

Commonwealth and International Perspectives on Self-Defence, Duress and Necessity

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Abstract

This article compares the provisions on self-defence, duress and necessity contained in the *Criminal Code* 1995 (Cth) and the Statute of the International Criminal Court (the 'Rome Statute'). The comparative exercise produces suggestions for improving these provisions which, if implemented, will achieve greater harmony between the national and international laws on these defences.

Introduction

Two major developments in criminal law have occurred recently which have potentially far ranging effects nationally and internationally. The first was the enactment of the *Criminal Code* 1995 (Cth) (hereinafter called the 'Commonwealth Code') which adopted most of the recommendations contained in a report by the Model Criminal Code Committee published three years earlier (Criminal Law Officers Committee of the Standing Committee of Attorneys-General 1993). Although the Commonwealth Code only applies in the Federal sphere, there is a distinct possibility that, eventually, the general principles of criminal responsibility contained in the Code will be adopted throughout Australia.

The second development was the ratification by Australia of the *Statute of the International Criminal Court* in 2002 (hereinafter called the 'ICC Statute').¹ As a result of the ICC Statute, a permanent international criminal court composed of judges who are independent of their home states, was created for the first time in history, to try perpetrators of crimes against humanity, genocide, war crimes and aggression. The first three of these crimes were introduced into Australian law at the time of ratification, while the crime of aggression awaits definition by the ICC Statute.

The ICC Statute contains provisions spelling out some of the general principles of criminal responsibility. As a leading player and supporter of the creation of the International Criminal Court (ICC), we can expect Australia to comply as much as possible with the ICC

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1 See UN Doc. A/CONF.183/9, available at <http://www.un.org/icc>, reprinted in 37 ILM 999 (1998), and known as the 'Rome Statute'. In this article, 'ICC Statute' will be used instead because it complements the expression 'ICC provision' which frequently appears in the discussion.

Statute. This renders the Statute an important source of law which Australian lawmakers (both legislators and judges) should take cognisance of. Among the general principles of criminal responsibility embodied in the Commonwealth Code and ICC Statute are provisions on self-defence, duress and necessity. These defences will be the focus of this article. Besides being present in both statutes, they have been selected for study because they all, generally speaking, involve a claim by the defendant that he or she had been compelled by a threat to commit the alleged criminal conduct. Being discrete defences, one would expect material differences between them. That said, this shared feature of compulsion creates a common platform for usefully comparing and contrasting certain elements of these defences.

The primary objective of this study is to determine the extent to which self-defence, duress and necessity are similar in the national and international legal spheres, and to identify any differences which could be ironed out. The fact that both the Commonwealth Code and ICC Statute have provisions on these defences makes it imperative to compare them since individuals could find themselves subject to either of these sets of provisions. For example, an Australian soldier serving overseas may be accused of a war crime and seek to plead self-defence. The ICC would have jurisdiction over such a case as the state of the nationality of the soldier (i.e. Australia) has ratified the ICC Statute (see Article 12(2)(a) of the Statute). The rule of complementarity contained in the ICC Statute (see para 10 of the preamble and Article 1 of the Statute) makes it very likely that Australia will retain jurisdiction over prosecution of the soldier with the result that he or she will be subject to the provision on self-defence under the Commonwealth Code. However, the possibility remains that the Australian government may decide that it is more politic to have the ICC try the case, whereupon the self-defence provision under the ICC Statute becomes operative. This would also happen were the ICC to decide to try the case on the ground that Australia was unable or unwilling to genuinely carry out the investigation or prosecution of the soldier (see Article 17). Were any of these scenarios to occur, fundamental fairness would be achieved if the provisions on self-defence under the Commonwealth Code and the ICC Statute were substantially similar, but not if they were materially different so as to result in an acquittal under one but not the other provision.

We therefore need to determine the extent to which the provisions on self-defence, duress and necessity are similar under the Commonwealth Code and the ICC Statute. Another objective of this study will be to see whether these provisions could be interpreted in ways which promote harmony between them. And where there are material differences between the provisions, law reform proposals will be made which seek to remove or reduce them.

Considerations which Assist this Comparative Study

This comparative study will be greatly assisted by keeping in mind the following two matters: first, the nature and origins of the Commonwealth Code and the ICC Statute; and secondly, the interaction between the national law contained in the Commonwealth Code and the international law found in the ICC Statute.

Nature and origins. The Commonwealth Code and ICC Statute have much in common in that they comprise serious attempts to conflate several other sets of laws. In relation to the Commonwealth Code, the criminal laws of the Australian common law jurisdictions and those of the code jurisdictions had to be taken into account in deciding how best to formulate each provision. Similarly, with regard to the ICC Statute, the criminal laws of common law and civil law jurisdictions had to be considered in arriving at an acceptable

formulation for each provision. This exercise of conflation could be viewed as a strength since the final product is drawn from several sets of laws, and endorsed by a number of jurisdictions. However, conflations of this nature also invariably involve compromises which could produce weaknesses. They include an aspect of a provision not fitting well with the rest of the provision, ambiguity or gaps in the provision, and inconsistency when compared with other provisions. Since both the Commonwealth Code and ICC Statute are new instruments, the relevant bodies should be open to revising any provision which is found wanting. For the Commonwealth Code, the body will be the Federal Parliament, and for the ICC Statute, it will be the Review Commission which will be convened in 2009 to evaluate the Statute (see Article 123).

