Excusing International Aggression

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Abstract and Keywords

This chapter discusses whether a nation can be excused for a wrongful invasion. It uses the “psychotic” aggressor argument in self-defense and uses it on the international environment. Using the argument, the chapter looks into the problem of whether self-defense applies against excused but unjustified aggression. It also studies the possible difficulties that the UN might encounter when applying this argument on international law. Additionally, the chapter examines whether necessity can be an excuse of self-defense by referring to Regina v. Dudley and Stevens.

Keywords: wrongful invasion, psychotic aggressor, unjustified aggression, United Nations, international law, self-defense, Regina v. Dudley and Stevens

1. The Psychotic Aggressor

As part of our systematic comparison of self-defense in domestic and international law, we need to address another distinguishing feature of Western legal systems: the availability of defensive force against excused aggressors. This concept may not be obvious to international lawyers. The specific example discussed in the literature of legal philosophy...
and criminal law is the use of defensive force against a “psychotic” aggressor. Here is the problem from an article written by one of us thirty years ago:

Imagine your companion in an elevator goes berserk and attacks you with a knife. There is no escape: the only way to avoid serious bodily harm or even death is to kill him. The assailant acts purposively in the sense that he rationally relies on means that further his aggressive end. He does not act in a frenzy or in a fit, yet it is clear his conduct is nonresponsible. If he were brought to trial for his attack, he would have a valid defense of insanity.¹

In more general form, the problem is whether self-defense applies against excused but unjustified aggression. If the aggressive conduct is itself justified, say, in the case of a police officer effecting a valid arrest (p.108) by appropriate means, it is clear there is no right to use defensive force in response. If the UN Security Council uses force in accordance with Chapter VII of the Charter, the nation invaded may not resist. Yet if the aggression is merely excused by necessity, duress, insanity, or mistake, the aggressor is not acting as a matter of right or privilege. There may indeed be a right to defensive force in response. The clearest case is force that is excused on grounds of insanity. No one thinks that the insane aggressor is justified, and therefore it is plausible to describe the insane aggressor as acting wrongfully and unlawfully.

There are two basic quandaries posed by the case of the psychotic aggressor. First, if the victim of the attack defends himself and kills the aggressor, should he be acquitted? Second, if a third party, a stranger, intervenes on behalf of the victim and kills the aggressor, should he be acquitted? The first question is relatively easy. It is hard to see either the justice or the efficacy of punishing someone who kills for the sake of selfpreservation. The more difficult issue is whether third persons should be allowed to intervene without risking criminal conviction. If one party to the affray must die, either the insane aggressor or his victim, why should an outsider be encouraged to choose sides? Neither is morally at fault; neither deserves to die. Yet it is hard to deny the pull in the direction of favoring the victim of the attack and permitting intervention to restrain and disable the aggressor.
These issues have great ramifications for necessary defense in international law. Probing the puzzle of the psychotic aggressor raises a host of new questions that are rarely addressed in the literature of international law. Can aggression by states ever be excused? What do we mean by excuses as opposed to claims of justification? Is there a difference between applying these concepts to individual behavior and adapting them to the behavior of states? These are difficult questions for both domestic criminal lawyers and international jurists.

Since the original article just cited appeared in 1973, the psychotic aggressor has become a fashionable item of discussion in philosophical circles, largely because Robert Nozick cited it in a book published in the mid-1970s. Kent Greenawalt responded to many of the arguments about justification and excuse in an important article of the mid-1980s, and one of us followed up with further reflections about the psychotic aggressor in 1992. We draw on these articles now in reviewing the controversy and extending the argument to international armed conflicts. This hypothetical case has vast repercussions for the law of defensive force against international aggression.

The problem has been to devise a theory that would account for our intuition that we may resist an excused but unjustified aggressor, typified by the purposive psychotic attacker in the elevator. The search for a solution has focused on the areas of self-defense and necessity, so we turn now to a comparative study of these defenses as they apply to the problem of the psychotic aggressor. As we shall see, there are not merely two rationales for acquittal expressed in the terms “necessity” and “self-defense”—there are no fewer than five, and one of our tasks will be to sort out these different rationales and show how each manifests itself both in common law and Continental legal theory.

A word of explanation is in order about the concept of Continental legal theory. The primary exemplar of this field is the theory of German criminal law as it developed in the early twentieth century and came into full bloom in the post–World War II period. The German literature of criminal law has been influential in the Spanish-speaking world, in Italy, in Eastern Europe, and in the Far East, especially in Japan and Korea. It
is the primary alternative to the common law model of analysis, and most of our citations in this chapter are to German literature.

2. Two Dimensions of Necessity
So far as common law commentators have broached this classic conundrum, they have argued in the language of necessity. Yet the plausibility of such claims of necessity may well turn on an internal tension in the theory of the defense. When common law lawyers speak of acting under necessity, it is never clear whether they are invoking a theory of justification or of excuse. As has been clear in German theory since James Goldschmidt’s insightful article in 1913, the rubric of necessity (Notstand) encompasses both theories of acquittal. When used as a justification, the theory of necessity requires a balancing of competing interests and a judgment that it is right, proper, and lawful to favor one interest over another.

When used as an excuse, the defense focuses not on the propriety of the act but on pressures compelling the defendant to violate the law. In the classic nineteenth-century case of Regina v. Dudley and Stevens, three starving shipwrecked sailors killed and cannibalized a fourth. The English court convicted them of murder in expectation that the Crown would commute their sentence, which in fact happened. If the case had been tried in a German court, the shipwrecked sailors might well have been acquitted on grounds of necessity. A German court might have concluded that they killed the lad Parker and fed on his flesh in order, in the language of the German Code, “to avoid an imminent, otherwise unavoidable risk” of starvation. But because this defense is one of excuse and not of justification, the killing would not be considered lawful and right. Nor could it be justified in a deontological ethical system that rejects the idea of killing an innocent person for one’s own benefit. But the pressures of hunger and the imminence of death might excuse their doing the wrong thing. The two facets of the defense correspond to radically different inferences about the defendant’s character. When we justify a choice between evils, we applaud the defendant’s judgment in choosing the superior value. His decision reflects well on his character. In contrast, when we excuse conduct as necessitated by overwhelming pressure, we
reject the suggestion that the defendant’s decision tells us what kind of person he is. We attribute his decision not to his character, but to circumstances in which the human thing to do is to succumb to pressure.

