Introduction

On 10 July 1985, two bombs exploded at Auckland harbour.[1] The bombs had been placed on board the *Rainbow Warrior*,[2] a Greenpeace vessel that was taking part in protests against French nuclear testing in Mururoa atoll in the Pacific. Greenpeace's photographer, Fernando Pereira, who was on board the ship at the time, died when the ship sank. Within a few days of the incident, two French secret service agents, Captain Prieur and Major Mafart, were captured in Auckland. They were carrying fake Swiss passports. Criminal proceedings were instituted against the pair; they pleaded guilty to manslaughter and were sentenced to ten years' imprisonment each. France initially denied any involvement in the affair, but subsequently – thanks to the work of two journalists – documents were revealed showing that the attack had been ordered by high-ranking French officials, apparently with the knowledge of the minister of

[1] For a summary of the facts, see *UN Secretary-General: Ruling on the Rainbow Warrior Affair between France and New Zealand* (1987) 26 ILM 1346, 1349ff; *Rainbow Warrior (New Zealand v France)* (1990) 20 RIAA 215. For information on the background of the case, see Dickson, 'Bomb Scandal Highlights French Testing' (1985) 229 *Science* 948; Firth, 'The Nuclear Issue in the Pacific Islands' (1986) 21 *J Pacific History* 202; Sawyer, '*Rainbow Warrior*: Nuclear War in the Pacific' (1986) 8 *Third World Quarterly* 1325; Thakur, 'A Dispute of Many Colours: France, New Zealand and the "*Rainbow Warrior*" Affair' (1986) 42 *The World Today* 209. For legal analyses of the incident before the arbitral award of 1990, see Charpentier, 'L'affaire du *Rainbow Warrior*' (1985) 31 AFDI 210; Dickson, 'Bomb Scandal Highlights French Testing'; Charpentier, 'L'affaire du *Rainbow Warrior*: le règlement interétatique' (1986) 32 AFDI 873; Appolis, 'Le règlement de l'affaire du *Rainbow Warrior*' (1987) 91 RGDIP 9; Pugh, 'Legal Aspects of the *Rainbow Warrior* Affair' (1987) 36 ICLQ 655; Wexler, 'The *Rainbow Warrior* Affair: State and Agent Responsibility for Authorized Violations of International Law' (1987) 5 *BU Int'l LJ* 389; Palmer, 'Settlement of International Disputes: The *Rainbow Warrior* Affair' (1989) 15 *Comm L Bull* 585.

[2] The name of the Greenpeace vessel, as subsequently recounted by New Zealand's prime minister at the time of the arbitration, came from an American Indian legend: 'When the earth's creatures have been hunted almost to extinction a rainbow warrior will descend from the sky to protect them'; see Palmer, '*Rainbow Warrior*', 589.

defence.[3] France eventually acknowledged having ordered the attacks; it maintained that, for this reason, its agents should not be held personally liable for the attack and demanded that New Zealand release the two agents.[4]

A serious diplomatic rift ensued, even leading France to restrict the importation of New Zealand products and threaten an economic embargo on New Zealand's exports to the European Community.[5] The dispute was eventually settled by mediation of the UN Secretary-General. In his (binding) decision, the Secretary-General ordered that the French agents be transferred to French authorities. They were to spend three years in isolation in a French military base in Hao, French Polynesia. The agents were not to leave the island before the expiry of the three-year period, other than with the mutual consent of the two states. Within a year of the agents' arrival in Hao, France unilaterally repatriated Major Mafart, arguing that he needed urgent medical treatment not available in Hao. A few months later, it unilaterally repatriated Captain Prieur, first arguing that her pregnancy was risky and subsequently that she must see her terminally ill father in Paris. For New Zealand, which had not consented to either transfer, France was in breach of the Secretary-General's ruling.

The parties eventually agreed to submit their dispute concerning the fate of the French agents to an international tribunal. Before the arbitral Tribunal, France attempted to explain its conduct by reference to the defences in the law of responsibility. The parties' arguments on this point, at least as reported in the award,[6] were, to say the least, confused and confusing. France, having initially referred to *force majeure* in the diplomatic

[3] The mission had been code-named 'Opération Satanique'. It is thought that more than ten French agents were involved, though only two were apprehended; Clark, 'State Terrorism: Some Lessons from the Sinking of the *Rainbow Warrior*' (1988) 20 *Rutgers LJ* 393, 397.

