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Under pressure: A study of the inclusion of the concept of a defence, specifically duress, in the Rome Statute

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## Abstract

This thesis examines the way in which the concept of criminal law defences for individuals has been imported to international law and the consequences of doing so. The idea of defending one's criminal act with a legally defined reason which removes criminal responsibility originates in national law. Self-defence is a good example of the 'best' kind of defence to plead: acquittal will result where serious assault, for example, was only committed against an attacker in order to save one's life. Domestic law places restrictions on the availability of such defences, particularly where serious offences such as murder are concerned and more flexible defences, such as duress, tend to be limited in their application to more serious crimes against the person. For example, self-defence is accepted as a full defence for murder in most jurisdictions, but there is a far greater reluctance to allow duress as a full defence for murder. In some jurisdictions, duress is not even recognised as a defence in the first place.

At the international level, the Rome Statute of the International Criminal Court has codified defences, directly importing a number of recognisable defences from domestic legal systems. However, the way in which this has been done is problematic: the Rome Statute was drafted to prosecute genocide, war crimes and crimes against humanity, yet it does not restrict or limit the application of any of the defences for the most serious crimes, as domestic systems tend to do.

The first part to this thesis demonstrates the way in which national law has been used as a source of principles for the concept of defences, leading to the conclusion that the defences have been imported in part from domestic law. This part to the argument looks at the influence of domestic law at the international level, acknowledging it as a source of and influence on international law and demonstrates the close connection between both. It then turns to the use of domestic defences before internationalised military tribunals and the International Military Tribunals at Tokyo and Nuremberg, concluding that defences have been available but were inapplicable, given the nature and seriousness of the crimes. The codification of defences in the Rome Statute is then explored, identifying the use of domestic law at the international level. However, this use is considered problematic where the crimes are so serious and the defence of duress is identified as a particularly flexible, and thus undesirable, defence for war crimes and crimes against humanity.

The second part builds on this argument by undertaking a comparative study of the defence of duress at the national level to demonstrate the lack of consensus in relation to the concept for even one charge of murder, before exploring the definition and inclusion of duress in the Rome Statute.

The thesis concludes by identifying ways in which the structure of defences in the Rome Statute could be improved in order to further the aim of the creation of the International Criminal Court: the avoidance of impunity.

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Author's declaration

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution.

Signature \_\_\_\_\_

Printed name Clare Frances Moran



*For Agnes Frances*

*“Be yourself; everyone else is taken.”*

*(Oscar Wilde)*

## 1. Introduction

- 1.1 The route to Rome: international criminal law and the concept of a defence
- 1.2 Defences in the Rome Statute: The problem of duress
- 1.3 Duress and necessity in national and international criminal law
- 1.4 Proposals for a fairer system

A defence, in criminal law terms, functions as a legally approved explanation for an action which would otherwise be considered criminal and punished accordingly; defences are, in the words of Schabas, ‘answer(s) to a criminal charge.’<sup>1</sup> A feature of most domestic legal systems, defences are available for a broad variety of crimes. At the international criminal law level, defences were only formally recognised in written law by the Rome Statute of the International Criminal Court in 1998: unlike previous international criminal law charters, statutes and projects, the drafters have chosen to include the concept of defences. The inclusion of the defences, which have been grouped together under the heading of ‘grounds excluding criminal responsibility’, has been noted without extensive critical discussion in the legal literature written on the International Criminal Court.<sup>2</sup> Indeed, few authors have investigated this seemingly unusual development on its own and tend to discuss defences when discussing other themes.<sup>3</sup> At first blush, this would seem highly unusual given the previous silence in other international documents on the notion of a defence in international law and indeed, the area of defences to serious violations of international criminal law remains one which has not received much academic treatment, despite analyses of the subject of criminal defences at national level.<sup>4</sup> Scaliotti has completed two notable studies on defences in the Rome Statute,<sup>5</sup> but both were general critical analyses of the law and neither focused on any defence in particular. This thesis aims to make a contribution to knowledge by analysing the place of defences in the Rome Statute, building on existing work which

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<sup>1</sup> W. Schabas, *An introduction to the International Criminal Court*, 4<sup>th</sup> edn, Cambridge University Press, 2010, 238.

<sup>2</sup> See R. Lee (ed), *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010; O. Triffterer, (ed) *Commentary on the Rome Statute of the International Criminal Court*, Beck Hart Nomos, 2008.

<sup>3</sup> E. van Sliedregt, *Criminal responsibility in international law*, Oxford University Press, 2012 and M. E. Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach*, Hart, 2013.

<sup>4</sup> See P. Robinson, *Criminal law defenses: A systematic analysis*, Colum L R 82(2) 199-291 1982.

<sup>5</sup> See M. Scaliotti, *Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility, Part I*, 1 Int’l Crim L Rev, 111-172, 2001 ; M. Scaliotti, *Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility, Part II*, 2 Int’l Crim L Rev, 1-46, 2002.

analyses them and focusing on the inherent problems with providing defences for serious violations of international criminal law. As a general study of defences would not add much to the existing discursive literature, this thesis focuses on the defence of duress, a contentious inclusion in the Rome Statute, to analyse the reasoning for the inclusion of defences and the way in which the International Criminal Court<sup>6</sup> may now interpret international criminal law in light of these newly codified principles.

The codification within the Rome Statute instigates the idea that a number of grounds, specifically mental incapacity,<sup>7</sup> intoxication,<sup>8</sup> self-defence,<sup>9</sup> duress,<sup>10</sup> following the orders of a superior<sup>11</sup> or where a mistake is made, either in fact or law,<sup>12</sup> will either ‘exclude’<sup>13</sup> or ‘relieve’<sup>14</sup> the individual pleading the ground of criminal responsibility. This mirrors the position at the national level: defences such as self-defence are recognisable as reasons for acquitting an individual who has committed a crime from individual criminal responsibility. However, other defences, such as duress, are less established and some, such as intoxication, are not recognised in some jurisdictions at all. Thus, an exploration of the place of defences in the Rome Statute, with a specific focus on duress as a particularly contentious defence, is proposed as an area worthy of further investigation. This thesis aims to understand the inclusion of defences in the Rome Statute. The focus on duress highlights the difficulties inherent in including so many diverse concepts under the one heading and explores these difficulties in light of their codification.

## 1.1 The route to Rome: international criminal law and the concept of a defence

The express inclusion of defences in an international criminal law statute is thus a recent development in international criminal law, which borrows heavily from domestic law in identifying the defences the drafters wished to extend to individuals before the ICC. Defences are an ordinary part of developed criminal legal systems<sup>15</sup> and their existence demonstrates legal recognition of an individual’s right to explain their actions during the court process. The acceptance of a defence can lead to the removal of criminal responsibility

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<sup>6</sup> Hereafter, ‘ICC’.

<sup>7</sup> Article 31(a), Rome Statute of the International Criminal Court (hereafter, ‘Rome Statute’).

<sup>8</sup> Article 31(a), Rome Statute.

<sup>9</sup> Article 31(a), Rome Statute.

<sup>10</sup> Article 31(a), Rome Statute.

<sup>11</sup> Article 33(1), Rome Statute.

<sup>12</sup> Article 32, Rome Statute.

<sup>13</sup> Article 31 and 32, Rome Statute.

<sup>14</sup> See Article 33, Rome Statute.

<sup>15</sup> See chapter 5 for a comparative study of necessity and duress, as well as chapter 3 which looks at the use of ‘recognised’ defences in domestic criminal law in international and internationalised criminal tribunals.

if the criteria outlined by the law are met; defences thus ‘allow’ individuals to commit crimes, where the action serves a purpose. This is accepted to varying degrees at the national level, but the broad approach at the international level for war crimes, crimes against humanity and genocide has generated little discussion of the fairness of such principles of such a development. It should also be noted that the main focus of this thesis is serious crimes against the person. The question is thus whether any serious crime against the person, and in particular those within the jurisdiction of the Rome Statute, can ever be ‘answered’ with reference to the defences codified in that same Statute.

The primary concern of this thesis is the defence of duress as codified by the Rome Statute. However, it should be noted that the drafting of the Rome Statute has extended the defence of duress to include what would be considered, in many domestic jurisdictions, a defence of necessity. The defences have a theoretical connection, in that both concern action which is committed as the result of pressure applied to the accused. It is acknowledged that the relationship between duress and necessity is a complex one and a precise exploration of the relationship between the defences is outwith the bounds of this work.<sup>16</sup> However, to explain the terminology used, the following general distinction is made. The source of that pressure in the case of duress tends to be another individual, who makes threats to harm the accused which compels the accused to act, whereas the defence of necessity tends to relate to situations in which the individual had to act as a result of a natural disaster or similar circumstances beyond his control. The Statute makes no distinction between the two and merging the defences in this way is not representative of the majority of domestic jurisdictions. As will be discussed later in this thesis, some separate the defences, some unify them and some jurisdictions will only recognise one or the other as applicable defences. At the international level, necessity and duress have been identified as separate defences. However, the Rome Statute characterises the provision in which both defences can be found as duress and so the defence referred to in this thesis will be that of duress. The exceptions to this will be where the related defence of necessity is referred to in the comparative study, in chapter five, and in chapter three, which deals with various forms of necessity and duress as defences to war crimes and crimes against humanity. There is also reference to necessity

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<sup>16</sup> See the following for the discussion of the boundary between necessity and duress: J. D. Ohlin, *The bounds of necessity*, J.I.C.J. 6 (2008) 289-308; D. Varona Gomez., *Duress and the anticolonial's ethic: reflections on the foundations of the defense and its limits*, 11 New Crim. L. Rev. 615-644 2008; P. Robinson, *Criminal law defenses: A systematic analysis*, Colum L R 82(2) 199-291 1982; M Gur-Arye, *Should a criminal code distinguish between justification and excuse?* 5 Can. J.L & Jurisprudence 215-236 (1992); S. Coughlan, *The rise and fall of duress: How duress changed necessity before being excluded by self-defence*, 39 Queen's L.J. 83-126 (2013-2014); O. Olusanya, *Excuse and mitigation under international criminal law: Redrawing conceptual boundaries*, New Crim. L. Rev. 23-89 (2010).

where appropriate, for example when discussing the way in which the Rome Statute has conflated the theoretical concepts of duress and necessity.

This thesis is divided into two parts. The first part examines the influence of domestic law on international law, then international criminal law in particular and the use of defences for charges of war crimes and crimes against humanity. The first part ends with a general exploration of defences in the Rome Statute, to determine which defences have been included and to understand the nature of the defences selected. The second part to the thesis then focuses directly on duress and begins with a comparative study of duress (and necessity in part, where relevant) at the domestic level. The drafting of duress in the Rome Statute is then discussed, exploring the reasoning behind its inclusion and the influence of the jurisprudence of the International Criminal Tribunal for the former Yugoslavia<sup>17</sup> on the drafters' choices. The final substantive chapter then looks at how the defence of duress may be interpreted and used by the judiciary at the ICC, as well as making suggestions for potential reform within the Rome Statute.

The second chapter begins the substantive work of the thesis by looking at the sources of international law and international criminal law in particular, examining the influence of domestic law on custom, general principles and treaty law. The work conducted here explores how general principles and custom have been used in public international law in general and international criminal law in particular. The focus on this chapter is on the sources of law and how the sources link international criminal law and domestic law, with domestic law being used as a frequent source of inspiration for international criminal law. Primarily, this work examines the determination of custom and general principles of international criminal law, to develop an understanding of how domestic law influences international criminal law through its role in these sources. Following this, the relationship between domestic and treaty law is examined and the influence from domestic law on treaties, specifically the Rome Statute, concludes the discussion herein.

The next chapter builds on the discussion of domestic law and examines how the domestic concept of a defence has been used in international criminal law, exploring the use thereof at national military tribunals, internationalised tribunals, the International Military Tribunals at Nuremberg and Tokyo and the later international criminal tribunals for Rwanda and the former Yugoslavia. Despite a lack of codification, the notion of defences was not disregarded

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<sup>17</sup> Hereafter, 'ICTY'.

by the tribunals established following the Second World War and a number of cases explored the potential application of self-defence and duress, and the related concept of necessity, to the crimes within their respective jurisdictions, although no international statutes or charters prior to the Rome Statute provided for the use of any defences, mentioning only the exclusion of superior orders. Prior to the Rome Statute, the admissibility of a defence was a matter of judicial discretion. Thus, the influence of prominent jurists and jurisprudence is also examined. In particular, the project for a draft statute of an international criminal court and international criminal code, carried out by Bassiouni, and the jurisprudence of the ICTY is discussed. An analysis follows of the draft statute and criminal code, focusing on the provisions for defences and their reasoning. In terms of the ICTY jurisprudence, the focus of the analysis is on one case, *Erdemovic*.<sup>18</sup> Here, the judges discuss extensively the application of the defence of duress to charges of war crimes and crimes against humanity. The joint and separate opinions are also examined, given the prominence of the case in international criminal law and its later, perceptible impact on the Rome Statute. Reflections on this work aim to lead on to the next chapter, an analysis of the defences outlined by the Rome Statute.

Chapter four takes a look at each of the defences in the Rome Statute at present, analysing each as they are drafted to understand the problems inherent in each. The function of a defence as a legally approved explanation for an action which would otherwise be considered criminal and punished accordingly, is reflected in the grounds for excluding criminal responsibility in the Rome Statute are no different. From the outset, it is telling that the drafters of the Statute did not want to allude to the defensibility of war crimes, crimes against humanity and genocide in any way, and elected to group the defences as reasons for releasing the individual from criminal responsibility. However, the effect of the defences remains the same. For example, self-defence is the most notable and well-recognised example of this 'permission' in that an individual need not submit willingly to his own demise and may take proportionate action when attacked by an aggressor. Other defences are less widely accepted as part of the framework of both international and domestic criminal law. The defence of duress stands out as distinct: there is little convergence at the domestic level on how to define duress, if duress and necessity are distinct concepts or ought to be unified, and if, as one or two concepts, the successful pleading ought to lead to an acquittal,

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<sup>18</sup> *Prosecutor v Erdemovic* IT-96-22- T/A 1996.

or simply mitigation of punishment. The issues inherent in the inclusion of duress are dealt with by the next part of the thesis.

## 1.2 The defence of duress in the Rome Statute

The second part of the thesis narrows its focus to the defence of duress in the Rome Statute. Building on work carried out in the first part, particularly the second chapter which examines the relevance of domestic law principles for international criminal law, the fifth chapter undertakes a comparative examination of duress (and necessity, where relevant) at the domestic level. Duress and necessity are concepts which may be defined or left undefined at the national level; some jurisdictions divide them into separate concepts, others unify them into one. Generally duress relates to acts committed under pressure where the pressure emanates from a threat made by another, whereas necessity is usually the more objective pressure, created by a natural disaster or circumstances which are not the result of human hands. Even the definition can vary and the application of the defence is also contentious. The approach at the national level is a vital part of this discussion because it demonstrates the lack of general principles and uniform approach in relation to both defences. This also indicates the lack of customary principles in this area, identifying a clear issue with the codification of a broad version of duress / necessity for international crimes. Five separate jurisdictions from both the civil and common law traditions are explored to understand the meaning of duress and necessity at the domestic level, following the logic that domestic law is a key source of the principles of international criminal law. Five distinct jurisdictions are analysed: England and Wales,<sup>19</sup> the United States of America, France, Germany and South Africa. The selection represents a broad geographical distribution as well as an even selection of common and civil law jurisdictions. The influence of the jurisdictions on other countries was also considered, with the inclusion of Germany and France of particular importance given their impact on the criminal codes of Latin American and African states. The comparative work undertaken here looks at the concept (or concepts, where separate, in domestic law) of duress (and often necessity as well) and their availability as defences to a charge of murder, given the focus of the thesis to serious crimes against the person.

The crime of murder is the most serious crime against the person in domestic law. The use of this most serious crime as a prism through which defences can be examined is critical for the application of the idea of defences in the context of the Rome Statute, as the argument

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<sup>19</sup> Hereafter abbreviated to 'England'.

put forward in this thesis is the difficulty of permitting the defence of duress, and other defences within the Rome Statute, for the very serious crimes against the person within the jurisdiction of the ICC. A comparative study will illuminate the general principles, if any, relating to the concept of duress in relation to a charge of murder. A general limitations on this concept at the domestic level may indicate a disconnection between the general principles of law which ought to be heeded; it may be the case that such a disconnect indicates an incoherence of principle in the Statute, which will be further explored in this thesis.

### 1.3 Duress in national and international criminal law

Building on the comparative study, chapter six looks at the way in which duress has been included in the Rome Statute. The Rome Statute defines duress broadly as a defence, in a way that would also encompass the domestic law concept of necessity. Duress and necessity are related concepts at the national level, and the distinction between the two tends to be the source of the pressure under which the individual is compelled: Duress relates to a threat is made by another person, which forces the person to act, whereas necessity is where an individual must act as a consequence of an urgent situation, such as a natural disaster. In the case of the Rome Statute, no distinction is made between the source of the pressure which compelled the individual to act, and there need only be a threat of ‘death or...serious bodily harm.’<sup>20</sup> The decision of the drafters to unify the defence gives rise to further issues, as often one defence is accepted in national law and the other is rejected. Reflecting briefly on the previous part of the study, in chapter four, of the various defences in the Rome Statute, it is clear that there are specific problems which relate to the inclusion of duress in the Statute.

In the Rome Statute, the defence of duress is broadly defined and appears to have been included despite lacking a customary basis, or one which finds support in the general principles of law. The definition the Rome Statute uses relates to pressure, subdividing the defence into pressure which is generated by a threat of serious bodily harm from another and that which results from ‘circumstances beyond that person’s control.’<sup>21</sup> Interestingly, the idea that a threat made by another is also beyond the control of the person pleading the defence remains an issue to be resolved. The defence is defined rather broadly and this chapter analyses the breadth of the definition, as well as the effect this will have on the application of the defence. Duress has been included in the Statute as a full defence, leading

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<sup>20</sup> Article 31(1)(d), Rome Statute.

<sup>21</sup> Article 31(1)(d)(i), Rome Statute.



to the complete removal of criminal responsibility if it is pleaded successfully. This idea is also discussed further, in the context of the work and negotiations of the Preparatory Committee.

The work of the Preparatory Committee is interesting insofar as it lacks a full discussion of the defences, and duress in particular. Given that prior international criminal statutes ignored the concept of defences and restricted the availability of superior orders, it is interesting that the idea should be accepted without much resistance. Indeed, it represented the least contentious inclusion in the Rome Statute, from the perspective of the negotiators. In this way, it seems that the dissenting opinion of Judge Cassese in *Erdemović*<sup>22</sup> at the ICTY was the main driver for its inclusion. The continuing influence of a difficult case such as *Erdemović* is interesting given the oft-cited notion that ‘hard cases...make bad law’<sup>23</sup> and in particular because of the frequently constrained circumstances of cases which arise during times of war or internal political upheaval. This chapter also examines the application of the defence of duress in the Rome Statute. Prior to its inception, duress was dealt with in detail by the ICTY in the *Erdemović* case and the discussion here focuses on the judicial discussion in that case. Judge Antonio Cassese provides, in his dissenting opinion, a set of criteria which must be fulfilled in order to successfully plead the defence of duress. As with the definition in the Rome Statute, it includes the idea that the action was proportionate although Cassese does espouse the more generous ‘lesser of two evils’ forms of proportionality. The comparison between the two definitions of duress demonstrates the difficulty of applying the defence in a consistent manner: the analysis conducted examines whether the ICC definition of duress would have exonerated *Erdemović*, and discusses the inclusion of proportionality. It is acknowledged in the discussion that proportionality is not a concept which can easily be used to judge actions which result in genocide, war crimes or crimes against humanity. The congruity of the inclusion of this concept with the development of international law is examined and it is questioned whether the treaty law in this case may be out of step with ideas in domestic law, custom and general principles.

The following chapter, chapter six, then looks at the reasoning for including duress and its exonerating effect on the purpose and aims of the ICC. As discussed in chapter three, the draft statute for an international criminal court rejects that a test of proportionality could be used where the act commits results in a war crime against the person, or a crime against humanity, which places an automatic restriction on the use of the defence. This restriction is

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<sup>22</sup> *Prosecutor v Erdemović* IT-96-22- T/A 1996.

<sup>23</sup> First noted in the English case *Winterbottom v Wright* (1842) 10 M & W 109, 114.

not mirrored in the drafting of the Rome Statute, broadening the defence to a greater extent than many of its domestic counterparts, as well as arriving at a different conclusion than customary international law. This chapter looks at the drafting of duress in the Rome Statute and examines the issues which arise as a consequence of its inclusion.

#### 1.4 Proposals for a fairer system

The final substantive chapter in this work examines the ways in which the ICC may interpret defences in the Rome Statute and makes proposals for reform, as a result of the research conducted. The seventh chapter looks at the possibility of a differentiated approach among the defences. It argues that the theory of the Rome Statute, through the conceptualisation of defences and crimes, must be consistent with its aims of preventing impunity through its *raison d'être* as a criminal court of last resort.<sup>24</sup> The current structure of the defences in the Statute is broader than the current customary position, and does not adopt any of the restrictions than many domestic jurisdictions have on defences for serious crimes against the person. The proposal attempts to connect the development of customary international law to the purpose of the Rome Statute, to maintain the rule of law internationally and to prevent impunity for serious violations of international criminal law. Each defence demands the same response from the Court, in the event of an acceptance: full criminal responsibility is removed from the individual and, consequently, the criminality of the act is negated. The Rome Statute requires that the accused be afforded the right to defend themselves,<sup>25</sup> and offers the right to the accused to raise defences.<sup>26</sup>

Chapter seven is the final substantive chapter in the thesis. It focuses on ways in which the deficiencies in the 'Rome law' defences which have been identified by the preceding chapters may be remedied. Following on from previous argumentation, it is not contested that defences have a place in the Rome Statute, but rather that there is an issue with the way in which they have been drafted. Using the prism of duress, it appears that this defence in particular could be improved through judicial interpretation at the ICC or, more ambitiously, reform of the Rome Statute. Article 31(2) notes that judicial discretion may be used in order to determine the 'applicability' of the ground excluding criminal responsibility before the Court, allowing the Court to restrict certain defences for certain crimes if it sees

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<sup>24</sup> See L. Grover, *A call to arms: fundamental dilemmas confronting the interpretation of crimes in the Rome Statute of the International Criminal Court*, E.J.I.L. 2010, 21(3), 543-583, 582.

<sup>25</sup> Article 67, Rome Statute.

<sup>26</sup> Article 67(1)(e), Rome Statute.

fit. There are also provisions on sentencing<sup>27</sup> which would allow the Court to distinguish between the different defences in terms of the punishment handed down. Finally, it is proposed that the Rome Statute could be reformed in order to distinguish formally between the defences, creating categories of defence rather than the current undifferentiated approach.

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<sup>27</sup> Articles 76-78, Rome Statute.

## Part I

### Importing domestic concepts to international law: How defences operate at the international level

International law is usually created by treaties, but customary international law and general principles of law may also constitute a source of law. The influence of domestic law on custom, general principles and treaties in the context of international criminal law is dealt with by the first chapter in this part, a discussion relevant to this thesis because of the import of the domestic concept of a defence to the international level. The use of domestic law by the Nuremberg tribunals was particularly evident and it is clear that through identifying certain offences which are considered universally criminal, such as murder, the characterisation of murder as a crime in international law represented no great leap in theory. The following chapter examines the extent to which defences have been used before international and internationalised criminal tribunals, particularly those concerned with the prosecution of war crimes. It also examines the consideration of defences, primarily self-defence and duress, by international criminal law jurists and the work of more recent international criminal tribunals, including the case of *Erdemovic*<sup>28</sup> before the ICTY. *Erdemovic* was, prior to the Rome Statute, the classic authority for the inapplicability of the defence of duress to charges of war crimes and crimes against humanity. A brief reflection of the impact of the work of both the tribunals and the jurists writing in this area is then made before moving on to an analysis of the defences which have been selected for inclusion in the Rome Statute. This looks at the drafting of each defence in turn, focusing on both its inclusion and the form the defence takes. The defences in the Rome Statute bear a great resemblance to the domestic law concepts from which they are derived, although there are some differences. These differences will be explored in order to underline the problems inherent in importing domestic law concepts from national legal systems into a system of international criminal justice for more serious crimes often committed on a greater scale. The analysis from this part should also demonstrate the distinctive nature of the defence of duress in the Rome Statute: it is not a universally accepted defence, unlike self-defence, and appears to create difficulties by the way in which it has been drafted. It is for this reason that the focus of the second part to the thesis will be on duress, a contentious inclusion in the Rome Statute.

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<sup>28</sup> *Prosecutor v Erdemovic* IT-96-22- T/A 1996.

