



## The Torture Lawyers: A Response

Responding to Jens Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193 (2010).

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In an important contribution to the debate concerning the criminal responsibility of lawyers who wrote or approved memos analyzing the legality of torture and other harsh interrogation methods, Jens Ohlin investigates fundamental issues concerning criminal liability. Ohlin provides a fresh perspective on the distinction between justifications and excuses and establishes why this distinction is central to the debate concerning the criminal liability of the “torture lawyers.” While Ohlin does not arrive at a definite conclusion as to whether the torture lawyers are criminally liable, he argues that some of the alleged doctrinal barriers to the prosecution of these lawyers are misguided. Most importantly, Ohlin investigates the soundness of the inference that the torture lawyers ought to be exonerated because the interrogators whom they advised should be exonerated on the basis of the defense of necessity. Ohlin maintains that, as a matter of criminal law theory, it is wrong to infer the former claim from the latter.

Ohlin’s article is rich and comprehensive. It examines the legality of torture, explores the many fallacies (and even frivolity) of the legal arguments provided by the torture lawyers, uncovers some important and previously unknown precedents (such as the *Ministries* case<sup>1</sup>), and investigates central issues in professional ethics. In this comment, I will focus my attention only on Ohlin’s discussion of justifications and

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<sup>1</sup> See Jens David Ohlin, *The Torture Lawyers*, 51 HARV. INT'L L.J. 193, 246 n.267 (2010).

excuses and their relevance to the debate concerning the liability of the torture lawyers. Ohlin's arguments concerning this subject can be summarized as follows: (1) The traditional defense used to exonerate interrogators is "justified necessity," which implies that the lawyers who advised the interrogators (and provided the legal memos) ought to be exonerated also; (2) There may sometimes be good reasons to exonerate the interrogators but not the lawyers; (3) The defense of "excused necessity" facilitates differentiating between the liability of the interrogators and that of the lawyers. Furthermore, it seems plausible that some of the interrogators should benefit from the defense of excused necessity, and such a defense does not (and cannot) extend to the lawyers.

The attractions of Ohlin's conclusions are undeniable. It seems morally wrong to exonerate lawyers who work in the safety and comfort of their offices simply because the interrogators themselves, who arguably face the horrors of terrorism on a daily basis, ought to be exonerated. Therefore, it seems right to explore legal doctrines which differentiate between the legal liability of lawyers and that of interrogators. However, I believe that Ohlin's characterization of justifications and excuses is flawed and, as a result, the legal consequences which he draws cannot be inferred from his analysis. In this comment, I challenge Ohlin's claim that the granting of justified necessity to interrogators necessarily implies the exoneration of the lawyers. I shall also argue that my view (as expressed in a joint paper with Assaf Sharon) explains not only why justified necessity attributed to the interrogators does not necessitate exoneration of the torture lawyers, but also why justified necessity attributed to the interrogators is incompatible with exonerating the lawyers. Justified necessity can exonerate the interrogators only if the interrogators exercise their own rule-free unfettered judgment. Thus, it follows that the lawyers cannot be described as accomplices of a justified act; they are instigators of a criminal act—the act of inflicting pain in a planned and deliberate rule-governed manner. This is because the act performed by interrogators who are guided by the lawyers is not a permissible act namely an act that is based on the exercise of a rule-free unfettered judgment.

Nobody denies that the most applicable criminal law defense in the case of torture is the defense of necessity.<sup>2</sup> Under the necessity defense, a defendant may be exonerated if his (otherwise criminal) act is necessary to prevent a harm which could not be averted but by performing the act. The harm must be sufficiently grave for this defense to apply. Legal theorists dispute what makes the harms averted by the defendant sufficiently grave such that she ought to benefit from it.

In most common law jurisdictions necessity is viewed as a "justification."<sup>3</sup> This often implies that in order to trigger the defense of necessity, the harms averted by the perpetrator must be greater than the harms resulting from the perpetrator's act. However, Ohlin rightly draws our attention to the fact that necessity need not be a

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<sup>2</sup> Of course, many would argue that no defense (including necessity) should apply in such cases. See generally Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681 (2005).

