Chapter XI

Grounds for Justification and the Scope of Self-Defence in Combat Situations

Grounds for justification are those circumstances that make attacks directed at civilians or civilian objects and disproportionate attacks lawful. They are the result of a number of political, social and legal considerations that render such attacks lawful when certain elements are fulfilled.

As a consequence, unlike the grounds for excuse which, in spite of excluding the perpetrator’s criminal liability, do not affect the unlawfulness of the attack, the grounds for justification have inter alia the following effects: (i) preventing third persons from resorting to self-defence against the attack because the attack is not unlawful and (ii) excluding the criminal liability of any participant in the attack because, in the final analysis, the attack is lawful.\footnote{Fletcher, \textit{Rethinking Criminal Law}, supra note 740, pp. 576-77 and 759-62. See also Muñoz Conde, \textit{Derecho Penal}, supra note 741, p. 346.}

The grounds for justification are comprised of objective and subjective elements. It is not sufficient if only the objective elements of a ground for justification are fulfilled; it is also necessary for the perpetrator to be aware of their existence.

Although art. 31 RS includes under one heading all of the grounds for excluding criminal liability without making any distinction among grounds for justification, grounds for excuse and grounds for exemption of punishment,\footnote{A. Eser, \textit{Article 31. Grounds for Excluding Criminal Responsibility}, Commentary on the Rome Statute of the International Criminal Court 539 (O. Triffterer ed., Nomos, 1999) [hereinafter Eser, \textit{Article 31}.]} art. 31(1)(c) RS includes some circumstances, such as acting in self-defence or in the defence of property, which are \textit{stricto sensu} grounds for justification.\footnote{Art. 31(1)(c) RS expressly provides that this ground for justification is only applicable in relation to war crimes.}

The first ground for justification arises when there is an objectively imminent and unlawful use of force against the perpetrator or a third person. In that regard, the ICC’s case law will have to answer the question of whether the expression “unlawful use of force” encompasses only physical force or also includes psychological pressure resulting, for instance, from threats. Therefore, the response (in the case at hand, the launch of an attack against civilians or civilian objects or a
disproportionate attack) must be carried out immediately before or during the enemy's unlawful use of force.

Furthermore, this ground for justification requires that the defensive action be reasonable in the sense that it is: (i) suitable and necessary to avoid the imminent risk or to repel the ongoing unlawful use of force and (ii) proportionate to the degree of danger to which the perpetrator or the third person is exposed as a result of the unlawful use of force.

Moreover, this ground for justification requires the person responding to the enemy’s imminent and unlawful use of force to be aware of the fact that his attack is a suitable, necessary and proportionate response to the unlawful use of force by the enemy, although avoiding the imminent risk or repelling the enemy’s ongoing unlawful use of force does not need to be his main purpose.\textsuperscript{910}

The question arises as to whether non-combatants who do not actively participate in the hostilities lose their protection – and therefore become military objectives – as a result of resorting to armed violence in order to save their lives or the lives of third persons (usually relatives) against members of the enemy’s armed forces who are attacking them – or are about to attack them – unlawfully.

In other words, do Hutu civilians who do not actively participate in the hostilities lose their protected status as a result of throwing stones at the members of the Interahamwe militia who approach them armed with machetes with the intent to kill them? Likewise, do those villagers who do not actively participate in the hostilities lose their protected status because they decide to shoot with their hunting rifles at the members of the enemy’s armed forces who are attacking the village with the intent to exterminate all its inhabitants?

The answer to these questions depends on the scope of application of self-defence in combat situations. If one considers that self-defence is not applicable in this context, the Hutu civilians or the villagers in the above-mentioned examples would lose their protected status and become military objectives for as long as they resort to armed violence. Hence, they could be lawfully attacked – this result would not vary regardless of whether one considers that they lawfully resorted to armed force in accordance with art. 4(6) GC III\textsuperscript{911} or whether it appears that they unlawfully resorted to armed violence because they were civilians and did not have the right to participate in the hostilities.

Nevertheless, art. 31(i)(c) RS does not exclude the application of self-defence with regard to any of the war crimes provided for in art. 8 RS, including those that can only be committed in combat situations, such as the launch of attacks at

\textsuperscript{910} Rodríguez-Villasante, Los Principios Generales del Derecho Penal, supra note 762, p. 424.

\textsuperscript{911} This provision grants the status of prisoner of war to those who fall into enemy hands if they are “inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war”. 