

COERCION BY CIRCUMSTANCE IN THE CAPE FLATS: AN EXPLORATION OF A GANG MEMBER'S RELIANCE ON THE DEFENCE OF NECESSITY †

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ABSTRACT

The violent crimes of the Cape Flats are nothing new. The oppression of these communities under previous discriminatory apartheid laws is continuously perpetuated through their dire socio-economic circumstances, such as abject poverty and a severe lack of social institutions. The residents have few viable opportunities for survival and protection outside of the realm of criminal gangs, causing gangsterism to become a perpetual threat to our democracy. Governmental responses have included enacting the Prevention of Organised Crime Act 121 of 1998, creating specialised Anti-Gang Units and a recent deployment of the military in gang-ridden communities on the Cape Flats – yet its effectiveness remains contentious. Our criminal law imposes punishment only on the culpable accused in proportion to their guilt – recognising the defence of necessity as a means to justify an accused's conduct when they acted under compulsion or out of necessity. This paper explores the controversial question of whether accused gang members may rely on necessity to escape liability for their criminal conduct as part of gangs, in situations where their conduct was compelled or necessitated by their particularly dire socio-economic circumstances or under active duress and coercion from existing gangs.

1 Introduction

The Cape Flats is notorious for its violent gang culture.¹ With over 80 000 members, gangs like the Americans and the Hard Livings have ruled their communities' streets with a dangerous, all-pervasive authority.² Dire socio-economic circumstances, high

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¹ D Pinnock 'Cape Town Gangs: The other side of paradise' in D Pinnock's *Gang Town* (2016) at 1.

² I Kinnes 'From urban street gangs to criminal empires: The changing face of gangs in the Western Cape' (2000) 48 *Monography ISS* at 10-12.

crime rates and the after-effects of the apartheid regime have left the disadvantaged communities of the Cape Flats with very few viable opportunities to survive independently of criminal gangs, causing gangsterism to emerge as a perpetuate threat to our constitutional democracy.³ Consequential governmental responses have included the Prevention of Organised Crime Act (**'the POCA'**) and deployment of Anti-Gang Units, yet its effectiveness to make the Cape Flats a safer place remains contentious.⁴ Implementation of these anti-gangsterism measures have highlighted two problematic assumptions during the prosecution of gang members: The first is that the accused is independent of their larger gang-terrorised community and can exercise a voluntary, non-consequential choice to associate with gangs.⁵ Secondly, the court often applies a watered-down understanding of the volatile situation on the Cape Flats.⁶ These assumptions skew what is expected of a 'reasonable person' in the Cape Flats to a higher standard than it should be.

At the heart of our criminal justice system is the imposition of punishment on culpable accused in proportion to their guilt.⁷ To unite the measure of punishment with the degree of culpability, our criminal law recognises various defences an accused can rely on to justify their conduct – such as the defence of necessity.⁸ This paper will rely on judicial and scholarly interpretations of the defence of necessity must be interpreted in a way to allow gang members to escape criminal liability in situations where their criminal conduct was compelled by their socio-economic circumstances or by active duress or coercion from criminal gangs.

The structure of the paper will be as follows: First, this paper will explore the nature of the defence of necessity and outline its requirements and limitations and provide a brief insight into life on the Cape Flats. Second, the dire socio-economic circumstances of residents on the Cape Flats and their experience of being actively

³ B van Wyk & W Theron 'Fighting gangsterism in South Africa: A contextual review of gang and anti-gang movements in the Western Cape' (2005) 18(3) *Acta Criminologica* at 51-52; D van der Linde *Criminal Gang Activities: A Critical and Comparative Analysis of the Statutory Framework under South African Criminal Law* (unpublished LLD dissertation, Stellenbosch University, 2018) at 37.

⁴ The Prevention of Organised Crime Act 121 of 1998; L Ramphela 'Bheki Cele anti-gang unit fully operational in the Cape Flats' *CapeTalk* (12 October 2018) available at: www.capetalk.co.za/articles/322733/bheki-cele-anti-gang-unit-fully-operational-in-the-cape-flats (Accessed: 6 June 2019).

⁵ D Rutkowski 'A coercion defence for the street gang criminal: Plugging the moral gap in existing law' (2012) 1(1) *Notre Dame Journal of Law, Ethics & Public Policy* at 139.

⁶ *S v Bradbury* 1967 (1) SA 387 (A) where the court failed to adequately consider mitigating factors.

⁷ J Burchell *The Principles of Criminal Law* 6 ed (2016) at 36-37.

⁸ Rutkowski op cit note 5 at 137-138.

compelled by gangs to become involved will be presented to determine whether it satisfies the requirements of necessity. This paper will then critically comment on whether an accused gang member can rely on the defence of necessity when they have chosen to break the law out of necessity to avoid suffering greater harms brought about by the conditions in their community.

2 The defence of necessity & the Cape Flats

As a starting point, it is important to explore the general nature of the defence of necessity and its requirements. Then an insight into life on the Cape Flats is necessary to understand the problematic nature of how criminal gangs and gang members are defined under our law, and why the connection between punishment and culpability is particularly relevant in this context.

2-1 The general nature of necessity

The defence of necessity arises when a person is faced with an inevitable choice of either suffering some evil or breaking the law and elects to commit an illegal act to avoid suffering greater harm.⁹ If in their defence, an accused proves the elements of necessity, their conduct of contravening the law will be regarded as justified. Consequently, the accused's conduct is not considered to be unlawful, rendering the accused not criminally liable.¹⁰

The term *necessity* refers to two situations: when the need to contravene the law to avoid suffering a greater harm is brought about by (1) the accused's surrounding circumstances, and (2) by human agency, such as gangs actively compelling the accused to participate in gang-related criminal activities.¹¹ While the defence of compulsion is included under the scope of necessity, it is critical to note that that compulsion applies when the accused chose to break the law while being actively compelled by a third party, such as existing gang members.¹² On the other hand,

⁹ C Snyman *Criminal Law* 5 ed (2007) at 441; Burchell op cit note 7 at 164-165.

¹⁰ G Kemp et al. *Principles of Criminal Law* 2 ed (2015) at 105-106.

¹¹ Burchell op cit note 7 at 164; *S v Goliath* 1972 (2) SA 1 (A) at para 24D.