Interaction between national and international laws. This is very much a two way process (Delmas-Marty 2002:1915). Dealing first with national laws incorporating international law, national laws and the courts interpreting them can no longer ignore the advance and relevance of international law in the domestic sphere. Recognising this, Brennan J in the Australian High Court case of *Mabo v Queensland [No 2]* declared that the 'common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law' (at 42). In a similar vein, Kirby J, when in the New South Wales Court of Appeal, said in *Cachia v Hanes* that 'statements of international law [are] a source of filling a lacuna in the common law of Australia or for guiding the court to a proper construction of the legislative provision in question' (at 313). Likewise, Merkel J in the Federal Court case of *Nulyarimma v Thompson* opined that '[a] rule of customary international law is to be adopted and received unless it is determined to be inconsistent with ... the general policies of [domestic] law, or lack of logical congruence with its principles' (at 654).

The ICC Statute, being a body of law agreed upon by a large number of nations including Australia, forms a respected and valuable source for comparison. While the transformation approach (Shearer 1997:48-51) favoured by our courts means that international law does not automatically form part of Australian law, the fact remains that the ICC Statute comprises a highly persuasive source of law. Should our lawmakers wish to disagree with a particular stance taken in the ICC Statute, it is important for them to focus on the reasoning behind that stance and not on its international character.

Turning to international law incorporating national laws, national laws contribute to the formation of international custom as evidence of state practice. But the role given to national laws by the ICC Statute is even more specific under Article 21(1) which regards those laws as a secondary source. The relevant part of that provision empowers the ICC to draw upon the 'general principles of law derived by the Court from national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards'. Clearly, the Commonwealth Code would be a source of national law from which to derive general principles of criminal responsibility were the ICC to try an Australian national.

Another consideration assisting the comparative exercise is the appreciation that the goal is not to render identical the provisions of the Commonwealth Code and ICC Statute on a particular matter. Rather, it is to strive towards a 'substantial similarity of norms or elements' (Cherif Bassiouni 1993:248; Knoops 2001:33-34). In this regard, there is an 'acceptance of a State's margin of appreciation, guaranteeing a certain degree of discretion' (Delmas-Marty 2002:1928). To prevent excessive divergence from this margin, it has been suggested that the human rights approach be adopted whereby a state's laws comply with

guiding principles derived from international law covenants on human rights (Delmas-Marty 2002:1929).²

With the above considerations in mind, we are in a position to commence our comparative study of self-defence, duress and necessity under the Commonwealth Code and ICC Statute.

Self-Defence

To facilitate comparison, the provisions on self-defence in the Commonwealth Code and the ICC Statute are reproduced here in full. Section 10.4 of the Commonwealth Code provides as follows:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:
 - (a) to defend himself or herself or another person; or
 - (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
 - (c) to protect property from unlawful appropriation, destruction, damage or interference; or
 - (d) to prevent criminal trespass to any land or premises; or
 - (e) to remove from any land or premises a person who is committing criminal trespass;
 and the conduct is a reasonable response in the circumstances as he or she perceives them.
- (3) This section does not apply if the person uses force that involves the intentional infliction of death or really serious injury:
 - (a) to protect property; or
 - (b) to prevent criminal trespass; or
 - (c) to remove a person who is committing criminal trespass.
- (4) This section does not apply if:
 - (a) the person is responding to lawful conduct; and
 - (b) he or she knew that the conduct was lawful.
 However, conduct is not lawful merely because the person carrying it out is not criminally responsible for it.

The self-defence provision in the ICC Statute is to be found in Article 31(1)(c). It is much shorter compared to the Commonwealth provision and reads as follows:

[A] person shall not be criminally responsible if, at the time of that person's conduct ... [t]he 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

2 A good example of the application of this approach is the influence of the European Convention on Human Rights on national laws. For the effect of the Convention on English law, see Ashworth 2006:60-64, 67-78.

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.

It would be convenient to categorise the various elements of the two provisions on self-defence into those concerned with the nature of the threat and those involving the defendant's response to the threat.

The Nature of the Threat

One significant difference between the Commonwealth and the ICC provisions pertains to the purely subjective appraisal of the threat in the former in contrast to the purely objective appraisal in the latter. Section 10.4(2) of the Commonwealth Code requires the defendant to have believed that one or more of the specified threats listed in that sub-section existed. Notably, it is not necessary for the defendant's belief to have been based on reasonable grounds which is the law in some Australian states.³ In stark contrast, on a strict reading of Article 31(1)(c), the threat must have been real, that is, to have existed as an objectively demonstrable fact. Ambos (2002:1032) has argued in favour of the objective stance which is the law in civil criminal law jurisdictions such as France and Germany on the ground that the underlying rationale of self-defence is premised on the defendant having reacted to a real threat in a permissible manner. In his view, were the law to replace this with the defendant's subjective belief, it would allow self-defence to succeed where the defendant had mistakenly believed that he or she was being attacked, thereby placing the conflict between the aggressor and the defender in the mind of the defender rather than in the real world. Ambos goes on to contend that these cases of putative self-defence are adequately covered by Article 32 of the ICC Statute which provides for the defence of mistake of fact.