How can one justify killing the psychotic aggressor under a theory of necessity? We would have to assume that sacrificing the life of the assailant yields a greater expected value, yet the most that can be gained from the killing is the saving of one’s life. If it is life against life, it is hard to see why we should say that it is right and proper for one person to live and the other to die.  

The fact is that, in the case of the psychotic aggressor, we are inclined to favor an acquittal even if the loss to the aggressor is greater than the gain to the defendant. Indeed, as the problem is stated, this is the case. All the defending party knows is that there is a possibility of death if he does not resist. To fend off this possibility, he chooses certain death for the aggressor. When probability factors are included in assessing the competing interests, it is clear the defendant engages in conduct with a higher expected loss (certain death) than expected gain (a probability of death). We could decrease the threat to the defendant without altering our intuitive judgment about the desirability of an acquittal. Would it make any difference if the defendant were threatened with loss of limb, rape, or castration? One would think not. As the problem is treated in the literature, it is assumed that justice would require acquittal in these cases as well.

It is possible that those commentators who looked at the problem as one of necessity thought that the life of the insane aggressor is worth less than the life of the defendant who is standing his ground. One finds analogies between psychotic aggressors and attacks by wild animals. If one thinks of the psychotic aggressor as subhuman, one might be able to justify the defensive killing as an act preserving the greater value. This is an intriguing if startling approach, but one that is apparently inadequate. Among its other defects, it fails to account for the case of temporary psychosis. If the aggressor is a brilliant but temporarily deranged scientist, it would seem rather odd to say that his life is worth less than that of his victim, who for all we know might be a social pariah.
More fundamentally, this approach violates a basic premise of the criminal law that individuals ought to be judged by what they do, not by their social status or general moral worth. It is true that in assessing culpability we make a judgment about the defendant’s character, but that judgment is limited to his character as manifested in the commission of the proscribed act. For purposes of sentencing one might wish to engage in a free-ranging inquiry about the defendant’s background and dangerousness, but those issues have traditionally never borne on the analysis of liability. Those who solve the problem of the psychotic aggressor by depreciating the life of the insane depart from the basic premise of equality before the law; they forsake the principle that it is conduct rather than status that determines criminal liability.

Depreciating the status of the psychotic reminds one of the moral devaluation of “rogue states” in international law. If one side is morally superior to the other, it is not particularly difficult to justify actions as furthering “the greater good.” Yet international law is supposed to be committed to the equality of all states, just as the principle of equality of the well and the sick prevails in domestic law.

The insane are not a breed apart, not lunatics under the permanent control of the moon (as once believed), but mentally ill humans who can, in principle, return to a normal state of responsibility. Insanity is not a condition that removes the person from the scope of the law for all cases and under all situations. The law addresses them, too. They violate the law when they kill, but they do so under conditions that deny responsibility for a particular act under a particular set of influences.

The necessity of a theory of excuses derives from this moral aspiration of the law: If the norms of the law address the insane, then there must be some available account of why the psychotic aggressor is not responsible for his aggression. The theory of excuses comes on the scene to fill this gap, to explain how individuals can violate norms and yet not be held accountable.

Excuses are a relatively recent development in the history of legal thought. In the eighteenth century even the most advanced thinkers, such as Kant, sought to solve the problem of responsibility not by applying excusing conditions but by
limiting the scope of the relevant norms. Or at least this is one way to read Kant’s treatment of the problem. In an (p.112) oft-cited passage in his *Legal Theory*, Kant poses the case of the shipwrecked sailor who, lost at sea, saves his life by pushing another person off the only available plank floating amid the wreckage. Our intuitions tell us that we should not punish this person, who acts to save his own life. But why? Kant writes:

There can be no penal law that would assign the death penalty to someone in a shipwreck who, in order to save his own life, shoves another, whose life is equally in danger, off a plank on which he has saved himself. For the punishment threatened by the law could not be greater than the loss of his own life. A penal law of this sort could not have the effect intended, since a threat of an evil that is still uncertain (death by judicial verdict) cannot outweigh the fear of an evil that is certain (drowning). Hence the deed of saving one’s life by violence is not to be judged inculpable (*inculpabile*) but only unpunishable (*impunible*), and by a strange confusion jurists take this subjective immunity to be objective immunity (conformity with law).\(^\text{11}\)

This passage lends itself to alternative interpretations. Either the statutory norm prohibiting homicide does not address the shipwrecked sailor if it cannot influence his behavior, or the rationale for not punishing the sailor’s life-saving act is the exculpatory effect of necessity. Kant’s views hover between these two positions. Even if the statutory norm does not apply to the shipwrecked sailor, his act is still a wrong in violation of general principles of law. This is the point of the last sentence, which stresses that the act is contrary to *Recht*, or law as principle. It is a wrong because it violates the general norm against interfering with the rights of others, and the first occupier of the plank presumably has a right to stay there.

Though the life-saving act of the shipwrecked sailor is wrong, the actor enjoys a subjective or personal immunity from punishment. Thus the life-threatening situation becomes a basis for excusing his conduct in the same way that the inner compulsion of the psychotic aggressor renders his conduct wrongful but excused. Both acts occur under overwhelming pressure. In one case, it is the imperative of staying alive that drives the sailor to aggress against the first occupier of the plank. In the other case, it is the distorting effect of mental
illness that commands the act of aggression. We see, then, that there are two types of excuse: one based on external and the other on internal circumstances. In neither case can one say that the aggressor would choose to do the act if the situation were normal. The aggressor’s true personality or character remains concealed behind the overlay of circumstances that compel the action.

Linking the theory of excuses to the actor’s character raises thorny issues here, but it is not clear that we need to examine this linkage. It should be enough to stress the involuntary nature of excused aggression. We cannot blame either the psychotic aggressor or the shipwrecked sailor because they are acting in extremis. They are not freely choosing to commit aggression. Yet the very language we are using—the vocabulary of voluntariness and free choice—troubles some theorists, who are skeptical about whether action is ever truly free and whether there is such a thing as free will. The skeptics, it seems, are inclined to ground the theory of excuses in their inferences to the actor’s character from wrongful action. They think that by relying on the notion of character they can justify criminal punishment, without relying on what they consider dubious assumptions about free will.