¹² Kemp op cit note 10 at 105-106.

necessity encompasses a wider range of scenarios arising from human and non-human agencies, including the compelling effect of an accused's circumstances.¹³

The rationale behind the defence of necessity being a part of our law lies in the idea that it is unjust to punish a person for responding to a threat or attack like a reasonable person would, even if it resulted in them having contravened the law.¹⁴ Imposing criminal consequences when a person acted reasonably in an emergency fails to justify any traditional theory of punishment, being deterrence, retribution or rehabilitation.¹⁵ When a person pleads necessity, they have already chosen to break the law – flouting the theory of deterring them from breaking the law through an ineffective threat of criminal sanction. Inflicting punishment upon an accused who acted like a reasonable person is undeserved and unfair.¹⁶ Whether an accused's conduct will be covered under the defence of necessity depends on the circumstances of the case, and the decisive element of its applicability is the *reasonableness* of the accused's conduct.¹⁷

2-2 The requirements of necessity

Necessity may be raised as a general defence to a common-law crime or alleged contravention of the statutory provision in issue unless excluded through legislation.¹⁸ Theoretically, this means that all gang members may rely on the defence of necessity when charged with a gang-related crime under either the common-law or the POCA. However, the Appellate Division laid down a general qualification on the interpretation of necessity, holding that it:¹⁹

‘must be confined within the strictest and narrowest limits, because of the danger attendant upon allowing a plea of necessity to excuse criminal acts.’

¹³ *Maimela v Makhado Municipality* 2011 (2) SACR 339 (SCA) at para 19; Kemp op cit note 10 at 106.

¹⁴ Burchell op cit note 7 at 164.

¹⁵ Kemp op cit note 10 at chapter 1.

¹⁶ Burchell op cit note 7 at 165-166.

¹⁷ *Maimela* op cit note 13 at para 16.

¹⁸ *S v Adams* 1979 (4) SA 793 (T) at 798F-H.

¹⁹ *S v Mahomed* 1938 AD 30 at para 35 as confirmed in *Adams* op cit note 18 at 797-798; *S v Canestra* 1951 (2) SA 85 (SWA) at para 324; *S v Werner* 1980 (2) SA 313 (W) at para 328.

This limiting rule of interpreting the scope of necessity must be kept in mind when applying the requirements for the defence of necessity to the context of the Cape Flats. The prosecution carries the burden of proving the non-applicability of necessity beyond a reasonable doubt.²⁰ For successful reliance on necessity, reasonable doubt must be cast regarding its application to the accused's case best achieved by the leading of evidence supporting their defence, requiring the accused to satisfy the following requirements:²¹

- (a) a legal interest of the accused must have been endangered;
- (b) by a threat which had commenced or was imminent, but which was:
- (c) not caused by the accused's fault; it must have been:
- (d) necessary for the accused to avert the danger; and –
- (e) the means used for this purpose must have been reasonable in the circumstances.'

This paper will take a criminological approach considering to what extent the socio-economic circumstances of the accused and the existence of coercive gang recruitment and participation can be argued to fulfil the requirements of the defence of necessity. First, however, it is important to determine who exactly classifies as a gang member under the common law and the POCA to narrow down the understanding of a reasonable person, and by extension what constitutes *reasonable* below.

2-3 Organised crime – defining 'gang member' and 'criminal gang'

As established, the POCA is the main piece of legislation dealing with organised crime. One of its main objectives is to supplement the ineffective traditional common law mechanisms to address the complex and ever-increasing threat of gangsterism.²² While it is beyond the scope of this paper to fully explore what constitutes a '*gang member*' and a '*criminal gang*' in our law, the problematic nature of these definitions specifically in the POCA must be explored to note the effect these vague, open-ended definitions have on the legal certainty of our criminal justice system. Section 1 of the POCA defines a '*criminal gang*' but starts with the word 'includes' – leaving the

²⁰ Burchell op cit note 7 at 53.

²¹ *Ibid*; Kemp op cit note 10 at 106-108; *Maimela* op cit note 13; *Adams* op cit note 18.

²² *National Director of Public Prosecutions v Mohamed NO & 2007 (2) SACR 145 (CC)* at para 14.

boundaries of what exactly can be defined as a criminal gang unclear.²³ Scholars debate whether *all* of the requirements in section 1 must be fulfilled, or whether the presence of some of them will suffice. Snyman argues that a wide interpretation of section 1 is required to give judicial leeway in determining whether a group is a criminal gang.²⁴ This approach was upheld by the Supreme Court of Appeal in *Prinsloo*.²⁵ In contrast, Kruger advocates for a strict closed-list interpretation to avoid a conflict with the *ius certum* aspect of the principle of legality, which requires certainty in the definition of crimes.²⁶ Whether section 1 infringes the principle of legality in the case where accused are uncertain whether they form part of a legally recognised criminal gang, is beyond the scope of this paper. However, Snyman's interpretation is preferred, since the mere choice to avoid an infringement of the principle of legality cannot be used to form the basis of Kruger's preference for a certain interpretation, especially when it includes a blatant ignorance of the word 'includes'.²⁷

Exactly who will legally constitute a *member* of such a criminal gang is consequently also unclear and section 1 of the POCA does not define a '*gang member*'. However, section 11 lists various guidelines the court may consider when deciding whether an accused is a gang member and can thus face potential criminal liability under the POCA.²⁸ In *Ceaser*, the court used the list in section 11 to substantiate a finding that an accused is a gang member and made it clear that it is not a *numerus clausus*, upholding the pre-POCA approach in *Thomas*.²⁹ This approach is also corroborated by the word 'may' in section 11.

What a criminal gang or a gang member is can loosely be interpreted considering the statutory elements in section 1 of the POCA in conjunction with the scholarly work on the subject. The uniqueness and plurality of gangs, especially on the Cape Flats, make it impractical to attempt an all-inclusive definition, but it remains imperative to keep in mind the differing judicial approaches to these definitions.³⁰

²³ The Prevention of Organised Crime Act 121 of 1998 at section 1; Van der Linde op cit note 3 at 137.

²⁴ C Snyman 'Die nuwe statutêre misdaad van deelname aan 'n kriminele bende' (1999) 12 *SA Journal of Criminal Justice* at 213-215.

²⁵ *S v Prinsloo* 2016 (2) SACR 25 (SCA) at para 57; Snyman op cit note 24 at 213-215.

²⁶ A Kruger *Organised Crime and Proceeds of Crime Law in South Africa* 2 ed (2013) at 72-73.