## 2. The use of domestic concepts in international law

- 2.1 Customary international law and international criminal law
- 2.2 General principles and international criminal law
- 2.3 The relationship between general principles, custom and treaty law in the ICL context
- 2.4 The effect on the Rome Statute of the International Criminal Court

International criminal law is part of public international law generally, and its norms are derived from the same sources as norms within other areas of public international law. The doctrine of sources of public international law is outlined by Article 38 of the Statute of the International Court of Justice, wherein the main sources of public international law are conventions, customs and general principles of law.<sup>29</sup> There is a further source mentioned in the article, the writings and 'judicial decisions and teachings of highly qualified publicists,'<sup>30</sup> which, it is noted in the article, should be considered a subsidiary means for distinguishing between legal and non-legal rules, as well as to identify the content of legal rules. Oppenheim's *International Law*<sup>31</sup> highlights a further distinction to be made between formal and material sources, in that formal source gives the rule its validity, whereas the material source expresses the origin of the rule. From this perspective, treaties are one formal source, custom is another<sup>32</sup> and general principles a third, but there does not appear to be a hierarchical structure between the sources. In other words, custom may be the formal source of the rule even where it is further expressed in a treaty.<sup>33</sup> This means that where the rule of formed by custom, custom will be the source of that rule. This would even be in the case of codified rules in treaties: the formal source of the law will always be the original source of the rule.

Thus, customary rules are international legal rules: custom is international law and customary rules in the area of international criminal law form as much part of the law as treaties and Statutes in this area do. The limitation, however, which is placed on international criminal law, distinct from other areas of public international law, is the requirement to respect the rights of the accused. At earlier international criminal tribunals, those of Nuremberg and Tokyo, the main source of law was custom: the law could not be created by treaty and then applied retroactively, thus existing custom was the only valid source which

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<sup>29</sup> Article 38(1), Statute of the International Court of Justice annexed to the Charter of the United Nations 1945.

<sup>30</sup> Article 38(1)(d), Statute of the International Court of Justice annexed to the Charter of the United Nations 1945.

<sup>31</sup> Robert Jennings and Arthur Watts (eds), 'Oppenheim's international law' (9<sup>th</sup> edn, OUP 2008), 23.

<sup>32</sup> H. Thirlway, *The sources of international law*, Oxford University Press, 2014, 4.

<sup>33</sup> *Ibid.*

could be applied to prosecute those accused of the crimes libelled. General principles and custom were used to determine the laws under which the individuals before the tribunals could be prosecuted, as the creation of norms via a treaty was not possible if the rights of the accused were to be considered. The law was divined from general principles and customary international law, both of which are rooted in the practice and opinions of States. Indeed domestic law and opinion has long influenced customary international law and so domestic practice has had a long and fruitful relationship with international law, and international criminal law in particular.

The Rome Statute, however, differs from previous international criminal law statutes and charters because it codifies the law which may be applied by the International Criminal Court. The conception of the Rome Statute as an international criminal code is important, because of the way in which it affects the principles of international criminal law. The main source of international criminal law in the context of the Rome Statute is now a treaty, deriving its authority as law from the role of ‘interstate consensus’<sup>34</sup> in which States must agree on the concepts therein. This marks a significant difference from domestic law, and also custom in the area of international criminal law, because States have expressly agreed upon the concepts to be applied by the Court. Through codifying much of the law, it is evident that the drafters of the Rome Statute wished for the bounds of the law to be clearer at the International Criminal Court, although this has not always worked in practice.<sup>35</sup>

The current state of affairs gives the impression of a far more straightforward approach: custom and general principles remain sources of international criminal law, and the Rome Statute may not be ‘interpreted as limiting or prejudicing in any way existing or developing rules of international law,’<sup>36</sup> but the Rome Statute is the source of law which the ICC shall apply primarily. However, this perspective disregards the notion that international criminal law is a ‘fusion’<sup>37</sup> of domestic law principles and international law. The Rome Statute itself recognises this fusion in article 21 of the Statute, wherein general principles rooted in domestic law may be used as a source of law<sup>38</sup> and there is potential for the link between domestic and international criminal law to continue. The role of domestic law as an influence on and inspiration for international criminal law will thus be explored in the

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<sup>34</sup> I. Bantekas and S. Nash, *International criminal law*, Routledge-Cavendish, 2007.

<sup>35</sup> See *Prosecutor v Ruto* (Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation) ICC-01/09-01/11 17 April 2014.

<sup>36</sup> Article 10, Rome Statute.

<sup>37</sup> I. Bantekas and S. Nash, *International criminal law*, Routledge-Cavendish, 2007 at 1.

<sup>38</sup> Article 21(1)(c), Rome Statute.

context of this thesis, to develop an understanding of how domestic law may still influence international criminal law, now that the Rome Statute has been signed.

The focus of this chapter is on the sources of law and the way in which these sources link international criminal law and domestic criminal law, drawing on the latter as a persuasive fount of legal inspiration. The initial focus of this chapter is on how custom and the general principles of law are determined in the area of international criminal law, which will help to develop an understanding of domestic law may influence international criminal law through these sources. The relationship between domestic law and treaty law is also relevant, particularly where the Rome Statute has imported concepts from domestic law, specifically duress, and adapted such without adhering to the limitations and restrictions placed thereon by domestic law.

## 2.1 Customary international law and international criminal law

Treaties, general principles and custom are formal sources of international law. The norms of customary international law are created through reference to two particular criteria: *opinio juris* and State practice. The definition of custom provided by the Statute of the International Court of Justice notes that there should be ‘evidence of a general practice accepted as law,’<sup>39</sup> with proof the above criteria adduced to support this general practice. State practice reflects the first part and is broadly construed, including inaction on the part of the State.<sup>40</sup> No definitive list is sought, or offered. The International Law Commission<sup>41</sup> recommends that custom ought to be ‘a general practice which is accepted as law,’<sup>42</sup> and identifies that these practices include legislative acts and decisions of national courts.<sup>43</sup> The ILC Special Rapporteur, Sir Michael Wood, further identifies the impossibility of listing all of the potential forms that State practice may take. In light of this, he notes that all forms of legislation, ‘from constitutions to draft bills’ may be held as evidence of State practice and furthermore, that ‘no form of regulatory disposition effected by a public authority is

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<sup>39</sup> Article 38(1)(b), Statute of the International Court of Justice, annexed to the Charter of the United Nations 1945.

<sup>40</sup> ILC *Text of the draft conclusions provisionally adopted by the Drafting Committee* (67<sup>th</sup> session, 4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.869, draft conclusion 6(1).

<sup>41</sup> Hereafter, ‘ILC’.

<sup>42</sup> ILC *Text of the draft conclusions provisionally adopted by the Drafting Committee* (67<sup>th</sup> session, 4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.869, draft conclusion 2.

<sup>43</sup> ILC *Text of the draft conclusions provisionally adopted by the Drafting Committee* (67<sup>th</sup> session, 4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.869, draft conclusion 6.

excluded,<sup>44</sup> meaning that all forms of domestic legislation may be considered evidence of State practice. Judgments of national courts are ‘value(d) as evidence of State practice’<sup>45</sup> even where they may not directly evidence the customary rule. Precise problems with the direct use of domestic court judgments stem from the inadequate use of sources or a ‘narrow’ outlook are identified by Crawford,<sup>46</sup> as quote by Wood,<sup>47</sup> and thus Wood holds that judgments of the higher courts will be afforded more weight.<sup>48</sup>

The latter part of the definition is *opinio juris*, which is the demonstration of acceptance and respect for a certain rule which is treated as law. Baker has argued that *opinio juris* by itself ought to constitute the basis of custom in international law,<sup>49</sup> however this conception ignores the idea that State practice may simply reflect *opinio juris* tacitly acknowledged by States, confirmed as ‘axiomatic’<sup>50</sup> by the International Court of Justice in a previous case. An expression of the State’s recognition of a rule requires evidence, which could be provided by the State’s conduct and respect for certain principles at the international level, but both parts of the definition must be evidenced in order to determine that the customary rule exists. This point was made by the International Court of Justice in the *Nicaragua* case<sup>51</sup>, in which it was held that,

*“The shared view of the parties as to the content or what they regarded as the rule is not enough. The Court must satisfy itself that the existence of the rule in opinio juris of States is confirmed by practice.”*<sup>52</sup>

Customary international law may thus be evidenced by a range of State behaviour, but the net effect must be that the rule is enforced by the State, tacitly or expressly through legislation, domestic decisions or inaction, and it must be considered a legal norm. It is clear that domestic law and practice is of the utmost significance to customary international law, and that recognition by other States of that rule as law confirms its place as custom. From the

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<sup>44</sup> Sir Michael Wood, Special Rapporteur, *ILC Second report on identification of customary international law*, (67<sup>th</sup> session, 5 May-6 June and 7 July-8 August 2014), para 41(d).

<sup>45</sup> Sir Michael Wood, Special Rapporteur, *ILC Second report on identification of customary international law*, (67<sup>th</sup> session, 5 May-6 June and 7 July-8 August 2014) para 41(e).

<sup>46</sup> J. Crawford, *Brownlie’s principles of public international law*, 8<sup>th</sup> edn, Oxford University Press, 2012, 41

<sup>47</sup> Sir Michael Wood, Special Rapporteur, *ILC Second report on identification of customary international law*, (67<sup>th</sup> session, 5 May-6 June and 7 July-8 August 2014) para 41(e).

<sup>48</sup> Sir Michael Wood, Special Rapporteur, *ILC Second report on identification of customary international law*, (67<sup>th</sup> session, 5 May-6 June and 7 July-8 August 2014) para 41(e).

<sup>49</sup> R. Baker, *Customary international law in the 21<sup>st</sup> century*, *EJ.I.L.* 2010, 21(1), 173-204 at 182.

<sup>50</sup> *Libyan Arab Jamahiriya v. Malta (Judgment)* *I.C.J. Reports 1985*, p. 28, para. 27.

<sup>51</sup> *Nicaragua v. United States of America (Judgment)* *I.C.J. Reports 1986*, p. 14.

<sup>52</sup> *Ibid.*, p.98, para. 184.



perspective of the International Court of Justice, the customary norm must be evidenced from the behaviour of the State at the international level or its domestic practice and the recognition of the rule as law. The International Law Commission affirms the practice of States as the ‘primar(y)’ method of forming and expressing custom,<sup>53</sup> although there is limited acceptance that other international organisations may contribute to the same formation and expression.<sup>54</sup> This is usually viewed in a conservative manner, in that some ‘judicial creativity’ may be warranted in order to fill gaps in customary international law, but perceived attempts at creating the law have been poorly received.<sup>55</sup> There is thus a connection between customary international law and domestic rules, that domestic rules influence the way in which the State conducts itself and the law which it applies in the domestic setting. This reflects the way in which the ICJ has operated for a number of years: as one notable example, the *Lotus*<sup>56</sup> case before the Permanent Court of International Justice examined, as part of the French’s government’s pleadings, municipal law to determine a rule in the area of contention. This practice has also been carried out in a number of other cases before the International Court of Justice.<sup>57</sup> In the *Lotus* case, the ICJ considered it possible to look to municipal law for proof of the existence of a legal rule but that the rule must be reflective of general practice. In that particular instance, the rule espoused by only a few States could not be taken as ‘an indication of the existence of the restrictive rule of international law which alone could serve as a basis for the contention of the French government.’<sup>58</sup> This notion is affirmed by the ILC, maintaining the significance of domestic law but requiring that the practice itself must be ‘sufficiently widespread and representative, as well as consistent.’<sup>59</sup>

For the rule to have an impact at the international level, it must represent the approach of a number of States across the world, and not the approach of a specific region. The International Court of Justice has rejected that which is practised in a particular region from influencing the content of customary international law.<sup>60</sup> A slightly stricter approach was

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<sup>53</sup> ILC, ‘Text of the draft conclusions provisionally adopted by the Drafting Committee’ (67<sup>th</sup> session, 4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.869, draft conclusion 4.1.

<sup>54</sup> ILC, ‘Text of the draft conclusions provisionally adopted by the Drafting Committee’ (67<sup>th</sup> session, 4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.869, draft conclusion 4.2.

<sup>55</sup> See Joseph Powderly, *Distinguishing creativity from activism: International criminal law and the ‘legitimacy’ of judicial development of the law*, in Niamh Hayes, Yvonne McDermott and William Schabas (eds), *The Ashgate research companion to international criminal law: critical perspectives* (Ashgate, 2013).

<sup>56</sup> *France v Turkey* P.C.I.J. Ser. A, No. 10, p. 4 (1927).

<sup>57</sup> See *Democratic Republic of Congo v Belgium*, Judgment, ICJ Reports 2002, p3; for a fuller discussion of the cases before the ICJ which refer to domestic law, see A Nollkaemper, *The role of domestic courts in the case law of the International Court of Justice* CJIL (2006) 5(2), 301-322.

<sup>58</sup> *France v Turkey* at p.29.

<sup>59</sup> ILC, ‘Text of the draft conclusions provisionally adopted by the Drafting Committee’ (67<sup>th</sup> session, 4 May–5 June and 6 July–7 August 2015) UN Doc A/CN.4/L.869, draft conclusion 8.1.

<sup>60</sup> *Columbia v Peru* (Judgment) I.C.J. Reports 1950, p266.

taken by the International Court of Justice in the *North Sea Continental Shelf* case, in which the State practice evidencing the existence of the rule had to be ‘virtually uniform.’<sup>61</sup> From this, it is clear that domestic practice has the potential to influence and create customary international law through the rules applied by States through domestic legislation and judgments as well as their behaviour at the national. Thus, in the area of public international law generally, the law and practice of States has guided the development of international law through the establishment of customary international legal rules.

Turning now to international criminal law in particular, custom was the source of substantive international criminal law before the inception of the Rome Statute, from which the content all of the previous international criminal tribunals originates. Indeed the International Criminal Court is the only international criminal tribunal which makes explicit reference to the application of customary international law norms in its Statute<sup>62</sup> despite previous tribunals having used customary international law as the basis for their decisions in a number of particularly difficult cases. The *Tadic*<sup>63</sup> and *Furundzija*<sup>64</sup> cases before the International Criminal Tribunal for the former Yugoslavia demonstrate the application of customary international law by reference to the Geneva Conventions<sup>65</sup> as an expression of customary international law<sup>66</sup> and case law of war crimes tribunals at the national and international levels.<sup>67</sup> Given their widespread acceptance as the general law of war, the Geneva Conventions also represent a statement of custom, formed by the agreement and consistent practice of a vast number of States, who have then chosen to codify the norms they share in the domestic, and often military, setting.

Given the application by national military tribunals of such laws, the national laws applied by the domestic tribunals, which reflects the provisions of the Geneva Convention, thus has an impact on the shape of customary international law. In *Tadic* it was noted that English law was to be considered ‘instructive’ and showed some support for the idea that municipal law

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<sup>61</sup> *North Sea Continental Shelf* cases (Judgment) I.C.J. Reports 1969, p. 3 at p.43, para.74.

<sup>62</sup> See, for example, article 4 of the Statute for the International Criminal Tribunal for Rwanda 1994 and article 3 of the Statute for the International Criminal Tribunal for the former Yugoslavia 1994 in contrast to article 21, Rome Statute.

<sup>63</sup> *Prosecutor v Tadic* IT-94-1-T 7 May 1997.

<sup>64</sup> *Prosecutor v Furundzija* IT-95-17/1-T 10 December 1998.

<sup>65</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 28.

<sup>66</sup> *Prosecutor v Tadic* (Judgment) IT-94-1-T 7 May 1997, para 577.

<sup>67</sup> *Prosecutor v Tadic* (Judgment) IT-94-1-A 15 July 1999, para 195 *et seq.*

could be referred to in such tribunals ‘provided that they are recognized to be amplification of, and not in substitution for, rules of International Law.’<sup>68</sup> Interesting, a similarly comparative study that would be taken to demonstrate general principles was considered in the *Tadic* case to be a required part of establishing a customary rule.<sup>69</sup> The main distinction at this juncture between customary rules and general principles is the specificity of the former; comparative studies are undertaken to find evidence of and consensus on a particular rule, rather than to evidence a general practice.

In *Furundzija*, it was found that there was no definition of rape at the international level and thus reliance on national law was ‘justified’, subject to certain conditions,<sup>70</sup> to uncover the customary rule. However, given the lack of consensus at the domestic level on the gender of the victim and the border between sexual assault and rape,<sup>71</sup> it fell to the Chamber to consider whether a rule existed in the general principles of criminal as opposed to customary international law. General principles may thus be used as a source in a similar manner to custom, but with greater focus on the comparison of domestic practice than the generalised recognition of a rule combined with evidence of domestic practice.

As shown above, customary international law is both inspired by and derived from domestic law and practice. The connection remains between the two areas of law and although custom stands alone as a source of law, it is not removed entirely from national law. Rather it can be influenced and supported by national laws which demonstrate the generalised acceptance of a particular rule. The line separating customary international law and general principles can blur, and so it is now to the notion of general principles and international criminal law that we now turn.

## 2.2 General principles and international criminal law

General principles are the third source noted in the Statute of the International Court of Justice, in which the Court may apply ‘general principles of law recognized by civilized nations.’<sup>72</sup> Bassiouni identifies general principles as ‘first, expressions of national legal systems, and, second, expressions of other unperfected sources of international law...such as

<sup>68</sup> *Prosecutor v Tadic* (Judgment) IT-94-1-T 7 May 1997, para 678.

<sup>69</sup> *Prosecutor v Tadic* (Judgment) IT-94-1-A 15 July 1999, para 225-226.

<sup>70</sup> *Prosecutor v Furundzija* IT-95-17/1-T 10 December 1998, para 178.

<sup>71</sup> *Ibid.*, para 180-182.

<sup>72</sup> Article 38(1)(c), Statute of the International Court of Justice, annexed to the Charter of the United Nations 1945; the wording is rather archaic and Fletcher notes that it is no longer ‘politically correct’ to distinguish between ‘civilised’ and ‘uncivilised’ nations, see G. Fletcher, *The grammar of criminal law: American, comparative and international*, Oxford University Press, 2007, 20.

when a custom is not evidenced by sufficient or consistent practice.<sup>73</sup> Friedmann notes the importance of comparative work in discerning general principles<sup>74</sup>, a form of uncovering the rules which exist by analysing the way in which individual State practice and law converges in certain areas, although other authors disagree on the importance of comparative work, a notion reinforced by the jurisprudence of the ICJ.<sup>75</sup> However, this ‘discinclination’ is problematic with criminal courts and thus in certain areas, there has been less focus on an intuitive approach<sup>76</sup> and more on ensuring that legal reasoning in international law is lead to a conclusion which is, as Ellis terms it, ‘anchor(ed)...in posited rules.’<sup>77</sup>

Quite apart from custom in method, general principles are the legal rules shared by domestic legal systems across the world. Here, a distinction must be drawn between general notions in domestic law, overarching principles in domestic law and general principles. An example of the first would be defences in criminal law, which most States have in one form or another. An example of the second would be the idea of the *nullum crimen sine lege*, recognised and respected by most domestic legal systems, but more of an underpinning concept than a rule. An example of the third would be the principle of self-defence: comparative work uncovers that most jurisdictions support the idea of self-defence and have such a defence within their domestic law. Only the latter category would be considered a general principle under article 38 of the Statute of the International Court of Justice. Fletcher and Ohlin equally support this proposition, holding that general principles evidence that which is ‘normatively correct, not conventionally accepted.’<sup>78</sup> Individually, Fletcher’s notion of general principles as ‘the product of interpretation, elaboration and debate’<sup>79</sup> appears to have greater relevance to the approach taken by international and internationalised criminal tribunals in uncovering the existence of a general principle of criminal law. General principles, unlike custom, draw directly on domestic law for both their validity and content, as opposed to simply verifying the existence of the rule. It is clear that the principle must be legal, rather than simply an expression of the social morality of a group of States,<sup>80</sup> and generally the rules are discerned

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<sup>73</sup> M Cherif Bassiouni, ‘A functional approach to the “general principles of international law”’ (1990) 11 Mich J Int’l L 768.

<sup>74</sup> W. Friedmann, *The use of “general principles” in the development of international law*, A.S.I.L. 57(2) 1963 279-299, 282.

<sup>75</sup> A. Pellet, *Article 38 in A. Zimmerman, K. Oellers-Frahm, C. Tomuschat and C. Tams, The Statute of the International Court of Justice: A commentary*, 2<sup>nd</sup> edn, Oxford University Press, 2012, 731-870, 837-8.

<sup>76</sup> *Ibid.*

<sup>77</sup> J Ellis, *General principles and comparative law*, E.J.I.L. 2011, 22(4), 949-971, 951.

<sup>78</sup> G. Fletcher and J. D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, (2005) 3 JICJ 539-561, 559.

<sup>79</sup> G. Fletcher, *The grammar of criminal law: American, comparative and international*, Oxford University Press, 2007, 81.

<sup>80</sup> A. Pellet, *Article 38 in A. Zimmerman, K. Oellers-Frahm, C. Tomuschat and C. Tams, The Statute of the International Court of Justice: A commentary*, 2<sup>nd</sup> edn, Oxford University Press, 2012, 731-870, 834-5.

following a thorough comparative examination of a number of systems which participate in international law-making. Thus general principles reflect a general approach taken to a common problem by a number of jurisdictions, finding their content directly from the domestic law.

A number of international, internationalised and military tribunals have made reference to domestic laws in order to identify the existence of a rule, with the International Tribunal for the former Yugoslavia confirming that general principles of international criminal law as an authoritative source of law.<sup>81</sup> The latter can be seen in the *Delalic* case before the International Criminal Tribunal for the former Yugoslavia, although there is little evidence of robust comparative work in the statement by the Trial Chamber that ‘it is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to “general principles of law” recognised by all legal systems.’<sup>82</sup> However, as it can be said that the criminalisation of such acts is not limited to a particular region or culture and as such, fulfils the criterion of a general practice.

Equally, the *Tadic* case held that the idea of referring to general principles in criminal cases was to ‘show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems....for this reliance to be permissible it would be necessary to show that most, if not all, countries adopt the same notion of common purpose.’<sup>83</sup> Interestingly, in the same paragraph, it refers to the ‘major’ legal systems of the world demonstrating the same approach as being sufficient to establish a general principle. This demonstrates the paradox that exists within general principles: Delmas-Marty speaks of norms created outside the treaty regime which is vulnerable to ‘power politics’<sup>84</sup> and yet judges may negate, or promote, this advantage through ‘giving precedence to their own or similar legal regimes...in a language they understand.’<sup>85</sup> Although this is a criticism which may also be aimed at custom, general principles are more vulnerable to such politics because their content is directly connected to domestic law. However, another case before the ICTY, *Erdemovic*,<sup>86</sup> demonstrated an attempt to prevent the preference of any one legal system or tradition, with a total of 27 different countries from both common law and civil law traditions surveyed to determine if a general principle existed. The aim in this case was to conduct ‘a

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<sup>81</sup> *Prosecutor v Delalic* (Judgment) IT-96-21-T 16 November 1998, para 168.

<sup>82</sup> *Prosecutor v Delalic* (Judgment) IT-96-21-T 16 November 1998, para 313.

<sup>83</sup> *Prosecutor v Tadic* (Judgment) IT-94-1-A 15 July 1999 at para. 225.

<sup>84</sup> M. Delmas-Marty, *The contribution of comparative law to a pluralist conception of international criminal law*, J.I.C.J. 1 (2003) 13-25 at 13.

<sup>85</sup> *Ibid.*, 15.

<sup>86</sup> *Prosecutor v Erdemovic* (Judgment) IT-96-22 7 October 1997.

survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of (the) jurisdiction which comports with the object and purpose<sup>87</sup> of the ICTY. The idea of also supporting the reasoning<sup>88</sup> of international criminal law is clear in this case, again returning to the idea that general principles in the context of international criminal law rely on domestic law to ensure that the rules emerge from a source which is congruous with the aims of the system.

This reliance on domestic legal norms to fill in gaps as the basis of customary international law and general principles demonstrates the importance of domestic norms in the system of international criminal justice. However, it is not clear how this affects a system such as the International Criminal Court in which many parts of the law have been codified. The issue of the interaction between general principles and customary international law, and treaty is thus the next line of inquiry.

### 2.3 The relationship between general principles, custom and treaty law in the ICL context

The interaction between general principles, customary international law and treaty law is of particular relevance to international criminal law, because of its foundations in customary law. As demonstrated above, the substantive content of international criminal law was customary prior to the inception of the Rome Statute. The written law for the tribunals of Nuremberg, Tokyo, the former Yugoslavia and Rwanda was created in order to establish the tribunals and create procedural rules for their operation. The substantive legal content was not created by such Statutes, but rather emanated from custom and was then placed in the Statutes and Charters governing the operation of the tribunals. Thus custom could have been said to be, and may remain, the formal source of international criminal law, while the above agreements are the material source. Equally, general principles have their place in international criminal law because of the way in which these have been used to complete the legal picture of certain issues, such as duress, which have arrived before international criminal courts and tribunals. The creation of the Rome Statute thus raises questions about the possible hierarchy of sources and the way in which custom and general principles impacts upon treaty norms and their interpretation. Sands highlighted and supported a recent proposal by the Institut de Droit International which noted that '[t]reaty and custom

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<sup>87</sup> *Prosecutor v Erdemovic* (Separate opinion of Judges Vohrah and McDonald) IT-96-22-A 7 October 1997.

<sup>88</sup> H.-H. Jescheck, *The general principles of international criminal law set out in Nuremberg as mirrored in the ICC Statute*, J.I.C.J. 2 (2004) 38-55 at 40.

form distinct, interrelated sources of international law...(and) norm(s) deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source.’<sup>89</sup> This part of the work will deal with how general principles, customary international law and treaty law interact in the area of international criminal law, to determine if there is a continuing link between domestic law and international criminal law.