[4] For details on the apprehension of the French agents and the subsequent scandal in France (the so-called underwater gate), see Memorial of France, *Rainbow Warrior Ruling*, 1359–60; Charpentier, 'L'affaire' (1985) 210.

[5] The import restrictions on New Zealand products and the threat of an economic embargo led New Zealand to lodge a complaint before the OECD and, later, to initiate proceedings pursuant to the non-binding procedure of consultation under the GATT. The complaints were withdrawn prior to the agreement for submission of the dispute to the UN Secretary-General; see Memorial of New Zealand, *Rainbow Warrior Ruling*, 1355. France denied having adopted these measures in connection with the *Rainbow Warrior* dispute; see Memorial of France, *Rainbow Warrior Ruling*, 1367.

[6] The parties' pleadings and other documents relating to the arbitration remain confidential to this day.

correspondence with New Zealand,[7] later said before the Tribunal that it did not mean to invoke *force majeure* as a legal defence. Rather, France wished to rely on 'the whole theory of special circumstances that exclude or "attenuate" illegality'.[8] On the facts, France emphasised the 'very special' nature of the circumstances of the two agents,[9] pleaded 'obvious' humanitarian considerations[10] and referred to the extreme urgency of the agents' position;[11] but at no point did France provide a specific legal basis for its actions. New Zealand opined that France's claims could plausibly come under the pleas of *force majeure* or distress – neither of which were, in any event, met on the facts. Crucially, however, New Zealand argued that the defences in the law of responsibility were *not* applicable to the breach of conventional obligations, such as those deriving from the Secretary-General's ruling. A party to a treaty, New Zealand said, is 'not entitled to set aside the specific grounds for termination or suspension of a treaty'.[12] In other words, the non-performance of treaty obligations could only be justified by reference to the grounds of suspension and termination in the law of treaties itself.

The Tribunal was thus presented, for the first time in contemporary international law, with the opportunity to address the 'circumstances precluding wrongfulness' as a discrete category of the law of responsibility. The award was significant for many reasons,[13] but specifically in respect of the defences, the Tribunal made two fundamental contributions. First,

[7] Note from the French ambassador in Wellington to the New Zealand Ministry of Foreign Affairs, 14 December 1987, quoted at *Rainbow Warrior*, [24] ('In carrying out their duty to protect the health of their agents, the French authorities, in this case of force majeure, are forced to proceed, without any further delay, with the French officer's health-related repatriation'). See also ibid., [76].

[8] *Rainbow Warrior*, [76].

[9] Ibid., [66].

[10] Ibid., [70].

[11] Ibid., [71].

[12] Ibid., [73].

[13] For legal analyses of the award and its significance, see Charpentier, 'L'affaire du *Rainbow Warrior*: la sentence arbitrale du 30 avril 1990 (Nouvelle Zélande c. France)' (1990) 36 AFDI 395; Marks, 'Treaties, State Responsibility and Remedies' (1990) 49 CLJ 387; Palmisano, 'Sulla decisione arbitrale relativa alla seconda fase del caso *Rainbow Warrior*' (1990) 73 *Rivista di diritto internazionale* 874; Pinto, 'L'affaire du Rainbow Warrior: à propos de la sentence du 30 avril 1990, Nouvelle-Zélande c/France' (1990) 117 JDI 841; Davidson, 'The *Rainbow Warrior* Arbitration Concerning the Treatment of the French Agents Mafart and Prieur' (1991) 40 ICLQ 446; Chatterjee, 'The *Rainbow Warrior* Arbitration between New Zealand and France' (1992) 9 *J Int'l Arb* 17; Migliorino, 'Sur la déclaration d'illicéité comme forme de satisfaction: à propos de la sentence arbitrale du 30 avril 1990 dans l'affaire du *Rainbow Warrior*' (1992) 96 RGDIP 61; Guillaume, 'L'affaire du *Rainbow Warrior* et son règlement' in Guillaume (ed.), *Les grandes crises internationales et le droit* (1994), 219. As reported by Daillier, the award is the second most referred to in the Commentary to the