The tentative conclusion at this stage of the argument is that insanity and personal necessity represent parallel excusing conditions that negate the voluntariness—and thus the actor’s personal responsibility—of a wrongful act. In Continental legal theory, certain features follow from the theory of excuses. If the actor is excused, his act remains wrongful (or unlawful), and that bears two systemic characteristics: everyone is allowed to use defensive force against a wrongful (and therefore unlawful) attack, and no one is entitled to aid a wrongful attack without becoming liable for the consequences.

It appears that neither dimension of necessity is adequate to solve the problem of the psychotic aggressor. The theory of justification requires the dubious assumption that the life of a psychotic is worth less than the life of the defendant. The theory of excuse yields unacceptable results with respect to the position of third parties who might intervene. The reason is that the theory of necessity ignores one important feature of the case: the fact that one of the parties is an aggressor and the other is holding his ground. That is precisely the feature
that is critical in the theory of self-defense, and therefore we turn to that cluster of theories in our search for an adequate rationale for acquitting the slayer of a psychotic aggressor.

3. Legitimate Defense Against a Psychotic Aggressor

In discussing the Goetz case in chapter 2, we outlined four distinct approaches to the theory of self-defense: self-defense as punishment, as an excuse, as the vindication of autonomy, and as a variation of lesser (p.114) evils. We now look at these arguments in greater detail as they apply to the problem of the psychotic aggressor. Because the psychotic would have a good defense by reason of insanity, we leave aside the first possibility of self-defense as a form of punishment, and are left then with three remaining models of defense that interact in different ways in different legal systems. We shall apply these models to the problem of the psychotic aggressor and then raise a new question: whether the model of the defense has an impact on the rule of proportionality.

The first model represents a theory of excuse. It is limited to those interests, such as life and bodily security, that individuals feel compelled to protect, and it typically requires the defendant to “retreat to the wall” before resorting to deadly force. The theory of the defense runs parallel to the excuse of necessity. The critical feature of both defenses is that circumstances have compelled the defendant to resort to deadly force.

This rationale is well expressed in the common law defense of se defendendo. According to common law authorities like Coke, Hawkins, and Foster, the essence of se defendendo is the “inevitable necessity” of killing to save one’s own life. This provides a rationale for acquitting the party who defends himself against the psychotic aggressor, but it suffers from the same shortcoming as the theory of necessity as an excuse: it fails to generate a defense for third persons who choose freely to intervene on his behalf.

The other two models of self-defense are both theories of justification, and thus they could potentially provide rationales for acquitting both the victim of the psychotic aggressor and the stranger who comes to his rescue. What is it about the aggression that prompts us to think that both the victim and the third party ought to be able to kill the psychotic aggressor? The approach of Continental legal theory is that
the defender has a right to the integrity and autonomy of his body, and therefore he has a right to repel encroachments upon his sphere of rights. Let us refer to this theory, in the parlance of German law, as *necessary defense*. The essential condition for necessary defense is a particular kind of aggression against an innocent agent; not all forms of aggression encroach upon autonomy. If the aggression is justified by, say, an arrest warrant, then even an innocent party under arrest would not have the right to resist. The criterion for aggression that may be resisted is unlawful (or wrongful) conduct, where it is clearly understood that conduct that is merely excused—for example, the attack of a shipwrecked sailor over the plank—is still wrongful. The focus is not on the culpability of the aggressor but on the autonomy of the innocent agent. It is assumed that the innocent defender has a right (p.115) to prevent any encroachment upon his autonomy. As German scholars have put it, the Right should never give way to Wrong.17

Necessary defense is the dominant theory in the entire German sphere of influence, and it also found expression in early common law theory. Recall Sir Edward Coke’s insistence that “a man shall never give way to a thief, etc., neither shall he forfeit any thing.”18 John Locke supported the same theory of an absolute right to protect one’s liberty and rights from encroachment by aggressors.19 (A graphic illustration of this theory is found in Tom Wolfe’s novel *Bonfire of the Vanities.*20 The protagonist, a white, upper-class professional, is put in a holding cell with a group of men much tougher and prison-hardened than he; one steps over and asks the newcomer to give him the cup of coffee he is drinking, and the protagonist realizes at that moment that if he surrenders the cup of coffee, he will become the slave of the covert aggressor.)

There is a tendency in this literature to think of the aggressor as someone who has placed himself beyond the law. Locke, for example, speaks of the aggressor’s being in a “state of war” with the defender;21 as if the aggression breaches an implicit contract among autonomous agents, according to which each person or country is bound to respect the living space of all others. The intrusion upon someone’s space triggers a justified response.
The same doctrine finds expression in the rhetoric of the American Revolution. The slogan “Don’t tread on me” expresses the claim that treading on someone else in itself entails a justified response. It is irrelevant whether the country or person so treading is culpable for his deeds. When at war, one is concerned only about the enemy’s aggression—not about his possible excuses. The roots of the right of defense are not in the culpability of the aggressor, but in the autonomy of the defender.

It is curious, however, that Article 51 of the United Nations Charter permits self-defense against any “armed attack,” without stipulating that the attack be unlawful or wrongful. Suppose that Israel’s strike against Egyptian airfields in the Six-Day War was justified as a response to an imminent attack by Egypt. Would Egypt not be justified in responding to the Israeli armed attack? There is no way to answer this question. The literature of international law is insensitive to this distinction. Not even the Rome Statute of 1998 recognizes the relevance of the distinction between justification and excuse in formulating the defenses to the crimes within the jurisdiction of the International Criminal Court. Thus, when we discuss these questions in the international arena, we work from a blank slate. Although the theory of justification is highly relevant to the law of war, it is not so clear, as we shall see, whether the theory of excuses ever affects the analysis of self-defense under Article 51.

Necessary defense, as we have described its principles here, generates a paradoxical view of aggression. It treats the aggressor as both a participant in the legal system and an externalized threat. The aggressor’s wrongdoing matters, but his culpability does not, and if tried for the crime, he would receive the benefit of all available excuses, including insanity, duress, mistake, and involuntary intoxication. But none of this is available to the aggressor in the face-to-face confrontation with the defender. The defender does not have to pull his punches just because the aggressor is insane or drunk or mistaken. In such a confrontation on the street, the aggressor loses the protections that he would normally get during a trial, that is, the right to plead excuses such as insanity or duress. It is almost as though the aggressor no longer counts as a person. Thus the aggressor is at once inside and outside the
legal community, simultaneously a comrade and an outlaw. This is a paradox generated by the law’s treatment of aggressors.

