¹⁶ In other words, the victim of the crime of genocide is the group itself.¹¹⁷ Yet art 31(1)(c) requires an ‘imminent and unlawful use of force’ producing a certain danger to a person or property. For art 31(1)(c) to apply to genocide, therefore, it seems that the very existence of the group, as a separate and distinct entity, would have to pose an imminent and unlawful danger to a person or property. It is simply unimaginable that the Court would characterise the very existence of a national, ethnical, racial or religious group as an imminent and unlawful threat ‘as such’.

Even if the circumstances could somehow fulfil this triggering condition, it is extremely unlikely that the destruction, in whole or in part, of a group ‘as such’, could ever qualify as ‘acting reasonably’ under art 31(1)(c). Indeed, the very nature of genocide defies all notions of reasonableness. It seems highly improbable that genocide could ever be ‘reasonably necessary’, as it is difficult to conceive of a case in which a less radical response would not be reasonably open to the defendant. Furthermore, it is difficult to imagine circumstances in which genocide could satisfy the requirement of proportionality. Consequently, it

¹¹³ *Rome Statute*, above n 1, art 6.

¹¹⁴ Opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951) (*‘Genocide Convention’*).

¹¹⁵ Preparatory Committee on the Establishment of an International Criminal Court, *Report of the Working Group on the Definition of Crimes*, as contained in *Decisions Taken by the Preparatory Committee at Its Session Held From 11 to 21 February 1997*, 3 (fn 3), UN Doc A/AC.249/1997/L.5 (12 March 1997).

¹¹⁶ *Rome Statute*, above n 1, art 6.

¹¹⁷ *Prosecutor v Akayesu (Trial Chamber Judgment)*, Case No ICTR-96-4-T (2 September 1998) [521] (*‘Akayesu’*). See also *1996 Draft Code*, above n 13, 88 (art 17): ‘The group itself is the ultimate target or intended victim of this type of massive criminal conduct’.

seems that the physical elements of the crime of genocide are logically incompatible with art 31(1)(c).

2 Mental Element

It is often said that art 6 imposes a requirement of specific intent (*dolus specialis* or *dolus aggravé*).¹¹⁸ In addition to requiring the intent to bring about a certain result by undertaking certain conduct (for example, death by killing), according to the general definition of intent articulated in art 30, genocide requires that the defendant pursue a *specific goal* or *purpose* that goes beyond the result of his conduct.¹¹⁹ The defendant must intend to destroy the group, in whole or in part, as such. This second layer of ‘specific intent’ is the very essence of the crime of genocide; yet the precise nature of this requirement is far from clear. Article 6 of the ICC *Finalized Draft Text of the Elements of Crimes* does little to clarify this issue:

Notwithstanding the normal requirement for a mental element provided for in article 30, and recognizing that knowledge of the circumstances will usually be addressed in proving genocidal intent, the appropriate requirement, if any, for a mental element regarding this circumstance will need to be decided by the Court on a case-by-case basis.¹²⁰

Thus the Court will decide the precise nature of the specific intent in art 6 in light of its historical antecedents and the effect of art 30. The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda will constitute a crucial source of authority in this regard. According to the ICTR Trial Chamber in *Akayesu* — the first international conviction for genocide — specific intent refers to ‘the specific intention, required as a constitutive element of the crime, which demands that the perpetrator *clearly seeks* to produce the act charged’.¹²¹ The Trial Chambers of the ICTR have largely followed the interpretation of specific intent given in *Akayesu*.¹²²

Many commentators agree that the phrase ‘as such’ in art 6 connotes a purposive definition of specific intent.¹²³ The defendant must act with the purpose of, for example, destroying Jews *because they are Jews*, although this need not necessarily be the sole purpose of the defendant’s acts. Article 6 prohibits the destruction of groups of people because of who they are, but it does

¹¹⁸ See, eg, *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [485]. In the US *Genocide Convention Implementation Act of 1987*, 18 USC § 1091(a) (1988), the specific intent requirement is explicit: ‘Whoever, whether in time of peace or in time of war ... and with the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such ...’. See also Joy Gordon, ‘When Intent Makes All the Difference in the World: Economic Sanctions on Iraq and the Accusation of Genocide’ (2002) 5 *Yale Human Rights and Development Law Journal* 57, 61; Schabas, *Genocide in International Law*, above n 110, 213–40.