<sup>3</sup> This is true also in England and in Canada. See Miriam Gur-Arye, *Should a Criminal Code Distinguish Between Justification and Excuse?*, 5 CAN. J. L. & JURISPRUDENCE 215, 219–20 (1992).

justification.<sup>4</sup> In fact, Section 35 of the German Penal Code recognizes necessity as an excuse.<sup>5</sup> According to this section, necessity as an excuse applies to “[a] person who, faced with an imminent danger to life, limb, or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself . . . acts without guilt.”<sup>6</sup> The actor will be excused if he is not “expected under the circumstances to accept the danger[.]”<sup>7</sup> It seems right to exonerate a defendant on the grounds that the act he committed was necessary to prevent a grave harm even when, ideally, the harm ought not to have been averted under the circumstances. In such cases, although the harm cannot justify the act, it is sufficiently grave to justify exonerating the actor.

Justified necessity involves a case in which the act should be exonerated because, all things considered, it is not wrongful—i.e. it was the right thing to do under the circumstances or, at least, it was permissible under the circumstances. This observation also implies that any agent who faces circumstances identical to those of the defendant ought to (or, at least, may) perform the same act.<sup>8</sup> By contrast, an excused necessity implies that the act itself is wrongful and ought not to have been performed by the defendant (or anybody else facing identical circumstances).<sup>9</sup> Exonerating the defendant in the case of excused necessity is based on an observation that the defendant operated under harsh conditions and that, although the act committed was wrongful, the legal system ought to take into consideration the difficult circumstances faced by the defendant. The legal system acknowledges human fragility and the imperfections of human beings operating under harsh circumstances. It affirms that human beings are not angels and that human nature sometimes bars the (otherwise) justified imposition of legal sanctions on individuals, despite the fact that the acts perpetrated by these individuals are wrongful.<sup>10</sup>

Many theorists have explored the doctrinal implications of the distinction between justified and excused necessity and, more generally, the implications of the distinction between justifications and excuses. Typically, legal theorists draw three implications from this distinction. First, it is often claimed that, unlike a justification,

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<sup>4</sup> See Ohlin, *supra* note 1, at 219-21.

<sup>5</sup> See Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt [BGBl], as amended, § 35 ¶ 1, translated in Bundesministerium der Justiz, Translation of the German Criminal Code, [http://www.gesetze-im-internet.de/englisch\\_stgb/englisch\\_stgb.html#StGB\\_000P35](http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#StGB_000P35) (last visited Jan. 24, 2010).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> See Ohlin, *supra* note 1, at 223.

<sup>9</sup> *Id.*

<sup>10</sup> This traditional characterization of the distinction between excuses and justifications has been disputed by Mitchell Berman. See Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1 (2003-2004). Berman argues (convincingly in my view) that justified conduct may be wrongful. Instead, what characterizes justified conduct is that it is not criminal whereas an excused defendant has committed a crime but is not punishable. While in this article I use the more traditional characterization of the difference between justifications and excuses, i.e., the characterization based on the wrongfulness of the act, my analysis would also be relevant to the revisionist framework proposed by Berman.

an excuse is not available to an actor who has created, through his own fault, the circumstances which give rise to the excuse. Second, an excuse is personal and therefore is granted only to the actor himself. By contrast, a justification is general. It is available to any third parties who assisted the actor. Last, one may use force to defend oneself against an excused attack but may not use force against a justified one.<sup>11</sup>

The second implication concerning the legal liability of third parties, is the only one that interests us here, as it forms a central part of Ohlin's argument. Legal theorists often maintain that if a person is exonerated on the grounds that his act is justified, it follows that all third parties who assisted the perpetrator are justified.<sup>12</sup> If the act perpetrated by the agent is not wrongful, it seems reasonable to infer that assisting the agent in perpetrating the act cannot be wrongful.<sup>13</sup> If I kill somebody in *justified* self-defense, the person who helped me struggle with the aggressor is also exonerated on the grounds that he assisted me in performing a *justified* act of self-defense. In contrast, it is argued that excused necessity applies only to the defendant himself and does not extend to third parties.<sup>14</sup> If agent A kills an "innocent aggressor," that is, a person who acts with the intention of killing A but is not responsible for his conduct, A would be excused.<sup>15</sup> However, there is no reason to extend the excuse to third parties who assisted the perpetrator in performing a wrongful action. This observation does not preclude the possibility that an independent excuse applies to the third party herself, but the mere fact that an excuse applies to A does not imply the exoneration of a third party assisting A in engaging in wrongful conduct.

It follows from this reasoning that if the interrogators' exoneration is based on *justified* necessity, the torture lawyers cannot be convicted as accomplices since they merely "assisted" the interrogator in performing a justified (non-wrongful) act. By contrast, if the interrogator's exoneration is based on *excused* necessity, lawyers who assisted the interrogators and provided them with the necessary legal cover are criminally liable, absent an independent excuse applying to them. Excused necessity is, like all excuses, a personal defense and cannot extend to third parties.