This ambiguous status is reflected in conventional legal expressions. In the German idiom, each instance of self-defense represents a conflict between Recht (Right) and Unrecht (Wrong). The victim stands for the Right, the aggressor for the Wrong, as though each conflict were a drama between good and evil. Another central concept is that of the legal order (die Rechtsordnung), which in the German view is threatened by every breach of the law. Thus the autonomy of the defender is identified with the idea of Law itself, and every act of self-defense is a defense of the basic structure of legal relationships. This explains why necessary defense is available to the defender as well as to third parties. This conceptual framework shunts the aggressor to the fringes of the legal system. Though he may be psychotic and morally innocent, he becomes an enemy of the Law itself.

The alternative, common law theory of self-defense is a variation on the justification of necessity; it originates from the need to balance the interests of the aggressor against the interests of the victim. Yet this model of self-defense as a lesser evil permits one to kill in the name of an interest less valuable than life by adding another factor to the balancing process—typically, the culpability of the aggressor. The aggressor’s culpability becomes the rationale for diminishing his interests relative to those of the victim. The common law would argue that one simply cannot balance the life of a culpable aggressor against the life of an innocent victim on the assumption that the two combatants are equally situated. The one (p.117) who chooses to start the fight is held to be entitled to less protection than the innocent victim. But the problem is how significant the factor of culpable aggression ought to be in diminishing the interests of the aggressor. This is the critical variable in assessing whether self-defense ought to be available against rape, castration, maiming, and theft as well as against homicide. The more significantly one regards the culpability of the aggressor, the less significant the victim’s interest has to be in order for the victim to have the right to use deadly force, if necessary, to repel the attack. The underlying premise is that if someone culpably endangers the
interest of another, his interests are less worthy of protection than those of the innocent victim.24

Self-defense as the lesser evil has found support in Germany,25 England, and the United States, but it has become dominant only in the common law tradition. Blackstone made it clear that the criterion that determined punishment (namely, the gravity of the criminal attack) also prescribed the contours of self-defense. No act “may be prevented by death,” he wrote, “unless the same, if committed, would also be punished by death.”26 Less serious attacks, such as petty thefts, were not capital offenses, and thus they could not be resisted with deadly force. Balancing competing interests is the essence of this version of self-defense, and the rule of reasonableness (or proportionality) naturally adheres to any system that, like the common law, is committed to the theory of self-defense as the lesser evil.27

The pinion of the balancing process is the aggressor’s culpability. The aggressor’s culpability depreciates his interests in the balancing process and thus distinguishes self-defense as the lesser evil from the justification of necessity. Yet with culpability as its pinion, this theory of self-defense cannot be geared to solve the problem of the psychotic aggressor. By definition, the psychotic aggressor is not culpable, and thus the Blackstonian common law approach fails to explain why his interests should be worth less than those of the victim. One might try to argue that the mere aggression, whether culpable or not, provides a basis for diminishing the interests of the aggressor in the balancing process. Yet this argument does not survive critical examination. Why should someone’s interest be diminished by virtue of aggressive propensities for which he is not morally to blame? One can understand diminishing an aggressor’s interest if he is to blame for the encounter, but it is hard to see why he should be worth less merely because his body is the locus of dangerous propensities. Self-defense as the lesser evil may provide a perfectly sound rationale for self-defense in the typical case, but it fails to explain our (p.118) intuition in a case in which the aggressor’s conduct is excused by reason of insanity or other acknowledged excusing conditions.

4. Proportionality in Domestic Law: Killing an Apple Thief
As one may imagine, the doctrinal lens of necessary defense, as recognized in the Continental tradition, filters out the shades and nuances of each case and transforms all situations into black and white. The only question left is whether the aggressor has intruded upon the defender’s sphere of autonomy; questions of degree are suppressed. This absolutist perspective, however, proves hostile to the rule of proportionality, as confirmed by the German Supreme Court in 1920 in the classic case in which an orchard owner shot and killed a thief running away with fruit from his trees. He claimed that he shot in self-defense—namely, in defense of his property. He was found not guilty; the prosecutor appealed, and the Supreme Court affirmed. The court recalled the basic premise of the Kantian theory of defensive force: Right need never yield to Wrong. As Kant formulated it, the foundation of Right (or the Law) is the principle of external freedom. Each person is entitled to a maximum degree of freedom compatible with a like freedom for others. Thus any intrusion upon a person’s sphere of rights generates a subsidiary right to use whatever force is necessary to repel the aggressor and restore the defender’s autonomy.

For generations, German scholars and their followers around the world have been anxious about this problem of shooting petty thieves. Of the many approaches in the literature and the case law, one draws on the first word in the definition of necessary defense in § 32—“appropriate”—which provides, “Necessary defense is that defense which is appropriate to avert an imminent unlawful attack against oneself or another” (emphasis added). Thus the scholars and judges would cut back the use of necessary defense on the ground that it is not “appropriate” under certain circumstances. This approach is somewhat less than principled, but at least it is grounded in the statutory language.

Another German attempt to make the distinction resembles the argument in the common law, which has progressively revised the categories for using defensive force by distinguishing first between felonies and misdemeanors, and thereafter between “atrocious” felonies and less serious felonies. A few German writers have tried the same approach. Friedrich Oetker argued in 1930 that attacks on minor interests should be regarded as mischief (Unfug) rather than wrongdoing (Unrecht) and that they should not trigger the full response permitted in a case of self-defense.
Eberhard Schmidhäuser revived this effort by claiming that petty attacks, those usually tolerated by society at large, do not represent violations of the Legal Order. His example is the violation of an antinoise regulation by a group of motorcyclists. The only way to suppress the noise might be to shoot them—a patently absurd result, but one suggested by the Kantian principle of absolute rights. These kinds of violations would not generate a right of self-defense, for they are implicitly tolerated by the community as a whole. This is an intriguing idea, if only because it reveals the sophistication required to accomplish what is simply assumed in the common law tradition.