the Tribunal clarified that the defences in the law of responsibility were applicable *also* to treaty breaches – thus endorsing a unitary system of international responsibility, one applicable regardless of the conventional or customary origins of the obligation allegedly breached. When similar issues came up before the ICJ some years later, in *Gabčíkovo-Nagymaros*, the Court did not hesitate to endorse this position, despite the invitation from one of the parties to find that, on this point, *Rainbow Warrior* had been incorrectly decided.[14] Second, in considering the 'whole theory' of defences invoked by France, the Tribunal turned to the ILC's draft Articles on 'circumstances precluding wrongfulness' that had been adopted on first reading in 1979–80. The draft Articles adopted by the Commission on that occasion constituted the first compilation of circumstances exonerating from responsibility. The ILC's adoption of these six provisions took place over two sessions, during which the Commission (and states) examined two reports by Roberto Ago and a comprehensive memorandum by the UN Secretariat.[15] Of these rules, the Tribunal thought three were relevant to France's case: *force majeure*, distress and state of necessity. In its assessment, the Tribunal relied heavily on the Commission's work to explain the defences, their requirements, conditions and differences, and its findings will be discussed in the relevant chapters of this book. With the exception of state of necessity, the Tribunal unhesitatingly endorsed the customary status of these rules.[16] The *Rainbow Warrior* award thus provided some welcome conceptual clarifications about the defences and their role in international law and gave a stamp of approval to the Commission's *démarche* on this issue. The award moreover contributed to the perceived authority of the ILC's work on responsibility, at the very least, in respect of its work on the defences.

Since then, most tribunals faced with questions concerning the defences simply rely on the Articles on the Responsibility of States for

ARS: Daillier, 'The Development of the Law of Responsibility through the Case Law' in Crawford et al. (eds), *The Law of International Responsibility* (2010), 43.

[14] Slovakia initially invited the Court to find that *Rainbow Warrior* had incorrectly stated the relationship between treaty law and the law of responsibility: Memorial of Slovakia, 315 [8.16]. But it subsequently changed its position: statement of Slovakia, CR 1997/8, 25 March 1997, 48–9 [2].

[15] UN Secretariat, '"*Force Majeure*" and "Fortuitous Event" as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine', ILC Yearbook 1978, vol. II(1), 61; Ago, Eighth Report on State Responsibility, ILC Yearbook 1979, vol. II(1), 3; Ago, Eighth Report on State Responsibility, ILC Yearbook 1980, vol. II(1), 13.

[16] *Rainbow Warrior*, 252–5.

Internationally Wrongful Acts (ARS),[17] often uncritically, and do not look any further. Yet, despite the welcome clarifications and endorsement in *Rainbow Warrior*, there is much that remains unsettled around these circumstances. The list of defences produced on first reading remained unchanged during the second reading of the ARS, despite Special Rapporteur Crawford's attempt to expand it.[18] Chapter V of Part One of the ARS lists as 'circumstances precluding wrongfulness': consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). During the second-reading process, some disputed aspects were clarified and improved, as will be seen in Part II of this book. Nevertheless, uncertainties remain. As recently as 2006, Ian Brownlie (who as a member of the ILC participated in the second reading of the ARS) remarked during a meeting of the Commission:

> With hindsight, it was clear that in the context of the draft articles on responsibility of States for internationally wrongful acts, the question of justifications had never been properly worked out. With every new case that came before the ICJ and every new arbitration, it became increasingly clear that the subject was immature, yet the Commission had adopted an 'emperor's new clothes' policy, so that it now had a splendid set of draft articles relating to justifications in the context of responsibility of States, which were very difficult to apply.[19]

These difficulties concern several aspects of the defences. On a practical level, there are uncertainties in respect of specific elements of each defence. To name but a few: that of the organ (or organs) authorised to give consent on behalf of the state; the scope (and recognition) of self-defence as a defence for the collateral infringement of 'other' obligations by measures of self-defence; the proportionality test in relation to countermeasures; whether the 'material impossibility' required for *force majeure* is absolute or may include instances of (extreme) difficulty of performance; the recognition, at customary law, of the defence of distress; and what constitutes an 'essential interest' for the purposes of state of necessity, or what does the 'only way' condition entail. More generally, the obligation referred to in Article 27(b) to compensate for 'material loss' in the event of the successful invocation of a defence remains a mystery: in respect of

