pISSN: 2454-7107, eISSN: 2455-4189

Indian Journal of Law and Human Behavior
Volume 3 Number 1, January - June 2017
DOI: http://dx.doi.org/10.21088/ijlhb.2454.7107.3117.3

Review Article

International Criminal Law: An Evaluation of Self Defense

Naresh Kumar Vats*, Megha Purohit**

Author Affiliation
*Professor of Law, Maharashtra National Law University, Nagpur, Judicial Officers' Training Institute (JOTI), C.P. Club Road, Civil Lines-Nagpur (Maharashtra), India.
**LL.M. Scholar, NLSIU Bangalore (Karnataka), India.

Reprint Request
Naresh Kumar Vats
Professor of Law, Maharashtra National Law University, Nagpur Judicial Officers' Training Institute (JOTI), C.P. Club Road, Civil Lines-Nagpur -440001(Maharashtra), India
E-mail:
prof.vatsnaresh@nlunagpur.ac.in;
vatsnk2006kurukshetra@gmail.com

Received on 17.03.2017
Accepted on 07.04.2017

Abstract

The idea of criminal responsibility of any person for the commission of any international crime is absolved in self defence. The crime committed by the accused which is grave in nature will not work out as the act was illegal on the face of it which is the violation of the human values. ICC mentioned various defences for excluding the criminal liability like duress, necessity, self-defence, mistake, mental incapacity, intoxication or superior order. Apart from it, there are various case-laws in which courts and tribunals have interpreted the defences in mitigating the sentence. The jurisprudence of criminal law lies on some premises such as 'a person will be innocent until proved guilty' and 'fair trial' and 'the court will consider whatever defences put forward by the persons who are being tried'. The researcher (s) intend that ICC have given a new horizon in the development of human rights by discarding the defences in furtherance of commission of serious crimes.

Keywords: Self-Defence; Military Tribunal; Doctrine of Mens Rea; Rome Statute; Universal Declaration of Human Rights.

Introduction

Self defence provide justification and excuse for any act done by the accused persons. Defences in international law present the idea that they absolve the criminal responsibility of any person for the commission of any international crime. But, this proposition is not as simple as it looks, tribunals and courts have to look into numerous considerations while granting the defences. If the crime committed by the accused person is grave in nature, then the ground of defences will not work out as the act was illegal on the face of it which is the violation of the human values. Hence, tribunals and courts do not allow the plea of defences in cases where the cause leads to violation of human rights. Hence, they play a central role in justice, equality and respect for human life and dignity which is necessary for international co-operation.

Article 31-33 of the Rome Statute of ICC list down various defences for excluding the criminal liability like duress, necessity, self-defence, mistake, mental incapacity, intoxication or superior order. Apart from it, there are various case-laws in which courts and tribunals have interpreted the defences in mitigating the sentence or in acquitting the accused person.

Thus, the paper strives to look into the development of defences in international criminal law to provide fully comprehensive account for assessing the accused persons' act. However, some important defences have picked up for the present study. Further, the paper will discuss that how far

the defences are effectively working in the regime of international criminal law and their compliance with the human rights.

Historical Background

The creation of hybrid or ad hoc tribunals and the rules of international criminal law reflect the necessity of indicting the war criminals, that's why many states unanimously agreed for repressing the crimes so as to protect the human values. International Criminal Law found its traces back to the time of Vedas, Mahabharata etc. in Hindu philosophy and during 4th and 5th Centuries at the 'Era of Christianity' where rules governing the conditions of 'just war' were introduced. Progressively, many changes were evolved so as to adopt the conditions affecting the war and finally with the establishment of League of Nations and the United Nations, the rules of ICL gained impetus. The reports of massive human rights violations worldwide surfaced the international community with a substantial challenge. Hence, post world war, numerous tribunals were constituted such as International Military Tribunal at Nuremburg, Rwanda, Tokyo, Special Court for Sierra Leone to punish the individuals guilty of war crimes.

Finally, Statute of International Criminal Court was adopted after the significant development at the global level. This was the first written document which comprehensively dealt with the principles of ICL. The jurisprudence of criminal law lies on some premises such as 'a person will be innocent until proved guilty', he shall be given 'full opportunity' to present his case, '*doctrine of mens rea'*, 'rights of the accused', 'fair trial' and 'the court will consider whatever defences put forward by the persons who are being tried'. Earlier, the defences were only in the relation with the superior orders (Control Council No. 10) as it has been clearly present when the IMT at Nuremburg were trying the accused persons [1]. ICTY recognized the ground of 'military necessity' as a permissible defense [2] and 'superior order' as a ground for mitigating sentence [3].

Towards the ICC Statute….