Despite their compelling plausibility, some legal theorists argue against the views endorsed by Ohlin that justifications always extend to third parties and that excuses never do. Ohlin himself exposes some fallacies made by theorists who make such arguments.<sup>16</sup> While his criticisms are cogent, he is wrong to infer that all justifications

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<sup>11</sup> For a classical discussion of the second and the third implication, see GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 759–62 (1978). Gur-Arye provides a detailed analysis of all three implications. See Gur-Arye, *supra* note 3, at 222–29.

<sup>12</sup> See Fletcher, *supra* note 11 at 761-62.

<sup>13</sup> See Ohlin, *supra* note 1, at 239.

<sup>14</sup> *Id.*

<sup>15</sup> Some theorists argue that in such a case, A ought to be justified rather than excused. *But see* Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 *PHIL. & PUB. AFF.* 74 (1994). In any case this is merely an example, and disputing the assumption underlying this example does not affect the more general observation concerning excuses.

<sup>16</sup> See Ohlin, *supra* note 1, at 240-43.

apply to third parties. In challenging some of the central observations made by Ohlin, I shall argue that to the extent that interrogators are justified in performing torture, their justification never applies to the lawyers. To do so, I will first rebut Ohlin's characterization of justifications and, in particular, his claim that the right of assistance of third parties is a defining characteristic (or, in Ohlin's own words, an "essential aspect") of justifications. In elaborating this claim Ohlin maintains that:

One cannot determine on other grounds whether a particular defense is a justification and then use that as a short-cut to determine whether a right of assistance applies. In short, this is impossible because there are no other legitimate and truly independent grounds—e.g. pure structure—for determining whether something is a justification or an excuse. The right of assistance is itself one essential aspect of the original determination of the proper classification of the defenses. The classification is a holistic investigation that includes the right of assistance at the foundational level.<sup>17</sup>

Under this view, the right of assistance is an essential component of justification. To be classified as a justification rather than as an excuse, third parties assisting the perpetrator of justified conduct must also benefit from exoneration, otherwise the defense is simply not classified as a justification.

At the same time, Ohlin endorses the view that justifications and excuses differ in their moral significance, as justifications (unlike excuses) imply that the defendant's act is not wrongful. In Ohlin's own words, "By virtue of the fact that a justification announces that the conduct is not wrongful, the application of the defense to a particular fact pattern announces to the public that others facing similar circumstances may also engage in the conduct."<sup>18</sup> In contrast, excuses "allow[] us to hold on to the conclusion that torture is wrong and that it violates our ex ante policy decisions regarding the treatment of detainees."<sup>19</sup>

Ohlin, therefore, appears to believe that there are two features characterizing justifications and differentiating them from excuses: (1) justifications (unlike excuses) apply to non-wrongful acts; and (2) in cases of justifications, third parties are entitled to assist the perpetrator. However, Ohlin cannot presuppose that as a matter of conceptual necessity, the two defining characteristics always go together. If, as I shall argue, there are indeed cases in which these two characteristics do not overlap, Ohlin would face a choice: either to endorse the traditional defining characteristic (based on the wrongfulness of the act) or to apply his own defining characteristic (based on the right of assistance), or, perhaps, a conjunction of these two tests.<sup>20</sup>

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<sup>17</sup> *Id.* at 244.

<sup>18</sup> *Id.* at 223.

<sup>19</sup> *Id.*

<sup>20</sup> A very similar point was made by Mitchell Berman. Berman criticizes earlier attempts to characterize justifications. He argues that one can identify two different theories of justification: the lesser evil conception and the third party conception of justification. Yet Berman maintains that the claim that there is an identity between these two conceptions of

Some theorists have argued that there are second-order reasons to differentiate between the question of whether an act is justified (in the sense that they apply to non-wrongful acts) and the question of whether third parties are entitled to intervene. Gur-Arye maintained that, given the grave, imminent dangers of violence and third parties' difficulties making normative judgments in cases involving violence, third parties should be able to benefit from an excuse applying to the actor.<sup>21</sup> Hence, sometimes, excuses should extend to third parties. Similarly, she argued that there are perhaps compelling reasons of policy for not allowing third parties to intervene in cases of justified acts when the protected value is property. In her view, encouraging third parties to intervene and assist individuals whose (justified) conduct is aimed at saving property has a price of its own.<sup>22</sup>