[17] Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.
[18] Crawford, Second Report on State Responsibility, ILC Yearbook 1999, vol. II(1).
[19] Brownlie, 2877th meeting, ILC Yearbook 2006, vol. I, 70 [18].

which circumstances is it applicable, when does it arise, and what is its legal basis? There are also other conceptual and theoretical uncertainties. Given the obvious differences between the various defences included in the ARS, most pressing is the question whether they all operate in the same way, or whether they can be classified into different categories. At its core, this difficulty relates to an important issue: that of the explanation of how defences operate, how they go about performing their exonerating effect. The ARS provide no explanation on this point, and neither does the case-law of international tribunals. Tellingly, it has been suggested that their operation is shrouded in mystery such that the most that can be said is that they work like 'optical illusions': now you see wrongfulness and responsibility, and now you do not.[20]

Defences are a fundamental part of any legal order. Legal orders regulate the relations between their subjects (mostly) through general and abstract rules.[21] Moreover, and this is especially the case in respect of orders based on customary law, they regulate for the future on the basis of past experience. And yet, every legal order must cater to, or accommodate, the exceptional, the uncertain, the unforeseen. Indeed, international life, like life in general, does not always follow an uninterrupted and undisturbed path. It is possible that in any given situation where it appears that a rule has been broken there are other factors, not necessarily explicit in that rule, which may cast a different light on the conduct in question. In this different light, it may appear, for example, that the application of the rule to the relevant conduct is unfair, inequitable, unjust or undesirable; it may be that the application of the rule to the relevant conduct undermines other policies or goals of the legal order. Indeed, as explained by Chile in the Sixth Committee of the General Assembly, 'the requirements of elementary justice [call] for certain exceptions to the normal rule'.[22] By way of example, a Chamber of the ICJ held in the *ELSI* case that '[e]very system of law must provide … for interferences with the normal exercise of rights during public emergencies and the like'.[23] Exceptional circumstances disturb normal legal relations in multiple ways, and legal orders thus provide for

[20] Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?' in Corten et al. (eds), *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007), 223.
[21] On the generality of rules, see Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (1993), ch. 2.
[22] A/C.6/35/SR.47, [7].
[23] *Elettronica Sicula SpA (ELSI)* (1989) ICJ Rep 15, [74].

various accommodation mechanisms. There is a paradox in the a priori regulation, through general and abstract rules, of the exceptional and unforeseen. But the alternative – to leave it up to decision-makers to assess, on a case-by-case basis, potential exceptional circumstances in which the 'normal' rules do not apply[24] – could result in a disturbing arbitrariness, contrary to the conduct-guiding function of law and the certainty of legal relations. This is all the more so in a decentralised order like the international one in which there exist no mandatory judicial authorities. A casuistic approach to exceptions in international law would result in a veritable law between Schmittian-sovereigns: each entitled to decide on the exception – if such a legal order is at all possible. In international law, mechanisms for the accommodation of exceptional situations include, for example, the grounds for the suspension or termination of treaties by reason of supervening impossibility or fundamental change of circumstances.[25] They also include the defences in the law of state responsibility.[26] Given how crucial defences are to

[24] A phenomenon that domestic law theorists refer to as the defeasibility of legal rules, on which see Ferrer Beltrán and Ratti, 'Defeasibility and Legality: A Survey' in Ferrer Beltrán and Ratti (eds), *The Logic of Legal Requirements: Essays on Defeasibility* (2012), 11. Note, however, that there are also broader understandings of legal defeasibility. See, e.g., Hage, *Studies in Legal Logic* (2005), ch. 1.

[25] Especially Article 60 (material breach of treaty), Article 61 (supervening impossibility of performance) and Article 62 (fundamental change of circumstances) in the Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980), (1969), (1969) 1155 UNTS 331.