In international law generally, there is no hierarchy of sources; indeed custom and treaty are envisaged to be on an equal footing with one another. Indeed, Sands notes that when the two are at odds, preference should be for the customary norm over the treaty norm, unless such an application would undermine the ‘object and purpose’ of the treaty.<sup>90</sup> He further notes that the aim should be to unify the international order, rather than to split it, and that the idea of one norm prevailing ‘assumes conflict when conciliation could be achieved.’<sup>91</sup> Although an optimistic view, of reconciling the norms by preferring similarity over difference, it may be possible to interpret codified conventions in this way, viewing codification as an illumination of current customary practices rather than the final word on how the norm ought to be applied. However, a preference for treaty law is evident in the practice of the ICJ, particularly, as Pellet notes, where such norms may reflect ‘*lex specialis*’<sup>92</sup> Thus the question arises whether treaty norms may be influenced by custom or general principles.

The relationship between treaties and custom has been recognised as ‘multiple and intricate.’<sup>93</sup> Tunkin identifies the two sources as being separate systems: one system of conventional law and the other customary.<sup>94</sup> His discussion accepts that general international law comprises both treaty and custom, but he also notes that treaty norms can be changed by customary practice. Indeed, he highlights that the International Law Commission attempted to make this part of the Vienna Convention,<sup>95</sup> but that it was not accepted and the problem remains unresolved.<sup>96</sup> The idea that customary practices may not simply be used for

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<sup>89</sup> P. Sands, *Treaty, Custom and the Cross-fertilization of International Law*, Yale Hum. Rts & Dev. L.J. (1998) 1 85-106 at 96, quoting Resolution on Problems arising from a Succession of Codification Conventions on a Particular Subject, Conclusion 10, reprinted in 66 ANNUAIRE I.D.I. 435, 441 (1996-II).

<sup>90</sup> P. Sands, *Treaty, Custom and the Cross-fertilization of International Law*, Yale Hum. Rts & Dev. L.J. (1998) 1 85-106, 104.

<sup>91</sup> *Ibid.*, 105.

<sup>92</sup> A. Pellet, *Article 38* in A. Zimmerman, K. Oellers-Frahm, C. Tomuschat and C. Tams, *The Statute of the International Court of Justice: A commentary*, 2<sup>nd</sup> edn, Oxford University Press, 2012, 731-870, 843-4.

<sup>93</sup> A. Pellet, *Article 38* in A. Zimmerman, K. Oellers-Frahm, C. Tomuschat and C. Tams, *The Statute of the International Court of Justice: A commentary*, 2<sup>nd</sup> edn, Oxford University Press, 2012, 731-870, 849.

<sup>94</sup> G. Tunkin, *Is general international law customary law only?* 4 EJIL (1993) 534-541 at 535.

<sup>95</sup> Vienna Convention on the Law of Treaties 1969.

<sup>96</sup> *Ibid.*, 539-40.

interpretation, but may alter the legal rules created by treaties, has been discussed by other authors as well. Weisburd engages with a discussion of whether treaties represent the ultimate State practice – an agreement on what the law is and belief in the rule as law.<sup>97</sup> However, he posits that even where there is a treaty in place specifying a particular rule, the continued practice contrary to that rule may develop the law differently, using the examples of navigational rights and the law of sea to demonstrate where this has happened.<sup>98</sup> His argument is that the breach of the treaty rule does not merely destroy the rule, but demonstrates the lack of faith in the rule as law, and consequently that custom can develop divergently from treaties even where a treaty has been signed.<sup>99</sup> D’Amato similarly agrees that the ‘weight’ of State practice may overrule a specific treaty rule, given that States clearly demonstrate, through their behaviour and laws, that they recognise a rule other than the one which is laid down by the treaty.<sup>100</sup> Prior to the Rome Statute, international criminal law has always relied on custom for its substance, using treaties and agreements for specific ends such as establishing courts. Customary norms have also been enshrined in agreements, such as the Convention against Torture.<sup>101</sup> And customary international law continues to be recognised under the Rome Statute as a separate system: article 10 notes that the Statute will not limit or prejudice ‘in any way existing or developing rules of international law for purposes other than this Statute.’<sup>102</sup> Sadat neatly expresses that this makes the Statute a ‘floor, not a ceiling’<sup>103</sup> and that States may continue to develop customary international law through practice and *opinio juris*. It remains to be seen whether customary norms may develop divergently from the law applied by the Rome Statute in the area of defence, leading to separate approaches by States and the ICC as to which defences an individual may raise when accused of a serious violation of international criminal law.

The relationship between general principles and treaties is not as significant as that between custom and treaties, as shown above. However, general principles are still considered a source of law and referenced regularly by international criminal tribunals and courts.<sup>104</sup> The effect of general principles on treaties is quite different from that of custom, in that a generalised legal rule would not have the same effect as an evidenced customary rule on the

<sup>97</sup> A. Weisburd, *Customary international law: The problem of treaties* (1988) 21 Vand J Transnat’l L 1, 6.

<sup>98</sup> *Ibid.*, 14-19.

<sup>99</sup> *Ibid.*, 11.

<sup>100</sup> A. D’Amato, *Custom and treaty: A response to Professor Weisburd* (1988) 21 Vand J Transnat’l L 459, 466.

<sup>101</sup> UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

<sup>102</sup> Article 10, Rome Statute.

<sup>103</sup> L. Sadat, *Custom, codification and some thoughts about the relationship between the two: Article 10 of the ICC Statute* (2000) 49 DePaul L. Rev. 909, 919.

<sup>104</sup> Prosecutor v Lubanga (Decision on confirmation of charges) ICC-01/04-01/06, 29 January 2007; *Prosecutor v Erdemovic* (Judgment) IT-96-22 7 October 1997.



validity and enforcement of a treaty norm, as demonstrated above by Weisburd. Fletcher and Ohlin maintain the distinction of the effect on treaties by, respectively, custom and general principles, but highlight that general principles can be used as a direct source where the legal rule is ‘normatively correct.’<sup>105</sup> The, admittedly dangerous, notion of ‘normative correctness’ is one which would support the greater inclusion of general principles in general international law to support the interpretation of treaty norms. The idea of normative correctness could be considered dangerous because of the way in which it could prefer one domestic system, or systems, over others. At the same time, a robust comparative methodology could undermine such criticism by ensuring that there is, as Ellis notes, sufficient anchorage in posited rules.<sup>106</sup> Further to this, the comparative method may also uncover the reasoning behind the rules, possibly highlighting common ground which was not initially apparent. In this way, the generalised approach of the law is similar and the inclusion of general principles, side-by-side with treaty law appears to be more appropriate than custom. It can also be used to interpret treaties more effectively because general principles can be used to guide the court to a decision, rather than laying down a particular rule which ought to be followed. Thus general principles can be used more appropriately to assist in the interpretation of treaties, rather than to replace the rules enshrined therein. This marks a significant difference from the way in which custom may affect treaties.

At first glance, treaties would appear to be the most important source of international law, but it is clear that there is no distinct hierarchy and, in fact, that custom is equally as important as a treaty rule. These sources sit side by side and can not only be equally applied by international courts, but it is clear that custom can influence treaty norms. Custom may even create further norms where the practice conflicts, but continues in spite of, a specific treaty norm. General principles can further be used as an interpretative tool for treaty norms, marking a distinction between international and domestic law. This avoids what Robinson terms the ‘unreflecting mimicry’<sup>107</sup> of domestic principles in the international system, in that norms are not simply reproduced, but rather used as part of the international system. Custom and general principles do not have the same effect on treaty norms, but rather supplement and develop the law with, and sometimes beyond, treaties. The Rome Statute acknowledges this role for custom and it is now fitting to examine the impact of these sources on the Rome Statute.

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<sup>105</sup> G. P. Fletcher and J. D. Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, (2005) 3 JICJ 539-561, 559.

<sup>106</sup> J. Ellis, *General principles and comparative law*, E.J.I.L. 2011, 22(4), 949-971, 951.

<sup>107</sup> D. Robinson, *A cosmopolitan liberal account of international criminal law*, L.J.I.L. 2013, 26(1), 127-153, 130.

## 2.4 The effect on the Rome Statute of the International Criminal Court

The system of ‘Rome law’ thus extends beyond the treaty itself, primarily because of the ICC’s role as the main enforcement mechanism for international criminal law. Tunkin’s distinction of two systems of international law, one being conventional, the other customary,<sup>108</sup> appears to be more blurred in the area of international criminal law given the importance of customary norms even where a treaty codifies the law. General principles, in their role as an assistant interpreter for treaty norms, may further confuse rather than clarify the matter. Nerlich’s idea that the ‘density of regulation’<sup>109</sup> by the Rome Statute may create a separate system is correct, which mirrors the idea that custom may develop concurrently with ‘Rome law,’ as countenanced by the drafters through Article 10. Thus, international criminal law and ‘Rome law’ may develop divergently as a consequence of the continued significance of customary international law. In this part of the work, an examination of the impact of the above discussion on the Rome Statute will be carried out to determine how customary international law and general principles will interact with the Rome Statute as a treaty. This discussion will conclude in an understanding of the position of domestic law and its purported influence on the law of the International Criminal Court.

Reference is made to custom and general principles in different parts of the Rome Statute, further separating custom into its own system, while considering general principles as a source of law to be applied. In article 21 of the Rome Statute, the law of the Statute is to be applied prior to other sources. This includes the Statute itself and the rules of procedure and of evidence which ought to be applied ‘in the first place.’<sup>110</sup> The subsequent priorities are any other ‘applicable treaties, and established rules’ in international law,<sup>111</sup> which could be viewed as a veiled reference to customary international law, and general principles,<sup>112</sup> the latter of which can only be applied if there has been no rule or principle divined from either of the prior sources. This allows general principles, and thus domestic law, to be used and to influence the development of the Rome Statute. Equally, there is nothing to say that general principles could not be used to influence the interpretation of the law by the Courts; no such exclusion is specified. Indeed certain areas of the Statute, such as defences, may require

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<sup>108</sup> G. Tunkin, *Is general international law customary law only?* 4 EJIL (1993) 534-541, 535.

<sup>109</sup> V. Nerlich, *The status of ICTY and ICTR precedent in proceedings before the ICC*, 305-326, C. Stahn and G. Sluiter, *The emerging practice of the International Criminal Court*, Martinus Nijhoff, 2009, 316.

<sup>110</sup> Article 21(1)(a), Rome Statute.

<sup>111</sup> Article 21(1)(b), Rome Statute.

<sup>112</sup> Article 21(1)(c), Rome Statute.

reference to general principles of law, given the position as an area lacking in development.<sup>113</sup> Ambos opines that international criminal law ‘must be based on comparative criminal law and not on one legal tradition alone’<sup>114</sup> and the Statute would appear to support this through the inclusion of general principles, which are given a more significant role in the Rome Statute than in that of the ICJ. Although no method is specified, ‘deriving’ the principles may indicate a preference for the comparative method, particular given the current thoughts on the matter by scholars such as Ambos and Ellis. The development of the law via general principles may stand yet as a useful tool for the further development of international criminal law, exerting its influence because of, rather than despite, codification.

The provisions on defences under the Rome Statute highlight where this has been anticipated by the drafters, with article 31 stating that:

*‘At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21.’<sup>115</sup>*

This cross-reference to general principles, to a greater extent than the ‘applicable’ treaties of international law and international armed conflict, demonstrates the consideration of the drafters as to the use of general principles of law, and also to the separateness of custom as a system. The Rome Statute thus provides for the further use of domestic law to further the development of the ‘Rome law’ system, through the interplay between general principles and international law. This is not to say that the invention of general principles of law is supported by the Statute;<sup>116</sup> an interpretation open to finding a genuine principle would prevent this from happening.

It appears that the border between conventional and customary international law, which may shift depending on the area concerned, has been maintained by the drafters of the Rome Statute. This leaves open the possibility for custom to develop concurrently with the Statute and for general principles, rooted in domestic law, to influence the Statute. It appears that there are now two systems of international criminal law: ICC law and customary international law, the latter of which can develop without effect on the ICC. Indeed, by following its own precedents, the ICC is being established as a system of international criminal justice which

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<sup>113</sup> R. O’Keefe, *International criminal law*, Oxford University Press, 2015, 224.

<sup>114</sup> K. Ambos, *Remarks on the general part of international criminal law*, J.I.C.J. 4 (2006) 660-673, 662.

<sup>115</sup> Article 31(3), Rome Statute.

<sup>116</sup> I. Bantekas, *Reflections of some sources and methods of international criminal and humanitarian law*, ICLR 6 (2006) 121-136 at 136.

stands alone.<sup>117</sup> It will take time to determine the extent to which this is possible, however, as the ICC has already relied on a decision from the International Criminal Tribunal for the former Yugoslavia<sup>118</sup> in one of its judgments.<sup>119</sup> Given the strong reliance on customary international law at the ICTY, it may yet be the case that the influence of custom pervades the system of ICC law.

It is evident that general principles will exert a greater formal influence on the system of international criminal law at the ICC. Custom's influence may be through the use of previous precedent from other criminal tribunals, something not explicitly expressed in the Rome Statute, but not excluded either. The issue arising from the use of these sources is to ensure that there is a degree of harmonisation in their application; as Delmas-Marty states, it is necessary for 'a certain level of interaction which both preserves a national margin and limits its ambit, notably based on comparative analysis.'<sup>120</sup> She further notes that there ought to be a systematised approach to using comparative law<sup>121</sup> to avoid fragmenting the same area of law within different systems. The reach of comparative law, the content of which is domestic law, demonstrates the influence that domestic norms have on this system of international criminal law. This reach, however, is contingent on the use of general principles by the ICC, rather than recourse to the decisions of previous international criminal tribunals. Indeed, it may be the case that customary international law may form the basis of the practice of the ICC if the Court continues to reach back to the ICTY and ICTR for inspiration. In any event, domestic norms will continue to be used as inspiration for decisions and interpretation of the Rome Statute, notably through the use of custom and general principles. The difficulty may arise, however, in areas such as defences where general principles and customary international law lack a decisive position or where they are incongruous with the law as stated in the Rome Statute. It may be the case that general principles and customary international law could be used to mould an alternative interpretation, possibly more or less restrictive, of the provisions, but it shines a light on the difficulty of straying rather far from domestic norms in one particular area. The influence of domestic norms in this instance serves to demonstrate a lack of substantive development in the area of defences, which could give rise to further issues.

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<sup>117</sup> Article 21(2), Rome Statute.

<sup>118</sup> *Prosecutor v Tadic* (Judgment) IT-94-1-A 15 July 1999 at para.84.

<sup>119</sup> *Prosecutor v Lubanga* (Decision on confirmation of charges) ICC-01/04-01/06, 29 January 2007, para. 209.

<sup>120</sup> M. Delmas-Marty, *The contribution of comparative law to a pluralist conception of international criminal*, J.I.C.J. 1 (2003) 13-25 at 21.

<sup>121</sup> *Ibid.*, 25.

The Rome Statute has created a new system of international criminal law by codifying many concepts in international criminal law and limiting the sources which the Court may applying, creating primacy in the Statute itself as a source of international criminal law. However, the value of domestic law remains through the reference to general principles in the Statute as a subsidiary form of law and potentially a means of interpretation for the Statute. The reliance of the ICC on cases from the ICTY also demonstrates the way in which customary law can continue to influence the regime of international criminal law before the ICC. The roots of customary international law and general principle are both in domestic law. As a consequence, domestic law continues to influence international law, and international criminal law as a specific branch, through customary international law and general principles of law. The roots of customary international law are inherently domestic: both State practice, a demonstrable and recurrent application of the law, and *opinio juris* are required in order to prove the existence of a customary norm. Thus the State must respect, apply and consider the norm law before it would be considered customary. This approval must be almost global in its reach; a European or American customary norm, as demonstrated above in the *Columbia v Peru* case, would be insufficient to create a rule in international law, regardless of how many countries in that particular region respected the norm. Indeed, customary law has had a significant influence on international criminal law in particular, with the ICTY frequently referencing customs and exploring domestic systems for consensus on a particular area. General principles were also utilised by the ICTY, and have equally had a strong influence on the development in international law. Despite the overlap that exists between the two areas, general principles rely less on consensus and more on a common approach uncovered through comparative work.

The specific influence of domestic norms on international criminal law is significant because of the continued reference to general principles derived from domestic criminal law in the Rome Statute. Thus, domestic law interacts with the Rome Statute through the use of customary international law and general principles. This interaction may allow different interpretations of the Rome Statute to be influenced by comparative law. This is a progressive idea, to meet the demands of a system of law that must respond to the needs of the international community, but the issue remains that there may be significant differences between domestic criminal law and international criminal law. Thus, the tools of general principles and customary international law may not be of great use in areas such as defences, which lack sufficient development. This gap, between general principles, custom and treaty law is not one which has been remedied by the Rome Statute in the area of defences, which

demonstrates the need for revision and possibly a new interpretation of this part of the Rome Statute.

### 3. The availability of defences for war crimes and crimes against humanity: The general position in international criminal law

- 3.1 Defences to war crimes from a national perspective
- 3.2 The paradigm shifts: Nuremberg and Tokyo
- 3.3 The influence of prominent literature and international criminal tribunals
  - 3.3.1 A draft code for an international criminal court
  - 3.3.2 *Erdemovic* at the ICTY
- 3.4 The impact of their work on the discussions during the Rome Conference and the drafting of the Rome Statute

Although the Rome Statute is the first piece of written international law to specify defences which may be used before the ICC, previous international and domestic legal measures to prosecute these crimes did allow defences to be pleaded at the discretion of the judiciary. Defendants before the international military tribunals argued that their actions were in self-defence<sup>122</sup> and the absence of provisions on defences allowed the courts to use its discretion in such cases. The unique mention, in the charters and statutes, of any pleas available to the defendant was the provision ubiquitous to twentieth century international criminal tribunals, which excluded superior orders<sup>123</sup> as a full defence and instead allowed it to be used as a plea in mitigation. Thus the explicit codification of defences within the Rome Statute for the relief of individual criminal responsibility is a novel step in international criminal law. The Rome Statute offers a more permissive form of judicial freedom, by which its applicable law<sup>124</sup> provisions allow the use of other sources of international criminal law to be used as a basis for considering other defences which are not enumerated in the Statute. This would allow the judges of the International Criminal Court to look beyond the Statute to other sources of ‘applicable law’<sup>125</sup> to apply or interpret these rules, as was discussed in the preceding chapter.<sup>126</sup> Judges are also free to decide the admissibility of any defence pleaded.<sup>127</sup> The Rome Statute has thus gone further than any previous international criminal law Statute and any previously elucidated customary norms by extending the number of sources from which

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<sup>122</sup> *US v Ohlendorf* et al U.S. Military Tribunal Nuremberg, 8-9 April 1947.

<sup>123</sup> Article 8, Charter of the International Military Tribunal at Nuremberg 1945, article 6, Charter of the International Military Tribunal for the Far East 1946, article 7(4), Statute of the International Criminal Tribunal for the former Yugoslavia 2009 and article 6(4), Statute of the International Criminal Tribunal for Rwanda 2010.

<sup>124</sup> Article 21, Rome Statute, to which reference is made in Article 31(3), Rome Statute.

<sup>125</sup> Article 21(1)(a), Rome Statute.

<sup>126</sup> Interestingly, this undermines the attempts by the drafters of the Rome Statute to carefully circumscribe the power of the judges of the ICC to make the law following the lessons learned from the ICTY; see M. Karnavas, The ICTY legacy: A defense counsel’s perspective, *Goettingen Journal of International Law* 3 (2011) 3, 1053-1092.

<sup>127</sup> Article 31(2), Rome Statute.

international criminal law, as applied by the International Criminal Court, may derive a defence.

Based on this broad approach to incorporating the concept of a defence, the way in which defences have been discussed and dealt with for crimes at the international level shall be explored in order to better understand the approach taken by the drafters of the Rome Statute. Using the sources of applicable law enumerated in article 21 of the Rome Statute as a guide, this chapter will examine available defences to war crimes and crimes against humanity from a national legal perspective. The purpose of this is to understand which defences are available at the national level for such serious crimes. This will involve using national military laws as a source as well as cases which were heard before national military tribunals, particularly those emanating from accusations of illegal conduct during the Second World War, as these provide rich discussion of the notion of defences for war crimes and crimes against humanity. The defence of superior orders is one in particular which can be found in a number of sources relating to international humanitarian law, as will be discussed, although it was later excluded by the International Military Tribunals following the Second World War. Thus, particular care will be taken to examine the argument that the defence of superior orders was 'removed' by Nuremberg and that the Rome Statute 'restores' it to international law,<sup>128</sup> as was always intended. The law of the tribunals at Nuremberg and Tokyo will also be scrutinised to understand from where the exclusion of superior orders arises and whether it did, in fact represent a departure from existing practice in this area.

The writings and opinions of prominent jurists exert a strong influence on international criminal law, and so the thoughts of international criminal law jurists on the concept of defences will be explored. This will also involve an examination of the discussions and preceding draft statutes for an international criminal court. In particular, there will be a certain focus on the work of M. Cherif Bassiouni and the work of Antonio Cassese, both of whom have written extensively on the ideas relating to and operation of international criminal law, with a degree of convergence in certain areas. Bassiouni's influence, in particular, on the final draft of the Rome Statute is clear when the ideas are closely examined in tandem with his draft international criminal code. Cassese's writings and dissenting opinion in the *Erdemovic*<sup>129</sup> case, heard before the International Criminal Tribunal for the former Yugoslavia, will also be explored to determine his influence on the inclusion of

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<sup>128</sup> H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394.

<sup>129</sup> *Prosecutor v Erdemovic* IT-96-22- T/A 1996.



defences in the Rome Statute. Particularly, it is worthwhile exploring the extent to which such jurists have influenced the Rome Statute and whether this has affected the Statute's congruence with established norms in international criminal law. This is of particular relevance because of the exclusion of the work of jurists as a source of law which can be applied by the Court under article 21, straying slightly from the accepted sources of public international law,<sup>130</sup> the latter of which does not countenance the use of judicial precedent. When these issues have been fully discussed, the Rome Statute's current position will be analysed. An analysis of the decision to include defences in the Rome Statute shall be undertaken, based on an exploration of the discussion of defences in the *travaux préparatoires* for the Statute. The literature which discusses the Rome Statute does not often make reference to defences or their place within the Statute, and less so the discussions which took place before the treaty was signed. This chapter aims to remedy this gap.

### 3.1 Defences to war crimes from a national perspective

From the national perspective, serious violations of international criminal law are most likely to be committed by the armed forces, the conduct of which is restrained by a number of different sources of law and policy. Military manuals, international humanitarian law and domestic law, particularly human rights norms, create established legal parameters within which the armed forces may act. This established system may also recognise the provision of defences, although the admissibility of such defences is contentious. In particular, the defence of superior orders is acknowledged as one which has special application, and controversy, in military situations as a consequence of the command structure which exists in the military context and on which the armed forces rely for operational efficiency. Noting Cassese's warning that prudence ought to be exercised where domestic legal concepts are being transferred or used in international criminal law,<sup>131</sup> it is worthwhile to look at the law and practice of both national and internationalised<sup>132</sup> military tribunals which have prosecuted serious violations through the application of, in the first instance, international humanitarian law. This part will look at the way in which national tribunals have interpreted the idea of a defence in international humanitarian law when prosecuting serious violations thereof. The military law discussed below often enumerates the defences available, but discussion in the

<sup>130</sup> Article 38(1), Statute of the International Court of Justice 1945, annexed to the United Nations Charter 1945.

<sup>131</sup> *Prosecutor v Erdemovic* IT-96-22- A 7 October 1997 dissenting opinion of Judge Cassese at 3.

<sup>132</sup> National war crimes tribunals are run by an individual state and international criminal tribunals will be run by a group of States, with latter tribunals being affiliated to the United Nations. Internationalised tribunals are a hybrid form of tribunal which apply both national and international law, usually run in the country where the offences have taken place. A recent example would be the Special Court for Sierra Leone, and the emerging Special Criminal Court for the Central African Republic, to be established in late 2015.

cases features two notably recurrent concepts: superior orders and duress. Cases concerning war crimes as tried by national military tribunals will also form part of the discussion, given their relevance to the law of the International Criminal Court and the way in which the law such tribunals have applied constitutes an expression of customary norms.

The defences of superior orders and duress may recur frequently in the law and practice of the tribunals discussed below, but there is evidence to suggest that other defences are available. The Manual for Courts-Martial of the United States,<sup>133</sup> which was used as a source in the US case of Lieutenant Calley<sup>134</sup> states that a number of special defences are admissible in respect of crimes committed by the armed forces, which may or may not take place during times of war. This is a good example of the emanation of customary norms from domestic sources. As there is no distinction between times of peace or war in the Manual and a defence was used in the Calley case, these defences are presumed to extend to the commission of war crimes when committed by members of the armed forces. Under Chapter XXIX of the Manual,<sup>135</sup> these are ‘excuse because of accident, self-defense, entrapment, coercion or duress, physical or financial inability, and obedience to apparently lawful orders.’<sup>136</sup> This has now been expanded by the 2012 Manual<sup>137</sup> to include justification, obedience to orders, mistake of fact and lack of mental responsibility.<sup>138</sup> The manual also excludes intoxication and mistake of law as defences, in general.<sup>139</sup> It is the defence of obedience to orders which was discussed extensively in the Calley case.