Ohlin could perhaps concede this exception and thereby also give up his claim that the right of assistance is a defining characteristic of justifications. His defense would be that second-order reasons of this type are irrelevant to the case at hand. One of the characteristic features of torture lawyers is that they did not perform their acts under urgency, stress, or pressure. They wrote their memos in air-conditioned libraries and heated offices. It therefore seems that second-order considerations (of the type raised by Gur-Arye) requiring the extension of excuses to third parties in cases involving violence cannot require one to extend the defense of excused necessity to torture lawyers. Furthermore, Ohlin could maintain that if the interrogators are justified, even Gur-Arye would be compelled to concede that the justification extends to third parties (despite her reservations). The protected value in the case of torture lawyers is not property; it is the body of the victim that is at stake. Consequently, according to Gur-Arye, it does not seem justified to limit the defense of justified necessity to the interrogators. It follows that while in principle there is no complete convergence between the two characteristics used by Ohlin to differentiate between justifications and excuses, these two characteristics ought to converge in the case of torture.

But there is a second, more interesting reason why justified necessity does not always apply to third parties: sometimes a person is justified in perpetrating an act because of his special and distinctive status or relation to the events at stake. To illustrate, think of the rule in the common law which dictates that parents and educators are legally justified in spanking their children.<sup>23</sup> It is not at all evident that the parents could be assisted by third parties in fulfilling their educational tasks.<sup>24</sup>

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justification is not plausible. See Mitchell N. Berman, *Lesser Evils and Justification: A Less Close Look*, 24 L. & PHIL. 681, 689-92 (2005).

<sup>21</sup> See Gur-Arye, *supra* note 3, at 225-26.

<sup>22</sup> Miriam Gur-Arye, *Should the Criminal Law Distinguish Between Necessity as a Justification and Necessity as an Excuse?*, 102 LAW Q. REV. 71, 85 (1986).

<sup>23</sup> This privilege of "moderate chastisement" is mentioned in 1 WILLIAM BLACKSTONE, COMMENTARIES 452-53 (15th ed. 1809). For a short description of the common law rules concerning physical disciplining of children, see Anne McGillivray, 'He'll learn it on his body': *Disciplining childhood in Canadian law*, 5 INT'L J. OF CHILD. RTS. 193, 201-06 (1997).

<sup>24</sup> A similar point has been stressed by Judge Wilson in the leading Canadian case on necessity. See

Even if one disagrees with this view and believes that third parties could assist parents to discipline their children, it does not seem right that parents could delegate the powers to spank to others, or could be guided by the instructions of others as to how and when to spank their children. Similarly, one could argue that while the interrogators could be assisted by third parties, they could not be guided in exercising their discretion.

Yet this is precisely what the torture lawyers did. The torture lawyers guided the interrogators, identified the circumstances under which they ought to torture, and determined which methods were permissible. The equivalent is not a third party who assists a parent in disciplining the children but a third party who guides the parent in deciding when and how to discipline. Even if a regular accomplice might be justified, an accomplice who controls the decision about when and how to discipline the child should not be justified because his behavior undermines the entire rationale for granting parents the power to discipline in the first place. The power to discipline is granted to parents because it is thought that such a power is constitutive to the relationship of parenthood.<sup>25</sup> Granting a third party such power is not only unjustified in the sense that it cannot exonerate the third party; it also seems to undermine the justification of the actions of the parent herself (to the extent that the parent was guided in his decisions by the third party).

Ohlin could raise three possible objections to the proposed analysis. First, as noted by Mitch Berman, the lawyers should not be perceived as *guiding* the interrogators but merely as *removing* what would otherwise be a powerful reason (either normative or merely prudential) not to torture.<sup>26</sup> According to this view, the interrogators ought not to be regarded as being moved to action by the lawyers' memos; instead, the memos address and undermine any reasons not to torture.

The argument is intriguing and may have some interesting legal implications. To develop this argument further, one ought to examine what the undermined reasons not to torture are, and how they operate. The memos, no doubt, may rule out such reasons as the interrogators' fear of being disciplined. Yet presumably the primary function of these memos is to clarify what the law with respect to torture is. To the extent that the interrogators are law-abiding individuals and are therefore being guided by the legal advice contained in the memos, the interrogators lose the justification that they had in the first place to perform the torture as, in my view, this justification applies only when they acted on their own initiative. I concede however that I cannot preclude the possibility that in some cases the memos functioned in a

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Perka v. The Queen, [1984] 2 S.C.R. 232, 276 (Can.). Judge Wilson believes that justified necessity can apply in cases in which "it is necessary to rescue someone *to whom one owes a positive duty of rescue.*" (emphasis added). *Id.* In Judge Wilson's view, such a justification would not apply to strangers to whom one does not owe such a duty.