¹¹⁹ Cassese, *International Criminal Law*, above n 37, 103.

¹²⁰ *Elements of Crimes*, above n 7, art 6.

¹²¹ Case No ICTR-96-4-T (2 September 1998) [498] (emphasis added); see also [518]–[520].

¹²² See *Prosecutor v Kayishema and Ruzindana (Trial Chamber Judgment)*, Case No ICTR-95-1-T (21 May 1999) [87]–[118]; *Prosecutor v Rutaganda (Trial Chamber Judgment)*, Case No ICTR-96-3-T (6 December 1999) [44]–[63]; *Prosecutor v Musema (Trial Chamber Judgment)*, Case No ICTR-96-13-T (27 January 2000) [884]–[941].

¹²³ See, eg, Gordon, above n 118, 61, 63.

not prohibit their destruction by virtue of where they are or what they have, or for some other overriding purpose that might be served by their extermination.¹²⁴ As Leo Kuper observes, ‘Berlin, London and Tokyo were not bombed because their inhabitants were German, English, or Japanese, but because they were enemy strongholds’.¹²⁵

Furthermore, the defendant must intend to destroy the *group*, in whole or in part. The intent to destroy individual Jews ‘as such’, with no broader intent to destroy the group, will be a racially motivated murder and not genocide. As the ICTR Trial Chamber stated in *Akayesu*:

The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an *ulterior motive*, which is to destroy, in whole or in part, the group of which the individual is just one element.¹²⁶

If the ICC adopts this purposive definition of genocidal intent, it follows that art 6 does not prohibit the destruction of a group of people, in whole or in part, for the purpose of defending a person or property. Where the defendant acts for a defensive purpose in accordance with art 31(1)(c), there is, *a fortiori*, a lack of the requisite mental element for genocide.¹²⁷

The following hypothetical scenario serves to illustrate this notion: the leaders of a country encourage the majority ethnic population to commit genocide against the minority population. Racial hatred sweeps the nation. Many minority members are murdered by the majority attempting to destroy the minority as a group. A member of the majority ethnic group (D) hates the minority group and would like to see it eliminated, but he is not a violent man and cannot bring himself to participate in the killings. One day two members of the minority ethnic group break into D’s house and attempt to rob the house, and in doing so threaten his daughter. D murders the men and is doubly pleased with his feat; not

¹²⁴ Earlier drafts of the *Genocide Convention*, above n 114, explicitly required a genocidal motive, stating that an act will only constitute genocide if it is wholly inspired by a prohibited motive. Some delegations at the drafting of the *Genocide Convention*, however, feared that this would enable defendants to escape conviction by claiming that their actions had been inspired by motives other than those enumerated: see UN GAOR, 6th Comm, 3rd sess, pt 1, 75th mtg, UN Doc A/C.6/SR.75 (15 October 1948); UN GAOR, 6th Comm, 3rd sess, pt 1, 76th mtg, UN Doc A/C.6/SR.76 (16 October 1948); UN GAOR, 6th Comm, 3rd sess, pt 1, 77th mtg, UN Doc A/C.6/SR.77 (18 October 1948). For this reason, the explicit motive requirement was removed and replaced with the somewhat ambiguous phrase ‘as such’.

¹²⁵ Telford Taylor, ‘When People Kill a People’, *New York Times Book Review* (New York, US), 28 March 1982, 18.

¹²⁶ *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [522] (emphasis added). The ICTY has made similar statements: see, eg, *Prosecutor v Jelisić (Trial Chamber Judgment)*, Case No IT-95-10-T (14 December 1999) [66]. See also *Nulyarimma v Thompson* (1999) 96 FCR 153, 160-1 (Wilcox J), for a discussion of genocidal intent in respect of indigenous Australians.