Obedience to orders, or the defence of superior orders, is generally recognised in military law, usually with the caveat that the order did not appear to be unlawful when followed. In the Calley case, which concerned the court martial of a lieutenant in the United States army, it was held that obedience to orders could not remove responsibility for war crimes where the acts committed were so clearly illegal. In this instance, the Court held that ‘an order to kill infants and unarmed civilians who were so demonstrably incapable of resistance’ was ‘so

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<sup>133</sup> Revised edition in 1969, referred to in *United States v Calley*, 22 U.S.C.M.A. 534, 21 December 1973 in the dissenting opinion of Judge Duncan.

<sup>134</sup> *United States v Calley*, 22 U.S.C.M.A. 534, 21 December 1973.

<sup>135</sup> Paragraph 216(a)-(g), Manual for Courts-Martial United States 1969, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/manual-1969.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/manual-1969.pdf) (accessed 28.03.14).

<sup>136</sup> Para 216 of the revised edition in 1969, referred to in *United States v Calley*, 22 U.S.C.M.A. 534, 21 December 1973 in the dissenting opinion of Judge Duncan.

<sup>137</sup> Manual for Courts-Martial United States 2012, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf) (accessed 28.03.14).

<sup>138</sup> Rule 916(c)-(k), Manual for Courts-Martial United States 2012, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/MCM-2012.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf) (accessed 28.03.14).

<sup>139</sup> Rule 916(l), *Ibid.*

palpably illegal that<sup>140</sup> no soldier ought to have followed it. Thus the defence rests on the legality of the order being followed, rather than the fact that the order was complied with. This is further supported by the notion put forth by McCoubrey<sup>141</sup> that the doctrine of superior orders was available as defence prior to the Second World War. He discusses the notion of an ‘ought to know’<sup>142</sup> doctrine in which soldiers may rely on the defence unless they were aware of the illegality of the order and uses the British Manual of Military Law from 1944<sup>143</sup> to demonstrate the acceptability of the defence in national legal systems prior to the Second World War. The British Manual uses a test of ‘obvious illegality’<sup>144</sup> which is reflected by the inclusion of the defence in customary international law, which excludes superior orders where the act itself was ‘manifestly unlawful’<sup>145</sup> but remains otherwise silent as to its use. A more recent study by the International Committee of the Red Cross equally notes that some States do not allow superior orders to mitigate punishment.<sup>146</sup> Interestingly, the study focuses only on the defences of superior orders and its corollary, command responsibility while noting that other defences, such as duress<sup>147</sup> may be present in customary international law.

There is also some discussion in the law and practice of national military tribunals to suggest that the pressure created by superior orders may be sufficient to remove criminal liability, and thus count as a defence of duress. The *Priebke*<sup>148</sup> case discussed the concept of extenuating circumstances where criminal liability for the massacre of civilians was the crime libelled. In this instance, both defendants had pleaded the existence of extenuating circumstances, which the tribunal acknowledged may constitute a defence. It held that the presence of superior orders and of military necessity may create extenuating circumstances for which the accused may be relieved of responsibility and that both are applicable during times of war.<sup>149</sup> The Court noted, however, that a strict interpretation of the doctrines would apply in such a case and only where the participation of the individual in question was not

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<sup>140</sup> *United States v Calley*, 22 U.S.C.M.A. 534, 21 December 1973, Judge Quinn’s judgment.

<sup>141</sup> H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394.

<sup>142</sup> *Ibid.* at 386-7.

<sup>143</sup> *Ibid.* at 391.

<sup>144</sup> Paragraph 13, British Manual of Military Law 1944, as discussed in H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394 at 391.

<sup>145</sup> J-M. Henkaerts and L. Doswald-Beck, *Customary international humanitarian law*, Cambridge University Press, 2005, Vol. 1, Rule 155.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> Military Tribunal of Rome, Case of Hass and Priebke, Judgment of 22 July 1997, available at [http://www.difesa.it/GIUSTIZIAMILITARE/RASSEGNA/PROCESSI/PRIEBKE\\_ERICH/Pagine/08\\_22-07-97.aspx](http://www.difesa.it/GIUSTIZIAMILITARE/RASSEGNA/PROCESSI/PRIEBKE_ERICH/Pagine/08_22-07-97.aspx) (accessed 28.03.14).

<sup>149</sup> Para 9, *Ibid.*

critical to the execution of the task:<sup>150</sup> in other words, pressure from a superior which amounts to duress may only be pled as a defence where the individual is a lower ranking officer. The responsibility, and particularly the planning and organisational role which Priebke had undertaken, meant that the defence was unavailable in the circumstances.<sup>151</sup> The carefully circumscribed nature of the defence means that the defence of duress can relate to superior orders, but that the pressure which constitutes duress in law must be evidenced separately from the issue of orders from a superior. Thus the unique situations in which war crimes are committed may make it difficult for a defence to be applied, even where it may be legally admissible. Comment in this area supports the assertion that duress may be available as a complete defence,<sup>152</sup> but its application has been elusive thus far.

The duty of the courts to consider defences was held by the *Flick* case<sup>153</sup> and affirmed by the *Ohlendorf* case, which held that it was ‘the privilege of a defendant to put forth mutually exclusive defenses, and it is the duty of the court to consider them all.’<sup>154</sup> The defence of duress, coercion or necessity, used interchangeably by the tribunals as these terms have been was considered by a number of military tribunals following the Second World War. The tribunal in *Flick* in particular examined the availability of a defence of coercion in situations of war.<sup>155</sup> In this case, the defendants pleaded coercion, or duress, as a defence to the war crimes, crimes against humanity and crimes against property of which they were accused during the Second World War. In applying the law, the tribunal examined the Nuremberg tribunal’s exclusion of the defence of superior orders when assessing the application of duress and concluded that it

*‘might be reproached for wreaking vengeance rather than administering justice if it were to declare as unavailable to defendants the defense of necessity’<sup>156</sup> here urged in their behalf. This principle has had wide acceptance in American and English courts and is recognized elsewhere.*<sup>157</sup>

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<sup>150</sup> Para 9-10, Military Tribunal of Rome, Case of Hass and Priebke, Judgment of 22 July 1997, available at [http://www.difesa.it/GIUSTIZIAMILITARE/RASSEGNA/M/PROCESSI/PRIEBKE\\_ERICH/Pagine/08\\_22-07-97.aspx](http://www.difesa.it/GIUSTIZIAMILITARE/RASSEGNA/M/PROCESSI/PRIEBKE_ERICH/Pagine/08_22-07-97.aspx)

<sup>151</sup> *Ibid.*

<sup>152</sup> M. Scaliotti, *Defences before the International Criminal Court: substantive law – part 1*, 1. Int’l. Crim. L. Rev (2001) 111-172, 148.

<sup>153</sup> *U.S. v Flick* et al. U.S. Military Tribunal Nuremberg, 22 December 1947.

<sup>154</sup> *US v Ohlendorf* et al U.S. Military Tribunal Nuremberg, 8-9 April 1948, 468.

<sup>155</sup> The court was ‘a special tribunal constituted pursuant to a four-power agreement administering public international law’, *U.S. v Flick* et al. U.S. Military Tribunal Nuremberg, 22 December 1947, 1188.

<sup>156</sup> Used interchangeably in this case with the concepts of duress and coercion.

<sup>157</sup> *U.S. v Flick* et al. U.S. Military Tribunal Nuremberg, 22 December 1947, 1199.

As such, the tribunal relied on domestic law to guide its path where there was no expression of legislative intention and did not interpret the exclusion of superior orders as the rule for defences in international criminal law. Rather, it was to be regarded as a specific exception, created to avoid undermining the grave nature of the offences libelled. Thus the tribunal accepted that the defence of duress may be raised, but that it had not to be applied in this instance as the necessary ‘compulsion and fear’<sup>158</sup> were not found to have been motives for their actions.

The *Ohlendorf*<sup>159</sup> case also considered the defence of duress and stated that it could be considered separately from the defence of superior orders.<sup>160</sup> As such, it was accepted that a defence of duress would be admissible before the tribunals, but that the defendant would need to provide evidence to substantiate the duress under which they had acted. The use of duress in this context was particularly interesting as the defendants attempted to argue that they had been subjected to duress as a form of pressure to submit to superior orders. This argument was rejected: superior orders should not be considered a form of duress<sup>161</sup> in law as duress should be held as a separate defence and thus superior orders could not be considered in this context.<sup>162</sup> The attempted use of duress to admit superior orders surreptitiously was recognised and rejected by the tribunal in this instance, which paid particular regard to the *Fuhrerprinzip*<sup>163</sup> and explained that although certain individuals may have felt pressure to conform during Hitler’s reign in Germany, that this pressure was insufficient to constitute duress as each case had to be considered individually and no individual had been compelled to commit the war crimes and crimes against humanity of which they had been accused.

Interestingly this supports the assertion that the exclusion of superior orders was unique in terms of the way in which defences were treated by international criminal law after the Second World War. As such, drawing on national law from the United States and England, the acceptance of defences at the national level could be held to have persuasive value at the international level, regardless of the gravity of the crime. The tribunals in *Flick* and *Ohlendorf* discussed above operated in an internationalised manner, drawing on

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<sup>158</sup> *U.S. v Flick et al.* U.S. Military Tribunal Nuremberg, 22 December 1947 at 1209.

<sup>159</sup> *US v Ohlendorf et al* U.S. Military Tribunal Nuremberg, 8-9 April 1948.

<sup>160</sup> *Ibid.* at 468-9.

<sup>161</sup> *Ibid.* at 471.

<sup>162</sup> *Ibid.* at 483.

<sup>163</sup> *Ibid.* at 506.

international criminal law and domestic criminal law which was the applied by military criminal tribunals, leading to a natural development in customary international principles and which could also be considered an expression of general principles. However, these tribunals represent a less renowned expression of the body of international criminal law which arose following the Second World War. The law and practice of the international criminal tribunals at Nuremberg and Tokyo, will be examined to understand their approach to the notion of defences, which appears to be rather different from the position established by national military courts and tribunals.

### 3.2 The paradigm shifts: Nuremberg and Tokyo

The tribunals at Nuremberg and Tokyo heralded the beginning of the trend of reaction to crises in international criminal law. Both were temporary, specialised and instigated in response to the events which had taken place during the Second World War. Both operated under their own Charters, which were drafted for ‘the prompt and just trial and punishment of the major war criminals’ from both the Far East<sup>164</sup> and the ‘European Axis.’<sup>165</sup> Their jurisdiction was outlined by their Charters which enumerated three specific groups of crimes – against peace, of war and against humanity – and neither Charter made reference to defences which were available to those indicted before it. The tribunals, particularly Nuremberg, have become infamous for their purported ‘removal’ of the defence of superior orders from international criminal law.<sup>166</sup> As discussed above, in the *Ohlendorf*<sup>167</sup> case, the issue of the leadership principle made it imperative that individuals indicted by either tribunal were not able to rely on either immunity due to an official position or the defence of obedience to orders. The specific nature of the exclusion meant that the only other reference to defence in the Charters relates to the right of the individual to a fair trial. However, defences were not ignored by the tribunals at Nuremberg and Tokyo, as a number of cases discussed the idea of superior orders, duress and self-defence. A closer look at the way in which defences were admitted and rejected by the tribunals is required in order to understand the availability of a defence at this critical point in the development of international criminal law, to ascertain the impact, if any, these trials had on the drafting of the Rome Statute.

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<sup>164</sup> Article 1, Charter of the International Military Tribunal for the Far East 1946.

<sup>165</sup> Article 1, Charter of the International Military Tribunal at Nuremberg 1945.

<sup>166</sup> Article 8, Charter of the International Military Tribunal at Nuremberg 1945 and article 7, Charter of the International Military Tribunal for the Far East 1946.

<sup>167</sup> *US v Ohlendorf et al* U.S. Military Tribunal Nuremberg, 8-9 April 1948 at 506.

The tribunals at Nuremberg and Tokyo did not explicitly discuss which defences may be available to defendants, focusing instead of the rights of the accused to a fair trial.<sup>168</sup> Both Charters reference only the concepts of head of state immunity and the defence of superior orders, both of which are expressly excluded from application. The statute acknowledges that mitigation of punishment may be available for superior orders only and cannot be used as a means of removing responsibility. Despite the lack of black letter law, however, reference was made in the judgment of the tribunal to the idea of defences. In preference to duress, which featured in the national military tribunals discussed above, the notion of self-defence was argued by the defendants. In particular, self-defence in the context of protecting a State<sup>169</sup> and the potential application of military excuse or justification, also known as military necessity<sup>170</sup> was raised. Both military necessity and self-defence were used as part of the wider argument on the part of the defendants of protecting the State from other powers which may have invaded.<sup>171</sup> However, this line of argument was not successfully pleaded as the Nuremberg judgment concluded that the invasions of Denmark and Norway were conducted in order to create a better base from which to attack the Allied powers. The tribunal made the distinction between self-defence and aggression, the latter of which characterised the actions of the defendants before the Nuremberg tribunal as a result of the disproportionate methods they had undertaken to arguably protect themselves. In the view of the tribunal, invading two countries in order to protect one's own could not be considered self-defence. The invasions were characterised as 'acts of aggressive war'<sup>172</sup> rather than acts of self-defence. In the same vein, the Tribunal at Tokyo listened to the submission that Japan had acted in self-defence in attacking a number of other States and the submission was rejected again, on the basis that those making decisions on behalf of the State had not acted proportionately and had planned these attacks as aggressive wars in order to further its own interests at that time.<sup>173</sup>

The idea of self-defence was therefore rather difficult to plead at both Tokyo and Nuremberg, largely because of the way in which the crimes against peace under both Charters were defined and the ease through which the prosecution could prove that the acts were thereby aggressive, rather than defensive. As the leaders and decision-makers of both countries were accused of crimes against peace, defined as '*planning, preparation, initiation*

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<sup>168</sup> Article 17, Charter of the International Military Tribunal at Nuremberg 1945 and article 9, Charter of the International Military Tribunal for the Far East 1946.

<sup>169</sup> *US v Ohlendorf* et al U.S. Military Tribunal Nuremberg, 8-9 April 1948.

<sup>170</sup> *U.S. v Flick* et al. U.S. Military Tribunal Nuremberg, 22 December 1947.

<sup>171</sup> Judgment of the International Military Tribunal at Nuremberg 1946, 436-7.

<sup>172</sup> *Ibid.*, 437.

<sup>173</sup> Judgment of the International Military Tribunal at for the Far East 4 November 1948, 49581-49591.

*or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.*<sup>174</sup> Thus self-defence was completely precluded in respect of such a charge; one cannot act in self-defence as the aggressor as it is counterintuitive to the very idea of self-defence in the first place. As Schabas<sup>175</sup> has noted, these tribunals encouraged the development of a link between the rest of the crimes under the Charters and the concept of an aggressive war, to reinforce the criminality of the actions as an extension of crimes against peace. Because of this, the scope of self-defence as pleaded before either Tribunal would be completely rejected by dint of the nature of the crimes and their link to an aggressive war.

The customary rule that Heads of State cannot be charged with criminal acts was rebuffed by the Nuremberg Charter<sup>176</sup> and was critical to the operation of the tribunals because of the context in which the crimes had been committed. All of the crimes alleged were committed on behalf of the States of which those indicted were nationals and by the governments of which they were employed. An ability to rely on the protection of the cloak of the State would have rendered an automatic acquittal for each of the accused. A more recent analysis of head of state immunity by Gaeta noted that this rule has been affirmed by customary international law which removes such immunity in the case of war crimes and crimes against humanity.<sup>177</sup> Domestic law further supports this position.<sup>178</sup> However, the rules used to demonstrate this are equally recent and it appears that the focus at the international military tribunals was more on personal responsibility than the official position. Indeed, the doctrine of individual criminal responsibility is that on which the post-war tribunals rested and the fact of its existence negated any possibility of head of state immunity. Much like the previous discussion of self-defence, the ‘head of state’ defence was precluded by the tribunals as a result of the way in which the charges were brought.

The Charters of both the Nuremberg and Tokyo tribunals expressly rejected the notion of superior orders as a full defence, which was held as unavailable to ‘free (an individual before the Tribunal) from responsibility...but may be considered in mitigation of punishment if the

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<sup>174</sup> Article 6(a), Charter of the International Military Tribunal at Nuremberg 1945 and article 5(a), Charter of the International Military Tribunal for the Far East 1946.

<sup>175</sup> W Schabas, *Unimaginable atrocities*, National University of Ireland, Dublin, 18 November 2011.

<sup>176</sup> Article 6, Charter of the International Military Tribunal for the Far East 1946 and article 7, Charter of the International Military Tribunal at Nuremberg 1945.

<sup>177</sup> P. Gaeta, *Does President Al Bashir enjoy immunity from arrest?* J.I.C.J. 7 (2009) 315-332.

<sup>178</sup> *Ibid.* at 317.



Tribunal determines that justice so requires.’<sup>179</sup> Thus no individual could plead superior orders in order to exonerate themselves entirely, but could use it to reduce the punishment meted out. The *Ohlendorf*<sup>180</sup> case noted that an absence of this exclusion may have generated what McCoubrey quantified as ‘a system of infinite regression in which all responsibility would be placed upon Hitler, who was by then conveniently dead.’<sup>181</sup> The *Fuhrerprinzip* meant that every order which was issued by the Nazi regime could be formally traced back to Hitler, thus explaining McCoubrey’s characterisation of responsibility as an infinite regression in such a case. This rejects the previous acceptance of the defence of superior orders for lower-ranking soldiers at national military tribunals, where it could function as a full defence subject to certain strictures. The discussion above, on the subject of superior orders, indicated that the only restriction on the defence was an early incarnation of the ‘manifest illegality’ test: the idea that the soldier ‘ought to know’ that the order should not be followed<sup>182</sup> and thus creates a narrow area in which the defence might be accepted. Thus the defence was accepted prior to Nuremberg and Tokyo, but rejected as all but a plea in mitigation following the war.

The Nuremberg and Tokyo tribunals had simply altered the defence to meet the requirements of a highly specific situation wherein it was necessary to avoid McCoubrey’s identified system of ‘infinite regression’. It cannot be said that it would be a desirable outcome for any of those indicted by either Nuremberg or Tokyo to escape responsibility for their contribution to the atrocities during the Second World War, but it cannot also be said that the law should be redacted in order to fit situations as they arise. The customary principles in this respect ought to have been properly entertained. However, it is equally difficult to argue that the maxim *nullum crimen sine lege* ought to apply to the concept of defences either. Defences are a conceptual element of criminal law, but their relationship with responsibility can have an effect on the criminality of an act. There is thus a link which ought to have been respected by the tribunals, even if it is not a direct expression of the *nullum crimen* principle. The use of the defence would most likely have fallen as a result of the way in which the charges were raised, in very much the same as way as the application of self-defence, and there was thus no need to expressly exclude it in this manner.

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<sup>179</sup> Article 6, Charter of the International Military Tribunal for the Far East 1946 and article 8, Charter of the International Military Tribunal at Nuremberg 1945.

<sup>180</sup> *US v Ohlendorf et al* U.S. Military Tribunal Nuremberg, 8-9 April 1948 at 506.

<sup>181</sup> H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394, 389.

<sup>182</sup> Paragraph 13, British Manual of Military Law 1944, as discussed in H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394, 391.

Much like the modern-day International Criminal Court, the tribunals at Tokyo and Nuremberg did not elect to indict individual soldiers who may have been coerced into complicity by overbearing superiors. Those prosecuted by the tribunals were high-ranking officials who were capable of making decisions which affected millions of lives. This demonstrates the irrelevance, in this case, of the defence of superior orders; in most cases, the accused were the superiors and in a position to take such decisions. Because of this, the limitation on the defence was perfectly appropriate and creates a useful parallel for the International Criminal Court. The policy of the International Criminal Court similarly targets those who occupy high ranking positions within governments and organisations and who are able to take the same life-changing decisions on the part of whole populations. Identifying the targets of the prosecutorial policy, the decision and policy makers, demonstrates that there is a general difficulty with defences in international criminal law, whether applied by international, internationalised or domestic criminal tribunals, such as those for the military. The way in which the crimes have been drafted and are applied offer little scope for any kind of defence, particularly superior orders. It is difficult to see, even now, a situation before the International Criminal Court in which superior orders could apply.

### 3.3 The influence of prominent jurists in literature and international criminal tribunals

#### 3.3.1 Bassiouni and the draft code for an international criminal court

#### 3.3.2 Cassese's dissent in Erdemovic

The Nuremberg and Tokyo tribunals were not isolated examples of the removal of the defence of superior orders and rejection of the immunity of heads of State for serious violations of international criminal law. Indeed the jurisprudence from the international criminal tribunals which followed them, along with the debate generated and sustained by jurists, helped to develop and expound the discussion of responsibility at the international level for individuals accused of crimes against humanity, war crimes and genocide. However, the field had not been extensively discussed and there remain two particular jurists who have discussed the notion of defences at the international level: Bassiouni and Cassese.

Bassiouni has been active for a number of decades in the field of international criminal justice and discussed the idea of an international criminal court<sup>183</sup> long after the UN General

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<sup>183</sup> M.C. Bassiouni, *The time has come for an international criminal court*, Ind. Int. L. and Comp. L. Rev. (1991) 1, 1-43.

Assembly had capitulated to the difficulty of drafting the crime of aggression.<sup>184</sup> Bassiouni's contribution to the concept of defences at the international level extends to drafting a Statute for an international criminal court, as well as an international criminal code;<sup>185</sup> the code explicitly includes defences for serious violations of international criminal law. The work of Judge Antonio Cassese at the International Criminal Tribunal for the former Yugoslavia similarly countenanced the availability of defences for serious violations of international criminal law. His dissenting opinion in the *Erdemovic*<sup>186</sup> case went directly against the opinion of the majority in the Appeals Chamber judgment. He discussed extensively the principle of the defence of duress to war crimes and to crimes against humanity, as distinct from the former. The contribution of both jurists to the development of the idea of defences will be discussed here, as well as discussion of the work of jurists which has been stimulated by the initial proposition of their ideas.

### 3.3.1 Bassiouni and the draft code for an international criminal court

The notion of an international criminal court was one which was tabled following the Second World War by the United Nations.<sup>187</sup> However the project stalled as a result of the failure to agree on the definition of aggression<sup>188</sup> and it was not until 1976 that a study was commissioned by the Conseil de Direction of the International Association of Penal Law<sup>189</sup> in order to further the understanding of international criminal law. Previous projects commissioned by the Association had discussed the idea of an international criminal court and this work was considered a motivation for the UN's decision to instruct the International Law Commission to work on the idea of an international criminal court.<sup>190</sup> However his work was the first attempt at a comprehensive international criminal code, which hints at his own aim of formalising a system of international criminal justice. Bassiouni chose to include defences in his code and thus entitled one article 'exoneration, justification and excusability'.<sup>191</sup> This was the attempt at codifying defences for serious violations in international criminal law, supporting the idea that the aim of creating a system of

<sup>184</sup> UN General Assembly Resolution 898 (IX) of 14 December 1954.

<sup>185</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987.

<sup>186</sup> *Prosecutor v Erdemovic IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997*.

<sup>187</sup> UN General Assembly Resolution 898 (IX) of 14 December 1954.

<sup>188</sup> *Prosecutor v Erdemovic IT-96-22- A 7 October 1997*.

<sup>189</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, Preface.

<sup>190</sup> *Ibid.*, 10.

<sup>191</sup> *Ibid.*, 109.

international criminal justice would require the system to undertake features common to domestic legal systems. The previous silence on the issue was not due to oversight. Indeed, the International Law Commission's draft code<sup>192</sup> (on which work began in 1982) acknowledged that defences may be raised but preferred to remit the idea to judicial discretion depending on the crime libelled.<sup>193</sup> The subsequent work completed by the *ad hoc* international criminal tribunals for Rwanda and the former Yugoslavia, following the in the footsteps of the tribunals at Nuremberg and Tokyo, make no reference to the idea of defences, other than to exclude superior orders as a full defence.<sup>194</sup> There are duties of disclosure on the defence team to inform the Court if they intend to submit an alibi or reason of mental defect<sup>195</sup> but there is no other reference to the idea of a defence in terms of giving a 'reason' for the acts committed.

Bassiouni's code notes six separate defences: 'individual' self-defence, necessity, coercion, superior orders, mistake and insanity.<sup>196</sup> The closeness of Bassiouni's code, in terms of the defences he has chosen to include, to the current incarnation of the Rome Statute is particularly interesting; it would appear that his work has been influential in guiding the drafters of the Rome Statute. The other distinction between the criminal code written by Bassiouni and the Rome Statute and the statutes of the tribunals established during the last decade of the twentieth century is the reactive nature of the latter grouping. Both the ICTY and the ICTR were established in response to atrocities, whereas the draft international criminal code and the Rome Statute were written to further the idea of an international system. It is possible that in the aftermath of an atrocity that it is difficult to consider that the crimes committed were defensible and accordingly, it may be judged more appropriate when the memory of the crimes is not so raw.