There is much force in the argument put forward by commentators like Ambos for an objective appraisal of the threat before the plea of self-defence can be allowed to succeed. The question, however, is whether the ICC Statute's stance of requiring the threat to be real, ignoring altogether the defendant's belief, is conceptually supportable and practically just when seen in the light of the ICC provision on mistake of fact. Contrary to Ambos' contention, Article 32 does not assist cases of putative self-defence (Triffterer 1999: paras 14 and 28). That Article states that '[a] mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime'. As for what constitutes such a mental element, Article 30 provides that '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'. Accordingly, the subject-matter of the mistake envisaged by Article 32 is strictly concerned with an offence element (specifically, the *mens rea* of the offence) and has nothing to do with a defence element such as a defendant's belief that circumstances exist which warrant his or her acting in self-defence.

As for the self-defence provision under the Commonwealth Code, basing the threat entirely on the defendant's subjective belief however unreasonable, is the very opposite of the ICC Statute's requirement that the threat has to be real. It is submitted that the absence of any objective appraisal whatsoever of the defendant's belief works too much in his or her favour and to the detriment of the unfortunate victim. It cannot be asserted with any real confidence that defendants operating under an honest but unreasonable belief are free from

3 Victoria, Queensland and Western Australia. The purely subjective belief approach is subscribed to in New South Wales, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. See further Fairall & Yeo 2005: paras 10 6-10 8.

culpability. If such persons are so out of touch with the reality of the situation, if they lack the judgment of normal people, should they not have taken care in verifying the correctness of their belief? This obligation to exercise due diligence is further justified because these persons are aware that they are invading an interest generally protected by the law. Flecher (1998:162) is therefore correct in stating that '[a]n unreasonable or faultful mistake is itself culpable and therefore it cannot negate the actor's culpability'.

Shifting our focus away from the defendant and onto the victim yields another argument against basing the threat entirely on the defendant's subjective belief. Take the case of a person who is unnaturally apprehensive or cowardly which leads him to honestly but unreasonably believe that he is being attacked. Without the limitation of reasonable belief, such a person can react violently towards others with impunity. As one American judge has observed, '[t]o completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force' (*People v Goetz* at 27 per Wachtler CJ). Surely, the criminal law should provide societal protection from such a person.

Fletcher (1998:162) contends that the solution is to require 'a person using force in self-defense [to] reasonably believe in the factual conditions of self-defense'. It is noteworthy that a reasonable person standard is not being subscribed to here. Under this test it is possible for a defendant to form a belief which differs from that which the reasonable person would have contemplated in the same circumstances. This is because the trier of fact is required to initially consider who this particular defendant is, taking into account his or her personal characteristics. Only when the trier of fact has a picture of the particular defendant can it proceed to determine whether such a person could have had reasonable grounds for believing what he or she honestly believed to be the nature of the threat. The Australian Federal Court in *Helmhout v The Queen* expressed the matter thus:

The test of whether an accused's belief was reasonable is not whether an unlawful attack was being made or was about to be made upon him, nor even whether the hypothetical reasonable man in the accused's position would have believed that an unlawful attack was being or was about to be made on him. The test is whether the accused himself might reasonably have believed in all the circumstances in which he found himself that an unlawful attack was being or was about to be made on him (at 4).

The Commonwealth legislature should give serious consideration to revising the self-defence provision under the Commonwealth Code to accord with this solution. This would herald a return to the common law position pronounced by the Australian Federal Court in *Helmhout* as well as the Australian High Court in *Zecevic v DPP (Vic)* (at 658) and fall in line with the self-defence provisions of the Griffith Code (*Criminal Code 1899 (Qld)*, ss258(1), 262-264, 266 and 267; *Criminal Code 1914 (WA)*, ss239-241, 243 and 244).

In passing, it is noted that the relevant Commonwealth provision on mistake of fact like the one in the ICC Statute, is strictly concerned with mistakes that negate the mental element of a crime.⁴ Consequently, although that provision states that a court 'may consider whether the mistaken belief was reasonable in the circumstances', it is of no assistance to a case of putative self-defence since the mistake there concerns the factual conditions of self-defence and not with the mental element of the alleged crime.

4 Section 9.1 states that: 'A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if (a) at the time of the conduct constituting the physical element, the person is under a mistaken belief about, or is ignorant of, facts; and (b) the existence of that mistaken belief or ignorance negates any fault element applying to that physical element.' For a discussion of this provision, see Leader-Elliott 2002:173-175.

Taking stock of my analysis thus far, the stance taken by the ICC Statute is too draconian in insisting on the factual reality of the threat and ignoring altogether the belief of the defendant. Conversely, the position taken by the Commonwealth Code is too lax in permitting a defendant's belief, however unreasonable, to support the plea of self-defence. It is submitted that the best stance is to require a hybrid test of a defendant's reasonable belief as to the existence and nature of the threat. When applying this test, the tribunal of fact will be required to take into account the defendant's personal characteristics such as his or her age, sex, physical disabilities, religious beliefs, ethnicity and such of the defendant's characteristics as might affect the gravity of the threat to him or her. By recognising these personal characteristics, society is acknowledging that it cannot realistically expect more of a person than to act in conformity with reasonable appearances. It is submitted that this partially subjective/objective test will go a long way to meeting the criticisms of the law currently found in the Commonwealth Code and the ICC Statute.