¹²⁷ Gabor Rona reaches the same conclusion: Gabor Rona, ‘Débats, L’Article 31(1)(c), Du statut de la cour pénale internationale’ (2000) 33(2) *Revue belge de droit international* 446, 447.

only has he protected his daughter, but he has also contributed to the campaign to wipe out the minority.¹²⁸

It is clear that D lacks the specific intent for genocide. He is not killing the minority men ‘as such’ — because they are members of the minority — but because they pose an imminent and unlawful threat to his daughter. The genocide inquiry will never reach the question of the applicability of art 31, as the case-in-chief against D will be incomplete.

Finally, in respect of the issue of genocidal intent, practical considerations should not be overlooked. Even if the ICC does not adopt a purposive definition of genocidal intent, the purpose or motive of the defendant will nonetheless be extremely relevant to prosecutions. Where the defence can raise a doubt about the existence of a genocidal purpose or motive, it will have gone a long way in casting doubt on the existence of genocidal intent. In any event, an individual who commits a genocidal act with a legitimate defensive purpose, and with no manifest purpose to destroy the group ‘as such’, is unlikely to attract much attention from the ICC in the course of genocide prosecutions — they will no doubt have much bigger fish to fry.

B *Crimes against Humanity*

The class of offences known as ‘crimes against humanity’, contained in art 7 of the *Rome Statute*, comprises a number of heinous acts directed against innocent and defenceless civilians, committed on a large scale and usually involving a high degree of planning. Indeed, the desire to prohibit only crimes ‘which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied ... endangered the international community or shocked the conscience of mankind’¹²⁹ is the underlying feature of crimes against humanity. This should guide the interpretation of the elements of these crimes.

The *chapeau* of art 7(1) establishes the following general definition for crimes against humanity:

For the purpose of this *Statute*, ‘crime against humanity’ means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack ...¹³⁰

The provision then lists a number of individual crimes, specifically: murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of international law; torture; rape and other sexual offences; persecution; enforced

¹²⁸ This scenario is based on an example from Nico Keijzer, ‘The Plea of Self-Defence’ (Lecture delivered at Preparing for the ICC: Course for Policymakers, Lawyers and the Military, The Hague, Netherlands, 20 December 2001), as cited in Elies van Sliedregt, ‘Defences in International Criminal Law’ (Lecture delivered at the 17th International Conference of the International Society for the Reform of Criminal Law, Convergence of Criminal Justice Systems: Building Bridges, Bridging the Gap, The Hague, Netherlands, 25 August 2003) 12, available at <<http://www.isrc.org/Papers/Sliedregt.pdf>> at 1 May 2005. See also Rona, above n 127, 447.

¹²⁹ UN War Crimes Commission, *History of the United Nations War Crimes Commission and the Development of the Laws of War* (1948) 179.

¹³⁰ *Rome Statute*, above n 1, art 7(1).

disappearance; apartheid; and ‘other inhumane acts’.¹³¹ Given the nature of crimes against humanity, it again seems unlikely that defensive force under art 31(1)(c) could ever operate as a defence in this context.

1 *Physical Elements*

The principal requirement of art 7 is that the defendant’s act be part of a widespread or systematic attack directed against any civilian population. Article 7(2)(a) further provides:

- (2) For the purpose of paragraph 1:
 - (a) ‘Attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

This criterion is fundamental to the distinction between crimes against humanity and ordinary crimes, which do not rise to the level of international concern. As the ICTY Trial Chamber stated in *Prosecutor v Tadić*:

The reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals, but rather result from a deliberate attempt to target a civilian population.¹³²