<sup>25</sup> See Alon Harel, *Why Only the State May Inflict Criminal Sanctions: The Case Against Privately Inflicted Sanctions*, 14 LEGAL THEORY 113, 123–25 (2008).

<sup>26</sup> E-mail from Mitchell N. Berman, Richard Dale Endowed Chair in Law, University of Texas at Austin School of Law, to Alon Harel, Phillip P. Mizock & Estelle Mizock Chair in Administrative and Criminal Law, Hebrew University (Jan. 28, 2010, 11:28 IST) (on file with author).

different way than those envisioned here and, in such cases, the lawyers may be described as accomplices rather than instigators.

Second, the child analogy is not an ideal one for my purposes, as torturers do not have any special relationship to suspects, and the power to torture, unlike the parental power to discipline, is not inherent to the ongoing relationship between interrogators and the suspects who are being interrogated. After all, in justifying the privilege of parents to discipline a child, I referred to a power that “is constitutive to the relationship of parenthood.” What type of relationship between the interrogator and the suspect justifies special privileges on the part of the interrogator that are analogous to those of the parent?

The parental relationship is a powerful case establishing the (mere) possibility that a justification does not extend to third parties. This conclusion rests on the complexity and richness of the relationship between a child and a parent. But this does not imply that this phenomenon is limited to such cases. In my view, the interrogator and the suspect are engaged in an ongoing relationship that gives rise to moral responsibility on the part of the interrogator. The interrogator bears full responsibility for the moral judgment that the torture is justified. To do so, she can hide behind no law, guidelines or commands of third parties. It is this feature of her status as an interrogator that implies that she ought not to be instructed or guided by others. The justifiability of her action hinges on exercising her moral judgment.

Last, Ohlin could, of course, challenge the moral assumptions underlying my example. He might be right in challenging, for instance, the claim that a parent could not delegate the power to spank to others. Even if he is correct, this example establishes that agent-specific reasons of this type may challenge the view that justifications must, as a conceptual matter, always apply to third parties. At least as a matter of conceptual analysis, it is possible to affirm that the interrogators ought to benefit from the defense of justified necessity while lawyers who purport to guide the discretion of interrogators should not.

I find this possibility particularly seductive because Ohlin’s claim that (some) interrogators should be excused seems unreasonable, for several reasons. First, it seems that the interrogators are state agents and that the interrogation methods used by them are part of their official duties. If this is the case, the interrogation is not merely an action perpetrated by the interrogators; it is an action that should be ultimately attributed to the state. But, as many theorists have pointed out, state acts cannot be excused. To affirm that the agents are excused, Ohlin must deny that their acts ought to be attributed to the state and regarded as public. Second, Ohlin’s view is dangerous. Excused necessity may exonerate interrogators who tortured suspects in cases in which the risk to human life posed by the suspects was remote simply because these interrogators can show that they acted out of anxiety and anguish. Even if we require that the mental anxiety necessary to excuse the interrogators be reasonable, Ohlin’s proposal still seems dangerous in that it legitimizes non-professionalism and sentimentalism on the part of interrogators. Interrogators are officials and, as such, they ought to be guided by the law rather than by anxiety or even compassion in cases in which such anxiety or compassion disrupts the performance of their job. Last, there seems to be a tension between the claim that

interrogators ought to benefit from the defense of excused necessity and the claim that the lawyers facilitated or assisted such interrogators in performing torture. An interrogator who deserves to benefit from the defense of excused necessity is an interrogator who is “deeply concerned with the deaths of innocent civilians” and who is “in a state of moral anguish”.<sup>27</sup> It seems unlikely to me that such an interrogator would be moved to action by lawyers’ memos. If an interrogator is waiting for the findings of legal memos or even consults them before she decides to torture, it seems to me that she is, as a matter of fact, acting in a calculating, self-serving way; therefore, she should not benefit from the defense of excused necessity. If this is the case, the lawyers cannot genuinely be regarded as providing assistance to such interrogators. It is more likely that the lawyers’ memos served precisely those interrogators who ought not to be excused.