These rules have clearly been incorporated in the ICC Statute. Article 31 to 33 of the ICC Statute or Rome Statute [4] presents various cases in which the person's criminal liability can be excluded or reduced to the extent if his defense satisfies the requirement of the sections in a given set of circumstances. Defenses are capable to accommodate various legal traditions of civil and common law systems into a single body [5].

Remarkably, the Rome Statute does not accept the defence of 'superior orders' on its fact, the test of 'manifest illegality' has been embraced in such cases.

Article 31 provides various grounds for excluding criminal responsibility such as duress, necessity, insanity, intoxication etc. Article 32 talks about 'Mistake of Fact' as it will be treated a ground of defence if an accused person does not possess requisite intention at the time of commission of crime. Article 33 provides for 'Superior Orders and Prescription of Law' as a ground of defence in certain circumstances. Comprehensive provisions are there in the statute, moreover the International Criminal Court through various judicial pronouncements have tried to give effect to these provisions taking into consideration the 'human values' and 'gravity of crime(s)'.

Research Problem

Strangely, the international community did not bestow the idea of defences in the 'war crimes'. There were no defences qualified under the Nuremburg Charter nor the ICTY or ICTR Statutes; however, the IMT at Nuremburg permitted the defence of duress, necessity while all tribunals permitted the defence of superior order only for mitigating the sentence not for the acquittal of the persons who were supposedly engage in war crimes.

With the adoption of Rome Statute, the uncertainty concerning these defences took away. Still, there are cases in which ICC did not allow the plea of defences considering the 'seriousness' of the crime(s). Hence, this picture needs more clarification in the mind of author as well as readers so as to ascertain the criteria of defences through objective considerations.

Defences: An Evaluation

Duress and Necessity

Article 31 (1) (d) of the Rome Statute talks about the duress and necessity as permitted defences. Duress and necessity are those available defences which accused put forward to escape from the fear of punishment. It provides the necessary justification for engaging in any crime. Duress connotes the idea that there was an imminent threat to the life of the person which deprives from exercising his will or freedom in a particular manner. It denotes that there is no active 'mens rea' on the part of the accused to commit the crime. As Lord Morris said in ***Lynch*** Case

[6] (United Kingdom):

"The question is whether a person the subject of duress could reasonably have extricated himself or could have sought protection or had what has been called a 'safe avenue of escape".

Similarly, the element of necessity requires any person to act in a given set of circumstances which is objectively ascertainable as per the case. Hence, the act of the accused person should justify the reasonability and probability test which would justify the need for action to avoid greater harm.

It was stated by the United Nations War Commission that "under Chapter XIII, Wharton's 'Criminal Law' Volume I, there is a underlying principle of the defence of necessity as follows:

"Necessity forcing man to do an act justifies him, because no man can be guilty of a crime without the will and intent in his mind. When a man is absolutely, by natural necessity, forced, his will does not go along with the act" [7].

It has been held in the case of *Attorney General v. Whelam* [8] (Ireland) that the acts otherwise criminal may be excused if were performed under threat by one of the persons of immediate death or terrifying personal violence at the time when the acts were committed. It was clearly stated that "Duress is a complete defence and not simply a matter of mitigation in sentence [9]."

In *R v. Hurley and Murray* (Australia) [10], the plea of duress was acknowledged when the person was having a threat of 'death or grievous bodily harm'.

In case of *R v. Hasan* [11] (United Kingdom) the House of Lords set forth some comprehensive guidelines as to how to regulate the cases concerning defence of duress in the following manner:

a. The threat or danger must be of death or serious injury;
b. The threat must be directed against the defendant, his or her immediate family or someone close to the defendant;
c. The relevant tests are in general objective, with reference to the reasonableness of the defendant's perceptions and conduct;
d. The defence is available only where the criminal conduct which it is sought to excuse has been directly caused by the threats relied upon;
e. There must have been no evasive action the defendant could reasonably have been expected to take;
f. The defendant must not voluntarily have laid himself or herself open to the duress relied upon;
g. Duress may be a defence to any crime except some forms of treason, murder and attempted murder.

In ***Einsatzgruppen*** *Case,* it was Found that

"*There is no law which requires that an innocent man must forfeit his life or suffer serious bodily harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real, and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever"* [12].

In the *Krupp Trial* [13], factors for determining the duress / danger were considered and consequently it was stated:

"..the question is to be determined from the standpoint of the honest belief of the particular accused in question...The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defence, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual [14]."

Hence, it was recognized that for claiming the defence of self-defence, the apprehension of the danger in good faith is the sufficient consideration. The defence cannot be exercised in those grounds where mere danger was present which could be avoided.