It is clear that the defendant’s actions themselves need not be widespread or systematic. Indeed, the ICTY Trial Chamber observed in *Tadić* that

a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable.¹³³

The defendant’s act must, however, form *part* of the broader campaign against the civilian population.¹³⁴ He or she must act pursuant to or in furtherance of a broader plan or policy, and not for purely personal reasons.¹³⁵ In other words, there must be a sufficient nexus between the defendant’s act and the wider civilian attack.¹³⁶

Although the *Rome Statute* does not specify the degree of nexus that is required, the methods adopted by the ICC to establish the nexus will probably be similar to those employed by the ICTY to prove the link between the acts and an armed conflict.¹³⁷ Reliable indicia may include: the similarities between the defendant’s acts and those occurring within the attack; the nature of the events and circumstances surrounding the defendant’s acts; the temporal and

¹³¹ Ibid art 7(1)(a)–(k).

¹³² (*Trial Chamber Judgment*) Case No IT-94-1-T (7 May 1997) [653] (*‘Tadić’*).

¹³³ Ibid [649].

¹³⁴ Rodney Dixon, ‘Crimes Against Humanity: Para 1 *Chapeau*’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 122, 124.

¹³⁵ *Tadić*, Case No IT-94-1-T (7 May 1997) [656].

¹³⁶ *Akayesu*, Case No ICTR-96-4-T (2 September 1998) [579].

¹³⁷ Dixon, above n 134, 125. Under the *Statute of the ICTY*, above n 15, art 5, ‘crimes against humanity’ require a nexus with an armed conflict; this requirement was not included in the *Rome Statute*.

geographical proximity of the defendant's acts with the attack; and the nature and extent of the defendant's knowledge of the attack.¹³⁸ Essentially, the defendant's act must not constitute a 'single or isolated act' that is unrelated to the broader attack.¹³⁹

Applying these principles, it seems that a crime committed against a civilian or civilians in self-defence, defence of another or defence of property would never form *part* of a widespread or systematic attack directed against the civilian population. The circumstances giving rise to a right of defensive force under art 31(1)(c) would negate any nexus between the defendant's act and the broader civilian attack, such that the use of defensive force by the defendant would constitute a 'single or isolated' act. Consequently, the question of defensive force would not arise, as the primary requirement of art 7 would not be satisfied.

Additionally, art 31(1)(c) requires that the defendant act *against* the imminent and unlawful use of force, which appears to exclude the use of defensive force against innocent civilians. Yet crimes against humanity are committed, by definition, against a civilian population. Finally, even if the defendant could somehow overcome these hurdles, the requirements of reasonableness and proportionality would usually exclude defensive force in this context. Like genocide, therefore, the physical elements of crimes against humanity are incompatible with the use of defensive force pursuant to art 31(1)(c).

2 *Mental Element*

Article 7 of the ICC *Elements of Crimes* requires the defendant to know that his or her conduct is part of, or intend it to be part of, a widespread or systematic attack against a civilian population.¹⁴⁰ Although art 7 contains no general requirement of a discriminatory motive, the crime of persecution has a motive requirement built into its specific definition.¹⁴¹ In general, where the defendant acts with a defensive purpose, he or she will not know or intend that his or her acts form part of a broader civilian attack. Rather, the defensive circumstances will generally negate any nexus between the defendant's act and the broader attack, both in the mind of the defendant and in the mind of an objective observer. Thus it seems that crimes against humanity are irreconcilable with the notion of defensive force under art 31(1)(c).¹⁴²

C *War Crimes*

The category of crimes known as 'war crimes', contained in art 8 of the *Rome Statute*, encompasses a number of acts prohibited by international treaties and/or customary law. Generally speaking, these acts must be committed during an armed conflict, by a perpetrator who is linked to one side of the conflict and

¹³⁸ Dixon, above n 134, 125; *Tadić*, Case No IT-94-1-T (7 May 1997) [629]–[633].

¹³⁹ *Tadić*, Case No IT-94-1-T (7 May 1997) [644].

¹⁴⁰ *Elements of Crimes*, above n 7, art 7.