The alternative to thinking about appropriate defense is to invoke a doctrine of private law that used to restrict the exercise of seemingly absolute rights. Continental civil theories originated the concept of *abus de droit* ("abuse of rights") as a way of restricting the scope of certain rights in the law of contract and property. This particularly Continental invention functions very much as an analogue to the rule of reasonableness in the common law. The difference is that reasonableness already figures in the statute as a limitation: "A person may use a reasonable amount of force in self-defense if he or she reasonably believes that he or she is about to be attacked." The German approach, which is followed in many countries in the Continental sphere, is to state an absolute rule in the statute—that is, a person may use all the force that is necessary to avert the attack—and then qualify the rule with a principle of abuse of rights when the use of force seems egregious and excessive.

Of course, this rule of limitation is hardly precise. Some scholars object that these vague boundaries create a trap for the unwary. We could once again appeal to Holmes’s words: "Detached reflection cannot be demanded in the presence of an uplifted knife." It is unfair to make the defender bear the risk of using excessive force (and going to prison) without providing clear guidelines specifying when he must forgo his defense and when he need not. If the use of force under § 32 is to be limited, then there must be unmistakable criteria for the kinds of cases where selfrestraint is mandated. Good examples would be attacks by children or the obviously insane or the precise situation that arose in the 1920 apple thief case: When
someone is escaping with stolen property, the owner must forgo deadly force and rely instead on available legal remedies. In all these cases, the defender would abuse his rights by shooting to kill.

One of the leading cases favoring the doctrine of abuse of rights is a 1963 Bavarian decision in which the defendant was convicted of attempted coercion for driving toward a pedestrian and threatening to run her down. The woman was standing in the single parking space available in a lot where the defendant wanted to park. The victim stated that she was holding the spot for someone else, whereupon the defendant drove toward her. His argument was that the victim’s behavior was illegal and that he was exercising self-defense. Fascinatingly, the Bavarian appellate court agreed. But, the court added, in this situation the defendant had abused his right of defense, for “the harm inflicted was disproportionate to that threatened by the attack” of standing in the parking space.

There would seem to be many reasons not to take this case as a precedent requiring tolerance of thefts or petty physical injuries when the only alternative is death to the assailant. First, this is a case on the fringes of self-defense. It is dubious whether one should regard occupying a parking space as an attack akin to physical assault. Second, it seems obvious that the defendant could have used lesser means to remove the woman from the space. The force was excessive even apart from the issue of proportionality. This case was once widely cited to support the growing scholarly consensus in favor of applying the doctrine of abuse of rights (Rechtsmissbrauch) to impose limits on the right of self-defense. This position has now become so well accepted that an extrastatutory limitation of proportionality on self-defense seems to be taken for granted.

Though this doctrine is gaining ground, it poses a significant difficulty. The principle of nulla poena sine lege (no punishment without prior legislative enactment) has constitutional status in Germany. Yet the judicially legislated right of self-defense may violate this principle. Applying the principle of abuse of rights to cases of self-defense creates a new class of punishable acts that would be covered by the traditional right—but not the qualified right—of self-defense. Accordingly, these acts are rendered punishable by judicial
decree, but thus imposing liability violates the rule of nulla poena sine lege. This does not inhibit legislative reform, but it does suggest that circumscribing a defense by judicial decree is a dubious practice.

This argument has hardly won the day. German courts have gone even further and ruled, in a series of decisions, that East German border guards could be held liable for shooting at citizens trying to escape to the West. They were arguably justified under an East German statute that authorized their using deadly force to prevent major crimes. Yet, after unification, the German courts reasoned that a statutory justification that violated higher principles of law could be disregarded in criminal proceedings against the guards. In effect, the German courts created a new category of criminal offense: shooting at escaping citizens in a way that previously would not have been punished under East German law. If this is an acceptable deviation from the principle of nulla poena sine lege, then curtailing the scope of self-defense is a minor adjustment.

The European Convention on Human Rights provides an additional source of limitation of the absolute right of self-defense recognized in the German Criminal Code. Under its recognition of the right to life in Article 2, the ECHR limits the role of self-defense to the protection of personal interests, thus excluding property, however valuable. Initially, the German courts tried to avoid this strongly worded limitation on necessary force to defend interests of property by arguing that the Convention applied only to interstate relations and had no bearing in actual cases within the domestic legal order. The Court of Human Rights in Strasbourg now intervenes so often and aggressively in domestic cases of European criminal justice that this argument has lost its traction, and in the future the German courts will have to pay more attention to the terms of the Convention as limitations on their domestic practice.

Yet this European principle would hardly make much sense if applied at the level of international law. Imagine a case of bloodless invasion. Argentine troops take over the Falkland Islands without spilling, or even threatening to spill, a drop of blood. Would this not constitute a case of aggression that could be resisted by defensive force under Article 51 of the Charter? It seems clear that England has the right to defend
its territory per se, and not only the people who live on that territory. Why, then, should individuals forfeit their right of defensive force when only property issues are at stake?

In fact, with respect to the occupation of land, there is a plausible distinction between the domestic and international arenas. Law enforcement in the domestic sphere is typically sufficient to regain land lost to unlawful occupiers, but if the Argentines were to gain control of the Falklands, it is not clear how the United Kingdom could invoke a legal process to regain its rights.

5. Justification and Excuse in International Criminal Law: Absolute Taboos
One of the great puzzles raised by the Rome Statute is determining the range of conduct and crimes to which these defensive claims should apply. They do not apply to waging war as such. As we saw in chapter 1, the law of war does not need a doctrine of self-defense to justify soldiers killing other soldiers. The law creates a conceptual space in which combatants are reciprocally exposed to the risk of being killed. Their killing of each other, in the ordinary course of fighting, is exempt from the definition of war crimes. Therefore no “ground for excluding responsibility” is necessary to explain why they are not guilty.

Not all domestic criminal lawyers pay attention to the distinction between justification and excuse. Despite the recent revival of theoretical work on criminal law, most Canadian, English, Australian, and French lawyers lump the two together under the general category of “defenses.” This explains why the Rome Statute, shaped by the English- and Frenchspeaking world, appears to lump all defensive considerations together in Article 31 as “grounds for excluding criminal liability.” The Article contains two grounds that are essentially excuses based on involuntary behavior (insanity and involuntary intoxication), one that is essentially a claim of justification (necessary defense) and one that is mixed (duress). For our purposes it is worth looking more closely at self-defense and duress under the Rome Statute.