To complete the argument, it is necessary to examine whether there are indeed reasons to justify the interrogators but not the lawyers. Can we, in other words, find some analogies to the cases of parental duties discussed earlier? To address these questions, let me use the earlier discussion of torture by Assaf Sharon and I in which we argue that:

[T]orture ought never to be regulated by (direct) rules legal or moral. One should never perform torture because a rule or a general (moral or legal) directive dictates that torture ought (or may) be performed, and a rule permitting, requiring or authorizing torture ought not to be accepted as a guide in the reasoning leading an agent to perform torture. Rule-governed directives to torture ought not to be followed even if such directives can perhaps correctly identify the circumstances under which torture ought to be performed and therefore help officials to make correct decisions. To be morally commendable, torture must be performed out of sheer necessity to save lives, maintain dignity, or fulfil [sic] some other urgent duty of similar magnitude. In the ticking bomb case, for example, only the imperative to save lives ought to figure in the agent’s reasoning, not a principle according to which torture may ever be permissible. Acts of this sort ought not to be governed by law and rules. As Aquinas puts it: *necessitas non habet legem* (necessity knows no law).<sup>28</sup>

To see what the implications of this analysis are, one should examine the two types of conduct that are the subject of our normative examination: the conduct of torturing performed by the interrogators, and the conduct of providing legal advice (or writing a legal memo) performed by the lawyers. Ohlin describes the lawyers’ conduct as designed to assist the interrogators in deciding on the methods of interrogation. I would challenge this description and argue that such conduct cannot be described in this way. If the lawyers’ conduct had any effect on the interrogators, it must have disrupted (or, more precisely, corrupted) rather than assisted them; it undermines the

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<sup>27</sup>See Ohlin, *supra* note 1, at 235.

<sup>28</sup>Alon Harel & Assaf Sharon, *What is Really Wrong with Torture?*, 6 J. INT’L CRIM. JUST. 241, 250 (2008).

defense that they could have used had they not been influenced by the legal advice provided to them.

Recall that the torture lawyers are not regular accomplices. Their “assistance” differs from the assistance provided by the administrative staff running the sites in which the torture takes place. More specifically, their so-called assistance consists in *guiding* the interrogators’ decisions. Yet, the view Sharon and I expounded in the paragraph above is that the justified interrogator—the one who is entitled to benefit from the defense of justified necessity—acts out of *sheer necessity*, i.e., her act is not governed by rules (or other type of norms such as standards). This feature is, in fact, necessary, because the interrogator should not be justified if he acted otherwise. The justified interrogator ought not to rely on an abstract balance struck by legislatures or regulators or, for that matter, lawyers; she ought to be guided by the force of the circumstances alone. By contrast, the lawyer of course cannot act in this manner. The torture lawyers have purported to identify pre-existing rules and precedents in an effort to guide the interrogators, but such rules are precisely what cannot guide the reasoning of the justified interrogator.<sup>29</sup>

It follows that the torture lawyers cannot aid the interrogators in perpetrating *justified* torture; in fact, their actions defeat the very preconditions necessary for the performance of justified torture (on the part of the interrogators). The lawyers are engaged in the impermissible task of designing rules to guide the interrogators’ decisions. If the interrogators yield to their recommendations, they ought not to benefit from the defense of justified necessity. It is misleading to describe the lawyers as accomplices “assisting” the interrogators; instead, their memos corrupt the interrogators’ decisions and, to the extent that the interrogators are guided by them, the lawyers undermine the very possibility of performing justified torture. This analysis bears some similarity to the discussion of parents, *supra*, as it suggests that the very intervention of third parties “to assist” a person in perpetrating a justified act by guiding her discretion does not necessarily lead to the conclusion that the “assistance” is justified. In fact, in some cases, such assistance is simply self-defeating, i.e., if successful, it undermines the justifiability of the perpetrator’s own act.

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<sup>29</sup> Ohlin challenges our analysis and argues that justifications must, as a conceptual matter, be governed by rules. In his view “a justification can form a kind of *ex ante* authorization, in the sense that it announces the conditions under which others may engage in similar conduct. By virtue of the fact that the justification states that the act was not wrongful, it functions with an element of rule-guidance.” See Ohlin, *supra* note 1, at 227. However, our argument is designed precisely to rebut this objection since we argue that the permissibility of the act may depend on the reasoning of the agent and that rule-governed reasoning is precisely what makes the conduct wrongful in cases of emergency.

It is true that in genuine cases of emergency every agent performing the act out of sheer necessity would be justified in performing it. But this does not imply that an agent who performs the act on the basis of rules is justified in performing it. The wrongfulness of torture in such cases depends on the agent’s reasoning.

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