Duress and Superior Order

The cases involving the duress and superior orders have brought significant considerations before the international community. It was accepted that if the threat is exerted upon any accused person by his superior then it will not absolve the accused from the criminal liability if the act committed is very grave in nature like genocide, crimes against humanity etc. which shake the core values of the humanity. In these cases, duress will only be a mitigating factor not the complete defence.

The Trial Chamber in case of *ICTY Prosecutor v. Erdemovic* [15], it was stated that: *"Accordingly, while the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict. They must be sought not only in the very existence of superior order-which must first be proven-but also and especially in the circumstances characterizing how the order was given and how it was received"* [16].

It reflects the notion that the grounds of defence

should not be considered on the face of it when the case involves 'superior order' because such cases hold greater responsibility, hence it is pertinent to look comprehensively in these cases so as to ascertain the truthfulness of the act(s).

The Trial Chamber relied on the wordings of the Appeals Chamber that *"duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings"* [17].

On the same grounds, a Canadian Military Court in the year 1946 in ***Hölzer*** Case stated that the ground for defence does not justify the act of committing heinous crime(s) [18].

However, in his dissenting opinion in the ***Erdemovic*** case, Judge Cassese emphasized that in the regime of International Humanitarian Law, the defence of duress or necessity does not exclude the responsibility of the accused person if he permissively opts 'to become a member of a unit, organisation or group institutionally intent upon actions contrary to international criminal law' [19].

Henceforth, the defences of duress and necessity require thoughtful deliberations taking into consideration the nature of the international crime committed by the person. They cannot be accepted as the total defence otherwise the formal inscription of the international human rights law will get affected.

Insanity and Intoxication

Article 31 (1) (a) of the Rome Statute excludes the criminal liability of the accused if at the time of the commission of crime he was not able to understand the nature and consequences of the act and not able to understand what is wrong or right in a particular case due to his mental incapacity. This rule has been widely accepted in various countries' domestic laws on the ground that it is unfair to punish the person when he does not have requisite intention to commit the crime.

In this context, I would like to quote the domestic law of the America which talks about the insanity as a defence in crystal clear terms. American Model Penal Code states: *"A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law."*

In *McDonald v. United States* [20], the court defined "mental disease" for the purpose of that jurisdiction's insanity test as "any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior control [21]."

In order for a defendant to make an adequate insanity defence, he or she must suffer from a severe mental illness, disorder, or defect at the time the alleged criminal act occurred [22].

There are three basic tests for insanity that a jurisdiction can use.

a. One is the common law M' Naghten test which requires that the defendant show he did not understand the nature and quality of his act or that he did not know his act was wrong. Jurisdictions that apply the MPC standard use the test set out in MPC Sec 4.01(1) [23].

b. The second test is the MPC substantial capacity test that states: the defendant will be acquitted if as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to confirm his conduct to the requirements of the law.

c. The last test is the irresistible impulse test. Under this test the defendant would need to show that he was unable to control his conduct because of an irresistible impulse.

ICTY said: *"This is a defence in the true sense, in that the defendant bears the onus of establishing it –that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong"* [24].

However, the defence of 'diminished mental capacity' was rejected by the ICTY in *Celebici* case. The Appeals Chamber, while considering the rules of international customary law held that the defence of 'diminished mental capacity' is different from the defence of insanity of ICC statute thus, former can only be pleaded to mitigate the sentence.

Article 31 (1)(b) talks about intoxication as a defence which reads as: "unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court."

So, if the person is involuntary intoxicated and was not in the senses, then he can take the defence under this article. Earlier also, this defence was allowed in cases of war crimes. In case of *United Kingdom v. Yamamoto Chusaburo* [25].

United Kingdom v. Yamamoto Chusaburo

(British Military Court), Law Report of the Trials of War**,** the court recognized this defence.

Command Responsibility/ Defence of Superior Orders

Rule 155. "Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered" [26].

If an accused is charged with a criminal offence, can he plead by way of defence that he was simply following orders of somebody in authority over him?

The underlying idea behind the defence of superior order is that the order given by the superior ones are always lawful in nature even though they are illegal on the face of it. As Dicey commented that "he may be liable to be shot by a court martial if he disobeys an order and to be hanged by a judge and jury if he disobeys it." It has been seen as a ground for mitigating the sentence but not the defence during the trail of war crimes [27]. This position has clearly find its mention in Article 8 of the Charter of IMT (Nuremberg Charter), it says, "The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires [28]."

Article 6 of the Tokyo Charter, article 6 of the Statute of the International Tribunal for Rwanda and Article 7 of the International Tribunal for the Former Yugoslavia assumes the ground of superior orders for mitigation of sentence only. Article 6 of the Statute of ICTR and Article 7 of the Statute of ICTY are identical in words and actions [29].