Regarding the types of harm threatened, the Commonwealth Code provides for defensive action to be taken against a wide range of harms. In stating that one can 'defend himself or herself or another person', s10.4(2)(a) is broad enough to include both physical and psychological harm to the person. The Commonwealth provision goes on to recognise a threat of false imprisonment of oneself or another person under s10.4(2)(b) which is in keeping with the protection of a person's bodily integrity. Additionally, s10.4(2)(c) permits defensive action to be taken against the destruction, damage or interference of property, and s 10.4(2)(d) and (e) against criminal trespass.

The threats recognised by the ICC Statute include harm to the defendant or another person which has been interpreted to mean '[t]he use of force directed against the life, bodily integrity or freedom of movement of the defender or a third party' (Werle 2005:para 411). Hence, this aspect of the ICC defence is as broad as the forms of threats against the person covered by s10.4(2)(a) and (b) of the Commonwealth Code.

With regard to defence of property, however, the ICC provision is much more restrictive, being applicable only in respect of war crimes and where the property fitted either of two descriptions. The first is that the property sought to be defended must have been 'essential for the survival of the person or another person', and the second is that the property was 'essential for accomplishing a military mission'. The first description is an attractive way of restricting the kind of property threatened to those upon which human life was critically dependent. On one view, this aspect of the ICC provision is more concerned with the protection of persons than of property. Were such property to be threatened, the ICC provision would allow the defendant to use force, including killing the aggressor, to protect the property provided that such force was proportionate to the degree of danger to the property protected. This stands in contrast to the Commonwealth provision (s10.4(3)(a)) which denies the defence to persons who had intentionally inflicted death or really serious injury to protect property. There is much to be said for extending the defence to property under the Commonwealth Code in the way provided for by the ICC provision. A strong argument could be made for empowering a defendant to use fatal force against an aggressor who is threatening to destroy property which is vital to the defendant's or others' survival. This could be achieved by adding the clause 'unless the property was essential for the survival of the person or another person' immediately after the words 'to protect property' found in s10.4(3) of the Code.

As for the protection of property essential for accomplishing a military mission, this is very specific to the ICC Statute and has no real bearing on national law. Therefore, nothing more need be said about it here other than that its inclusion in the ICC Statute was highly

controversial and that it has no basis under customary international criminal law (Knops 2001:87-90; Cassese 2003:230).

The Commonwealth Code defence is not available to a person who had responded to lawful conduct (comprising the threat) provided he or she knew that the conduct was lawful (see s10.4(4)). Put in another way, the defence is available to a person who had acted in self-defence against a lawful threat if he or she mistakenly believed that the threat was unlawful. It has been contended above that a defendant's belief as to the existence of the threat should not be permitted to be entirely subjective but be based on reasonable grounds. The same arguments apply equally here for requiring the defendant's mistaken belief as to the unlawfulness of the threat to be based on reasonable grounds. Essentially, a person who was at fault in mistakenly believing the factual conditions of self-defence should not be allowed to have his or her culpability negated.

The Commonwealth provision goes on to stipulate that conduct is not lawful merely because the actor was not criminally responsible for it. This rider is necessary to enable the defence to operate against, say, a legally insane aggressor who would technically not be criminally responsible for his or her conduct.

In comparison, the ICC provision restricts the operation of the defence to cases involving unlawful threats with no allowance made whatsoever for cases where the defendant did not know that the threat was unlawful. Furthermore, the ICC provision is silent about cases where the aggressor's conduct was lawful only because of some legal defence available to him or her. The rider appearing in Article 31(1)(c), namely, of the defender being involved in a defensive operation conducted by forces, is of no assistance here. It is submitted that these are material gaps which the Review Commission of the ICC Statute should rectify by amending the provision along the lines of the Commonwealth provision, subject to the defendant having reasonably believed that the threat was unlawful. Until this is done, the ICC would do well to incorporate these features into the provision.

The Response to the Threat

This requirement of self-defence is conventionally expressed through the concepts of 'necessary', 'reasonable' and 'proportionate' response. These concepts are well known in national criminal legal systems including our own but very difficult to define conclusively. What is clear, however, is that the 'necessity' of the defensive response is distinct from the 'proportionality' of that response. Quoting Fletcher (1998:135) again:

Necessity speaks to the question whether some less costly means of defense, such as merely showing the gun or firing a warning shot into the air, might be sufficient to ward off the attack. The requirement of proportionality addresses the ratio of interest threatened both on the side of the aggressor and of the defender. The harm done in disabling the aggressor must not be excessive or disproportionate relative to the harm threatened and likely to result from the attack.

The Commonwealth provision requires the defendant to have believed the conduct to be 'necessary' for one of the specified purposes, and that the conduct was 'a reasonable response in the circumstances as he or she perceives them'. Concerning the concept of 'necessary', it is unclear whether the Code requires the defendant to have used the least that is, minimum) amount of force, or that it is permissible for him or her to have used more force provided it was reasonable in the circumstances. The latter stance is to be preferred for recognising the human reality that a person acting in self-defence will have been operating under intense pressure which would have denied him or her the opportunity to calmly decide which of the available responses was the least harmful. The Commonwealth

provision arguably adopts this stance by drawing a close connection between the concept of 'necessary' and that of a 'reasonable response' appearing later in the provision. These two concepts could be conflated to become the requirement of a 'reasonably necessary response'. Further support for interpreting the Commonwealth provision in this way is that it does not specify a legal duty to retreat. The concept of a 'reasonably necessary response' sits well with this. While retreating will certainly be the least harmful response open to the defendant, there may be other reasonable responses which should be available to a person taking defensive action against an aggressor.