[26] The book cannot address the difficult jurisprudential question of defining the concept of 'defence' – and providing a basis upon which to distinguish defences from rule elements (what the ARS calls 'constituent requirements of obligations': Commentary to Chapter V of Part I, [7]), if such a distinction is at all possible. Rather, the book will take as a starting point the assumption made in the ARS that the defences are *distinct* from obligations. This assumption is not an uncontroversial proposition as a matter of legal theory, and many works in domestic law have been devoted to examining it. See, among others, Williams, 'Offences and Defences' (1982) 2 *Legal Studies* 233; Campbell, 'Offence and Defence' in Dennis (ed.), *Criminal Law and Justice* (1987); Finkelstein, 'When the Rule Swallows the Exception' in Meyer (ed.), *Rules and Reasoning: Essays in Honour of Frederick Schauer* (1999), 147; Fletcher, *Rethinking Criminal Law* (2000); Gardner, 'Fletcher on Offences and Defences' (2003–4) 39 *Tulsa LR* 817; Gardner, 'In Defence of Defences' in Gardner (ed.), *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007), 77; Duarte d'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (2015). International lawyers and theorists have yet to address this issue. While theoretically controversial, as a matter of positive law it seems to be the case that states, international tribunals and international lawyers think of and treat defences as distinct from obligations. Note, however, that this assumption caused some difficulties in respect of the plea consent, which will be addressed in Chapter 4.

any legal order, it is surprising that they, as a category, have received such minimal attention in the international legal literature, which has so far not engaged in a deep and sustained manner with the analysis and understanding of the function and operation of defences and with the clarification of the conceptual, theoretical and practical difficulties posed by them.

The aim of this book is not to examine or clarify every lingering uncertainty about defences in the law of state responsibility, for the topic is a very broad one. Moreover, as Brownlie observed, it is also a topic that may still be immature to allow the resolution of every one of these difficulties. The immaturity that Brownlie referred to results from both a paucity of practice and a scarcity of legal-theoretical development. Practically, this is because the provisions relate to circumstances of such exceptionality that, by definition, they will occur only rarely. In the absence of more practice (especially judicial or arbitral practice, where the defences are more likely to be considered in depth), very little can be said in respect of the various practical problems mentioned earlier. Elucidation of these problems will require further experience with the defences, and this may take some time. This book will therefore focus on conceptual and theoretical difficulties instead. It is possible that the 'ripening' of the defences from a theoretical standpoint may illuminate (and even guide) the resolution of practical difficulties if and when these may emerge. Indeed, as argued by Roger O'Keefe:

> Explicitly or effectively explanatory theory can serve to elucidate what the hidden sense – over and above any rationale or rationales offered by the system itself or its actors – of a specific rule of international law might be, lending a purposiveness or deeper purposiveness to what may appear an arbitrary or at least unconvincingly rational normative arrangement. The elaboration of a plausible 'thick' rationale for an applicable positive rule may in turn have an implicitly prescriptive import.[27]

The book will thus hone in on the question of the operation of the defences – in particular, whether they all produce their effects in the same way (do they all preclude wrongfulness?) or whether they can be classified into two different typologies: circumstances that preclude wrongfulness (justifications) and circumstances that preclude responsibility (excuses). Its aim will be primarily that of presenting an explanatory theoretical account of the law and practice of defences. Incidentally, as will be seen,

[27] O'Keefe, 'Theory and the Doctrinal International Lawyer' (2015) 4 *UCL J of L & Jur*, sec. E.

these explanatory theories may also involve normative or prescriptive elements, in that they may enlighten previously obscure aspects or they may even guide the development of the law where the law is uncertain.[28]

The defences in the ARS, as becomes evident from a quick glance at the text of Chapter V of Part One, address very different exceptional circumstances ranging from the breach of obligations, to the use of force, to the occurrence of natural disasters. Such are the differences among them that Chapter V of Part One has been described – not without a tinge of criticism – as a 'grab bag'[29] of rules. Is it possible to account for some of the variations among them by distinguishing different typologies among the circumstances? In domestic legal orders, which often recognise a much larger collection of disparate defences, scholars and theorists have elaborated different taxonomies in an effort to organise and systematise them.[30] Justification and excuse are the most common and well-known concepts used in this regard.[31] These are not exclusively legal concepts. They exist in theology and moral philosophy,[32] and are part of ordinary language as well.[33] As Vaughan Lowe has observed, 'no dramatist, no novelist would confuse [these concepts]. No philosopher or theologian would conflate them'.[34] In the legal field, the development of justification and excuse as concepts relevant to the classification of exceptional circumstances began in the early twentieth century, primarily in the context of criminal law. Since then, aside from some enduring fuzzy edges,[35] it is now no longer disputed that there is a conceptual distinction between justifications and excuses and that these notions, and their difference,

[28] On the role of theory in legal argument, see Mills, 'Rethinking Jurisdiction in International Law' (2013) 84 BYIL 187, 237.