The provision on self-defense in the Rome Statute is drafted in the spirit of the Continental doctrine of necessary defense. It covers all three relevant categories: defense of self, defense of others, and defense of property. The scope of permissible force
in defense of self and of others is exactly the same: against “an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person.” This language conforms to the general requirements of self-defense in all domestic legal systems, except that it fails to mention the element of necessity. In the defense of property, the defender is entitled in the course of war to protect “property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission.” But the provision does not say how much force is permissible to defend these essential forms of property. It could be read in several ways: either as proportionate force or as any amount of force necessary. On the whole, however, this provision is in line with the general trends of criminal legislation in the world as a whole.

By contrast, the provision called “duress” is an unfortunate mixture of both excuse and justification. The term duress usually connotes a coerced response to a serious threat of harm, and under the Rome Statute, the defense is available when action is “caused” by any “threat of imminent death or of continuing or imminent serious bodily harm against that person or another person.” The threat need not be unlawful. It could derive from human sources or from natural causes. It might even consist in a routine threat of death in warfare. In responding to the threat, the person must act “necessarily and reasonably.” Thus far, except for the omission of the word “unlawful,” the language of the Rome Statute runs parallel to the definition of duress in the Model Penal Code and of “personal necessity” in the German Penal Code. But the concluding phrase of the provision imposes a limitation not found in the code provisions on excusable conduct: “provided that the person does not intend to cause a greater harm than the one sought to be avoided.” The implication is that the provision is not applicable in homicide cases like the situation in the Erdemović case, tried before the International Criminal Tribunal for the Former Yugoslavia. In that case, the defendant, a Serbian soldier, participated in the slaughter of Bosnian Muslims after his commander threatened to kill him and his family. Although Judge Cassese argued vigorously that duress could apply even in a war crime, the majority of the court held that duress can never be a complete justification for war crimes or crimes against humanity when the victims are innocent human beings. Indeed, the language
of balancing the harm committed against the harm avoided is not typically found in the definition of duress, but rather in claims of justification based on avoiding the lesser evil.

This infelicitous language compresses two major categories of defensible conduct that stand separately under most criminal codes. First, it does not include the full range of excusable conduct “caused” by overwhelming threats. In principle there is no reason why the excuse of duress should not apply to cases of coerced conduct, even if the harm done is greater than the harm avoided. This is widely accepted in Continental as well as U.S. jurisprudence. Further, the provision lops off cases of justifiable conduct—here the harm avoided exceeds the harm done—if that conduct is not “caused” by the external threat. The language of causation invokes images of coercion, but justifiable necessity might also be freely chosen as the right thing to do under the circumstances.

To correct this truncated combination of duress as an excuse and necessity as a justification, the International Criminal Court will have to improvise new defenses when the occasion warrants it. Fortunately, the Rome Statute permits the court to recognize new grounds for excluding criminal responsibility when they are available in the “general principles of law derived from national laws of legal systems of the world,” and both duress as an excuse and lesser evils as a justification meet this test.49

One of the great puzzles raised by the Rome Statute is determining the range of the conduct and crimes to which these defensive claims should apply. They do not apply to waging war as such. As we shall see (p.124) in chapter 8, the law of war does not need a doctrine of self-defense to justify soldiers’ killing other soldiers. The law creates a conceptual space in which combatants are reciprocally exposed to the risk of being killed. Their killing in the ordinary course of fighting is exempt from the regular prohibition against killing, and therefore no “ground for excluding responsibility” is necessary to explain why they are not guilty.50

The range of Article 31 is extremely limited. For example, we cannot imagine that the crime of genocide could either be excused or justified. Genocide in self-defense or under duress seems a bit far-fetched. If a case of self-defense or duress or necessity could even be contemplated in this case, the
purposes of the action would be beneficial, and no longer subject to description as “an intent to destroy the group as such.” And it seems equally implausible that participants in genocide could rely on claims of insanity or involuntary intoxication. Perhaps one or two participants might be so affected in their mental capacity, but there would still be many in the group who would retain their capacity to act responsibly.

Crimes against humanity seem equally beyond the realm of the arguments detailed in Article 31. How would one seek to justify the crimes of extermination, enslavement, or torture on grounds of self-defense, necessity, or even the peculiar form of duress defined in the statute? These, as well as other offenses listed in the catalogue of crimes against humanity, are absolute taboos. Any attempt to justify torture on grounds of lesser evil would generate the kind of controversy we have witnessed in the United States in recent years over the “torture memos” written to justify the behavior of the U.S. troops in Abu Ghraib. The same is true of “enforced disappearance of persons.” Should we give a brutal tyrant his day in court with the claim that kidnapping and murdering suspects was necessary for the defense of the country? Nor is it easy to imagine the systematic or widespread commission of these offenses as excused on grounds of insanity or involuntary intoxication. Groups might go temporarily crazy or get temporarily drunk, but they are not likely to act long enough under these conditions for their conduct to meet the criteria of collective crimes against humanity. When it comes to the many crimes that egregiously violate human dignity, the very thought of a justification is an insult to the victims.

The prohibitions against sex crimes are also absolute in nature. Think of rape and sexual slavery. No one could justify these actions on grounds of self-defense or lesser evil. And insofar as we think of them as collective actions, they are not subject to excuse either. But as individual war crimes they might be subject to claims under Article 31(1)(a) and (b) by analogy to sex crimes committed in domestic law.

But there are some crimes on the long list subject to the jurisdiction of the International Criminal Court for which the argument of justification might be thinkable, even plausible. All offenses of destroying property, we would think, are subject to possible justification. And others might be justifiable where
necessitated by the exigencies of war. Forcible transfer or deportation would be justifiable if undertaken to protect the population from atomic radiation or some other disastrous by-product of war.

There is no way to know, at the outset of an investigation or prosecution, whether or not the provisions of Article 31 apply. This problem is radically undertheorized. The commentators do not address the issue. The readers of the Rome Statute must have the good sense to distinguish between offenses that are meant to be absolute taboos and offenses that function as most crimes do in domestic criminal law: criminal under normal circumstances but subject to justification in abnormal cases.