Noticeably absent in the Commonwealth provision is the requirement that the defendant's response has to be proportionate to the threat. The likely explanation for this is that the drafters meant the concept of proportionality to be subsumed under that of a 'reasonable response' found in the provision. This accords with the view taken by the Australian High Court in *Zecevic v DPP (Vic)* (at 662). While that may be so, it is submitted that the Commonwealth provision pins too much on the concept of 'reasonable response'. As we have seen, it is an umbrella term covering the concept of 'necessary' and now that of 'proportionality'. It is submitted that the Commonwealth provision would be much improved if it were to replace the concept of 'reasonable response' with that of proportionality, so that the only concepts dealing with response to the threat in self-defence would be that of necessity and proportionality. These two concepts being clearly distinguishable, the legal requirement pertaining to the defendant's response in self-defence would be much better expressed and applied.

In comparison, the ICC provision specifies that the defendant must have acted 'reasonably' in defence of himself or herself, another person or property, and 'in a manner proportionate to the degree of danger' to the defendant or other person. Subscribing to the suggestion made above that a proportionate response forms part of the broader concept of a reasonable response, Werle (2005:para 417 n296) has critically described this aspect of the ICC provision as the 'cumbersome doubling of proportionality'. Another criticism of the ICC provision is that it makes no reference whatsoever to the concept of 'necessary' response. Perhaps, the drafters meant for this concept to be subsumed under that of 'reasonably' contained in the provision (Ambos 2002:1034). Be that as it may, it is submitted that the concept of 'necessary' response is sufficiently distinct to warrant a separate reference of its own, and not to be submerged within the concept of acting 'reasonably' with its close association with proportionate force. The observation has been made earlier that the law should clearly distinguish the necessity of the defensive response from the proportionality of that response. As presently worded, the ICC provision on self-defence fails to do this.

Interestingly, as we shall see below, one of the requirements of the ICC provision on duress is that the defendant must have acted 'necessarily'. It is difficult to appreciate why the concept of necessary response is required for duress but not for self-defence. The Review Commission examining the ICC Statute should therefore rectify this ambiguity by expressly inserting a requirement of necessary response into the provision on self-defence. Until this is done, it is submitted that the ICC should read this requirement into the provision.

Once the requirement of necessity is in place, it should, for the reasons previously given, be interpreted as requiring the defender's response to have been 'reasonably necessary' force as opposed to the minimum amount of force necessary to defend himself or herself, another person or property. Accordingly, the assertion by Cassese (2003:222) that self-

defence requires there to have been 'no other way of preventing or stopping the offence' should not be followed.

Another issue concerning the response to the threat concerns the test for determining whether the response was 'necessary', 'reasonable' and 'proportionate'. The choice of tests could be (1) the defendant's purely subjective belief; (2) the defendant's belief based on reasonable grounds; or (3) an appraisal by the tribunal of fact – that the response was necessary, reasonable and proportionate. Both the Commonwealth and ICC provisions have chosen test (3). Given the strong emphasis placed on objectivity for this aspect of the law by the Commonwealth Code and ICC Statute, it would be pointless arguing for test (1). However, test (2) is attractive for being partly subjective/objective. This test has the support of Australian common law (*Zecevic v DPP (Vic)* at 661) and self-defence provisions in the Griffith Code (*Criminal Code* 1899 (Qld), ss258(1), 262-264, 266 and 267; *Criminal Code* 1914 (WA), ss239-241, 243 and 244). There is good reason why this test may be preferred over that of (3). Its emphasis on the defendant's belief ensures that, in the determination of culpability, sufficient account is taken of the personal characteristics of the particular accused.⁵ Thus, characteristics such as the defendant's age, sex, physical disabilities, religion and ethnicity would be relevant in assessing the reasonableness of the accused's belief in the necessity, reasonableness and proportionality of the force applied by him or her. It is only fair that such personal attributes should be considered as society cannot realistically expect more of a person than to take reasonable retaliatory action in the face of an actual or perceived threat. It is not at all certain whether test (3) permits these personal characteristics to be taken into account. As a result of this comparative study between these tests, it is submitted that our Federal courts and the ICC should replace test (3) with test (2).

Must the defender wait for the attack to commence before taking defensive action or can he or she act in advance of such an attack? The wording of the Commonwealth provision is wide enough to recognise what has been described as a pre-emptive strike. On this issue, the ICC provision accepts this form of response by describing the danger as 'imminent' (as opposed to 'immediate') thereby allowing for circumstances where the attack was still some time away. This is a welcome pronouncement in international criminal law which had hitherto scant case law on the issue. The rationale for permitting pre-emption is that a person's vital interests of life and physical security cannot be adequately protected if he or she must 'wait until the first blow is struck' (Ashworth 2006:145). Whether there is a need for the Commonwealth provision to likewise describe the threat as imminent is debatable. In the domestic context, the imposition of this requirement could create problems for battered defendants in violent relationships who seek to rely on the plea of self-defence in answer to charges of killing their batterers (Victorian Law Reform Commission 2004:paras3.49-3.64). It would be preferable to regard imminence as a factor when determining whether the defendant's conduct was necessary and reasonable in the circumstances. As Kirby J in the Australian High Court case of *Osland v The Queen* noted, '[t]he significance of the perception of danger is not its imminence. It is that it renders the defensive force used really necessary and justifies the defender's belief that "he or she had no alternative but to take the attacker's life"' (at 382).