[29] Rosenstock, 'The ILC and State Responsibility' (2002) 96 AJIL 792, 794.

[30] For an impressive example of such an exercise in the context of US criminal law, see Robinson, *Criminal Law Defences* (1984).

[31] Robinson, cited earlier, identified as many as four different types of defences. For an argument in favour of these additional typologies (at least in the criminal law) see Husak, 'Beyond the Justification/Excuse Dichotomy' in Cruft et al. (eds), *Crime, Punishment, and Responsibility: The Jurisprudence of Antony Duff* (2011), 141.

[32] Greenawalt, 'The Perplexing Borders of Justification and Excuse' (1984) 84 *Col LR* 1897, 1903.

[33] See the *Oxford English Dictionary* definitions of both words: justification is '[t]he action of justifying or showing something to be just, right, or proper; vindication of oneself or another' (3), and excuse is the 'attempt to clear (a person) wholly or partially from blame, without denying or justifying his imputed action' (I.1.a).

[34] Lowe, 'Precluding Wrongfulness or Responsibility: A Plea for Excuses?' (1999) 10 EJIL 405, 406.

[35] On which see Greenawalt, 'Perplexing'.

are legally relevant. The criminal law philosopher Douglas Husak has summarised the consensus on these notions as follows:

> Justifications are defenses that arise from properties or characteristics of acts; excuses are defenses that arise from properties or characteristics of actors. A defendant is justified when his *conduct* is not legally wrongful, even though it apparently violates a criminal law. A defendant is excused when *he* is not blameworthy or responsible for his conduct, even though it … violates the criminal law.[36]

Note, however, that even if conceptually distinct, not all legal orders actually employ these notions in their criminal (or private) law to systematise the defences recognised in the legal order.

Moreover, there are also voices (an admittedly dwindling number) who contend that the distinction has no significance in practice, that this is, in short, a distinction without a difference. But this criticism is overstated. A number of practical implications can be derived from the distinction between justification and excuse. Since justifications concern the legal qualification of an act, if the act is justified and, as such, in accordance with the legal order, this qualification has a universalising tendency. Namely, it can affect the liability of accessories and the availability of rights of reaction. Moreover, if invoked against a criminal charge, it can have an impact on the liability of the invoking party for civil damages. Excuses, in turn, concern the actor and are, for this reason, individualised. They have a relative effect only: they cannot be enjoyed by accessories, they do not affect rights of reaction and, if invoked in criminal settings, they have no bearing on liability for civil damages. These are, of course, only logical implications of the distinction and need not be, and in fact are not, all followed in the domestic legal orders which distinguish between these two typologies of defences. That these consequences follow from the distinction does not entail that they must, therefore, be binding in the domestic legal orders

[36] Husak, 'Justifications and the Criminal Liability of Accessories' (1989–90) 80 *J Crim L & Criminology* 491, 496 (emphasis in original, footnotes omitted). The quotation elides Husak's statement that excuses concern conduct that 'apparently' violates the criminal law. Husak's statement in this regard appears related to his view that there exists no logical priority between justification and excuse: Husak, 'The Serial View of Criminal Law Defences' (1992) 3 *Criminal Law Forum* 369; Husak, 'On the Supposed Priority of Justification to Excuse' (2005) 24 *Law & Philosophy* 557. But note that his view is not widely shared, see, e.g., Baron, 'Is Justification (Somehow) Prior to Excuse? A Reply to Douglas Husak' (2005) 24 *Law & Philosophy* 595, and the references cited therein. These definitions represent the core of the consensus, but note that there are still differences of opinion on the margins; for a useful review of these differences see Ferzan, 'Justification and Excuse' in Deigh and Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (2011), 239.