In the final analysis, then, the impact of Article 31 of the Rome Statute is limited indeed. We can imagine some cases of attacks by civilians that must be repelled by the use of military force, taking a toll both on lives and property; there would be no war crimes in these limited cases. There might also be a few other incidents in which soldiers executed commands under duress, and they would be excused if the harm was not too great. However limited its range, Article 31 is a good first step in refining international law by applying justification and excuse to the larger issues of justifiably going to war or coping with the risk of terror at home by declaring a metaphorical “war on terror.”

6. Excuses in International Law
Let us shift now from jus in bello to jus ad bellum, from incidents of prosecutable criminal conduct to the conduct of warfare in the international law binding on states. The only case of lawful war as we know it is as an exercise of legitimate defense, as a necessary and proportionate response to an imminent unlawful attack by another state or an equivalent substate organization against one’s own nation or another. The very existence of other defenses in Article 31—other “ground[s] for excluding criminal responsibility”—prompts us to ask whether these other grounds could find application on the international level. What about the possibility of duress as defined in the Rome Statute, or lesser (p.126) evils as we might understand them under the creative potential of the International Criminal Court?\textsuperscript{56}
If populations led by their armies were forced to move into other countries to avoid a natural disaster, the receiving country would not likely regard the newcomers as invaders; presumably, they would be treated as temporary refugees. Of course, the receiving country could close its borders, and if that happened, the incoming population might use weapons to clear the way and generate living space for themselves. If their incursion was by force, they would clearly be in violation of Article 2(4) of the United Nations Charter, and their arguments of duress and necessity would fall on deaf ears. This thought experiment convincingly illustrates that these other claims of excuse recognized in domestic law would find little application in international law.

National autonomy seems to be a stronger value than personal autonomy in Western legal systems today. No state can make the decision that it should invade another state by reasoning that on balance the invasion is better for the international community as a whole. On the international level, our communal sense of shared interests is not yet strong enough to overcome traditional principles of national independence. This issue will be discussed in greater detail in the next chapter on humanitarian intervention.

The likelihood of invoking excuses in international conflict is minimal. As we mentioned in chapter 3, international law once viewed self-defense as an excuse based on self-preservation, but international lawyers now exclusively treat the concept as a justification. War is based on collective action (a theme we explore more thoroughly in the final chapter), and most excuses require a mental element hard to conceptualize in the case of nations.

Consider again the case of the psychotic aggressor, but this time apply it to the international system. Assume that a psychotic dictator, without popular support, launches an attack against a neighboring state. The dictator is clearly acting irrationally and has a mental disease, say, megalomania and narcissism rising to the level of a psychotic misperception of his place in world history. The dictator also has complete control over his country’s military, so he has the ability to implement his psychotic plans. Let us also assume that the inhabitants are afraid to resist because in the past the dictator
has summarily executed both deserters and political opponents. He shows no mercy at all.

The attack is therefore launched against the neighboring state, and it is clearly unlawful aggression under international law. The target has the right to resist the unlawful aggression, but how do we evaluate the international culpability of the dictator’s citizens? We would have no problem holding them responsible for the dictator’s actions, at least as long as the dictator remains in power. But what if the people overthrow their dictator and renounce his past actions? There is a basic assumption that a state is responsible for its past actions even after a change in government. For example, past debts are assumed by a new government, and this is usually the price of admission to the world community. It is therefore a pragmatic requirement under international relations that a state treat itself as being continuous with its predecessors, even if it has changed heads of state or its entire political structure.

Nonetheless, one might imagine the inhabitants of this newly liberated state appealing to the international community that their conduct ought to be excused. Their nation was hijacked, they might say, by a psychotic dictator. The nation as a whole ought to be excused for the psychosis of its leader. Under domestic law, the psychosis would be accepted as a good defense. How should we treat the excuse under international law? Of course, the excused aggression is still unlawful and the target of the invasion should be allowed to resist with force. Legitimate defense is always allowed against an unlawful attack regardless of whether the original attack is excused or not. The aggression was not, after all, justified. But the international system may wish to excuse the aggression and withhold punitive sanctions against the rehabilitated nation, even though it was the source of the aggression. The international community may feel that it would not be fair to burden its citizens with the crushing weight of war reparations.

Should we use the language of excuse to describe this situation? We are not so sure, although the possibility is provocative. There is, however, one claim of excuse that nations might be able to successfully invoke to defend themselves against charges of unlawful aggression: if they are reasonably mistaken about the possibility of an imminent
attack, their response will subsequently be excusable. Suppose that the United States had credible and reasonable public evidence that Saddam Hussein possessed weapons of mass destruction, as well as a long-range missile system aimed at the United States. Under such a perception of danger, the invasion of Iraq could have been defended even if no weapons were subsequently found. In the domestic law of self-defense, a reasonable belief in an imminent attack will excuse the use of force, even against someone who is totally innocent. In Continental jurisdictions this is called putative self-defense. Some people argue that putative self-defense is also justified on these (p.128) reasonable perceptions of danger; but such debates about classification are esoteric and not subject to easy resolution, and for our purposes, we need not decide whether putative self-defense is an excuse or a justification.\textsuperscript{57} The salient point is that a reasonable mistake of danger can support the use of force in the international arena.

Most international lawyers treated the legitimacy of the Iraq invasion as if it were dependent on actually finding WMD. As far as the analogy to domestic law is concerned, this is false. It should have been enough that the evidence prior to the invasion was public, observable by all, credible, and sufficient to satisfy a reasonable person. Adlai Stevenson’s presentation of photographs of Russian missiles installed in Cuba provided a benchmark for the kind of evidence that should have been produced. However, the evidence that Colin Powell revealed at the United Nations (pictures of unmarked trailers where weapons were supposedly being manufactured) fell far below that standard of reasonable proof. A full analysis of this “mistake of fact” excuse for the invasion of Iraq will be presented in chapter 7 on preventive war.\textsuperscript{58}

Whether putative self-defense—reasonable mistake of fact as an excuse—should be accepted in international law remains an open question. Should there be a standard of the “reasonable nation,” by analogy to the reasonable person, for judging whether mistaken perceptions of aggression are excusable? Should the prior relationship of, say, Iraq and Israel enter into the analysis, as the prior relationship of the parties would in domestic law? These are urgent issues, but the literature on international law has not yet begun to address them. It would be gratifying to see an awakening of interest in the
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foundations of such principles that are taken much too much for granted.