Although there are similarities between Bassiouni's code and the Rome Statute, he takes a more nuanced and developed approach to the defences, in contrast to the approach of the Rome Statute. Similarly, he avoids the common law term 'defences' and steers towards the reasoning for the removal of responsibility by heading the section 'exoneration, justification

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<sup>192</sup> Draft code of crimes against the peace and security of mankind including the draft Statute for an international criminal court, UN General Assembly Resolution 36/106 of 10 December 1981.

<sup>193</sup> Article 14, Draft code of crimes against the peace and security of mankind including the draft Statute for an international criminal court, instructed by the UN General Assembly Resolution 36/106 of 10 December 1981.

<sup>194</sup> Article 7(4), Statute of the International Criminal Tribunal for the former Yugoslavia 1991 and Article 6(4), Statute of the International Criminal Tribunal for Rwanda 1994.

<sup>195</sup> Article 67(B)(i), Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia 2009 and article 67(A)(ii), Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda 1996.

<sup>196</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 109.

and excusability.<sup>197</sup> The distinctions between the defences in the Rome Statute and those in his draft criminal code tend to be seen more clearly in the detail; self-defence is narrowed to ‘individual’ self-defence, rather than the extended version of defence of others and of property in the Rome Statute. He also rejects the availability of duress and necessity where the act constituting criminal conduct was ‘likely to produce death.’<sup>198</sup> He notes that it has been deliberately drafted in this manner, to function as a restraint on individual behaviour.<sup>199</sup> In this way, the defences are carefully circumscribed to prevent their wide application, either in relation to the type of conduct or groups of individuals to whom the defences may be available. He also states in later work that his approach is pragmatic and that he has sought to ‘combine, rather than reconcile’<sup>200</sup> the world legal systems that contribute to the general principles of criminal law which are part of international criminal law. However, the reliance on the American Model Penal Code<sup>201</sup> to formulate the construction of the defences indicates that it bears more relation to the defences available in common law systems, rather than a true combination of international legal systems. Given the differences between the American system and other systems, shown by undertaking a comparative analysis of the defence (and sometimes defences) of duress and necessity in chapter five, it is clear that the use of the American Model Penal Code may have obliterated the influence of other domestic legal systems. The extent to which domestic legal systems are combined by this source is questionable.

### 3.3.2 Cassese’s dissent in *Erdemovic*

The failure of the statutes of the international criminal tribunals to explicitly mention defences did not mean that the notion of defences was not discussed by the tribunals. Indeed, the availability of one defence in particular was raised in the first judgment handed down by the International Criminal Tribunal for the former Yugoslavia. The dissenting opinion of Antonio Cassese in the *Erdemovic*<sup>202</sup> case was particularly interesting because it rejected the majority position that duress was not available to a charge of crimes against humanity. Although Erdemovic’s case was eventually remitted to a new trial chamber and he was tried for war crimes for his part in the Srebrenica massacre, his initial appeal was on the basis that he was not given sufficient appreciation of the nature of his guilty plea and wished

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<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.*

<sup>199</sup> *Ibid.*, 112.

<sup>200</sup> M.C. Bassiouni, *Introduction to international criminal law*, Martinus Nijhoff, 2012, 401.

<sup>201</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 112.

<sup>202</sup> *Prosecutor v Erdemovic* IT-96-22- A 7 October 1997.

the reasons for his decision to participate in the atrocity to be taken into account when his case was being heard. A more detailed analysis of the case will be undertaken in chapter five, when the notion of duress will be explored, but it seems inevitable that the release of Cassese's opinion in 1997 prior to the negotiations for the Rome Statute had an effect on the final draft of the Rome Statute. Upon further reflection and research, as discussed below, it is clear that Cassese captured the zeitgeist of the theory of defences in international criminal law at that point in time. Thus his powerful argument for duress as a full defence is argued here to have had some influence over those who included the defence of duress in the Rome Statute. The Rome Statute's definition supplants, in international criminal law, the majority judgment of the Appeals Chamber in *Erdemovic*, which held that duress is not available in customary international law as a defence to a charge of war crimes.

Cassese's opinion in *Erdemovic* concluded, based on a number of authorities from domestic law and military tribunals, that duress ought to be available to a charge of crimes against humanity in restricted circumstances. In particular, he noted that the pleading of duress which required the satisfaction of the criteria of a severe threat to life or limb, proportionality, no means of escape and that the situation was not self-inflicted<sup>203</sup> would be too difficult to fully meet in cases of crimes against humanity or war crimes. As a result, he held that the proportionality requirement should be removed where the killing of innocents was concerned and where the individual's refusal to comply would not prevent any further killing.<sup>204</sup> In this way, he held that the defence of duress was both 'realistic and flexible' and thus ought to be included.

It is interesting that Cassese's formulation, based on domestic and customary international law, has been incorporated into the Statute more closely than the previous work of the International Law Commission and the draft criminal code written by Bassiouni. In particular, his caution that 'the war in the former Yugoslavia furnishes us with so many examples of...atrocities that (we) ought not to dismiss any possible scenario as fanciful or far-fetched'<sup>205</sup> appears to have been heeded by the drafters of the Rome Statute. One of the few criticisms of Cassese's opinion is by Keller, who argued that it overstates the importance of the Nuremberg judgment,<sup>206</sup> rather than focusing on all of the military tribunals held

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<sup>203</sup> *Prosecutor v Erdemovic* IT-96-22- A 7 October 1997 dissenting opinion of Judge Cassese at 41.

<sup>204</sup> *Ibid.*, 42.

<sup>205</sup> *Ibid.*, 47.

<sup>206</sup> K.J. Heller, *The Nuremberg Military Tribunals and the origins of international criminal law*, Oxford University Press, 2011, 377.

following the Second World War. However this criticism does not take account of the fact that the tribunals, as demonstrated above, did consider the concept of duress and coercion and simply found it to be inapplicable based on the facts. The facts in this case, of a junior conscript being threatened with death if he did not comply, relate more to Bassiouni's exclusion than that of the international military tribunals which prosecuted war crimes following the Second World War. The substance of Cassese's argument remains and it does appear that the Rome Statute built upon his 'realistic and flexible' doctrine of duress. Indeed, it is difficult to ignore the timing of the *Erdemovic* case and the inclusion of duress, rather than necessity, in the Rome Statute. It is clear the Cassese's recognition of the current thinking and the expounding of his views in a forum as public as the ICTY, had an impact on the question of defences which may be available at the international level for war crimes.

### 3.4 The impact of their work on the discussions during the Rome Conference and the drafting of the Rome Statute

Based on the analysis prior to this section, it is evident that there is some support in the work of international criminal law jurists and jurisprudence for the recognition of defences by the Rome Statute. The treaty's contribution lies in the fact that it is the first agreement which reflects a broad international consensus on the subject of defences which ought to be made available to defendants before the Court. As much as this step may appear to have been a bolt from the blue, it is evident based on the foregoing discussion that the idea of defences for individuals who have committed serious violations of international criminal law was tabled far in advance of the beginning of the negotiations in 1998. The way in which each of the above has affected the drafting of the Rome Statute will now be discussed.

The effect of the national military tribunals on the Rome Statute is evident, particularly the way in which these dealt with defences. There was no formal barrier to defences in any of the national military tribunals and a number, mentioned above, entertained and discuss the concept of defences, even where the crime involved the killing of innocents or serious violations of international criminal law. However, the previous tribunals were not so explicit as to inform the defendants of the availability of a defence or of the potential to use any reasons to defend their actions. There appears to have been a reliance on domestic law, relating to both military and criminal law, in such tribunals wherein the availability of the defence was dictated by the country of origin of the military tribunal. In this way, defences such as superior orders and duress were discussed by the courts. Indeed, the defences could

be applied and the reason for their lack of application was not the seriousness of the offence committed, but rather the lack of evidence to support a claim of, for example, superior orders.<sup>207</sup>

McCoubrey's assertion that a defence of superior orders was available<sup>208</sup> prior to Nuremberg is well-founded and it is clear that the 'manifest illegality' test of the order represented the watermark for the admission of such a defence. The military tribunals, international and otherwise, equally felt unable to reject defences such as duress out of hand where these were available in domestic law, despite the charges of war crimes creating a more controversial context than a typical domestic crime. In this way, the tribunals drew on the existing domestic laws in order to apply accepted defences and acknowledged the role that such defences may play. The pragmatic effect, however, of this application was that none who pleaded the defences could provide sufficient evidence in order to succeed. It could be argued that, although defences may be available in this context, they are precluded because of the type of criminal conduct within the jurisdiction of international criminal law. This is not a proposition which has been accepted by the drafters of the Rome Statute and it may be possible that the desire to create a full 'system' of international criminal law has blinded the drafters to this consideration. The influence of previous military tribunals can be seen in the Statute, but their experience is not reflected: the jurisprudence demonstrates the difficulty of the defences ever being successfully pleaded by a defendant.

The influence of the tribunals at Nuremberg and Tokyo is not particularly evident in the Rome Statute. The tribunals referred only briefly to the concept of defences, and then by exclusion: both Charters noted that superior orders and the official position of the defendant could not be used as defences for any of the crimes within their jurisdictions. The Rome Statute appears to have replaced the principle that the defence of superior orders is unavailable and sets out a number of defences which are available. However the approach of the tribunals to the idea of self-defence, where its applicability was discussed, could indicate that the deliberate exclusion of superior orders and the defence of occupying an official position was an idea confined to these defences alone. It is not evident as to why defences were not dealt with by the Statutes of both tribunals, and it is clear that neither were viewed as a suitable model for the Rome Statute.

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<sup>207</sup> *US v Ohlendorf* U.S. Military Tribunal Nuremberg, 8-9 April 1948 at 506.

<sup>208</sup> H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394.



Following on from this, the preparations that preceded the signing of the Rome Statute demonstrate the more open approach that the drafters wished to take to the idea of defences. The draft Code discussed by the International Law Commission in the years following the establishment of the tribunals, and its updated version in 1996, indicated that it would be within the remit of the Tribunals to accept defences if there was sufficient evidence to support their application, but that any defence would only be admitted at the discretion of the Court.<sup>209</sup> Although the Code does not refer specifically to any defence, the commentary notes that duress should be considered one such defence<sup>210</sup> but espouses a limitation similar to that of Bassiouni in his own draft criminal code.<sup>211</sup> The reason for exclusion may relate to the same idea put forward above in respect of the tribunals for the former Yugoslavia and Rwanda: in the aftermath of an atrocity and war crimes committed against civilians, in any context which involves the brutal killing of innocents, it is difficult to argue for justifications and excuses on the part of the accused. Such discussion is possibly only open during times of peace rather than immediately following acts of barbarity.

This idea is well supported by the discussions held prior to the signing of the Rome Statute in 1998, as Schabas highlights in his commentary.<sup>212</sup> The International Law Commission's draft in 1995 was met with a simultaneous draft written by experts, referred to as the updated Siracusa draft<sup>213</sup> and, as noted by Ambos,<sup>214</sup> duress was not available in this draft where the act was likely to cause death. Ambos notes elsewhere that the lack of differentiation, or heed paid to the distinction between justifications and excuses, was a structural issue which persisted throughout the drafting, and remained unaddressed by the International Law Commission.<sup>215</sup> This would appear to demonstrate that the drafters were keen to include defences, but that less attention than necessary was paid to their inclusion. Eser's contribution to Triffterer's commentary further supports this, in particular viewing duress in

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<sup>209</sup> UN Draft Code of Crimes against the Peace and Security of Mankind, International Law Commission Report on the work of its forty-sixth session, Yearbook of the International Law Commission, UN Doc A/CN.4/SER.A/1996/Add.1 (Part 2), 17-56.

<sup>210</sup> *Ibid.*, 40.

<sup>211</sup> *Ibid.*, 41.

<sup>212</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 490.

<sup>213</sup> 1994 ILC Draft Statute for an International Criminal Court with Suggested Modifications (Updated Siracusa-Draft) prepared by a Committee of Experts.

<sup>214</sup> K. Ambos, *Other grounds for excluding criminal responsibility*, 1003-1048 in A. Cassese, P. Gaeta and J. R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, 2002, 1016-7.

<sup>215</sup> K. Ambos, *Establishing an international criminal court and an international criminal code: Observations from an international criminal law viewpoint*, 7 EJIL (1996) 519-544 at 530-1.

the Rome Statute as ‘ill-guided’<sup>216</sup> and highlighting the lack of attention paid to issues such as the proportionality test therein for war crimes and crimes against humanity.<sup>217</sup>

Indeed, the discussions of the Preparatory Committee on the notion of defences have not been greatly covered in academic literature<sup>218</sup> demonstrably because it appears that little of a substantive nature was included in the formal proposals. Saland’s sole piece<sup>219</sup> on the subject of defences indicates that the discussions on the topic of defences were the most difficult, given the distinctions between the domestic legal systems on the topic of defences.<sup>220</sup> Indeed, the report on the work of the Preparatory Committee<sup>221</sup> appears to adopt the articles wholesale and there is no substantive discussion on the defences, with the original proposal remaining in place for the signing of the Rome Statute.<sup>222</sup>

The impact of jurists, who demonstrated a more developed understanding of international criminal law than drafters of prior statutes for international criminal tribunals, on the preparations Rome Statute is evident, given the work conducted prior to the negotiations and the similarities between such work and the Statute. The two most influential jurists on the topic of defences before the International Criminal Court are arguably Bassiouni and Cassese. Bassiouni’s draft code clearly set the tone for the Rome Statute: a comprehensive examination of the concepts required for an international criminal code, from the perspective of creating a system of international criminal justice rather than a stand-alone tribunal. This perspective encouraged the inclusion and codification of defences for international crimes, under the heading of ‘exoneration, justification and excusability.’ This indicated a differentiation between the defences, but there was no further differentiation provided, as all were to be placed in the same article to achieve cohesion.<sup>223</sup> The defences in Bassiouni’s draft code have all been included in the Rome Statute, however, this hint of difference between the defences was not replicated. Cassese’s dissenting opinion in the

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<sup>216</sup> A. Eser, *Article 31: Grounds for excluding criminal responsibility*, 863-893 in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Hart, 2008 at 883.

<sup>217</sup> *Ibid.*, 888.

<sup>218</sup> One of the few pieces of work was written by the Swedish delegation to the Preparatory Committee; see P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999.

<sup>219</sup> P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999, 206.

<sup>220</sup> United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court, Rome, 15 June – 17 July 1996, Volume II UN Doc A/Conf.183/13 at 132, para 26.

<sup>221</sup> Preparatory Committee on the establishment of an international criminal court 1-12 December 1997 UN Doc. A/AC.249/1997/L.9/Rev.1 18 December 1997.

<sup>222</sup> P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999, 206.

<sup>223</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 112.

Erdemovic case has had more of a direct impact on the drafting of the Rome Statute, in that the defence of duress which he advocated has now been included. Bassiouni's draft code sought to divide the defence into necessity and coercion, but Cassese's definition of duress which did not specify the source of the threat was adopted directly by the drafters of the Rome Statute. Bassiouni's idea that the defence should not be available where the harm which the individual seeks to defend may cause death, in the case of both duress and necessity, was also rejected by the drafters. Thus Cassese's idea of the 'realistic and flexible' duress appears to have resonated to a greater degree with the drafters, who sought to incorporate a broader form of duress which may be applicable to the crimes within the jurisdiction of the Rome Statute, with the caveat that judicial discretion may be exercised in the admission of such defences.<sup>224</sup>

It is clear that the work of both jurists affected the drafting of the Rome Statute and that the work of both played a role in drawing the attention of the drafters to specific issues, particularly where the drafting of the Rome Statute took place. Bassiouni's domestic law pedigree dictated that a system without defined defences would appear incomplete and it is his desire to introduce them which can be clearly seen in the final version of the Rome Statute. However, the dissenting opinion of Antonio Cassese<sup>225</sup> has also affected the direction of the Rome Statute, in that the defence of duress is now accepted as part of the international system of criminal law propagated by the International Criminal Court. Cassese's judgment reflected the understanding of defences in international criminal law at that time, demonstrated by the research outlined above on the work of the Preparatory Committee. However, his exposure of the defence was much more rigorous than the work of the PrepCom. His study of the military tribunals which had discussed defences, as well as the judgments at Nuremberg and Tokyo, reflect a growing change in the approach to defences in international law.. However, the larger question of how defences may be available for such heinous crimes, while satisfying the tests which restrict them in customary international law and general principles thereof, remains unanswered. By incorporating Cassese's defence without any of the restraints tabled by Bassiouni, the Statute creates a broad notion of duress. There appears to be a high degree of acceptance around this issue at the level of the Rome Statute, with little critical comment of the impact this change in international criminal law may have.

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<sup>224</sup> Article 31(3), Rome Statute.

<sup>225</sup> *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997.

In conclusion, it can be seen that the idea of defences did not begin with the Rome Statute and that previous works, including tribunals and the writings of jurists, supported this development in international criminal law. The confidence of the drafters of the Rome Statute to include defences, where previous treaties and charters remained silent or mentioned the concept only by exclusion, is notable and reflects a change in international criminal law. Previous tribunals and trials took place in response to atrocities which had occurred in the recent past, whereas the writings of jurists and the drafting of the Rome Statute would have taken place in a relatively peaceful setting. As a result, the Rome Statute differs from every previous expression of international criminal law in codifying the defences to serious violations of international criminal law. The national perspective on defences as derived from military tribunals was to accept defences which were available to serious crimes against the person in national law. The tribunals then determined, using the tests available in national law, whether the defence would be available on the basis of the evidence provided. There was no evidence that a rule persisted which precluded the availability of a defence in relation to the seriousness of the crime, particularly as many of the military tribunals drew on codified law which provided for such defences without restriction as to the type of case in which they could be used. The failure to accept defences at this level related more to the lack of evidence used to support their application, rather than a general rule of exclusion. This was particularly so in relation to the defence of superior orders.

It was therefore unusual that the drafters of the Charters for the tribunals at Nuremberg and Tokyo opted to exclude the defence of superior orders to prevent the relief of responsibility on the basis of following orders by those indicted. The exclusion of superior orders was clearly to avoid constant recourse to superior responsibility, which would have collapsed both tribunals by preventing the attribution of any individual other than the most senior in each regime and contradicted entirely the doctrine of individual criminal responsibility. A closer analysis, and indeed a comparison with the work of national tribunals, indicates that such exclusion was an overcautious provision in the Charters: those indicted were in positions of control and it would be unlikely that such an individual would be hewn to the complete command of his or her superior. Additionally, the manifest illegality test would have prevented the success of the defence in most cases, given the nature of the orders dictated by the regimes in Germany and Japan at that time. However, it is also possible that the exclusion of defences was more in reaction to the type of crime which was committed during the Second World War: the trend appears to be distaste for defences in respect of serious violations of international criminal law in the immediate aftermath of an atrocity.

This question, of why defences have been ignored in this way where reactive tribunals have been established is given further prominence by the work of Bassiouni, who included an explicit expression of defences which has been replicated by the Rome Statute. However his proposed restriction on the defence for any crimes which may result in death has not been retained. Interestingly Cassese's concept of duress, as propagated in his dissenting opinion, appears to find greater favour with the drafters than Bassiouni's separate defences of coercion and necessity. In general, the contribution of the jurists to this area is evident in the final draft of the Rome Statute.

The Rome Statute thus does not introduce the concept of defences at the international level and its instigation as a 'peacetime' institution equally breaks with the recent history of international criminal law tribunals. Consequently, its drafters were in a better position to consider questions of international criminal law theory and to refine concepts in a way which was not pressured by time or political circumstance of a recently committed atrocity. However this does not explain the inclusion of such broad defences or the idea that defences for certain crimes may not be acceptable. In fact, it throws the issue into greater prominence. There appears to be a lack of consensus on the issue of defences for certain crimes and thus it remains curious that the drafters of the Rome Statute have chosen to make such a bold statement in this way. The effect of different influences can be felt, but it is not clear as to what the aim of including defences has been. The next step in this study is to explore the defences which the Rome Statute has codified in order to determine the role of the Rome Statute in enshrining the place of defences in the system of international criminal law.

#### 4. Moving forward: Defences codified by the Rome Statute of the International Criminal Court

- 4.1 Mental incapacity and removal of criminal responsibility
- 4.2 Intoxication
- 4.3 Self-defence
- 4.4 Duress
- 4.5 Mistake
- 4.6 Superior Orders

The Rome Statute's codification of defences represents a novel step at the international level, and the choice of defences appears to create certain provisions which do not marry up with the development of customary international law. To further investigate the novelty of these provisions, an examination of the defences which have been included in the Rome Statute shall be undertaken. The content of the grounds which may be pleaded for removal of criminal responsibility<sup>226</sup> when charged with an offence will now be analysed.

In domestic criminal law, the word generally used to denote the negation of criminal liability is a 'defence,' defined by Schabas as effectively being an 'answer to a criminal charge.'<sup>227</sup> However the Rome Statute prefers the use of the wording 'excluding'<sup>228</sup> and 'reliev(ing)'<sup>229</sup> criminal responsibility, setting it apart from both civilian and common law systems. Using Schabas' definition, it is evident that the grounds fit into the paradigm of defences, whether as complete 'answers' or grounds which could act to mitigate responsibility and consequently, punishment. The potential for the latter possibility will also be explored, given the use of different terms in the grounds for excluding criminal responsibility in Article 31 of the Rome Statute, and defence of superior orders, which purports to 'relieve'<sup>230</sup> criminal responsibility.

Although the Rome Statute does not refer to the grounds as defences, the word 'defences' will be used interchangeably with 'grounds for excluding criminal responsibility' with good reason. The function of a defence is to remove criminal responsibility, and a defence is

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<sup>226</sup> Specifically Articles 31-33, Rome Statute.

<sup>227</sup> W. Schabas, *An introduction to the International Criminal Court*, Cambridge University Press, 2007, 226.

<sup>228</sup> Articles 31-32, Rome Statute.

<sup>229</sup> Article 33, Rome Statute.

<sup>230</sup> Article 33(1), Rome Statute.

therefore identical in operation to such grounds,<sup>231</sup> from a pragmatic perspective. From a theoretical perspective, the defences, or grounds, may be further subdivided into justifications and excuses. At present, however, the Statute makes no such distinction. The purpose of this initial part of the thesis is to explore the grounds, firstly, on which the Rome Statute permits the removal of criminal responsibility. These will each be discussed in turn, with the culmination of the discussion highlighting the differences in terms of reference used within the Rome Statute.

The Rome Statute provides ‘grounds for excluding criminal responsibility’<sup>232</sup> in two articles, and article 33 further identifies a set of circumstances in which an individual might be ‘relieve(d)’ of criminal responsibility. The focus of these provisions is firmly on the removal of criminal responsibility. Under Articles 31, there are four specific grounds for the exclusion of criminal responsibility. These are mental incapacity,<sup>233</sup> intoxication,<sup>234</sup> self-defence,<sup>235</sup> or duress.<sup>236</sup> Article 32 further identifies that where a mistake has been made, either in fact or law,<sup>237</sup> it shall be a ground for excluding criminal responsibility, as long as the mistake does not relate to whether the act committed was ‘a crime within the jurisdiction of the court.’<sup>238</sup> Finally, article 33 represents the greatest break with the tradition of international criminal tribunals thus far and entertains the possibility of a defence of superior orders, indicating such a situation will ‘relieve’<sup>239</sup> the individual pleading the ground of criminal responsibility.

The grounds are familiar reasons for removing criminal responsibility at national level, which can be seen in most jurisdictions. As this chapter will demonstrate, self-defence is a common defence present in most domestic jurisdictions and is even recognised in international law as a defence for States. Mental incapacity, equally, is often used as a defence where the individual lacked the requisite intent to commit the crime as a result of a defect in his reasoning by way of a psychiatric illness, for example. However the other defences are somewhat controversial in their inclusion, as many of these do not qualify as full defences in domestic law and thus represent neither customary international law nor an expression of

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<sup>231</sup> A. Eser *Defences in war crimes trials*, 251-273 in Y. Dinstein and M. Tabory (ed.), *War crimes in international law*, Kluwer Law International, 1996, 251.

<sup>232</sup> Articles 31-32, Rome Statute.

<sup>233</sup> Article 31(a), Rome Statute.

<sup>234</sup> *Ibid.*

<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> Article 32, Rome Statute.

<sup>238</sup> Article 32(2), Rome Statute.

<sup>239</sup> See Article 33, Rome Statute.

general principles. The defence of duress is particularly interesting, as its form in the Rome Statute appears to meld duress, in which an individual chooses the lesser of two evils, and necessity, which usually relates to a physical threat, such as a natural disaster. In some jurisdictions, neither would be available as a full defence, entirely removing criminal responsibility. The Rome Statute, however, makes no distinction between the defences and places each one, from self-defence to superior orders, on an equal footing. To determine if the scope of reasons for justifying criminal conduct has been expanded by the inclusion of these defences within the Rome Statute, the contents of each defence shall be analysed in turn.

#### 4.1 Mental incapacity and the removal of criminal responsibility

The first ground available in the Rome Statute as a defence is that of mental incapacity, on the basis that he or she may suffer from a mental disease or defect.<sup>240</sup> The wording is very clear in that the disease or defect cannot simply be a condition which affects the individual's perception, but should be sufficient to 'destroy...that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.'<sup>241</sup> The distinction here is made quite clearly between mental incapacity, where the individual's ability to understand the consequences of his or her actions is 'destroyed' and diminished responsibility, where an individual's lack of perception may make him or her less culpable, and therefore lessen the requirement to punish him or her. Darcy identified that that, in the latter case, he or she 'might not evade conviction, but could receive a mitigated sentence.'<sup>242</sup> The issue with such a distinction, however, is whether such an individual ought to stand trial in the first place if the understanding he or she exhibits is so impaired as to constitute a barrier to the trial. An examination of the jurisprudence from the ICTY in this area may prove fruitful in understanding the distinction.