²⁷ Kemp op cit note 10 at 17-18; Kruger op cit note 26 at 72-73; Van der Linde op cit note 3 at 137-138.

²⁸ The Prevention of Organised Crime Act 121 of 1998 at section 11.

²⁹ *S v Ceaser & Others* (WCC unreported case no. SS29/2009) at para 16; *S v Thomas* (2015) JDR 1932 (WCC) at 481-482; Van der Linde op cit note 3 at 298-299.

³⁰ Pinnock op cit note 1 at 3-6; D Lambrechts *The Impact of Organised Crime on Social Control by the State: A Study of Manenberg in Cape Town, South Africa* (unpublished Ph. D-dissertation, University of Stellenbosch, 2013) at 118-120.

2-4 Understanding the origins and nature of gangs on the Cape Flats

Gangsterism is a problem that presents a substantial threat to members of society.³¹ The gang culture on the Cape Flats can be attributed to three main socio-historical factors: the influence of previously discriminatory legislation, the reduction in the police powers, and the activities of foreign syndicates over our weakened borders.³²

2-4-1 *The origins of gangsterism*

Under the apartheid government, the impact of racially discriminatory legislation, such as the Group Areas Act (**'the GAA'**) led to the forcible relocation of many coloured communities from their home towns to the area now known as the Cape Flats.³³ Approximately 700 000 families were displaced under this piece of legislation.³⁴ The Cape Flats has often been described as the apartheid era's *'dumping ground'* where those people belonging to what was then considered as 'inferior' races were forced into informal government-built townships and removed from those areas that were designated for *'civilised whites'*.³⁵ A policy of spatial apartheid, allowed by the GAA, led to the segregation of living areas of the different races as recognised under the apartheid regime.³⁶

A lack of adequate housing, no form of leadership, unemployment, poor living conditions and overcrowding became characteristic of the communities of the Cape Flats.³⁷ Illegal structures were erected since the establishment and maintenance of infrastructure and community facilities was not a governmental priority.³⁸ Core social

³¹ A Standing *Organised Crime: A Study from the Cape Flats* (2006) at 33; Rutkowski op cit note 7 at 141-142.

³² D Pinnock *Breaking the Web: Gangs and Family Structure in Cape Town* (1985) at 10-11; I Kinnes 'Reclaiming the Cape Flats: A community challenge to crime and gangsterism' (1995) 2 *Crime and Conflict* at 5-8.

³³ The Group Areas Act 41 of 1950; I Kinnes *Contested Governance: Police and Gang Interactions* (unpublished Ph. D dissertation, University of Cape Town, 2017) at 68-74.

³⁴ Van Wyk & Theron op cit note 3 at 51-53.

³⁵ S Jensen 'Discourses of violence: Coping with violence on the Cape Flats' (1999) 25(2) *Journal of Social Dynamics* at 76; D Pinnock *State Control and Street Gangs in Cape Town: Towards an Understanding of Social and Spatial Development* (unpublished MA thesis, University of Cape Town, 1982) at 72.

³⁶ Standing op cit note 31 at 2-3.

³⁷ Van der Linde op cit note 3 at 36-37; R Chetty 'Social complexity of drug abuse, gangsterism and crime in Cape Flats' schools, Western Cape' (2015) 3 *South African Journal of Criminology* at 55-56.

³⁸ Pinnock op cit note 1 at 4-5.

institutions were severely disturbed and working-class people subjected to dire socio-economic circumstances still present in the Cape Flats communities today.³⁹

This unstable civil order is widely accepted as a main cause of gangsterism necessitating criminal involvement as a means of survival.⁴⁰ More than 20 years after the apartheid, though the lines of racial restrictions on where to make one's living are no longer policed, the demography of the population of the Cape Flats remains largely unchanged, indicating the lasting effects of spatial apartheid.⁴¹ This has resulted in much of the gang membership on the Cape Flats consisting of coloured males that have previously been racially discriminated against by the apartheid regime.⁴²

2-4-2 Reduction in police powers in the post-constitutional era

The current Constitution brought a strong focus on human rights as contained in our Bill of Rights and emphasises the importance of due process in the criminal justice system.⁴³ The new constitutional era has significantly restricted the powers of the police and has led to policing mechanisms in the South African Police Service being perceived as lenient.⁴⁴ This era of political transition has allowed criminal gangs to flourish since the previous 'police state' under the apartheid government has been significantly weakened and the law enforcement powers of the police curtailed.⁴⁵

2-4-3 Transnational nature of organised crime over weakened borders

The last factor which has largely contributed to the proliferation of criminal gangs was the weakening of the country's national borders.⁴⁶ When the borders re-opened for international trade, immigrants and refugees after the apartheid era, criminal influences from other countries fostered conditions for drug smuggling syndicates and

³⁹ A Cooper "Gevaarlike transitions": Negotiating hegemonic masculinity and rites of passage amongst coloured boys awaiting trial on the Cape Flats' (2009) *Journal of Psychology in Society* at 2-3.

⁴⁰ T Samara *Cape Town After Apartheid: Crime and Governance in the Divided City* (2011) at 93-94.

⁴¹ S Mguzulwa *An Exploration of Male Youth's Perceived Impact of their Involvement in Youth Gang Violence on their Educational Attainment in Khayelitsha Site B* (unpublished M.Sc. (Social Development) thesis, University of Cape Town, 2014) at 10-11.

⁴² Pinnock op cit note 1 at 7-8.

⁴³ The Constitution of the Republic of South Africa, 1996 at chapter 2; Van der Linde op cit note 3 at 32.

⁴⁴ M Cowling 'Fighting organised crime: Comment on the Prevention of Organised Crime Bill 1998' (1998) 11 *South African Journal of Criminal Justice* at 350-351.

⁴⁵ Standing op cit note 31 at 38-39.