¹⁴¹ See *ibid* 15 (art 7(1)(h)): 'The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population'. See also Darryl Robinson, 'Defining "Crimes Against Humanity" at the Rome Conference' (1999) 93 *American Journal of International Law* 43, 46.

¹⁴² Note that M Cherif Bassiouni also seems to consider defensive force to be irrelevant to crimes against humanity: see M Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd ed, 1999) 449.

against a victim who is either neutral or linked to the other side of the conflict.¹⁴³ The *chapeau* of art 8(1) establishes the following general definition of war crimes:

The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.¹⁴⁴

1 *Physical Elements*

Plan, policy and scale are not elements of, or jurisdictional prerequisites for, war crimes.¹⁴⁵ Rather, they are factors to be taken into account by the prosecutor in determining whether to commence investigations against potential defendants.¹⁴⁶ If a state has a general policy of complying with international humanitarian law, it would be more likely to take effective corrective action on its own initiative,¹⁴⁷ in which case the ICC would have no jurisdiction over the war crime in question.¹⁴⁸ If, on the other hand, a war crime is committed as part of a state-sanctioned plan or policy, it would be far more likely to come before the ICC, both because the nature of the crime would be more likely to attract the attention of the Court and because the state in question would be less likely to prosecute the perpetrator on its own initiative. The large-scale or highly organised nature of such a crime, however, would generally exclude defensive force.

In theory, the isolated killing of a single prisoner of war or the solitary rape of a woman in occupied territory could be a war crime, even if it is entirely unrelated to a broader attack, but in practice such a case would be unlikely to come before the ICC. If such a case were to come before the Court, notwithstanding the demanding prosecutorial standards of the ICC, the question of defensive force may arise. In such a case, in order to fall within art 31(1)(c), the defendant's conduct would need to be reasonably necessary and proportionate, and committed against the initial attacker — criteria which would become increasingly difficult to satisfy with the increasing seriousness of the defendant's acts. It would be particularly difficult to fulfil the proportionality requirement where the initial triggering attack occurs against property.

¹⁴³ William Fenrick, 'War Crimes: Introduction/General Remarks' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 180, 180.

¹⁴⁴ *Rome Statute*, above n 1, art 8(1).

¹⁴⁵ William Fenrick, 'War Crimes: Paragraph 1: "Jurisdiction in respect of War Crimes"' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (1999) 181, 181.

¹⁴⁶ *Ibid.*

¹⁴⁷ *Ibid.*

¹⁴⁸ Paragraph 10 of the preamble of the *Rome Statute*, above n 1, states that 'the International Criminal Court established under this *Statute* shall be complementary to national criminal jurisdictions'. This complementarity standard is further developed in art 17, which essentially provides that as long as a national criminal jurisdiction is able and willing to genuinely investigate and prosecute the matter, the Court does not have jurisdiction.

2 Mental Element

War crimes do not possess the overarching intent requirements present for genocide and, unlike crimes against humanity, need not be a known part of a broader attack on a civilian population. Moreover, although some war crimes incorporate alternative or additional mental elements to those imported into art 8 by virtue of art 30, these additional mental elements are not necessarily incompatible with the mental element of defensive force.¹⁴⁹ Accordingly, there may exist some theoretical scope — albeit extremely limited — for the application of art 31(1)(c) to war crimes.

V CONCLUSION

The adoption of the *Rome Statute* heralds a new era in the effective prosecution and punishment of serious violations of international humanitarian law. It is one of the most complex international instruments ever negotiated, representing an attempt to merge elements of the legal systems of more than 150 states into a single document. In many areas, the *Rome Statute* may be regarded as an authoritative expression of the legal views or *opinio juris* of a great number of states, and may be taken to reflect customary international law.¹⁵⁰ There is potential for the influence of the *Rome Statute* to extend beyond the operation of the ICC itself and deep into domestic criminal law, serving as a model for the modernisation of domestic systems¹⁵¹ and assisting national prosecutors and judges to apply domestic laws in accordance with international humanitarian law.