To conclude this comparative study of the Commonwealth and ICC provisions on self-defence, reference may be made to the formulation of self-defence in the Siracusa Draft Statute for an International Criminal Court (Association Internationale de Droit Penal, International Institute of Higher Studies in Criminal Sciences/Max Planck Institute for

5 A similar point was made earlier in this article concerning the accused's reasonable belief as to the nature of the threat.

Foreign and International Criminal Law et al. 1996). Many of the suggestions for improvement made above are contained in Article 33-12(1) of the Draft which reads as follows:

Self defence consists in the use of force against another person which may otherwise constitute a crime when and to the extent that the actor reasonably believes that such force is necessary to defend himself or anyone else against such other person's imminent use of unlawful force, and in a manner which is reasonably proportionate to the threat or use of force.

It will be observed that under this formulation, the test is the same in respect of the nature of the threat and the response to it, namely, the defendant's reasonable belief. This shared test has the virtue of injecting simplicity to an otherwise complicated area of the law. Another admirable feature of this formulation is that it embraces the concepts of necessity and proportionality and avoids further complicating the law by steering clear of the all too broad concept of a 'reasonable' response.

Duress and Necessity

The defences of duress and necessity each have separate provisions under the Commonwealth Code. Duress is defined in s10.2 as follows:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence under duress.
- (2) A person carries out conduct under duress if and only if he or she reasonably believes that:
 - (a) a threat has been made that will be carried out unless an offence is committed; and
 - (b) there is no reasonable way that the threat can be rendered ineffective; and
 - (c) the conduct is a reasonable response to the threat.
- (3) This section does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out conduct of the kind actually carried out.

The defence of necessity is described as 'sudden and extraordinary emergency' under the Commonwealth Code. For the sake of brevity, it will be simply called 'necessity' here. It is defined in s10.3 as follows:

- (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in response to circumstances of sudden or extraordinary emergency.
- (2) This section applies if and only if the person carrying out the conduct reasonably believes that:
 - (a) circumstances of sudden or extraordinary emergency exist; and
 - (b) committing the offence is the only reasonable way to deal with the emergency; and
 - (c) the conduct is a reasonable response to the emergency.

The ICC Statute combines the defences of duress and necessity under the one provision. This was the result of the Rome Conference regarding the two defences as substantially similar (Saland 1999:208). Article 31(1)(d) reads as follows:

[A] person shall not be criminally responsible if, at the time of that person's conduct ... [t]he 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.

Cases involving threats 'made by other persons' will be the equivalent of the defence of duress under the Commonwealth Code, and those involving threats 'constituted by other circumstances' will be equated with the defence of necessity (that is, sudden or extraordinary emergency) under the Code.

As with the law of self-defence, it would be helpful to discuss the requirements of duress and necessity according to whether they are concerned with the nature of the threat or the response to it.

The Nature of the Threat

The issue of how the threat is to be assessed – whether through the perception of the defendant or whether it has to be based on factual reality – is exactly the same as that previously discussed in relation to the provisions on self-defence. It was there proposed that the best approach was for both the Commonwealth Code and the ICC Statute to adopt the middling stance of the defendant's belief based on reasonable grounds concerning the nature of the threat. This proposal applies equally to the defences of duress and necessity. Fortunately, the Commonwealth provisions embrace this position by stating that they apply only where the defendant 'reasonably believes' that the threats or circumstances of emergency existed (s10.2(2)(a) for duress; s10.3(2)(a) for necessity). Hopefully, the Review Commission of the ICC Statute will follow suit to avoid the injustice of convicting a person who could do no more than base his or her conduct on a reasonable belief in the existence of a threatened danger.

Regarding the types of threats recognised for the defences of duress and necessity, the Commonwealth provisions do not specify them in detail. Presumably any form of threat or circumstances of emergency will be recognised so long as they induced the defendant to commit the crime charged. Of course, this alone will not exculpate the defendant who would also need to satisfy the other defence requirements. By contrast, the ICC provision limits the types of threats to 'imminent death or of continuing or imminent serious bodily harm'. The Rome Conference considered including threats to property but ultimately decided against doing so. The restriction of threats to death or serious bodily harm before the defences will operate is understandable given the very serious nature of the crimes falling within the jurisdiction of the ICC.⁶ However, it would be entirely in keeping with this sentiment to extend the defence to persons who were confronted with the destruction of property which was essential to their survival. It was noted earlier that this type of threat is recognised by the ICC provision on self-defence, where the point was made that it has as much to do with the protection of human life as with property.