⁴⁶ Van der Linde op cit note 3 at 33-34.

other gang-related crimes to enter our country and flourish.⁴⁷ This allowed gangs on the Cape Flats to increase their level of structural organisation and their crimes have become more serious, more frequent and more widely spread.⁴⁸ Street gangs begun to expand their networks, use established codes of conduct to control their gang members and have started to ‘control their customers’, who are mainly members of the communities that they operate in.⁴⁹

2-5 The prosecution of gang members

Formulating a definition for the terms ‘*criminal gang*’ and ‘*gang member*’ is paramount as it defines who can be prosecuted under the POCA and consequently whether accused can raise the defence of necessity. A gang member may be tried and convicted for any criminal offense they commit while part of a criminal gang.⁵⁰ Chapter IV of the POCA outlines specific statutory and gang-related crimes in addition to mere gang participation, threats of retaliation and the recruitment of new gang members.⁵¹ The POCA is superfluous due to its overlap with the common law and lacking specificity on the definitional elements for the crimes it created.⁵²

Furthermore, under section 10(3) of the POCA, a convicted gang member’s sentence can be increased by the mere aggravating fact that they are part of a gang – even for less serious crimes like traffic offenses. This is arbitrary as it imposes additional criminal liability upon an accused for actions unrelated to their gang involvement.⁵³ While a court may consider the personal circumstances of the accused during the sentencing process, because of the particular relationship between punishment and an accused’s culpability discussed below, this paper will argue that courts should attach more weight to the impact of the accused’s living conditions.⁵⁴

⁴⁷ Standing op cit note 31 at 38-39; Cowling op cit note 44 at 351-352.

⁴⁸ B Haefele *Criminal Economy, Gangs and Child Abuse in the Western Cape Town* (2003) at 3.

⁴⁹ Pinnock op cit note 1 at 105; E Mylonaki ‘The manipulation of organised crime by terrorists: Legal and factual perspectives’ (2002) 2 *ICLR* at 213.

⁵⁰ Burchell op cit note 7 at 51-68.

⁵¹ The Prevention of Organised Crime Act 121 of 1998 at sections 9 and 10.

⁵² D van der Linde ‘A law designed to fight gang violence in South Africa won’t do the job – here’s why’ *The South African* (2019) available at: www.thesouthafrican.com/gang-violence-law-south-africa-ineffective/amp (Accessed: 6 June 2019).

⁵³ A Basson ‘Make gang bosses liable for crimes carried out in their names’ *TimesLive* (14 December 2018) available at: www.timeslive.co.za/news/south-africa/2018-12-14-make-gang-bosses-liable-for-crimes-carried-out-in-their-names/ (Accessed: 6 June 2019).

⁵⁴ *S v Jordaan & Others* (CC20/2017) WCHC 13 at para 12.

2-6 The relationship between punishment and culpability

Our criminal justice system aims to punish gang members in accordance with their culpability, and any negating or mitigating factors regarding their potential for criminal liability must be adequately explored and weighed up.⁵⁵ Punishment is imposed to restore order to society and must reflect the blameworthiness of the accused to be regarded as just.⁵⁶ Sufficiently coerced or compelled conduct does not warrant punishment.⁵⁷ To determine whether an accused's conduct was *sufficiently* coerced, a contextual approach to the application of the requirements of necessity is required to determine whether an accused gang member can *currently* rely on this defence of escape liability for their participation in gang-related activities.

3 Pleading necessity in the context of the Cape Flats

The defence of necessity can be broken down into two seminal parts: (1) the requirements for the attack or threat that the accused faced, and (2) the requirements of the accused's response to the attack or threat. This section will explore these requirements by taking a comparative English approach and applying a contextual understanding by considering how the standard of a reasonable person ought to be judicially interpreted within this context.

The first set of requirements for necessity focuses on the attack or threat a person is facing and requires: (1) a legal interest to be in danger; (2) the danger must have commenced or be imminent, and lastly, that (3) the danger must not have arisen through the fault of the accused.⁵⁸

3-1 Requirement no. 1: The accused's legal interest endangered

When a protected legal interest of the accused is threatened or attacked their illegal conduct may be justified under necessity.⁵⁹ Clearly the constitutional rights to life,

⁵⁵ E Arnolds & N Garland 'The defence of necessity in criminal law: The right to choose the lesser evil' (1974) 65(3) *Journal of Criminal Law & Criminology* at 291-292.

⁵⁶ Rutkowski op cit note 5 at 139-142.

⁵⁷ Burchell op cit note 7 at 53-55.

⁵⁸ Kemp op cit note 10 at 106-108.

⁵⁹ Burchell op cit note 7 at 168.

bodily integrity or property of the accused are protectable legal interests, and when it is attacked or threatened, this requirement of necessity is satisfied.⁶⁰ A grey area, however, is when the accused acted out of poverty, such as breaking the law to avoid hunger or a lack of shelter. Kemp relies on the decisions in *Canestra* and *Werner* to argue that 'sheer' economic necessity does not constitute a legal interest and cannot be used to plead necessity.⁶¹ He fails to consider the limitations of the cited case law: *Canestra* dealt with the defence of impossibility, for economic necessity is not regarded as a *defence*, but does constitute a legal *interest* worthy of protection.⁶² When citing the second case, *Werner*, Kemp did not consider that the case failed based on insufficient evidence led and not on the merits of the claim which relied on economic necessity as a justifiable protectable legal interest.⁶³ Burchell argues that the 'harm avoided must be weighed against the harm done', making it unnecessary to limit the availability of defences to a closed list of protectable legal interests.⁶⁴ Threats or attacks on other interests protected by law, such as family life, privacy or personal freedom, must be sufficient for necessity.⁶⁵

However, the Statute of the International Criminal Court (**'ICC-statute'**) limits the list of recognisable interests to life and when your right to bodily integrity is severely threatened or attacked.⁶⁶ The Rome Conference considered including property rights but actively decided against it.⁶⁷ Our law has adopted these qualifications but has widened the range of interests that can be threatened or attack, even alluding to the idea that mental harm is included in this list.⁶⁸

An accused gang member can contend that they responded out of necessity to a threat or attack on their legal interests, such as their family, property, life, health, and economic aspects such as employment and poverty.⁶⁹ English law does not allow for

⁶⁰ Constitution at sections 10, 12(2) and 25.

⁶¹ *Canestra* op cit note 19 at 57; *Werner* op cit note 19.

⁶² Kemp op cit note 10 at 106.

⁶³ G Williams *Textbook of Criminal Law* 2 ed (1983) at 756-757; J van der Westhuizen *Noodtoestand as Reverdigheidsgrond in die Strafreg* (unpublished LL.D-dissertation, University of Pretoria, 1979) at 729.

⁶⁴ Burchell op cit note 7 at 167-169.