Article 6 (3) of Statute of the International Tribunal for Rwanda provides, "the fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof [30]."

Article 6 (4) of Statute of the International Tribunal for Rwanda provides, "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires [31]." This proposition has been discussed in case of ***t****he Prosecutor v. Jean Kambanda* [32].

In *Bagilishema* case, the new horizon of the superior order was given in the regime of interpretation of this defence to apply it over the civilian superiors and the accused was acquitted. The Trial Chamber stated that:

"According to the Trial Chamber in *Celebici* case, for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must, have the "material ability" to prevent and punish any offences [33]."

In case of *The Prosecutor v. Darko Mrdja* [34]**,** the ICTY Trial Chamber declined the defence of duress and superior orders because the act of the accused was unlawful on the face of it. The Chamber cited Article 7 (4) of the Statute of ICTY and said that the defences can only be used in mitigation of sentence hence, they do not absolve the criminal liability of the accused.

However, this position has slightly changed during the times i.e. from Nuremberg Charter to Rome Statute. The test of 'manifest illegality' has also been incorporated in the Statute.

Article 33 of the Rome Statute reads as

1. "The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

a. The person was under a legal obligation to obey orders of the Government or the superior in question;

b. The person did not know that the order was unlawful; and

c. The order was not manifestly unlawful.

For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful."

As, we have observed that the cases of superior orders have been dealt by the tribunals and the courts in a very careful manner. The legitimacy of the acts ordered by the superior possesses great significance. The persons acting under them have to follow the instructions of the orders, sometimes, they constitute grave violations of the human rights. That's why the principle has evolved in the light of war-crimes.

For constituting the defence of superior liability, the person must be unaware of the fact that the order was unlawful and that order should not be 'manifestly unlawful'. These restrictions have put in the Rome Statute to assess the acts of the persons who commit international crimes under the shed of the 'superior responsibility'. It shows that the underlying purpose behind this provision is to safeguard the humanity so that the acts which are manifestly unlawful do not leave the scope of availing the defence for such persons otherwise the very objective of the Rome Statute will fall.

Analysis

In order to comprehend the idea that how far these defences are effective in the light of human rights, one has to grasp the notion of defences from the view-point of the case-laws. The legitimacy and sanctity of the defences permitted under the Rome Statute depends upon the circumstances and the nature of the offence. Hence, the exclusion of criminal responsibility is not the absolute under the ICL, however it is more conditional in nature.

The Rome Statute seems to be the protector of the human rights by creating the balance between the duties of the soldiers and the interest of the justice for human beings. It shows that the Statute is not merely a display of human rights rather the ICC through various decisions has succeeded in punishing the offenders so as to secure the fundamental rights of the human beings. It is seen to be in compliance with the UDHR, 1948. As, Article 11 (1) of the Universal Declaration of Human rights says: "Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

The ICC Statute provides the opportunity to all persons to present their case and to consider their defences. The Statute comprehensively deals with the procedural aspect of the crimes so as to comply with the natural justice principles but at the same it has to satisfy the requirements of punishing those individuals who had committed or involved in crimes, by discarding their defences on the grounds of humanity.

After the adoption of the two covenants in 1966 i.e. ICCPR & ICESCR, the International bodies worked hard to strive and secure the human values by preventing the commission of crimes. Numerous conventions and treaties were adopted to regulate the conduct which affects human rights like Geneva Conventions, Convention on Prohibition against the Genocide, Convention against Torture etc.

Still, due to ongoing humanitarian crisis all over the world, especially in European countries, the very purpose of the Rome Statute and the international community seems to be diminishing which require some watershed amendments in terms of effective implementation of 'universal jurisdiction', hence some more powers should be given to the ICC for preserving the peace and humanity in the world.

Hence, considering the blind incongruity of the acts of terrorism, crimes against humanity, genocide and war crimes, the court has to apply the grounds of defences very cautiously.

Conclusion

The research paper explains the various standard statutory defences in the light of the development of ICL. Further, we have seen that the various tribunals and ICC have given a new horizon in the development of human rights by discarding the defences in furtherance of commission of serious crimes. ICC has seen to a very cautious in applying the defences. If the purpose of the law is simply to deter certain behaviour - whether in peace time or in conflict - defences would make little sense for the optimum form of deterrence would be for the law to offer no defence, still I consider that the defences forms an integral part in the jurisprudence of international criminal law.

Presently, it is a generally accepted proposition that a subordinate who acts in conformity with orders is liable to punishment when he knows compliance would involve a civil or military crime or misdemeanor. This provision denotes the positive connotation in the regime of international law. Ultimately, 'preserving the humanity' and delivering the humanitarian assistance through the efforts of the courts, tribunals are the ultimate goals of the whole international community to which we are also a part.

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