Notes:


(6.) *Regina v. Dudley and Stevens* (1884), 14 Q.B. 273 [hereafter cited as *Dudley & Stevens*].

(7.) StGB § 35. The conditions of the defense are that (1) there be an imminent risk of death or serious bodily harm, (2) the risk threatens the actor or his dependent, (3) the situation is not the actor’s fault, and (4) there is no other way to avoid the risk but to inflict the harm in question.


(10.) The same point was made by Alexander Loeffler, *Unrecht und Notwehr*, 21 Zeitschrift für die gesamte Strafrechtswissenschaft 537, 539 (1901) (criticizing those “who regard it as modern to depreciate the life of the insane”).

(11.) Kant, *Legal Theory*, appendix to the introduction, § II.


(14.) Coke, *The Institutes*, at 55; Matthew Hale, 1 *Pleas of the Crown* 481–87 (1680); Michael Foster, *Crown Law* 275 (1762); William Hawkins, 1 *A Treatise of the Pleas of the Crown* 113 (1716); 4 *Blackstone*, at 184.


(16.) Indeed, se defendendo was thought to be part of the theory of necessity. See 4 *Blackstone*, at 186.

(17.) It is generally held that the phrase first appeared in U. F. Berner, *Die Notwehrtheorie*, Archiv des Criminalrechts 547, 557, 562 (1848), though the maxim derives straight from the conceptual framework of Kant’s theory of law. See George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 Colum. L. Rev. 533 (1987).

(18.) Coke, *The Institutes*, at 55.

(19.) John Locke, *Two Treatises on Civil Government* 120–27 (1690).


(21.) Locke, *Two Treatises*, at 126.
(22.) Rome Statute Art. 31.

(23.) On the structural difference between self-defense and necessity, compare Figures 4.1 and 4.2 supra.

(24.) For a good recent exposition of this theory, see Rodin, *War and Self-Defense*.

(25.) Some noteworthy German writers maintain that self-defense is based on a theory of balancing interests. Theodor Lenckner, *Gebotensein und Erforderlichkeit der Notwehr*, 1968 GA I.

(26.) 4 *Blackstone* at 182. This seems to be the first account of why there are limits to the common law privilege of deadly force.


(28.) *Decision of September 20, 1920*.


(30.) *Kommentar* § 32, n.44, at 601.


(36.) *See* Decision of the Bavarian Higher State Court. Coercion (or *Noetigung*) is punished under StGB § 240.

(37.) GG § 103 (II).

(38.) One reply to this argument is that imposing limits on the defense only makes explicit the underlying theory of the defense; see Lenckner, *Gebotensein und Erforderlichkeit der Notwehr*, at 8–9. This argument assumes, without support, that the German theory of self-defense reflects the balancing of interests.

(39.) *See, e.g.*, Case of Albrecht, Kessler and Streletz, 2 BvR 1851/94 et al. (individual responsibility and liability for killing fugitives at the inner-German frontier) (October 24, 1996), translated and reprinted in 18 H. R. L.J. 65, 69 (concluding that § 27 of the Border Act could be displaced by higher law “if it expressed a manifestly gross breach of basic ideas of justice and humanity”).

(40.) For a discussion of the traditional handling of the defense of property interests in German law, see Fletcher, *The Right and the Reasonable*, at 967–70 (explaining the Kantian basis for the traditional German rule that permits resistance against even minor aggression). Again, this rule follows the German maxim “Right need never yield to Wrong.”

(41.) Rome Statute Art. 31(1)(d).

(42.) *Id.* Art. 31(1)(c).

(43.) *Id.*

(44.) Compare MPC § 2.09 (“coerced … the use of, or a threat to use, unlawful force against his person or the person of another”).

(45.) *Id.*; StGB § 35.
(46.) Rome Statute Art. 31(1)(d).

(47.) Erdemović, Case No. ICTY-96–22, Sentencing Judgement of the Trial Chamber II, March 5, 1998.

(48.) Erdemović, Case No. ICTY-96–22, Appeals Chamber Judgement, Dissenting Opinion of Judge Cassese, October 7, 1997. Cassese argued, “After finding that no specific international rule has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the general rule on duress should apply—subject, of course, to the necessary requirements. In logic, if no exception to a general rule be proved, then the general rule prevails.” However, the majority made the opposite inference. Having found no customary rule allowing duress as a complete justification for killing innocent civilians, the court declined to permit the defense. Cassese does, nonetheless, concede that it would be difficult for a duress argument to succeed in cases where the victims are innocent civilians, because the defense applies only when the crime is not disproportionate to the evil sought to be avoided. Our analysis helps explain why: proportionality means different things in different legal contexts. See earlier discussion. The analysis of disproportionality in the context of duress depends, ultimately, on the theory for recognizing the claim—whether it is treated as a justification or an excuse.

(49.) Rome Statute Art. 31(3), taken together with Art. 21(1) (c).

(50.) For some reason, philosophers have a difficult time grasping this truth. For a detailed discussion, see chapter 1, section 4.


(52.) This is strictly prohibited as a crime against humanity under Rome Statute Art. 7(1)(i).

(53.) See Rome Statute Art. 7, and chapter 8 below.
(54.) These are strictly prohibited as crimes against humanity under the Rome Statute Art. 7 (1)(g) and as war crimes under Art. 8(2)(b)(xxii) (international armed conflicts) and Art. 8(2)(3)(vi) (subnational armed conflicts).


(56.) Rome Statute Art. 21(1)(c) (recognized under the “general principles of law derived from national laws of legal systems of the world”).

(57.) See Greenawalt, Perplexing Borders; see also Francisco Munoz Conde, “Rethinking” the Universal Structure of Criminal Law, 39 Tulsa L. Rev. 941, 952 (2004). For the full argument that putative self-defense should be classified as an excuse, see Fletcher, The Right and the Reasonable.

(58.) A few scholars have begun to look at the issue of excusing nations based on reasonable mistakes of fact. See chapter 7.