⁶⁵ J Burchell 'Heroes, poltroons and persons of reasonable fortitude: Juristic perceptions on killing under compulsion' (1988) 1 *SA Journal of Criminal Justice* at 30; *Levy NO v Schwartz NO* 1948 (4) SA 930 (W) at 933.

⁶⁶ The Statute of the International Criminal Court (2002) available at www.un.org/icc. Our law complies with the minimal treaty requirements and expands its scope.

⁶⁷ S Yeo 'Compulsion and necessity in African criminal law' (2009) *Journal of African Law* at 97-98.

⁶⁸ *S v Mtewtwa* 1997 (3) SA 628 (E); *S v Malan* 1998 (2) SASV at 143.

⁶⁹ Yeo op cit note 67 at 95-96.

a wide list of interests, and expressly excludes reliance on necessity for hunger, homelessness and life necessities, but focuses on life and bodily integrity.⁷⁰ By regarding the lack of life necessities as ‘mere discomfort’ to individuals is a gross undermining of universal human rights – the right to food, shelter and safety are fundamental constitutional rights of the residents of the Cape Flats.⁷¹

In the context of the Cape Flats, the requirement that an accused’s legal interest must have been threatened is an easy element to prove. Residents live in crime-ridden communities and the lack of quality education and feasible employment opportunities results in them having to resort to gang involvements to get an income and minimise the effects of their socio-economic circumstances. The economic needs of the accused from the Cape Flats is clear, and the violent nature of gangsterism logically presents threats to the lives and human rights of the residents.

3-2 Requirement no. 2: The threat has commenced or is imminent

The threat or danger to the accused’s legal interest must have already commenced or about to begin.⁷² While mere anticipation of a threat does not suffice, the accused is not required to wait for a threat to materialise before taking the necessary steps to avoid the harm to their legal interest.⁷³ However, the accused’s response must start before the threat or attack has passed – it must have been done with the purpose of *averting* the danger.⁷⁴ The person executing the threat or danger need not be present for the danger to have commenced or be imminent.⁷⁵

Threats and violence on the Cape Flats are all-pervasive and the large hierarchical structure of gangs spread out over various locations makes it hard to pinpoint who the aggressor or person executing the threat or attack is.⁷⁶ Is it the gang leader giving the command of the threat or the attack, or the foot soldier who executed it? The complexity of organised crime on the Cape Flats have been significantly increased by the now-transnational nature thereof, resulting in the presence of multi-national

⁷⁰ *Southwark London Borough v Williams* [1971] 2 All ER 175 at 179 (English case).

⁷¹ *Ibid.* at 180-181; Constitution at section 12(1)(c) and 26-27.

⁷² Kemp op cit note 10 at 107; J de Wet & H Swanepoel *Suid-Afrikaanse Strafreg* 4 ed (1985) at 81ff.

⁷³ *S v Moller* 1971 (4) SA 327 (T) at 329-330; Burchell op cit note 7 at 169.

⁷⁴ *Mtewtwa* op cit note 68 at 631; *R v Baxter* 1929 EDL 189; *S v Damascus* 1965 (4) SA 568 (SR) at 600; *S v Kibi* 1978 (4) SA 173 (E) at 181; *R v Chipsea* 1964 (4) SA 472 (SRA) at 477.

⁷⁵ Burchell op cit note 7 at 169.

⁷⁶ Jensen op cit note 35 at 79-80.

gangs.⁷⁷ Holding that a threat or attack may subsist even if the aggressor is not present (perhaps giving the command for the threat or attack from a distant location) is more logical than the Canadian and English approaches requiring the aggressor to be physically present when the accused undertakes to respond by breaking the law.⁷⁸

The violent crimes of the Cape Flats are not new.⁷⁹ In many of its communities, the chance of being killed in the Cape Flats is higher than in some of the world's most war-torn cities.⁸⁰ With over 2 000 murders reported over a period of seven months, it is no surprise that Cape Town is ranked as the 11th most dangerous city in the world.⁸¹ Recently the situation has escalated even further to the point where President Ramaphosa deployed our defence force within the Cape Flats – but despite the military presence, 46 murders were committed over a single weekend.⁸² While many of the residents of the Cape Flats participate in gang-related activities at some point in their lives, before they join a criminal gang or partake in that gang's illegal activities – it is vital to remember that these residents form part of a larger community that is terrorised by the high rates of crimes such as murder, rape and assault.⁸³ It is the confluence of direct violence in the form of threats or the perpetrating of thousands of violent crimes within the Cape Flats that contributes greatly to a person's involvement in a criminal gang.⁸⁴ When a gang member threatens or attacks an accused's interests, it is clear from the situation in which case there is often a threat of direct violence involved – usually through assault, murder and threats to bodily injury to the accused or their loved ones or their property.⁸⁵

It is much harder to pinpoint exactly when the threat or compulsive force of the accused's socio-economic circumstances arise. When exactly does a lack of education become so unbearable as to merit gang involvement to avoid its harmful effects, such as unemployment and poverty? When an accused could no longer

⁷⁷ Burchell op cit note 7 at 170; Van der Linde op cit note 3 at 33-34.

⁷⁸ *Queen v Ruzic* 2001 SCC 24 (Canadian case); The Canadian Criminal Code at section 17; Rutkowski op cit note 5 at 201-202.

⁷⁹ Van der Linde op cit note 3 at 23.

⁸⁰ Pinnock op cit note 1 at 2-3.

⁸¹ eNCA 'Cape Town ranked the 11th deadliest city globally' eNCA (30 July 2019) available at: www.enca.com/news/cape-town-ranked-11th-deadliest-city-globally (Accessed: 31 July 2019).

⁸² J Evans 'Western Cape weekend murder rate climbs to 46 despite army presence in crime hotspots' *News24* (July 2019) available at: www.news24.com/SouthAfrica/news/western-cape-weekend-murder-rate-climbs-to-46-despite-army-presence-in-crime-hotspots-20190729 (Accessed: 1 August 2019).

⁸³ Rutkowski op cit note 5 at 139; Jensen op cit note 35 at 76.

⁸⁴ Van der Linde op cit note 3 at 267.