The Commonwealth provisions, unlike the ICC one, do not expressly require the threat to have been imminent. Whether imminence is crucial to the defences of duress and necessity is debatable. It is certainly a requirement in many national laws and one can readily appreciate how it highlights the fact that the defendant was operating under intense

6 For the suggestion that the recognised threats reflect western legal thinking about culpability 'which underestimates the material and ideological handicaps that constrain the choices of the poor and powerless', see Saul 2006:210.

pressure to avoid a threat that was about to happen. However, there may be cases where a person could experience the same sort of intense pressure to take avoiding action without the threat having to be imminent. For example, the threat may be to kill a hostage in a month's time, or the circumstances of emergency may be the onset of an epidemic of a disease the harmful effects of which take some time to materialise. Furthermore, the time frame dictated by the concept of imminence is not at all certain. Is it limited to a few minutes, hours or days? Instead of relying on this nebulous concept of imminence to restrict the scope of the defences of duress and necessity, the Commonwealth provisions leave it to the other defence requirements to do so. They are that there was no other reasonable way of avoiding the threat and that committing the offence charged was a reasonable response in the circumstances. These other requirements place the correct emphasis on the need for the defendant to take urgent avoiding action which may or may not be due to the imminence of the threat.

The final matter to discuss under this sub-heading concerns who the threat has to be directed at. The Commonwealth provisions do not specify any particular persons, nor does the ICC provision which states that the threat may have been against the defendant 'or any other person'. This is a sound position to take as it correctly recognises that the threat to human life, including that of a complete stranger, is something that can move ordinary people to commit a crime, even a serious one, to save that life.

The Response to the Threat

In the earlier discussion of self-defence, the significance of the concept of necessity to that defence was noted. Necessity has an equally important role to play in the defences of duress and necessity. It speaks of whether there was some other means of avoiding the threat besides committing the offence charged. The term 'necessity' or its derivatives do not appear in the Commonwealth provisions on duress and necessity. However, those provisions impose requirements which clearly incorporate the concept of necessity. Thus, the defence of duress stipulates that there must have been 'no reasonable way that the threat can be rendered ineffective' (s10.2(2)(b)). Similarly, the defence of necessity requires that 'committing the offence is the only reasonable way to deal with the emergency' (10.3(2)(b)).

As for the ICC Statute, its provision on duress and necessity expressly requires the defendant to have acted 'necessarily' to avoid the threat. This may be contrasted with the Statute's provision on self-defence which has been previously criticised for failing to specify such a requirement.⁷ All told, both the Commonwealth Code and ICC Statute are to be applauded for clearly incorporating the concept of necessity in their provisions on duress and necessity.

Another requirement concerning the response to the threat involves comparing the harm caused by the defendant in committing the alleged offence with the harm which the threat would otherwise have occasioned. The Commonwealth provisions on duress and necessity both express this requirement in terms of the defendant's conduct having to be 'a reasonable response' to the threat or emergency (s10.2(2)(c) for duress; s10.3(2)(c) for necessity). This same formula is used for the Commonwealth provision on self-defence which was earlier criticised for not using the concept of proportionate response in its place. That criticism

7 Compare Eser 1999:para 39; and Ambos 2002.1040 contend that the elements of duress and self-defence under the ICC Statute relating to the accused's response to the threat, are more or less the same. It is difficult to accept this, given the absence of a clear expression of the concept of necessity in the self-defence provision

does not apply to the defence of duress which by nature focuses on the defendant's behaviour rather than the consequences of that behaviour. Of course, the consequences (or harm) of such behaviour is a consideration which the Commonwealth provision on duress acknowledges by inquiring whether the defendant's conduct was a reasonable response to the threat.

The requirement of response under the ICC provision on duress and necessity stipulates that the defendant must have acted 'reasonably to avoid the threat, provided that [he or she did] not intend to cause a greater harm than the one sought to be avoided'. The proviso is controversial. The reason for having it was to serve as a compromise to have the provision on duress and necessity accepted by the Rome Conference (Ambos 2002:141). Unfortunately, the proviso appears to be rife with difficulty both in terms of comprehensibility and application. Its lack of comprehensibility lies in its uneasy relationship with the other requirement of the provision concerning response, namely that the defendant must have acted reasonably to avoid the threat. Presumably, it is for the tribunal of fact to determine whether or not the defendant had acted reasonably in the circumstances thereby making it an objective appraisal. How then does the proviso, with its subjective intention of the defendant fit in? What would the outcome of a case be were the tribunal of fact to decide that the defendant's act was unreasonable, but at the same time found that the defendant had not intended to cause a greater harm than the one sought to be avoided? Or conversely, what would the outcome be if it was determined that the defendant's act was reasonable but that he or she intended a greater harm than that sought to be avoided? At a practical level, the proviso will be very difficult to apply since it involves having to prove not only that the defendant intended the harm but also that he or she believed that the harm intended was less than that sought to be avoided. All told it is submitted that the ICC provision on duress and necessity would work much better without the proviso. The requirement found in the ICC provision that the defendant must have 'act[ed] necessarily and reasonably to avoid' the threat should be sufficient to ensure that the defence will not operate too restrictively nor too broadly. As noted previously the Commonwealth provisions on duress and necessity support this position.

Both the Commonwealth and ICC provisions on duress and necessity permit the defendant to use fatal force in seeking to avoid the threat or emergency. The debate over whether these defences should be available in homicide cases is well canvassed elsewhere and need not be repeated here (e.g. Cassese 2003:246-251; Fairall & Yeo 2005: paras 4.27-6.31; 8.11-8.18). Suffice it to say that proponents in favour of extending these defences to homicide cases would be pleased to have these important sets of legislation supporting their position.