The ICTY encountered several cases where the individual accused of crimes within the jurisdiction stated that he (invariably) was unable to stand trial. In *Prosecutor v Pavel Struger*,<sup>243</sup> the Tribunal held that there was no specific provision in relation to declaring an individual unfit for trial but that both the prosecution and defence had set out their

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<sup>240</sup> Article 31(1)(a), Rome Statute.

<sup>241</sup> *Ibid.*

<sup>242</sup> S. Darcy, *Defences to international crimes*, 231-245 in W. Schabas and N. Bernaz, *Routledge handbook of international criminal law*, Routledge, 2011, 234.

<sup>243</sup> IT-01-42-T (Decision re the defence motion to terminate proceedings) 26 May 2004.



respective cases on the basis that, if unfitness were to be proved, the trial should be terminated.<sup>244</sup> The court also held that the principle of mental incapacity barring trial was one which ‘enjoy(ed) general acceptance’ throughout national legal systems,<sup>245</sup> although there was nothing to suggest that a mental condition was a ‘prerequisite’<sup>246</sup> for finding an individual unable to stand trial. The central concern for the tribunal was whether the individual could participate properly in the trial in order to access his right to a fair trial in international law.<sup>247</sup> In this particular instance, the accused sought to rely on psychiatric damage incurred during his participation in the war and therefore, that he was not suffering from such injury at the time of the commission of the alleged crimes. The tribunal in this case examined his ability to discuss his case with the counsel representing him, his ability to understand the proceedings and whether he could adequately give evidence in his own cause.<sup>248</sup> His ability to do so lead the Trial Chamber to conclude that he was fit to stand trial; the central distinction here is between a pleading of mental incapacity at the time of committing the crimes and a pleading which resulted from later or contemporaneous injury or illness. The connection, however, is the wording within the Rome Statute, of the ‘destruction’ of such capacity. This indicates a permanent situation, which arguably would preclude the use of a defence which required evidence that the individual’s capacity to understand had been ‘destroyed’ at the time of committing the offence.

A more relevant case, which relied on the tests developed by *Struger*, is that of *Kovacević*<sup>249</sup> where the individual was alleged to be unfit to stand trial as the result of a mental disorder which was undisclosed.<sup>250</sup> The case undertook a similar approach to understanding the accused’s mental state in respect of professional medical and psychiatric opinions. The Tribunal also added that it was not necessary for the functions outlined in *Struger* to be present to ‘their highest level,’<sup>251</sup> but rather that the individual had to understand the proceedings, charges, evidence and be able to testify<sup>252</sup> as a baseline for comprehension.

Although not directly linked to the defence of mental defect or disease itself, the legal tests enunciated by the Tribunal above give an indication of the way in which a ‘destruction’ of mental capacity might be understood at the International Criminal Court. The difficulty

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<sup>244</sup> IT-01-42-T (Decision re the defence motion to terminate proceedings) 26 May 2004, para 19.

<sup>245</sup> *Ibid.*, para 29.

<sup>246</sup> *Ibid.*, para 35.

<sup>247</sup> *Ibid.*, para 22.

<sup>248</sup> *Ibid.*, para 49.

<sup>249</sup> IT-01-42/2-I (Public version of the decision on the accused’s fitness to enter a plea and stand trial).

<sup>250</sup> *Ibid.*, para 3.

<sup>251</sup> IT-01-42/2-I (Public version of the decision on the accused’s fitness to enter a plea and stand trial), para 27.

<sup>252</sup> *Ibid.*, para 29.

here, however, is how the test might be applied. The above cases demonstrate that the accused must demonstrate some understanding in order to stand trial. If he or she is fit to stand trial, how could he or she have perceived the unlawfulness of their actions? The former requirement of understanding requires arguably less perception than the latter, which would require, among other faculties, an ability to distinguish right from wrong. This argument demonstrates the impropriety of ‘transplanting’ a defence which has a ‘counterpart in domestic criminal law’<sup>253</sup> to international criminal law, where the requirements of attribution of legal responsibility, and effectively *mens rea*, are different. The high threshold of the defence, to demonstrate the ‘destruction’ of mental faculties, reflects the seriousness of the crimes to which it may be admitted. However, this threshold also makes it incongruous with the ICTY jurisprudence on fitness to stand trial and it is clear that the Rome Statute has not followed the ICTY’s lead in this respect.

The idea that the defence has been ‘transplanted’ from the domestic domain to the international is further supported by the lack of provision for assisting those who are mentally ill.<sup>254</sup> At the national level, an individual who is unable to stand trial or who cannot be found guilty on the basis of mental incapacity will usually be remanded by the authorities; he would not be held responsible for his actions on account of the mental incapacity, but equally could not be released on the grounds of public safety. The issue raised by the provision of such a defence in the Rome Statute is that the individual could not be punished by the International Criminal Court, but there is equally no facility to treat mental illnesses in such a way. Transferring the individual to national authorities appears moot if the trial was dealt with at the international level. The issue here appears to be that of direct transposition from national law to international law: this defence does not appear to fit congruously within international criminal law nor does its addition appear to have any merit within the Rome Statute. The higher threshold for the use of the defence renders its application unlikely, given that an individual with a capacity so destroyed would be unlikely to be rendered fit to stand trial in the first instance.

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<sup>253</sup> S. Darcy, *Defences to international crimes*, 231-245 in W. Schabas and N. Bernaz, *Routledge handbook of international criminal law*, Routledge, 2011, 231.

<sup>254</sup> V. Ghareh Baghi, *Critical study on mental incapacity in International Criminal Court*, 2011 Acta U. Danibus Jur. 78-86 2011.

## 4.2 Intoxication

Intoxication as a defence to a criminal charge is recognisable from a number of domestic jurisdictions, and Darcy has argued that the role intoxicating agents has played in recent conflicts, such as that in Sierra Leone, lead to the inclusion of such a defence.<sup>255</sup> Yet this has created difficulties at the international level owing to the differences in perception regarding the effect on criminal responsibility had by the ingestion of drugs or alcohol. The defence in the Rome Statute refers to ‘a state of intoxication that destroys (a) person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct...to the requirements of the law.’<sup>256</sup> It does not require that the individual has been drugged against his or her will, but does provide the caveat that the defence cannot be used if ‘the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage’<sup>257</sup> in the crime arraigned by the court. This avoids the situation where an individual required ‘Dutch courage’ in order to act, but then seeks to rely on the use of such substances to exonerate his conduct. There are therefore two issues in particular in relation to this defence which ought to be explored. The first is the issue of the difference in perception that the consumption of drugs and alcohol has. Through the prism of intoxication as a defence, it is reasonable to perceive that it would be a mitigating factor. However it has, in some cases, been viewed as an aggravating influence on the behaviour of the accused. The second issue is that of the use of intoxicating agents to encourage individuals to commit certain acts. This will be examined in the case of child soldiers and a particular case from Rwanda, which was remitted to the Gacaca courts.

During the drafting of the Rome Statute, the inclusion of intoxication as a defence proved controversial on account of its different perceptions of the effect that alcohol or drugs ought to have on the criminal responsibility of the individual. There is undoubtedly no broad consensus on intoxication as a defence; the distinction is often made between Islamic countries and Western countries, with the former group of countries considering the consumption of alcohol or drugs to aggravate responsibility, rather than to mitigate it. However this perception is false as there are some Western countries which equally reject

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<sup>255</sup> S. Darcy, *Defences to international crimes*, 231-245 in W. Schabas and N. Bernaz, *Routledge handbook of international criminal law*, Routledge, 2011, 235.

<sup>256</sup> Article 31(1)(b), Rome Statute.

<sup>257</sup> *Ibid.*

some forms of intoxication as a defence to a criminal charge.<sup>258</sup> However the jurisprudence of the ICTY reflected a different understanding of the reasoning underlying a defence of intoxication. It held that diminished mental capacity can operate as a mitigating factor in many jurisdictions and that intoxication can cause mental impairment.<sup>259</sup> However, the Trial Chamber in *Kvočka*<sup>260</sup> noted that the most relevant aspect of the analysis was whether the individual was voluntarily or involuntarily intoxicated. It further noted that involuntary intoxication was to be considered, of the two types of intoxication, the only valid ground for mitigation of sentence and concluded that ‘in contexts where violence is the norm and weapons are carried,’<sup>261</sup> the consumption of drugs and alcohol is to be identified as an ‘aggravating rather than mitigating’ factor.<sup>262</sup> This is arguably reflected in the Rome Statute’s codified version of the defence, in which the most important aspect is whether the individual took proper responsibility for his actions in the context in which he found himself. However the Rome Statute appears to augment the ground for mitigation to a full defence, fully removing criminal responsibility from the actor. The inclusion of this defence is slightly confused, particularly when reflecting upon its execution. Technically it would only be available where the intoxication is forced or coerced, but the wording is not clear.

Arguably the reason for including such a defence was the experience borne out of the liberal use of intoxicating agents in various conflicts to coerce children and other vulnerable individuals to become complicit in war crimes. In such situations, alcohol and drugs were viewed as one of the main ‘highly coercive elements at play.’<sup>263</sup> A case before the Gacaca courts, a domestic court in Rwanda established to prosecute those accused of serious violations of international criminal law, primarily genocide and crimes against humanity<sup>264</sup> provides a useful example. Although such courts were domestic, their authority stemmed from the responsibilities the State had to protect, prosecute and punish under international law.<sup>265</sup> The rulings of these courts thus have a degree of relevance to the present point, particularly the case of François Minani, who was convicted of genocide<sup>266</sup> at the age of 16.

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<sup>258</sup> Scotland, for example, does not admit voluntary intoxication as a defence to a criminal charge; see *Brennan v H.M. Advocate* 1977 J.C. 38. However, in *Ross v HMA* 1991 J.C. 210, involuntary intoxication was held to be a defence in respect of serious assault.

<sup>259</sup> *Prosecutor v Kvočka* IT-98-30/1-T, para 706.

<sup>260</sup> *Ibid.*

<sup>261</sup> *Ibid.*, para 706.

<sup>262</sup> *Ibid.*, para 706.

<sup>263</sup> S. Grover, *Child soldier victims of forcible genocidal transfer*, Springer, 2012, 86.

<sup>264</sup> Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity committed since October 1, 1990.

<sup>265</sup> For more detail on the Gacaca system, see E. Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, NYU JILP (2002) 34, 355-396.

<sup>266</sup> *Affaire François Minani* 25 September 1997.

The facts of this case<sup>267</sup> are relevant to the issue of intoxication, as these provide a useful example of the way in which intoxicating agents can be used in the context of war. Minani was instructed by members of the Interhamwe to kill his four young Tutsi nephews. After initially refusing, he was severely beaten. He continued to refuse until he was sedated, at which point he then submitted and carried out the orders. Following trial before a Gacaca court, he was convicted of genocide in respect of his nephews, despite his age and the circumstances in which he found himself. A plea of duress, rather than intoxication, was found to be grounds for mitigation and the punishment was reduced accordingly. However the court declined to view the intoxication as a defence in isolation; rather it was to be viewed as a contributing factor which should lessen his guilt overall. The court therefore acknowledged intoxication, and concurrently duress, as mitigating circumstances rather than full defences, or grounds for the exclusion of criminal responsibility.

This case is particularly important in its demonstration of the way in which the ‘defence’ of intoxication ought to be viewed. If ever there were to be an appropriate subject for the relief of responsibility, it would be an individual who was heavily coerced through the use of intoxicants into murdering his young nephews. The fact that the intoxication marked the ‘tipping point’ prior to the commission of the offence demonstrates the relevance of intoxication; the situation itself was highly coercive but the link between the act and intoxication is stronger. The Gacaca court, however, still refused to grant full relief from responsibility, in light of the fact that it held that genocide had been committed.<sup>268</sup> This particular case demonstrates the difficulty of removing criminal responsibility at the international level: it is a tragedy for all involved, but the removal of responsibility would indicate that the action was appropriate in the circumstance. The accused’s behaviour and circumstance may make a lesser punishment appropriate in the circumstances, but it should not permit the full removal of criminal responsibility. In the case of international crimes, as recognised by the Gacaca courts, there are some issues too serious to merit the removal of criminal responsibility. The aims of the court, to maintain the rule of law and to offer justice for the victim,<sup>269</sup> would be undermined should the offender be completely exonerated, ignoring the harm done to international society through the commission of such crimes in these cases as well as to domestic society and the individual victim.

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<sup>267</sup> S. Grover, *Child soldier victims of forcible genocidal transfer*, Springer, 2012, 212.

<sup>268</sup> The question of whether the requisite genocidal intention had been proved would be another ground for defending the prosecution, but it is not relevant to this particular issue.

<sup>269</sup> Fletcher and Ohlin have discussed the importance of avoiding impunity and protecting the victims, the latter of which is a focal point of the current version of the Rome Statute and the authors indicate that this is a key difference from national legal systems; see G. Fletcher and J.D. Ohlin, *Reclaiming fundamental principles of criminal law in the Darfur case*, J.I.C.J. 3 (2005) 539-561 at 539 *et seq.*

### 4.3 Self-defence

The doctrine of self-defence is well-established in international law at State level and the Rome Statute officially extends that protection to individuals by stating that criminal responsibility will be excluded for an individual who commits any of the crimes under the Rome Statute in order to defend himself, ‘reasonably’<sup>270</sup> in the first instance. Typically the requirements for self-defence at State level are those of ‘proportionality’<sup>271</sup> and imminence,<sup>272</sup> and this has been retained by the Rome Statute, as the ‘reasonable’ reaction must also be ‘in a manner proportionate to the degree of danger to the person or the other person or property protected.’<sup>273</sup> The third requirement is that the danger itself must emanate from ‘an imminent and unlawful use of force,’<sup>274</sup> for the defence to be available to the accused. The second part of the defence is more controversial, in that it allows the use of the defence for the protection of property. It functions in respect of war crimes only, and allows the commission thereof in defence of ‘property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission.’<sup>275</sup> The only caveat applied to the second part to the defence is that simply being part of an operation mounted to defend a particular area or property would not automatically require the admission of the defence, therefore the grounds on which self-defence was pleaded would need to be evidenced, rather than the defence simply be available to all armed units acting in defence of, for example, a village.

There are a number of issues that ought to be explored in respect of this defence. The first is the fact that the threshold for admission of the defence has, arguably, been raised through the requirement of the individual acting reasonably, as well as in response to an immediate threat in a proportionate fashion. This will be examined in the first instance. The second is the extension of self-defence to include the protection of property in the context of war crimes, which is predicated on a utilitarian calculation of the least suffering for individuals. An examination of the caveats in relation to the defence will be undertaken, including a view of the crimes that may be committed in the defence of property as permitted by the Statute.

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<sup>270</sup> Article 31(a)(c), Rome Statute.

<sup>271</sup> C. Wicker, *The concepts of proportionality and State crimes in international law*, Peter Lang, 2006.

<sup>272</sup> O. Bakircioglu, *Self-defence in international and criminal law: The doctrine of imminence*, Routledge, 2011, specifically 58.

<sup>273</sup> Article 31(a)(c), Rome Statute.

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

The idea that self-defence is a right of both the individual<sup>276</sup> and the State<sup>277</sup> is a concept which has been fully established in international law. An individual is not expected to lay down his life when confronted by an aggressor, nor is the State expected to sacrifice the lives of its population when directly confronted.<sup>278</sup> In international criminal law, the recognition of this particular defence appears congruous with the development of international criminal law and the Trial Chamber at the ICTY<sup>279</sup> referred to this particular article of the Rome Statute when debating the admissibility of self-defence to war crimes in noting that self-defence was a rule of customary international law.<sup>280</sup> It is in this context that possibly the defence is of the most relevance, as its application appears implausible in the context of crimes against humanity and genocide. The requirement of acting in order to protect populations of certain areas where those actions may constitute war crimes does, however, raise different questions of a utilitarian nature.

The important legal aspects to the defence are that the threat to which the individual is responding is imminent and that the response is proportionate. The first requirement, that the attack threatened is immediate in nature, can be referred to as the ‘imminence rule’<sup>281</sup> and is something of an inherent requirement for self-defence, as ‘absent imminent threat, the anticipated danger may never take place, nor be serious enough to justify lethal force in response.’<sup>282</sup> Indeed, the overwhelming requirement to respond must be that which leaves ‘no moment for deliberation.’<sup>283</sup> The response itself must then be proportionate in relation to the attack; the force used must not be vastly greater than that deployed in the attack against the individual pleading self-defence. However, the tests in tandem appear to be anachronistic: if there is no time for deliberation, it is difficult to understand how the force used can be identified as proportionate. Indeed, it is arguable that the force used in most cases of self-defence would be greater than that of the attacker in order to ensure repulsion.

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<sup>276</sup> M. Scaliotti, *Defences before the International Criminal Court: substantive law - part 1*, 1, Int'l. Crim. L. Rev (2001) 111-172, 162, quoting Stefan Glaser in this regard, who holds that it may be the prerogative of both the State and the individual to employ self-defence.

<sup>277</sup> J. Kittrich, *The right of individual self-defense in public international law*, Logos Verlag, 2008.

<sup>278</sup> Article 51, Charter of the United Nations 1945.

<sup>279</sup> *Prosecutor v Kordic and Cerkez*, IT-95-14/2-T, 26 February 2001, paras 448-452.

<sup>280</sup> *Ibid.*, para 451.

<sup>281</sup> O. Bakircioglu, *Self-defence in international and criminal law: The doctrine of imminence*, Routledge, 2011, specifically 58.

<sup>282</sup> *Ibid.*, 58.

<sup>283</sup> Secretary of State Webster, in 1841, wrote to the British Lord Ashburton in reference to the *Caroline* case involving the deployment of force in anticipation of a situation requiring self-defence. This test was outlined as a requirement for self-defence in a note dated 24 April 1841, enclosed with a letter to Lord Ashburton dated 27 July 1842.

The Trial Chamber in *Kordic*<sup>284</sup> acknowledged that each case of self-defence ought to be ‘assessed on its own facts and in the specific circumstances relating to each charge.’<sup>285</sup> It is in particularly difficult situations that the idea that the individual acted ‘reasonably’ would function as an expansive provision of the defence, rather than one which narrows its application and creates a higher threshold for its application.

The introduction of the concept of self-defence extending to the protection of property created ‘something of a novel concept,’<sup>286</sup> as self-defence has traditionally been limited to the protection of the person, using the tests outlined above. As demonstrated in *Kordic*,<sup>287</sup> mere membership of a military unit is insufficient to allow the individual to access the defence and rather, it ought to be demonstrated that the actions committed were ‘essential,’ either for the survival of another or for the accomplishment of a military mission. This new and expanded ground creates difficulties as it permits the commission of war crimes in order to advance the objectives of a particular war. The list of war crimes in the Rome Statute<sup>288</sup> is a long and extensive list of the various atrocities that are illegal under the Rome Statute and reflects international humanitarian law provisions in other instruments through reference to the Geneva Convention,<sup>289</sup> effectively prohibiting criminal conduct against civilians. Although the premise of allowing self-defence in the context of war may be appropriate, to expand it in this manner is not necessarily beneficial. It also appears to be incongruous with the customary provisions on international humanitarian law which prevent the abuse of civilians regardless of military objective. This particular aspect of article 31 has contributed to the broadening of the concept of self-defence, much further away from the concept of ‘individual’ self-defence propagated by Bassiouni, although it ought to be noted that the application of self-defence varies depending on whether the crime is one under international humanitarian law or international criminal law. The limits placed on behaviour by each form of law differ, primarily because of the different contexts in which both may apply; international humanitarian law is a *lex specialis* extending to situations of armed conflict alone.

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<sup>284</sup> *Prosecutor v Kordic and Cerkez*, IT-95-14/2-T, 26 February 2001.

<sup>285</sup> *Ibid.*, para 452.

<sup>286</sup> S. Darcy, *Defences to international crimes*, 231-245 in W. Schabas and N. Bernaz, *Routledge handbook of international criminal law*, Routledge, 2011, 236.

<sup>287</sup> *Prosecutor v Kordic and Cerkez*, IT-95-14/2-T, 26 February 2001.

<sup>288</sup> Article 8, Rome Statute.

<sup>289</sup> Article 8(2)(a), Rome Statute.



#### 4.4 Duress

Duress is an unorthodox inclusion in the Rome Statute given the dubiety over its existence and application in customary international law and the lack of general principles on the matter. The argument has been made<sup>290</sup> that the defence as drafted in the Rome Statute conflates the concepts of duress and necessity, combining elements of both defences into a unified defence of compulsion to act. The crux of the defence is that the individual succumbed to a force greater than he could withstand and thereby committed the crime. The origin of the threat of force then delineates whether the defence ought to be considered duress or necessity: necessity is where the threat tends to be as a result of circumstance, or a natural threat, whereas duress is created a result of a threat made by another individual. The defence of duress within the Rome Statute constitutes a ground for the exclusion of criminal responsibility where the act was ‘caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person,’<sup>291</sup> thereby including that which threatens other individuals as well as the actor directly. The limitations on such threats are that the avoidance of the threat must be necessary and reasonable,<sup>292</sup> and that of proportionality: that the harm caused must not be greater than that which is avoided. The last aspect is the unification of duress and necessity, in that the threat can be ‘made by other persons’<sup>293</sup> or ‘constituted by other circumstances beyond that person’s control.’<sup>294</sup> The inclusion of the defence of duress within the Rome Statute is thought to be reaction against the majority judgment in the ICTY case of *Erdemovic*,<sup>295</sup> which rejected the admissibility of a full defence of duress in respect of murder as a war crime, citing the lack of a customary rule stating that duress is a full defence to murder in international law.<sup>296</sup>

There are a few difficulties with the inclusion of this defence in particular, not least of all Scaliotti’s criticism stemming from ‘several writers, including Bassiouni and Eser...stress(ing) that necessity occasioned by natural factors is hardly conceivable as a defence to international crimes, and it is difficult to foresee under what circumstances it could justify or excuse

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<sup>290</sup> J. D. Ohlin, *The bounds of necessity*, J.I.C.J. 6 (2008) 289-308.

<sup>291</sup> Article 31(1)(d), Rome Statute.

<sup>292</sup> Article 31(1)(d), Rome Statute.

<sup>293</sup> Article 31(1)(d)(i), Rome Statute.

<sup>294</sup> Article 31(1)(d)(ii), Rome Statute.

<sup>295</sup> IT-94-22-A, 6 October 1997.

<sup>296</sup> IT-94-22-A, 6 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vorah at para 48.

international crimes.<sup>297</sup> The implausibility as to the circumstances which may give rise to the duress in the context of war crimes or crimes against humanity is not of central concern, but rather the reasoning underlying the removal of criminal responsibility on such a basis. There is firstly the issue that this part of the Rome Statute has sought to merge the different concepts of duress and necessity, thus creating a broader defence for serious violations of international criminal law. The separation of the defence into two categories, duress and necessity, becomes more significant when the second issue is tackled, that being the argument put forward by Dinstein. He notes that ‘the correct approach (in international law) is that no degree of duress can justify murder, let alone genocide’<sup>298</sup> and therefore the argued conflation of this defence creates further issues for the Rome Statute in that war crimes and crimes against humanity may now be justified because of the pressure under which the accused acted. Two issues thus arise. The first issue is that the defence apparently conflates duress and necessity<sup>299</sup> as concepts, failing to distinguish the former as an excuse and the latter as a justification.<sup>300</sup> The issue of classifying duress and necessity as justifications or excuses will be dealt with in this work at a later stage, in chapter six, where it is of greater relevance. For this purpose, it is the fact that both concepts have been included as full defences, completely excluding criminal responsibility if accepted, is problematic. This article has been much criticised as a result, indicating that the resulting provision ‘was mainly an effort to combine duress and necessity.’<sup>301</sup> Scaliotti notes that, in the opinion of Albert Eser, it is ‘one of least convincing provisions (of the Rome Statute), as it tried to combine the concepts of justifying necessity and merely excusing duress in an ill-guided and lastly failed attempt.’<sup>302</sup> The distinction here is made between the fully exonerating effect of necessity, which tends to be characterised as an unavoidable set of circumstances beyond the actor’s control, and the relief provided for the actor in the case of duress, where he took the decision to commit a criminal act in extremely constrained circumstances. It is also relevant that other constrained circumstances, such as being issued with illegal orders, did not previously offer any relief from criminality for the actor, as was the case with the Charter of the International Military Tribunal, which expressly prohibited the use of the defence of superior orders.<sup>303</sup>

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<sup>297</sup> M. Scaliotti, *Defences before the International Criminal Court: substantive law – part 1*, 1. Int’l. Crim. L. Rev (2001) 111-172, 146.

<sup>298</sup> Y. Dinstein and M. Tabory (ed.) *War crimes in international law*, Kluwer Law International, 1996 at 11.