⁸⁵ *Ibid.* at 268-270.

survive with these socio-economic circumstances present can be regarded as the moment the threat or attack arises.⁸⁶ If an accused lacked schooling or is illiterate and their only viable means to afford food and shelter is through gangsterism, the compulsive nature of the circumstances is clear: it is through the inadequacies in existing local social institutions that a scarcity of life necessities is created on the Cape Flats, contributing to a motivation for suffering residents to resort to gang involvement.⁸⁷ This element of necessity is a bit harder to prove, but it is enough to show that there were circumstances or an active threat or attack that has started or is about to commence. Direct violence commences when actual physical violence is directed at the accused's legal interests, whereas threats or attacks of structural violence through socio-economic circumstances arise when it becomes so intolerable that turning to gangs are a less harmful approach.⁸⁸

3-3 Requirement no. 3: The threat is not caused through the accused's fault

A person may not benefit from their own wrongdoing – when the threats or attacks faced by an accused was caused by their own conduct or prior negligence, they are prohibited from relying on necessity to justify their conduct of breaking the law.⁸⁹ The court in *Bradbury* upheld the argument that a choice to join a gang classifies as such prior conduct by stating that:⁹⁰

‘as a general proposition, a man who voluntarily and deliberately becomes a member of a criminal gang with knowledge of its disciplinary code of vengeance cannot rely on compulsion as a defence.’

The effect of the *Bradbury*-principle is clear, but it is not whether the accused had prior knowledge of the criminal gang's violent nature that is relevant to determine the applicability of this principle, it is the word ‘voluntarily’ that poses a problem in this

⁸⁶ Burchell op cit note 7 at 170.

⁸⁷ Rutkowski op cit note 5 at 151; Standing op cit note 31 at 2.

⁸⁸ Van der Linde op cit note 3 at 267; I Spergel ‘Violent crimes in Chicago: In search of social policy’ (1984) 58 *Social Service Review* at 201-202; Pinnock op cit note 1 at 6.

⁸⁹ Kemp op cit note 10 at 107; Burchell op cit note 7 at 170; *S v Garnsworthy* 1923 WLD 17 at 21; *S v Mneke* 1961 (2) SA 240 (N) at 243.

⁹⁰ *Bradbury* op cit note 6 at 399-400 and 404.

ratio. For a gang member to rely on necessity, their involvement with gangs must not be entirely voluntary. The lack of judicial understanding of local gangs and living conditions on the Cape Flats was illustrated in *Mandela* - the accused was convicted without evidence being led determining whether their association with the gang was voluntary or compelled by circumstances.⁹¹

Burchell ties voluntariness closely to the doctrine of free will, which argues that an accused could freely choose between different courses of action – it is this freedom of choice that our law can justifiably hold people criminally liable for their choices only when their actions were governed by their free will.⁹² Our courts have interpreted ‘voluntarily’ conduct as focused, goal-directed behaviour and has held that ‘involuntary’ refers to accused’s conduct that have resulted because of external forces on their body or circumstances.⁹³ This is where Burchell’s distinction between absolute force (*vis absoluta*) and relative force (*vis compulsiva*) is useful: When physical violence was exerted on the accused, absolute force is imposed.⁹⁴ The surrounding circumstantial factors have been recognised for their compulsive force, and while it does not render the accused’s conduct *entirely* involuntary, it cannot be regarded as entirely voluntary either, meriting a decreased likelihood for attracting liability for their conduct.⁹⁵

In the Cape Flats, the English approach grants a useful perspective. The case of *Sharp* has been noted as the English version of our *Bradbury*-principle with its purpose being to force people to rather avoid dangerous circumstances that could lead them to committing crimes.⁹⁶ Lord Chief Justice Land held that an accused must not willingly place themselves in an environment where the coercive forces of gangs are present.⁹⁷

But when we consider the Cape Flats, the residents do not have an active choice whether to live in its communities – it is an after-effect of the apartheid legislation namely the GAA and it is beyond the powers of the residents to relocate to safer areas due to the widespread poverty and limited resources.⁹⁸ Accused have no real choice

⁹¹ *S v Mandela* 2001 (1) SACR 156 (C) at 77; W le Roux ‘Killing under compulsion, heroism in the age of constitutional democracy’ (2002) 15 *SA Journal of Criminal Justice* at 101.

⁹² Burchell op cit note 7 at 73; Kemp op cit note 10 at 43; *S v Chretien* 1981 (1) SA 1097 (A) at 1104; *S v Eadie* 2002 (3) SA 719 (SCA) at 70.

⁹³ *S v Potgieter* 1994 (1) SACR 61 at 84; *Eadie* op cit note 92 at para 36.

⁹⁴ Burchell op cit note 7 at 73.

⁹⁵ Rutkowski op cit note 5 at 198; Kemp op cit note 10 at 43.

⁹⁶ *Regina v Sharp* 1 Q.B. 835 (1987) (English case); Rutkowski op cit note 5 at 198.

⁹⁷ *Sharp* op cit note 96; Rutkowski op cit note 5 at 199.

⁹⁸ Rutkowski op cit note 5 at 199-200.

whether to be in the vicinity of and be associated with gangs: It is a means to escape being subjected to greater harms and unbearable threats by living as a non-gang member within in their gang-ridden communities.⁹⁹ This element of the defence of necessity is proven when an accused did not wilfully make their situation worse by exacerbating their living conditions through their own fault and by the fact that the accused's decision to associate with gangs can never be said to be voluntary.

The second set of requirements focuses on the response undertaken by the accused who relies on necessity and requires: (1) the accused's conduct must have been necessary and have (2) used reasonable means to avert the threat or attack.¹⁰⁰

3-4 Requirement no. 4: The response must have been necessary

The course of action undertaken by the accused must have been necessary to avert the threat or attack and subsequent harm.¹⁰¹ It is not required that there was absolutely no alternative means to achieve this purpose, but only that there was no other *practically feasible* way of averting the harm without breaking the law.¹⁰² Absolute necessity in this regard is not required, but the accused's conduct must have been *reasonable* and this will be discussed in the next section.¹⁰³

Burchell's approach, as endorsed in by our courts, is a simple enquiry as to whether the harm would have followed if the accused did not act as they did.¹⁰⁴ An accused may only take the needed action that would suffice to escape the harm threatened or perpetuated by their socio-economic circumstances or gang members.¹⁰⁵ If accused resort to gang involvement as the only means to provide food and shelter to their family, clearly the conduct was necessary to avoid hunger, homelessness and possible death. However, if the accused had viable means of employment that would achieve the same purpose, the conduct is not necessary. This philosophy was upheld in the American case of *Lewis*.¹⁰⁶

⁹⁹ *Ibid.* at 140.