Article 31(1)(c) of the *Rome Statute* constitutes the first detailed codification of defensive force in international criminal law. As a component of the general principles of criminal law, a plea of defensive force is theoretically available to defendants charged with all crimes within the jurisdiction of the ICC (with the exception of the defence of property, which is restricted to war crimes). The ICC will no doubt receive pleas of defensive force in future cases, and it is therefore necessary to clarify the elements of art 31(1)(c) before such cases come before the Court. This analysis of the *Rome Statute* may also be of assistance in the application of domestic criminal law, as national courts continue to use international legal materials in the enactment and application of their own laws.

In practice, however, pleas of defensive force are unlikely to succeed in the ICC, at least in respect of large-scale crimes committed by leaders, planners and

¹⁴⁹ The crime of wilful killing, for example, requires the defendant to be *aware* of the factual circumstances that establish the protected status of the victim under the *Geneva Conventions: Elements of Crimes*, above n 7, art 8(2)(a)(i). See also Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* (2003) 38.

¹⁵⁰ *Prosecutor v Furundžija (Trial Chamber Judgment)*, Case No IT-95-17/1-T (10 December 1998) [227]. See also *Prosecutor v Kordić and Čerkez (Trial Chamber Judgment)*, Case No IT-95-14/2-T (26 February 2001) [451]: '[t]he principle of self-defence enshrined in this provision [Article 31(1)(c)] reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law'.

¹⁵¹ As the *Rome Statute* is predicated on the principle of complementarity, discussed above n 148, many states will need to bring their own substantive criminal law into line: see William Schabas, 'The Follow Up to Rome, Preparing for Entry into Force of the *International Criminal Court Statute*' (1999) 20 *Human Rights Law Journal* 157, 157.

organisers that are the Court's *raison d'être*. In the first place, jurisdictional constraints on the Court will exclude the vast majority of cases to which defensive force might apply. The ICC can try only 'the most serious crimes of concern to the international community as a whole',¹⁵² thereby excluding isolated war crimes committed in the legitimate exercise of defensive force. Moreover, the ICC is not designed to try all perpetrators of all crimes within its jurisdiction. It will be concerned not only with the most serious crimes, but also with the most serious criminals.¹⁵³

Even if a case involving legitimate defensive force does come before the ICC, the facts constituting a basis for a plea of defensive force will generally negate the elements of the crime in question. Defensive force incorporates requirements of urgency, necessity and proportionality, and precludes attacks on innocent civilians. Where the acts of the defendant satisfy these requirements, they will not satisfy the physical elements of genocide or crimes against humanity, and will only rarely satisfy the physical elements of war crimes. Furthermore, the defensive purpose of the defendant will negate the requisite mental element of genocide and crimes against humanity. In most cases, therefore, the Court will not actually reach the question of defensive force, as the prosecution will be unable to establish the requisite elements of the case-in-chief against the defendant.

The logical incompatibility of defensive force and crimes within the jurisdiction of the ICC elucidates the essentially evil nature of these crimes and the intended prosecutorial strategy of the ICC. The ICC is a court established for 'big fish' — a relatively small number of leaders, organisers and planners — in cases of genocide, crimes against humanity, large-scale war crimes and aggression. The purpose of the Court is to end impunity for the perpetrators of 'unimaginable atrocities that deeply shock the conscience of humanity'.¹⁵⁴ In light of political and budgetary constraints, the energies of the prosecutor will be confined to addressing 'the most serious crimes of concern to the international community as a whole'.¹⁵⁵ Where a case satisfies the requirements of defensive force as outlined herein, this will serve as a strong indication that the case does not warrant the attention of the prosecutor.

¹⁵² *Rome Statute*, above n 1, art 5(1).

¹⁵³ Schabas, *Introduction to the International Criminal Court*, above n 71, 23–4.

¹⁵⁴ *Rome Statute*, above n 1, preamble.

¹⁵⁵ *Ibid* art 5(1).