<sup>299</sup> J. D. Ohlin, *The bounds of necessity*, J.I.C.J. 6 (2008) 289-308.

<sup>300</sup> *Ibid.* at 292.

<sup>301</sup> M. Scaliotti, *Defences before the International Criminal Court: substantive law – part 1*, 1. Int’l. Crim. L. Rev (2001) 111-172, 155.

<sup>302</sup> *Ibid.*, 155.

<sup>303</sup> Article 8, Charter of the IMT at Nuremberg 1945.

The second issue is whether any such defence may justify the crimes within the jurisdiction of the International Criminal Court, answered in the negative by Dinstein.<sup>304</sup> Given the previous disinclination in customary international criminal law for the transfer of criminal responsibility as a result of circumstance, it is striking that the Rome Statute has chosen to include such defences in its purview. However, as noted above the majority decision in *Erdemovic*<sup>305</sup> may have precipitated the proposed change. Indeed Antonio Cassese's dissenting opinion in that case is often cited as the reason for the adoption of this particular provision. Cassese, when delivering his dissent from the majority on the predicament of the young soldier who had complied with the direction to murder civilians when threatened with death and harm to his family, provided the compelling argument that the law 'should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards.'<sup>306</sup> His reasoning was largely based on German cases following the Second World War, which had applied international law by and large,<sup>307</sup> and Italian cases, again following the Second World War, concerning those who had followed instructions to shoot partisan fighters.<sup>308</sup> The precedent set by these cases indicated that duress be allowed if a refusal to fight would be tantamount to martyrdom, where the victims would still be killed regardless. The compelling nature of the argument, however, does not answer the question of whether serious crimes can ever be legally committed under compulsion. It also does not separate a finding of guilt from punishment; in the case of duress or necessity, a finding of guilt may be of the utmost importance in terms of recognising the harm committed to the victim, to society and in recognising the importance of maintaining the rule of law even under pressure. This provisions does not countenance that it may not be necessary to punish an individual who lacked the requisite intention to cause the harm which resulted from his actions, but may be appropriate to find him guilty.

#### 4.5 Mistake

Mistake is included in the Rome Statute under a separate article from the four defences outlined in Article 31, but the reference to an exclusion of responsibility remains. Article 32

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<sup>304</sup> Y. Dinstein and M. Tabory (ed.) *War crimes in international law*, Kluwer Law International, 1996, 11.

<sup>305</sup> IT-94-22-A, 6 October 1997.

<sup>306</sup> IT-94-22-A, 6 October 1997, Cassese dissent, para 47.

<sup>307</sup> *Ibid.*, paras 36 and 37.

<sup>308</sup> *Ibid.*, para 35.

holds that both mistakes of fact<sup>309</sup> and law<sup>310</sup> may exclude criminal responsibility. A mistake of fact made by an individual seeking to rely on the defence will only exonerate his conduct should it ‘negate(s) the mental element required by the crime.’<sup>311</sup> A mistake of law, however, is more narrowly construed and an individual cannot rely on his ignorance as to whether the conduct committed was a crime within the jurisdiction of the Court. Rather, it must also nullify ‘the mental element required by such a crime’<sup>312</sup> in order to be grounds for excluding criminal responsibility. The inclusion of both has been attributed by Scaliotti on ‘similarity of the result’<sup>313</sup> rather than any theoretical position and that if one should be included, an individual should not be punished in either case for not intentionally committing the crime. Therefore the similarity between the defences is the fact that the individual did not intend to commit the crime, and accordingly lacked the requisite *mens rea* to incur full criminal responsibility for the act.

*Prima facie* the inclusion of such a defence in the Rome Statute appears appropriate, providing such orders are not manifestly illegal. Indeed, where orders are manifestly illegal, Dinstein quoting Lauterpacht noted that ‘there is no room for mistake’<sup>314</sup>; that an obviously illegal order is not one which should find relief in the shade of the defence of mistake of law, as codified. The idea of the defence of mistake, of both fact and law, is therefore inextricably linked to the intention to commit a criminal act. In the context of the Rome Statute, this is to be found in the mental element provisions of Article 30. The first issue to be explored, therefore, is whether mistake as a defence is an unnecessary addition to the Rome Statute in light of the requirement for intent. Another relevant point to be discussed is the potential confusion between the ‘mistake’ in relation to the law or facts, and the illegality of the order. This shall be discussed in reference to a potential case, as well as whether it actually adds anything given the requirements for the mental elements of crimes within the Rome Statute.

Under Article 30, in order for an individual to be guilty of a crime under the jurisdiction of the Rome Statute, it is necessary for that individual to have both ‘intent and knowledge.’<sup>315</sup> Intent is then defined by the Article where the person ‘means to engage in the conduct’<sup>316</sup> and has awareness that the action committed will ‘cause that consequence, or is aware that it will

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<sup>309</sup> Article 32(1), Rome Statute.

<sup>310</sup> Article 32(2), Rome Statute.

<sup>311</sup> Article 32(1), Rome Statute.

<sup>312</sup> Article 32(2), Rome Statute.

<sup>313</sup> M. Scaliotti, *Defences before the International Criminal Court: substantive law - part 2*, 2. Int’l. Crim. L. Rev (2001) 1-46, 13.

<sup>314</sup> Y. Dinstein, *The defence of ‘obedience to superior orders’ in international law*, Slijthoff-Leyden, 1965, 105

<sup>315</sup> Article 32(1), Rome Statute.

<sup>316</sup> Article 32(2)(a), Rome Statute.

occur in the ordinary course of events.’<sup>317</sup> Knowledge is then further defined as ‘awareness that a circumstance exists of that the consequence will occur in the ordinary course of events.’<sup>318</sup> This sets, as Schabas indicates, ‘the highest standard for fault’<sup>319</sup> on the part of the actor, as the two requirements appear to create a high threshold for the commission of a crime under the Statute. It is also clear to see that there is significant overlap between the two concepts,<sup>320</sup> but ensures that the Rome Statute is reasonably limited in its application, by focusing the Prosecutor’s attention on those who are truly blameworthy in the conflict. The height of this threshold almost appears to make the defence of mistake appear superfluous, as it is difficult to imagine an individual who makes a mistake, either in fact or in law, guilty of an offence under the Statute in light of the extensive provisions on *mens rea*. Intent in this context is watertight; it does not appear to be possible to make a mistake and still incur criminal responsibility under the Statute, as the individual would either lack the requisite knowledge regarding the effect of his actions, or fail to meet the requirements of intention in ‘meaning to cause’ the crime in question.

This argument is better explained in the context of a problem which illustrates the issues relating to the inclusion of mistake as a defence. Heller<sup>321</sup> has noted three cases<sup>322</sup> in which Article 32 may apply, one being a mistake of fact, where civilians are misidentified as soldiers and attacked as legitimate targets. The second is that of a mistake of law, where the accused believed that civilians could be legitimately attacked during war, and the third being a mixed situation, identified as a ‘mistake of legal element.’<sup>323</sup> In the example for the third situation, the soldier attacks a civilian group on the basis of a mistaken notion that a group must be ‘purely’ civilian to receive protection and the presence of some soldiers makes it a legitimate target. The work notes that Article 32 appears to extend to some situations in which mistake of legal element plays a role<sup>324</sup> and that this therefore extends the scope of the exclusion of criminal responsibility, in an unjustifiable way in the opinion of Heller.<sup>325</sup>

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<sup>317</sup> Article 32(2)(b), Rome Statute.

<sup>318</sup> Article 32(3), Rome Statute.

<sup>319</sup> W. Schabas, *General principles of criminal law in the International Criminal Court Statute (part III)*, 6 Eur. J. Crim., Crim. L. & Crim. Just. 400-428 1998, 419.

<sup>320</sup> R. Clark, *The mental element in international criminal law: The Rome Statute of the International Criminal Court and elements of offences*, Crim. L.F. 2001, 12(3), 291-334, 302.

<sup>321</sup> K.J. Heller, *Mistake of legal element, the common law and article 32 of the Rome Statute*, 6 J. Int. Crim. Just. 419-445.

<sup>322</sup> *Ibid.*, 420.

<sup>323</sup> *Ibid.*, 420, quoting K.W. Simons, *Mistake and Impossibility, Law and Fact, and Culpability: A Speculative Essay*, 81 Northwestern Journal of Criminal Law and Criminology (1990) 447-517, 458.

<sup>324</sup> *Ibid.*, 421.

<sup>325</sup> *Ibid.*, 445.

Returning to the original link between the mental elements required by the Rome Statute and the defence of mistake, it is difficult to see that any of the above cases would require or allow the admission of the defence itself. The requirement in the Rome Statute of ‘intent *and* knowledge’<sup>326</sup> means that both must be proved in order for an individual to be guilty. In this first instance, the individual lacks the requisite knowledge, in that he is not aware that ‘the circumstance exists.’<sup>327</sup> It cannot be said that he intends to kill civilians as he does not know that the group identified are civilians in the first instance. The crime is therefore not committed under Article 30 before any relevant defences are involved. In reference to the second scenario, it is scarcely conceivable that an individual in this instance would not be committing a war crime nor entitled to any relief from responsibility in any case. A soldier who does not know that civilians are to be protected in time of war is one who should not have carefully constructed provisions to shield him from the law; he is not expected to be a ‘scholar of international law’<sup>328</sup> but the law that prohibit soldiers from deliberately targeting civilians is not one which is particularly difficult to identify. The role of the soldier is to protect; the situation above demonstrates ignorance of the law rather than a mistake. In the case of the third situation, again the situation is one of ignorance of the law rather than mistake. Although these examples are hypothetical, there must be a degree of realism applied. Soldiers operating in the environment of a conflict are not to be considered simple or immature across the board. Part of the duty of the operative is to understand the bounds of his authority to act, with no excuse for ignorance. As ignorance is no defence, it is difficult to envisage the context in which the full defence of mistake could be utilised.

#### 4.6 Superior orders

The inclusion of a defence of superior orders has been viewed variously by jurists, with some noting it as a break with the Nuremberg tradition of excluding superior orders as a defence<sup>329</sup> and others citing it as the proper ‘restoration’<sup>330</sup> of a previously accepted doctrine in international military law. The defence itself is not simply ‘restored’ however in a general fashion to all crimes under the State, but is carefully circumscribed to apply singularly to war

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<sup>326</sup> Article 30(1), Rome Statute.

<sup>327</sup> Article 30(3), Rome Statute.

<sup>328</sup> Y. Dinstein, *The defence of ‘obedience to superior orders’ in international law*, Slijthoff-Leyden, 1965 at 200

<sup>329</sup> Article 8, Charter of the IMT at Nuremberg 1945.

<sup>330</sup> H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394, 386.

crimes.<sup>331</sup> A three-part test must be met in order for the defence to be admissible, that being the legal requirement of the individual to follow orders of a superior,<sup>332</sup> that the individual was unaware of the illegality of the instructions<sup>333</sup> and that the order itself was not ‘manifestly unlawful.’<sup>334</sup> The Article then restricts the application of the defence to charges of war crimes, on the grounds that ‘orders to commit genocide or crimes against humanity are manifestly unlawful.’<sup>335</sup> At Nuremberg, the defence was reduced to a plea in mitigation, indicating that an individual who followed orders may plead mitigating circumstances in order to lessen the punishment for the crime. However the argument has been made that Nuremberg had redacted the defence to such a plea, and that the Rome Statute has now arguably been ‘restored’ it to fully relieve criminal responsibility from the individual.

There are a number of issues inherent in creating a full defence of superior orders, not least of all the concern enunciated by the drafters of the Charter of the International Military Tribunal for Nuremberg of a ‘system of infinite regression’<sup>336</sup> in relation to responsibility. This criticism is no less pertinent now, despite the absence of Hitler’s doctrine of absolute obedience,<sup>337</sup> as the military ultimately functions on the basis of obedience to orders. There are therefore a number of contentious issues to be explored in relation to the inclusion of this defence, which for reasons of time and space will not be discussed here. The most pertinent is the discussion of whether the defence truly has been ‘restored’ as argued above, or whether it has been augmented from a plea in mitigation to a defence. The consequences of this perceived augmentation for criminal responsibility will also be discussed.

The idea of superior orders as a full defence was removed by the Charter for the International Military Tribunal at Nuremberg as part of an ancillary support to the doctrine of individual criminal responsibility and in a bid to avoid the mass release of Nazi war criminals, able to rely on the *Fuhrerprinzip* to escape responsibility<sup>338</sup> for their contribution to the atrocities committed. Instead, the Charter permitted superior orders to be used as a plea in mitigation,<sup>339</sup> which allowed the Tribunal to reduce the sentence accordingly. Prior to this,

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<sup>331</sup> Article 33(2), Rome Statute.

<sup>332</sup> Article 33(1)(a), Rome Statute.

<sup>333</sup> Article 33(1)(b), Rome Statute.

<sup>334</sup> Article 33(1)(c), Rome Statute.

<sup>335</sup> Article 33(2).

<sup>336</sup> H. McCoubrey, *From Nuremberg to Rome: Restoring the defence of superior orders*, I.C.L.Q. 2001, 50(2), 386-394, 389.

<sup>337</sup> See B.F. Pauley, *Fascism and the Fuhrerprinzip*, Central European History, 12(3), Sept. 1979 272-296.

<sup>338</sup> J. Maogoto, *The superior orders defence: A game of musical chairs and the jury is still out*, 10 Flinders J. L. Reform 182-210 2007, 193.

<sup>339</sup> Article 8, Charter of the International Military Tribunal at Nuremberg 1945.

it has been acknowledged that the concept of refuting full responsibility on the grounds of superior orders was recognised as a customary rule in international law, evidenced by reference to military manuals.<sup>340</sup> Two approaches were acknowledged to exist in national military laws: conditional liability and absolute liability. Cryer<sup>341</sup> identifies the former as being the British approach, while the latter is that of the United States. He also argues that the customary rule was that a soldier cannot rely on the defence where he was aware of the illegality; where he was argued to have 'known or should have known'<sup>342</sup> that the order was illegal. The latter doctrine was espoused by the Tribunals following the Second World War and the former can be seen in the Rome Statute. Absolute liability dictates that the individual will be held responsible for his conduct regardless of the existence of superior orders which he was bound to follow, whereas conditional liability relies on the 'manifest illegality' test, offering the individual relief from criminal responsibility where it was not clear that the order followed violated the laws of war.

Dinstein's metaphor of superior orders as a 'shield'<sup>343</sup> which a soldier might use as protection against the law is useful in demonstrating the problem of superior orders as a defence, while equally demonstrating its value as a plea in mitigation.<sup>344</sup> Soldiers cannot be expected to question every order, but are not robotic and ought to be aware of the illegality of certain orders. It is not to place soldiers in an impossible situation, but rather to ensure that proper accountability is achieved for the commission of any international crimes. The Rome Statute has not therefore 'restored' the defence of superior orders as such, but created a full defence where a plea in mitigation existed previously. The usefulness of superior orders as a plea in mitigation is undermined, as the rejection of a full defence leaves the individual unable to seek any relief for the difficult situation in which they may have been placed. It also leaves open the possibility of directly undermining the doctrine of individual criminal responsibility more than any of the other defences in the Rome Statute, as it permits the direct transfer of responsibility on the basis of rank. The use of the manifest illegality test and the limitation of the use of the defence to war crimes further demonstrate the attempt to make the defence more circumspect when it may be more appropriate, and more humane in its application, as a plea in mitigation.

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<sup>340</sup> P. Gaeta, *The defence of superior orders: The Statute of the International Criminal Court vs Customary International Law*, E.J.I.L. 1999 (10) 172-191, 176-7.

<sup>341</sup> R. Cryer, *The boundaries of liability in international criminal law, or 'selectivity by stealth,'* J. Conflict & Sec, L. 3-31 2001, 12.

<sup>342</sup> *Ibid.*, 3.

<sup>343</sup> Y. Dinstein, *The defence of 'obedience to superior orders' in international law*, Slijthoff-Leyden, 1965, 5.

<sup>344</sup> The use of superior orders, or any of the other defences, as a plea in mitigation is not precluded by the Rome Statute.



It is worth noting that the Rome Statute does not appear entirely comfortable with the concept of superior orders as a defence: the idea is set apart in its own article from the other grounds excluding responsibility,<sup>345</sup> and different language is used, that being the ‘relie(f)’<sup>346</sup> of criminal responsibility. This points to a possible chasm between the justifying effects of the exclusionary defences and that which relieves criminal responsibility, and overall demonstrates the incongruity between the defences and the crimes under the jurisdiction of the Rome Statute. It is clear that the idea of superior orders being restored is an interesting concept, but for true restoration to the customary position, it ought to have been included as a plea in mitigation, rather than a full defence to exonerate the accused.

The purpose of this part of the study was to avoid a repetitive restatement of the literature<sup>347</sup> on the defences within the Rome Statute and to outline the issues with supplying the defences in such terms within the Statute. More than anything, the aim was to demonstrate that the Rome Statute, in this area, has attempted to create law by fashioning defences with a narrower definition than previously existed. In doing so, the drafters have relied upon defences which are arguably ‘unique’ to international criminal law, such as superior orders, and those which can be said to have a ‘counterpart’ in domestic criminal law, such as duress and mistake. Overall, it can be seen that some systems of domestic law, through custom and general principles, have played a decisive role in the selection of defences which were identified for inclusion within the Statute.

The defence of mental incapacity, as outlined by the Statute, indicates that an impairment which destroys an individual’s capacity to understand the unlawfulness of their conduct will constitute grounds for the exclusion of criminal responsibility. The inclusion of this defence implies a direct transposition from domestic to international law which is not entirely appropriate and this tension is reflected in the idea that the high threshold may necessarily preclude the defence, as an individual with such a serious mental impairment may not be fit to stand trial. The defence also makes no allowances for diminished responsibility as a

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<sup>345</sup> Article 33, Rome Statute.

<sup>346</sup> Article 33(1), Rome Statute.

<sup>347</sup> M. Scaliotti, *Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility*, Part I, 1 Int’l Crim L Rev, 111-172; M. Scaliotti, *Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility*, Part I, 1 Int’l Crim L Rev, 111-172; A. Eser, *Article 31: Grounds for excluding criminal responsibility*, 863-893 in O. Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, Hart, 2008; W. Schabas, *An introduction to the International Criminal Court*, Cambridge University Press, 2007.

ground for mitigation of punishment, leaving a wide gap between the full defence and full attribution of criminal responsibility.

Intoxication appears to be equally transplanted from domestic law, although in a controversial fashion as many jurisdictions do not admit voluntary intoxication as a full defence. The jurisprudence from the ICTY appears to have been followed in this instance, holding that involuntary intoxication ought to function as a ground for excluding criminal responsibility. However the gap between intoxication as a ground for mitigation and a defence again may create problems, as the intoxication must ‘destroy’ the individual’s capacity to understand the unlawfulness of their conduct. It also conflicts with rulings of the Gacaca courts on the defences available for a charge of genocide, which are persuasive in their contribution to the development of international criminal law in the context of defences.

Self-defence is recognised in international and national law, as a full defence whereby an individual may commit a crime to prevent unlawful force being used against him to his severe injury or death. This defence is well-established in international law and provides the only true balance between the rights of the victim and the rights of the accused in the context of defences; in other words, it represents the only situation in which there is no choice but to act. The expansive nature of this defence also reflects its legitimacy in national and international law.

Duress, and its objective counterpart, necessity, are included within the Statute in a slightly controversial fashion, given the lack of a customary rule in this area. However the ICTY ruling which arguably influenced the inclusion demonstrates more the appropriateness of including such grounds as pleas in mitigation to reduce the punishment, rather than full defences. A lack of consensus at the ICTY reflected the lack of consensus among States and the admission of a highly subjective ground such as duress as a full defence simply cannot be argued to be compatible with the seriousness of the crimes covered by the Rome Statute.

The inclusion of mistake as a defence within the Statute again gives rise to issues in relation to its admission as a defence. It is clear that mistakes can be made during operations in time of war, but it is not clear that such mistakes should automatically remove criminal responsibility. The three situations outlined above indicate that the defence would not be required in situations of factual mistake, as the mental element of the crime under Article 30

could not be proved. In other situations, it is difficult to see how these would not constitute ignorance of the laws of war rather than mistakes, given the burden placed on soldiers to protect civilians.

Finally, the defence of superior orders was held to have been ‘restored’ by the Rome Statute to its customary position. However, the defence applies only to war crimes and is so narrowly defined that its availability as a full defence is questionable. The use of superior orders as a plea in mitigation would have been a more humane ‘restoration’ of the defence, and more in keeping with customary principles. It is difficult to reconcile a full defence of superior orders with the liability tests present in national legal systems and the opportunity to codify superior orders as a plea in mitigation here was unfortunately missed.

The tension between the provision of these defences and the crimes within the jurisdiction of the Rome Statute is evident, given the high thresholds set by the wording in Articles 31-33. The confidence demonstrated by the expansive wording of the provisions of self-defence indicate that it may be the only true justification within the Statute, with the rest reflecting some provisions from national law that have been transplanted, and that do not fit congruously with the purpose, requirements and, often, the context of international criminal law.

## Part II

Using duress to exclude criminal responsibility for war crimes and crimes against humanity

Following on from the conclusion of the previous part with the problems inherent in the defences in the Rome Statute, the second part to the argument begins by isolating the defence of duress in the Rome Statute as the most problematic ground on which to exclude criminal responsibility. There are particular problems associated with permitting a defence of duress in relation to serious violations of international criminal law. Specifically the defence is too flexible and broad, the idea of internal or external pressure too vague and immeasurable to permit the release from criminal responsibility. The case is amply demonstrated by the first chapter in this part, which takes a look at the defence of duress to a charge of murder in a number of different jurisdictions. Although the defences are closely related, many jurisdictions separate the concepts: duress is where a threat is made, usually by a third party, and the criminal act is a consequence of acting under pressure: the individual acts, literally, with a gun to his or her head. However, necessity is where the individual judged the situation to require his or her criminal action, usually where the situation was beyond his or her control. This usually relates to natural disasters or accidents; being lost at sea and seeking to murder a companion in order to eat him and survive is one example of a situation in which one may argue 'necessity'. The comparative nature of the study uncovers a lack of general principles in this area, as well as demonstrating a general reluctance on part of a number of national jurisdictions to permit the killing of another while under pressure, from unusual and pressured circumstances or due to a threat.

The next part explores duress as a defence in the Rome Statute. The drafters have chosen to unite the concepts of duress and necessity, often viewed as separate defences at the domestic level and install it in the Statute as a full defence, leading to a complete acquittal for those who successfully plead it. The idea of duress is explored and the problems associated with classifying duress as a full defence for such serious crimes is discussed, against the backdrop of the comparative study. It also deals in detail with the case of *Erdemovic* before the International Criminal Tribunal for the former Yugoslavia, which dealt with the idea of duress as a defence to war crimes and crimes against humanity in detail. The Appeals Chamber in that case rejected, by a narrow majority, the applicability of the defence for such serious offences but a compelling and influential dissent by Judge Antonio Cassese was made, which appears to have had a greater influence than the majority verdict. This part also deals with the idea of duress as a means of completely exonerating the individual from responsibility, arguing that the continued influence of a 'hard case' such as that of *Erdemovic*

on the law is not conducive to the central aim of international criminal law: the avoidance of impunity. As such, the final part to this thesis discusses the ways in which the inclusion of defences may be interpreted by the Court, or even reformed.

## **5. Killing under pressure: A study of the availability of the defence of duress to a charge of murder in a number of national jurisdictions**

- 5.1 England and Wales
- 5.2 United States
- 5.3 France
- 5.4 Germany
- 5.5 South Africa
- 5.6 Is there a general principle of duress as a defence?

The relevance of national law to international criminal law, as demonstrated in chapters two and three, clearly explains the characterisation of the discipline as a ‘fusion’<sup>348</sup> between international law and domestic criminal law. The problem of duress at the international level, as dealt with by the previous chapter, should thus be explored by reference to domestic law. The purpose of this chapter is to undertake a comparative analysis of the availability of the defence of duress to a charge of murder. The defence of necessity may also be discussed, as the defences have been unified by the Rome Statute, and it can sometimes be the case that necessity is available as a defence to murder where duress is unavailable. In general, however, the focus will be on duress.

The jurisdictions have been selected in order to represent a number of the systems which have exerted influence at the international level. These jurisdictions have influenced the codified provisions in others, or may have influenced the adoption of a common law system, making them the most relevant to study for the purpose of identifying a general principle in international law. The idea behind this chapter is not to argue that domestic and international provisions ought to be directly analogous, which is not the case. Rather it is put forward that international criminal law ought to represent standards which are not lesser than those applicable at a national level for serious crimes against the person, particularly murder, in the context of serious violations of international criminal law.

To make the study relevant in the context of serious violations of international criminal law, the use of the defence, or defences, will be examined in relation to the most serious crime against the person: responsibility for the death of another individual. This means that the defence, or defences, will only be discussed where they are available for murder, or killing. It is acknowledged that the defence of duress may be available in these jurisdictions for other

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<sup>348</sup> I. Bantekas and S. Nash, *International criminal law*, Routledge Cavendish, 2007, 1.

crimes, but its application will only be discussed insofar as it is available for murder or the domestic equivalent to manslaughter or culpable homicide. This part of the discussion aims to support the argument that it may not be compatible to permit a defence of duress or necessity at an international level if there is a lack of a general principle at the national level for a similarly serious type of crime against the person, on presumably a smaller scale. By restricting this chapter to the application of the defence to the crime of murder, the study focuses on the admissibility of defences to the most serious crime at a domestic level and allows the findings to be applied meaningfully in the context of serious violations of international criminal law at a later stage in the development of the thesis.