¹⁰⁰ Burchell op cit note 7 at 172-173; Kemp op cit note 10 at 107.

¹⁰¹ Kemp op cit note 10 at 107; *Adams* op cit note 18 at 798F-H.

¹⁰² Williams op cit note 16 at 223-224.

¹⁰³ Kemp op cit note 10 at 108.

¹⁰⁴ Burchell op cit note 7 at 172; *Garnsworthy* op cit note 89 at 211; *Canestra* op cit note 57 at 324; *Bradbury* op cit note 6 at 398-400.

¹⁰⁵ Kemp op cit note 10 at 106-107.

¹⁰⁶ *United States v Lewis* 450 U.S. 924 (1981) at 1279 (American case).

'the [defence] does not arise from a *choice* of several sources of action; it is instead based on a real emergency. It may be asserted only by a defendant who was confronted with a crisis as a personal danger, a crisis that did not permit a selection from among several solutions, some of which would not have involved criminal acts.'

In the Cape Flats, when an accused's legal interests were threatened or attacked, such as being assaulted, they may only respond with necessary actions that will avoid the danger. If an accused can circumvent the harms of a direct assault by running away, killing the aggressor would not be a necessary act as there were less consequential or intrusive means of achieving the same purpose. However, if an accused's life is threatened and the only viable means of surviving is to kill the aggressor, doing so would constitute a necessary act. At this point, it is important to recall that each case must be assessed by considering the circumstances of the accused and their response to an attack or threat, but appropriate weight must be given to each of these circumstantial factors.¹⁰⁷

3-5 Requirement no. 5: The accused must have used reasonable means

The response of the accused must have been *reasonable*, requiring that (1) no more harm than what was necessary to avoid the attack must have been taken and that (2) the harm done must not be greater than the harm avoided.¹⁰⁸ A literal choice between the *lesser* of two evils is required. When assessing whether the accused's conduct was reasonable the court has the task of balancing the interests of the accused and the interests of the person who suffers whatever harm was caused by the accused in their responding conduct.¹⁰⁹

Determining whether the accused's response was reasonable, the immediate circumstances of the accused and the nature of their responding actions must be explored. The seemingly dichotomous concepts of direct and structural violence become relevant once again as the prevalence of structural violence in the Cape Flats contributes directly to the high levels of direct violence that is experienced by its

¹⁰⁷ Rutkowski op cit note 5 at 159; *S v Bailey* 1982 (3) SA 772 at 775A.

¹⁰⁸ Kemp op cit note 10 at 108; *Mahomed* op cit note 19 at 34-36; *Adams* op cit note 18 at 800B-C; *R v Samuel & Others* 1960 (4) SA 702 (SR) at 703.

¹⁰⁹ Burchell op cit note 7 at 173.

communities.¹¹⁰ On the one hand, it is easy to condemn the prevalence of gangs and their crimes to call for stricter policing and legislation to curb the phenomenon of organised crime, in which case the reduction in the powers of the police under our new constitutional dispensation must be considered.¹¹¹ However, the confluence of direct violence as threats or perpetuation of vast amounts of daily crimes must be understood to determine if an accused's response to these threats or attacks was reasonable.¹¹²

The first consideration is the state's duty to uphold and give effect to the right of all its citizens to enjoy freedom and security of their person, including to be free from all forms of violence.¹¹³ If the state fails in this duty, residents are forced to live in dangerous, crime-ridden communities and this is a substantial contributing factor precipitating the accused's association with gangs to obtain protection.¹¹⁴

Second, the power and social control exercised by gangs over the communities in which they operate has widely been accepted.¹¹⁵ This is supported by Thrasher's theory of social disorganisation which posits that in communities that are *socially disorganised* (high crime rates, rife poverty and inadequate social institutions) gangs are the main providers of a social support system.¹¹⁶ When fundamental social institutions are insufficient to fulfil the needs of the community, the effects, as noted by Spergel, are quite severe:¹¹⁷

'The violent gang is a natural, lower class interstitial institution, resulting mainly from the weakness of secondary institutions, such as schools, local communities and ethnic organisations, and ... from the weakness of primary institutions such as the family, to provide adequate mechanisms of *opportunity* and *social control*.'

Spergel quite correctly notes the relationship between social disorganisation of a community and the increase in community involvement with local gangs.¹¹⁸

¹¹⁰ N du Toit 'Gangsterism on the Cape Flats: A challenge to *engage the powers*' (2014) 70(3) *HTS Theological Studies* at 1-2.

¹¹¹ Cowling op cit note 44 at 350-351.

¹¹² Du Toit op cit note 110 at 7-8.

¹¹³ Constitution at section 12(1)(c).

¹¹⁴ Rutkowski op cit note 5 at 139.

¹¹⁵ Du Toit op cit note 110 at 7.

¹¹⁶ J Wood & E Alleyne 'Street gang theory and research: Where we are now and where do we go from here?' (2010) 15 *Aggression & Violent Behaviour* at 102.

¹¹⁷ Spergel op cit note 88 at 201-202; Pinnock op cit note 1 at 6; Rutkowski op cit note 5 at 150-151.

¹¹⁸ D Curry & I Spergel 'Gang homicide, delinquency and community' (1988) 26 *Criminology* at 385.

Further factors exacerbate this relationship: Financial wealth and opportunities are presented by gangs, normally by getting involved in the trading of drugs and weapons as these present viable ways for the accused to escape poverty and to be able to enjoy and afford the necessities of life.¹¹⁹ Additional factors such as a lack of access to the courts and affordability of legal counsel, as well as corruption within local government organisations have led to the flourishing of gangs and creates the opportunity to exercise gang control over the communities.¹²⁰ Last in the group of social institutions, is the stability of family structures. This is best explained by the theory of cultural transmission which argues that the criminal activities within the Cape Flats communities are *culturally transmitted* between residents and households, exposing other members of the community to criminal behaviour.¹²¹ Easy access to drugs and the procurement of firearms without a license is a key characteristic of life on the Cape Flats.¹²² The last consideration is the youth element and the power relationships between existing gangs and the residents of the Cape Flats.¹²³

The phenomenon of joining a gang to ensure one's protection and survival within a gang-ridden community is not new.¹²⁴ Rutkowski explores the basic instinct a person has to ensure their own survival, which has been recognised in society by the presence of law enforcement and a constitutional right to be free from violence.¹²⁵ What is often overlooked is while involvement in gangs may have serious negative consequences for a gang member's personal relationships (such as the threat of prosecution associated with weapons and drugs) a gang association does contribute to the prevention of physical harms to gang members.¹²⁶

Coercive recruitment of new members takes the form of either *mental* or *physical coercion*. Mental coercion refers to the threatening of a potential new gang recruit or by placing them or their family in dangerous situations.¹²⁷ Physical coercion refers to

¹¹⁹ Pinnock op cit note 1 at 6-9.