There is one other requirement of duress and necessity, found in many national legal systems, which does not involve the nature of the threat nor the response to it. This requirement prevents the defendant from relying on either of these defences if he or she was culpable in exposing himself or herself to the conditions which led to his or her being threatened. The term 'prior fault' aptly describes this form of culpability (Yeo 1990:chap 5). In relation to the defence of duress, this requirement of 'prior fault' denies the defence to a defendant who had voluntarily associated with a person or group of persons whom the defendant knew could compel him or her with threats into committing a crime of the kind which he or she was charged with. These cases are excluded from the scope of the defence for deterrence purposes, by warning people that the law will not excuse them if they were at fault in associating with violent criminals. The Commonwealth provision on duress imposes this requirement by stipulating that the defence 'does not apply if the threat is made by or on behalf of a person with whom the person under duress is voluntarily associating

for the purpose of carrying out conduct of the kind actually carried out' (s10.2(3)). By comparison, the duress component of the ICC provision (Article 31(d)(i)) does not have such a requirement despite there being a body of international case law supporting it (Ambos 2002:1039; Cassese 2003:245-246). This omission is very likely to have been an oversight rather than a deliberate decision by the Rome Conference. Until such time as the Revision Committee amends the ICC provision to incorporate this requirement, it will be for the ICC to read the requirement into the provision.

This stance of excluding the operation of a defence on the basis of the defendant's prior fault operates equally in respect of the closely related defence of necessity. In such cases, the defence would be denied to defendants who had been culpable in exposing themselves to the emergency. An example of this requirement is to be found in the English Law Commission's draft criminal code provision on necessity which denies the defence 'to a person who has knowingly and without reasonable excuse exposed himself to the danger' (Law Commission 1989:cl43(3)(b)(iii). See also s3.02(2) of the American Law Institute's Model Penal Code 1962).

The Commonwealth provision on necessity omits to include a similar requirement which is all the more surprising given that the provision on duress has, as we have seen, a requirement incorporating the doctrine of prior fault. By comparison, the necessity component of the ICC provision (Article 31(d)(ii)) does allude, although not very clearly, to such a doctrine by stating that the threat constituting circumstances (other than threats by persons) was 'beyond [the defendant's] control'.⁸ Arguably, this could be interpreted to mean that a defendant who had control of the circumstances before they turned into an emergency (and therefore no longer within his or her control) would be denied the defence. It is submitted that both the Commonwealth and ICC provisions on necessity could be improved by adopting a clause on prior fault like the one found in the English Law Commission's draft criminal code.

Conclusion

This comparative study of self-defence, duress and necessity under the Commonwealth Code and ICC Statute has shown that they share many similarities. As for their differences, some can be supported when it is borne in mind that the Commonwealth Code defences are available to a much wider range of offences than those under the ICC Statute. Furthermore, the fact that all the types of crimes which the ICC has jurisdiction over are of a very serious nature could have influenced the way the defences under the ICC Statute were formulated. However, there are a few differences which cannot be explained away in this manner, and they make it debatable whether one could confidently say that the defence provisions under the Commonwealth Code and ICC Statute are on the whole 'substantially similar'. These differences raise the real possibility of having entirely different outcomes for a case depending on whether the accused was tried before an Australian court or the ICC. This could lead to cries of injustice either by an accused who was convicted, or by his or her victims in the event of an acquittal.

8 This clause may have been borrowed from the Siracusa Draft, Association Internationale de Droit Penal, International Institute of Higher Studies in Criminal Sciences/Max Planck Institute for Foreign and International Criminal Law et al. 1996. Article 33-13 of the Draft states in part that '[n]ecessity excludes punishment when circumstances beyond a person's control are likely to create an unavoidable private or public harm . . .'

Since the ICC Statute was enacted several years after the Model Criminal Code Committee formulated its defence provisions, the Committee would not have had the opportunity to consider the ICC provisions. It is, of course, never too late for the Federal Parliament to do so. While this is not a call to slavishly adopt the ICC provisions, our defence provisions would be that much better by undertaking 'a genuine creative search for a synthesis of, or balance between' (Delmas-Marty 2002:1923) the two sets of provisions. This article has sought to do this wherever the wording of the provisions permit it.

At the same time, there is much that international criminal law could gain from studying the national criminal law of a state like Australia. Although a small nation on the world stage in terms of population size, Australia is special for having nine different sets of criminal laws operating within its national borders. Added to this is the long comparative legal tradition of Australian lawmakers who have often been prepared to look beyond their national laws in search of a just solution. The provisions in the Commonwealth Criminal Code are a legacy of this wealth of legal thinking and development.

It should be borne in mind that the defences under Article 31 of the ICC Statute such as those discussed in this article are themselves only emerging and yet not well-established principles of international criminal law. However, they comprise a very important initiative, 'providing determinacy and the possibility of a uniform corpus of law' in respect of defences which may be presented at a trial of international crimes (Cryer 2005:302). Given their significance and potential, it is vital that they be formulated as clearly and comprehensively as possible, and that they operate to exculpate the blameless but not the blameworthy. Comparing the ICC defences with those found in a national legal system such as Australia's, and revising the ICC provisions where necessary, will go a long way to achieving this.

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