¹²⁰ S Williams 'Police and gangs: Undergraduates' perceptions of the similarities and differences' (2016) *University Honours Program Theses* at 202.

¹²¹ Wood & Alleyne op cit note 116 at 9-10.

¹²² M Shaw 'Organised and cross-border crime in post-apartheid South Africa' (2009) 6(1) *South African Journal of International Affairs* at 116; Pinnock op cit note 1 at 11.

¹²³ Pinnock op cit note 1 at 10-12.

¹²⁴ M Jankowski *Islands in the Street: Gangs and American Urban Society* (1991) at 47-58.

¹²⁵ Constitution at section 12(1)(c); Rutkowski op cit note 5 at 152.

¹²⁶ L Wegner, A Behardien, C Loubser, W Ryklief & D Smith 'Meaning and purpose in the occupations of gang-involved young men in Cape Town' (2016) 46(1) *SA Journal of Occupational Therapy* at 54-56.

¹²⁷ T van Lennep 'Cape Town gangs: Political dimensions' *Helen Suzman Foundation* (25 January 2019) available at www.hsf.org.za/publications/hsf-briefs/cape-town-gangs-political-dimensions. (Accessed 2 August 2019).

the infliction of physical pain or attacks on the potential recruit or their family members, or through the destruction of their property.¹²⁸ These methods are not isolated incidents and its eventual outcome is causing the potential recruits to enlist with the gang, but the presence of coercive acts shows that the recruits have no real choice in doing so.¹²⁹ Coercive gang recruitment does in fact exist, that much is clear. However, its severity and the weight attached to it must be subjectively assessed by the courts on a case-by-case basis to assess the accused gang member's claim that they did not want to partake in the criminal activities of the gang and that they were coerced.¹³⁰

Once a person is a member of a gang, it is not easy to abandon and disassociate oneself from the criminal activities of that gang. The demanding nature of orders given by gangs to their members cannot be underestimated. When a gang member fails to execute any of their duties (e.g. showing defiance, not committing the acts commanded by the gang leaders, or failing to uphold the general gang order), there is a very serious threat of retaliatory punishment.¹³¹ Gang leaders' use of violence and deadly force against members of their own gang has been well explored in literature.¹³² Threats to bodily integrity and life minimalises the ability to resist continued gang involvement, as such resistance is met with severe consequences – thus the *practical* ability to leave a gang is decreased.¹³³

Interestingly, even when a gang member manages to leave their gang under these hostile circumstances, this does not necessarily equate to an increase in their personal safety.¹³⁴ Gang members remain residents of the communities in which their gangs operate even after they have left their gangs.¹³⁵ However, this change in association is not known by rival gang members, and because animosity between local gangs, competing gangs are not likely to believe a person who claims to have left their gang.¹³⁶ In addition, the previous gang member no longer benefits from the protection

¹²⁸ Jankowski op cit note 124 at 59.

¹²⁹ Rutkowski op cit note 5 at 156.

¹³⁰ *Ibid.* at 159; *Bailey* op cit note 107 at 775A.

¹³¹ Rutkowski op cit note 5 at 159.

¹³² Jankowski op cit note 124 at 59.

¹³³ Rutkowski op cit note 5 at 164.

¹³⁴ *Ibid.* at 166.

¹³⁵ I Spergel *The Youth Gang Problem: A Community Approach* (1995) at 97-98.

¹³⁶ G Knox 'Comparison of cults and gangs: Dimensions of coercive power and malevolent authority' (1999) 6(4) *Journal of Gang Research* at 31; Rutkowski op cit note 7 at 163-165.

and discouraging of attacks that belonging to their previous gang provided them, rendering protection a key motivation to join a gang.¹³⁷

Lastly, the moral and ethical limits of the reasonableness enquiry are not set in stone and constitute a highly contentious aspect of criminal justice and substantial scholarly discourses have attempted to answer the questions on the accused's (1) the legal obligation to suffer harm, and when the situation involved (2) killing under compulsion. Our law does not differentiate whether the defence of necessity can be raised based on the type of crime that was committed, unlike under English law.¹³⁸ Instead, necessity and compulsion are general defences to all crimes and while its requirements must be interpreted narrowly, our courts do not subscribe to the 'saintliness' or 'heroic self-sacrificing actions' expected from citizens by the English courts.¹³⁹ This approach in *Goliath* might be constitutionally controversial but is yet to be measured against our Bill of Rights to determine its constitutional validity. The reasonableness requirement of necessity is the most difficult one and must be assessed on a case-by-case basis.

4 Conclusion

'Law is ineffective in the deepest sense, it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case ... is divorced from any moral base and is unjust.'¹⁴⁰

The residents of the Cape Flats are surrounded by daily forms of direct and structural violence that severely diminishes their ability to freely and without consequence dissociate from the activities of gangs in their communities. A contentious difficulty confronting the courts, in considering the defence of necessity, is the determination of reasonableness. In our adversarial legal system, the duty will be that of the accused's legal representative to lead sufficient evidence to allow the court to adequately attach weight to the accused's circumstances to understand how the

¹³⁷ C Conly *Street Gangs: Current Knowledge & Strategies* (1993) at 18-21.

¹³⁸ Burchell op cit note 7 at 173.

¹³⁹ Burchell op cit note 7 at 185; Rutkowski op cit note 5 at 148.

¹⁴⁰ English Model Penal Code & Commentaries 2.09 at 374-375; Rutkowski op cit note 5 at 137.

accused were *coerced* into participating in gang activities as a means for survival and protection. In practice, the prospects of a rigorous legal defence that will address such issues is greatly diminished by the lack of access to justice and quality legal counsel to those subjected to poverty in the Cape Flats. Theoretically, however, this paper has argued that there is no criminological basis for prohibiting an accused from relying on the defence of necessity simply because they can be regarded as a gang member.

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