As discussed in chapter four, the Rome Statute unifies the concepts of duress and necessity.<sup>349</sup> In some domestic systems, duress and necessity are concepts with different theoretical roots and thus remain separate defences. This will be discussed in the context of each country later but, as a general introduction where this distinction applies, the following differences can be observed. Duress as a defence can be defined as where an individual acts as a result of internal pressure, such as that created by another individual threatening the first, and commits a criminal offence as a result. Necessity, on the other hand, can be deemed to relate to situations where an external pressure compels action, such as action required in the face of a natural disaster and the individual concerned commits a criminal offence. This distinction will be used, where relevant, in this study and both defences will be studied as a result of only one existing in some jurisdictions<sup>350</sup> and no distinction being made between the two in the criminal law of other jurisdictions.<sup>351</sup>

The jurisdictions which have been selected for analysis are England and Wales,<sup>352</sup> the United States, France, Germany and South Africa. These jurisdictions have been chosen both for their prominence at the international level and the effect which their legal systems have had on the development of law in other countries, in some cases as a result of colonisation<sup>353</sup> and in others as a result of influence.<sup>354</sup> For example, the European countries cited above have influenced the development of domestic criminal law in Asia and Latin America, and the focus of the selection was rather to ensure that both civil and common law systems were represented, as opposed to specific geographical areas. A brief sketch of each legal system,

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<sup>349</sup> Article 31(d), Rome Statute.

<sup>350</sup> For example, England recognises only the defence of necessity for the crime of murder (nominally) and renders inapplicable a defence of duress by threats for a charge of murder as either principal or accessory.

<sup>351</sup> For example, the defence of compulsion in South Africa extends to both internal and external pressures.

<sup>352</sup> As noted above, this shall be abbreviated to 'England'.

<sup>353</sup> The law in Senegal is based on French law, from which it gained independence.

<sup>354</sup> The Argentine system is based on French law, which it sought as inspiration.

outlining its sources and operation, will precede the main discussion of necessity and duress in each, avoiding presumed knowledge of each individual system. The sources highlighted will then be used to analyse the existence of an analogous concept to duress and necessity, highlighting the distinction, if any, between the two concepts at domestic law and the availability of either, both or the defence where unified to a charge of murder.

## 5.1 England

The English jurisdiction is based on common law, within which statute and legal precedent set by previous cases constitutes the body of the law. Thus there is no neat legal definition set within a code for what may comprise a defence of duress or necessity and the existence of the defences can be seen through discussion in legal literature and case law. English law recognises three defences which relate to the discussion at hand: necessity and two forms of duress: duress of circumstances and duress by threats.<sup>355</sup> Wilson thus notes that there is a clear distinction between necessity and the two types of duress, although holds that necessity has ‘crept into English law via backdoor of duress.’<sup>356</sup> However, this view may not be entirely correct, as English criminal law acknowledged the existence of a defence known as necessity long before either subdivision of duress was discussed, despite there being no specific definition of what it may constitute.<sup>357</sup> Necessity and duress remain distinct in modern texts<sup>358</sup> but traditionally, the courts have rejected all three defences as applicable to a charge of murder.<sup>359</sup>

The roots of the concepts can be found in the writings of James Stephen<sup>360</sup> who referred to situations of duress and necessity as ‘compulsion’ to commit an unlawful act, of which compulsion bears the greatest relation to duress.<sup>361</sup> Stephen’s initial identification of the concept in English law,<sup>362</sup> progressively referring to it as an excuse, but one which made no distinction between internal and external forms of compulsion, was published one year prior to the oft-cited case of *R v Dudley*.<sup>363</sup> In this case, the court analysed Stephen’s writings and declared the question before the court to be that of necessity, given that no threats from

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<sup>355</sup> J.W. Herring, *Criminal law: text, cases and materials*, Oxford University Press, 2012, 664 and N. Padfield, *Criminal law*, Oxford University Press 2008, 111.

<sup>356</sup> W. Wilson, *Criminal law: Doctrine and theory*, Longman, 1998 at 280.

<sup>357</sup> J. Stephen, *History of the criminal law of England*, 1883, vol. 2 at 108.

<sup>358</sup> J.W. Herring, *Criminal law: text, cases and materials*, Oxford University Press, 2012, 656-664; 665-668 and N. Padfield, *Criminal law*, Oxford University Press 2008, 103 and 107.

<sup>359</sup> *R v Dudley and Stephens* [1884] 14 QBD 273.

<sup>360</sup> J. Stephen, *Digest of the criminal law*, 1887.

<sup>361</sup> J. Stephen, *History of the criminal law of England*, 1883, 108.

<sup>362</sup> J. Stephen, *History of the criminal law of England*, 1883, 108.

<sup>363</sup> *R v Dudley and Stephens* [1884] 14 QBD 273.



another individual were involved. The court held in this instance that it had not been, under the circumstances, any more necessary to kill the weaker boy than any of the other occupants of the boat,<sup>364</sup> and from this perspective the issue appears to be that taking the path of least resistance, namely killing the weakest member of the group, denied the defendants the opportunity of claiming necessity as their defence. The court went on further to hold that the admission of such a defence in balancing one life against another would create an ‘awful danger,’ given the difficulty of judging what might be necessary to whom in which circumstances.<sup>365</sup> Stephen’s<sup>366</sup> view that the defence should be decided upon at the present moment was followed in this case and the issue was not that necessity was unavailable, but rather did not apply in those circumstances. The statement that English law demands heroism in a situation of necessity is inaccurate,<sup>367</sup> precisely because the killing in this case was not any more necessary than the killing of any of the other men. Each life was of equal value and accordingly no one life had a greater right to subsist than the other where the issue of self-defence against an aggressor did not arise.

The concept of necessity was also used to justify a member of the court’s ruling in favour of the separation of conjoined twins in the *Re A (Children)*<sup>368</sup> case. In this case, Brooke LJ based its reasoning on the elements of Stephen’s formulation of necessity, in which he identified a ‘doctrine’<sup>369</sup> of necessity, in which instance an individual may be acquitted of a crime on the grounds that he or she acted as the result of pressure. Brooke LJ concludes that the three requirements of Stephen’s doctrine of necessity were met in this instance and thus that the separation of the twins was justified in law. This demonstrates that the defence of necessity may be available as a defence to murder in ‘circumstances like these.’ Brooke LJ concluded that

*‘there need be no room for the concern felt by Sir James Stephen that people would be too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases, at the risk of other people’s lives. Such an operation is, and is always likely to be, an exceptionally rare event.’*<sup>370</sup>

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<sup>364</sup> *R v Dudley and Stephens* [1884] 14 QBD 273, 288.

<sup>365</sup> *Ibid.*, 287.

<sup>366</sup> J. Stephen, *History of the criminal law of England*, 1883, vol. 2, 108.

<sup>367</sup> J. Burchell, *South African Criminal Law and Procedure: Volume I- General Principles of Criminal Law*, Juta, 2011, 162.

<sup>368</sup> *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam. 147.

<sup>369</sup> *Ibid.*, Brooke LJ, para 219.

<sup>370</sup> *Ibid.*, 240.

Thus the unfortunate and inevitable death that would result following the operation did not require the use of a defence by the surgeons, and rather ought to have been carried out on the grounds of necessity for the preservation of the life of the healthier twin. This line of argument was further supported by the later case of *Nicklinson*.<sup>371</sup> In this case, it was held by the court that a defence of necessity would not be available to anyone who helped Mr Nicklinson to commit suicide, where he was unable to do so independently as a consequence of the degenerative condition from which he suffered. The court affirmed that there was no common law or codified defence of necessity or duress to murder,<sup>372</sup> and thus neither would apply where the charge was of actively assisting a person to commit suicide.

The existence of the doctrine of necessity in English law, where there is a risk of 'consequences' which could lead to an 'irreparable and inevitable' evil is therefore unchallenged; the consequences of creating any rule must always be considered before the rule is applied. Because of this, its applicability to a charge of murder is something which must be declared by Parliament, as the current common law defence does not extend to cover such situations.

Thus, the notion of necessity in English law is separate from that of duress. Stephen's concept of compulsion bears the greatest relation to the modern concepts of duress of circumstances and duress by threats, and his unified version of the defences has much in common with the Rome Statute's definition of duress in that there is no distinction made on the basis of the source of the threat which requires the individual in question to commit the unlawful act. However, he notes that the defence is only available to those who were supporting the principal to carry out the act by aiding and abetting.<sup>373</sup> The courts have applied Stephen's ideas, refining the concepts into separate ideas which are distinguished by the source of the threat. Most recently, duress by circumstances has been acknowledged as a form of necessity<sup>374</sup> and there is much to suggest that the modern law holds that necessity is only available where duress of circumstances can be proved,<sup>375</sup> demonstrating a lack of clear distinction between the concept of necessity and the idea of duress of circumstances. Neither would be available at present for a charge of murder and the above cases generally relate to driving offences, where the defence may be used.

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<sup>371</sup> *R (on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin).

<sup>372</sup> *Ibid.*, Toulson LJ., para 84.

<sup>373</sup> J. Stephen, *Digest of the criminal law*, 1887, 23.

<sup>374</sup> *R. v Sasikaran Selvaratnam* [2006] EWCA Crim 1321.

<sup>375</sup> *R. v Conway* [1989] Q.B. 290.

The defence of duress by threats is much more distinct and far more contentious than that above. The definition of duress has not been dealt with extensively by the courts and more serious cases tend to focus on its applicability, rather than the extent to which the individual has been threatened. The judgment in *Howe*<sup>376</sup> relies on the definition written in Hale's pleas of the Crown,<sup>377</sup> which holds that there has to be a 'fear of death' threatened by another individual compelling the accused to act. The case of *Hudson*<sup>378</sup> holds that the question is really one of whether the will of the accused was 'overborne', which is an issue of proof to be decided by the jury.<sup>379</sup>

The defence was raised again in the case of *Lynch*<sup>380</sup> where it was held that it could be available to an individual aiding and abetting the commission of a murder, on the basis that *'a man who is attacked is allowed within reason to take necessary steps to defend himself. The law would be censorious and inhumane which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys.'*<sup>381</sup> The subsequent case of *Abbott*<sup>382</sup> rejected outright the defence on the grounds that the accused had been a principal actor in the murder, in which it was argued that accepting the defence would have constituted creating a new defence to the crime of murder.<sup>383</sup>

The notable case of *Howe*<sup>384</sup> discussed extensively the idea of the defence of duress to a charge of murder for both the principal and any who had aided and abetted his or her action. *Howe* formally overturned the judgment in *Lynch*, removing the possibility that duress by threats could ever be used as a defence to murder. Lord Hailsham held:

*"In general, I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest, as did the majority in Lynch and the minority in Abbott that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in Dudley and Stephens. But many will not, and I do not believe that as a "concession to human frailty" the*

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<sup>376</sup> *R v Howe* [1987] A.C. 417, 453.

<sup>377</sup> *R v Howe* [1987] A.C. 417, Opinion of Lord Hailshaw, 427.

<sup>378</sup> [1971] 2 Q.B. 202.

<sup>379</sup> [1971] 2 Q.B. 202, 206.

<sup>380</sup> [1975] A.C. 653.

<sup>381</sup> *Ibid.*, Lord Morris of Borth-y-Gest, 671.

<sup>382</sup> [1977] A.C. 755.

<sup>383</sup> *R v Abbott* [1977] A.C. 755, 767.

<sup>384</sup> [1987] A.C. 417.

*former should be exempt from liability to criminal sanctions if they do. I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either "just or humane" which withdraws the protection of the criminal law from the innocent victim.*<sup>385</sup>

Following these cases, the English Law commission published a study of select defences, including duress.<sup>386</sup> This recommended that a statutory formulation of duress be passed and that it apply to murder as well as other offences.<sup>387</sup> An attempt was made to formulate a definition, which was contained in a draft Bill to the report, as follows:

*'A person shall be regarded for the purposes of this section as having taken any action under duress if he was induced to take it by any threat of harm to himself or another at the time when he took it he believed (whether or not on reasonable grounds) –*

- (a) That the harm threatened was death or serious personal injury (physical or mental);*
  - (b) That the threat would be carried out immediately if he did not take the action in question or, if not immediately, before he could have any real opportunity of seeking official protection; and*
  - (c) That there was no other way of avoiding or preventing the harm threatened;*
- Provided, however, that in all circumstances of the case (including what he believed with respect to the matters mentioned in paragraphs (a) to (c) above and any of his personal circumstances which are relevant) he could not reasonably have been expected to resist the threat.*<sup>388</sup>

However as of 2014, there has been no attempt to define duress within a statute.<sup>389</sup>

The definition created by the Law Commission report was considered and applied by later authority, although it was regarded as a narrow construction of the concept of duress.<sup>390</sup> The authority in question, *Howe*<sup>391</sup> ruled that the test for duress ought to be 'objective in part and subjective in part,'<sup>392</sup> reflecting part (c) of the definition above. The definition was generally met with approval by the bench in this case, but ultimately it was rejected where the

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<sup>385</sup> *Ibid.*, Lord Hailsham, 432.

<sup>386</sup> *Criminal law report on defences of general application*, Law Com. No. 83, Law Commission of England and Wales, 28 July 1977.

<sup>387</sup> *Ibid.* at 2.44.

<sup>388</sup> *Ibid.*, appendix 1, clause 1.

<sup>389</sup> A 2005 Law Commission report on Partial Defences to Murder declined to discuss duress as the last set of recommendations had not been implemented by Parliament.

<sup>390</sup> *R v Howe* [1987] AC 417.

<sup>391</sup> *Ibid.*

<sup>392</sup> *Ibid.*

individual had taken part in the murder of an innocent to protect his own life. The lack of statutory force behind the definition meant that the recommendation that Parliament ought to take steps to codify the defence, which is further supported by the judgment of Lord Mackay, which held that the decision was bound to leave inconsistencies in the law.<sup>393</sup>

This judgment creates further smoke around the concept by referring to another jurisdiction to determine the limits of the defence of duress to a charge of murder.<sup>394</sup> The unusual factor here is that the jurisdiction in question, South Africa, has a very different conception of duress and necessity from that of England. The criminal law of South Africa formulates duress and necessity as compulsion, and makes no differentiation between compulsion emanating from threats from an individual or from certain circumstances. The application of such a concept to the areas of duress and necessity would amalgamate previously separate conceptions of the defence. Interestingly, this draws the idea of necessity full circle, to its original definition as elucidated by Stephen.

## 5.2 United States

The United States is the second common law jurisdiction to be examined by this study. The sources of law are found in similar places, through statute and case precedent. Ultimate legal power is vested in the Supreme Court by the Constitution.<sup>395</sup> Federal law is therefore supreme over State law, but crimes are usually only prosecuted at the federal level where these have affected an interest which ought to be protected by the United States as a whole.<sup>396</sup> All fifty two States have their own criminal code, within which there can be a great deal of variation in approach to the same problems.<sup>397</sup> However all States ought to give due recognition and respect to the laws and precedents set in other States when making decisions,<sup>398</sup> despite the disparity between the codified laws of different States. Practice does not thus reflect this principle.

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<sup>393</sup> *R v Howe* [1987] AC 417 at 457.

<sup>394</sup> *R v Lynch* [1975] A.C. 653 at 683, referring to a South African case.

<sup>395</sup> Article III, Constitution of the United States of America.

<sup>396</sup> Such as the review of detention of suspected terrorists under the *habeas corpus* doctrine, see 8 USC sec. 1226a, 1 March 2012.

<sup>397</sup> P. Robinson, and M. Drubber, *The American Model Penal Code: A brief overview*, 10 New Crim. L. Rev. 319-341 2007, 320.

<sup>398</sup> Article IV(1), Constitution of the United States.

A study of each State's approach to duress and necessity therefore would not necessarily yield the representative theoretical picture of the jurisdiction that this chapter has as its aim. Therefore the focus of the discussion here will be on the US Model Penal Code,<sup>399</sup> analyses of legal theory provided by Anglo-American legal literature and cases which discuss duress and necessity at the Federal level. The Model Penal Code does not represent a statement of positive law, but marks an attempt by American legal scholars at understanding the bounds of the criminal law in the United States. It also prompted a certain volume of reform during the sixties and seventies of State criminal codes.<sup>400</sup> It should be noted, however, that both are considered to be common law defences<sup>401</sup> and that a certain 'legislative resistance'<sup>402</sup> exists to codifying the conception of necessity in US law. The limitations of such an approach to studying these concepts are acknowledged, but the influence of the Code on academic literature is evident.<sup>403</sup> The influence of other areas of criminal theory, such as the Anglo-American theoretical division of defences into justifications and excuses, is visible in the practice of law in the United States,<sup>404</sup> and so the influence of the Model Penal Code in academic literature may well have a greater relevance than such lawyers anticipate.

As with English law, the United States as a jurisdiction appears to distinguish between duress and necessity. The applicability of the defence of necessity to serious crimes has been tested in the *US v Holmes*,<sup>405</sup> which preceded the English *Dudley* case by four decades. This case centred on the prosecution of the sailor in charge of a sinking ship in which he threw passengers overboard at sea in a bid to lighten the load and save the rest. There followed an interesting discussion on the 'law of necessity'<sup>406</sup> and the difficulty of the situation was acknowledged as being rooted in its rarity, 'for law is made to meet but the ordinary exigencies of life.'<sup>407</sup> The concept of self-defence was also referenced<sup>408</sup> as a defence which might justify the taking of life.<sup>409</sup> Despite such deliberations, the court held ultimately that the

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<sup>399</sup> Drafted in 1962 by the American Law Institute. See Robinson, P., and Drubber, M., *The American Model Penal Code: A brief overview*, 10 New Crim. L. Rev. 319-341 2007.

<sup>400</sup> Robinson, P., and Drubber, M., *The American Model Penal Code: A brief overview*, 10 New Crim. L. Rev. 319-341 2007 at 320.

<sup>401</sup> *Commonwealth v Leno* 415 Mass. 835 (1993).

<sup>402</sup> M. Hoffheimer, *Codifying necessity: Legislative resistance to enacting choice-of-evils defences to criminal liability*, 82 Tul. L. Rev. 191-246 2007-2008, 243, speaking of certain, but not all, State jurisdictions.

<sup>403</sup> Revisions to State criminal codes such as those in New York and New Jersey were heavily influenced by the Model Penal Code; see s35 of the Criminal Code of New York, which provides a defence of necessity and justification in one, as in the Model Penal Code.

<sup>404</sup> *Commonwealth v Almeida* 381 Mass. 420 1980.

<sup>405</sup> 26 FedCas 360 (1842).

<sup>406</sup> *US v Holmes* 26 FedCas 360 (1842), 366.

<sup>407</sup> *Ibid.*

<sup>408</sup> *Ibid.*, 368.

<sup>409</sup> The distinction ought to be made between cases of necessarily taking innocent life, however, and necessarily reacting with force against an aggressor.

sailor was guilty and that there was no application of the law of necessity in such circumstances, as it is for such circumstances that a non-derogable prohibition on the taking of life exists.

The post-war case of *Flick et al.*<sup>410</sup> also raised the issue of the defence of necessity, specifically in relation to war crimes. Here the charges were of forced labour and slavery during the Nazi regime by companies, but the defence of necessity was held not to be precluded by the explicit rejection of a defence of superior orders within the Nuremberg statute.<sup>411</sup> However the charges here are not argued to be tantamount to murder, but simply that the case demonstrates the perception, discussed further in chapter three, that the defence of necessity may be available in respect of charges of war crimes.<sup>412</sup> It is of further value to note that duress was briefly mentioned, and the lack of further elaboration suggests support for a distinction between the concepts in the United States.

The defence of duress is available at the federal level,<sup>413</sup> and has not yet been ruled out as a defense to murder. There are two particular states which permit the use of duress as a defence to all charges of murder<sup>414</sup> and it does exist as a defence without explicitly set limits as to its application to a murder charge in American criminal legal theory.<sup>415</sup> It is characterised as an excuse in US law, in which the individual, if the criteria of the defence are satisfied, may be excused from criminal responsibility.<sup>416</sup> Duress has a closer connection to necessity in US law as they appear to be two sides of the same coin: both involve pressure, and where one excuses the conduct, the other defence justifies it. The *Flick* case would tend to demonstrate that tendency, with an open discussion of duress being rather obviously avoided in favour of distinguishing necessity as separate from any form of superior orders. Instead, a defence of being compelled to act in American law then becomes a question of whether the individual's actions were justified or excused. Thus the distinction is made between duress and necessity through the theoretical lens of justification and excuse. This

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<sup>410</sup> *USA v Flick*, US Military Tribunal Nuremberg, Judgment of 22 December 1947.

<sup>411</sup> Article 2(4)(b), Council Control Law No 10.

<sup>412</sup> In this case, some of the defendants were acquitted on the grounds of necessity, but two (Flick and Weiss) were convicted on account of the active way in which they pursued the contracts in order to secure slave labour.

<sup>413</sup> See *Dixon v. United States*, 548 U.S. 1 (2006).

<sup>414</sup> See R. Shankland, *Duress and the underlying felony*, J.Crim.L. & Criminology, 2009, 99(4) 1227-1258.

<sup>415</sup> See, *inter alia*, C.L. Carr, *Duress and criminal responsibility*, Law and Philosophy, 10(2) (May 1991) 161-188; J. Dressler, Duress, in J. Deigh, and D. Dolinko, *The Oxford Handbook of Philosophy of Criminal law*, Oxford University Press, 2011 at 269-298; D. Varona Gomez, *Duress and the anticolony's ethic: reflections on the foundations of the defense and its limits*, 11 New Crim. L. Rev. 615-644 2008.

<sup>416</sup> See S. Mulroy, *The duress defense's uncharted terrain: Applying it to murder, felony murder, and the mentally retarded defendant*, San Diego L.R. 43 (159), 2006 159-208.

will be discussed in more detail following an analysis of the relevant provisions of the Model Penal Code.

The inception of the Model Penal Code in 1962 appears to mark a scholarly embrace of the theoretical distinction between duress and necessity as being that of justification and excuse, rather than a formal separation. Duress is set apart within its own section of the Code,<sup>417</sup> but necessity is not explicitly referred to within the Code. The concept of defending an otherwise unlawful act as necessary is encapsulated within the justification defence, phrased as the ‘choice of evils’ defence.<sup>418</sup> Duress is characterised as an ‘affirmative’<sup>419</sup> defence in which the individual argues he acted because

*‘he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness would have been unable to resist.’*<sup>420</sup>

Here it is clear that the origin of the threat, emanating from the pressure of another individual rather than circumstance, identifies the defence as duress and not necessity. However this line of argument is confused when the choice of evils defence is examined. The defence is phrased thus:

*‘Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:*

- (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and*
- (b) Neither the Code nor other law defining the offense provides exceptions or defences dealing with the specific situation involved; and*
- (c) A legislative purpose to exclude the justification claimed does not otherwise plainly appear.’*<sup>421</sup>

Both defences specify that situations which have been created by the individual pleading the defence are excluded from their mutual reach<sup>422</sup> and a closer look at each reveals further similarities. Arguably the ‘conduct that the actor believes to be necessary’ could be such as a result of a threat stemming from another individual. The two defences are not mutually

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<sup>417</sup> 2.09, Model Penal Code.

<sup>418</sup> *Ibid.*, 3.02.

<sup>419</sup> *Ibid.*, 2.09 (1).

<sup>420</sup> *Ibid.*, 2.09 (1).

<sup>421</sup> *Ibid.*, 3.02 (1).

<sup>422</sup> 2.09 (2) and 3.02 (2), Model Penal Code.



exclusive but rather duress appears to be a specific case of necessity, which could simply be a development from English legal theory rather than a differentiation. There does appear to be a degree of overlap between the two defences and, interestingly, both defences can be raised at once.<sup>423</sup>

The distinction between the two remains that of one defence which functions as either a justification or an excuse, depending on the circumstances. The theme of justifications and excuses is prominent in US academic literature,<sup>424</sup> in which academic criminal law theorists have divided defences into justifications and excuses. Although there are many subtle variations within the academic arguments, justifications appear to link to relieving the act of criminality, whereas excuses absolve the individual of criminal responsibility in those specific circumstances. Milhizer characterises an excuse defence as ‘one which focuses on the actor and not the act. A defendant is excused when he is judged not blameworthy for his conduct’<sup>425</sup> despite where the conduct in question is harmful to others. His definition of a justification is then the converse, in that the act is deemed to be appropriate in the circumstances and thereby not a criminal offence.<sup>426</sup> This is further developed by Milhizer in identifying the otherwise criminal conduct in question as being good – ‘of benefit to society.’<sup>427</sup> It is this aspect of providing a justification of necessity which is most concerning in the context of homicide, particularly where the Model Penal Code’s variant of necessity requires the legislature to specify that there ought to be no justification for homicide. The common law crime of murder has not yet been excluded from the application of a defence in this way.

In the context of duress and necessity, duress is an excuse which frees the actor of responsibility, whereas necessity is a justification. The latter applies to a moral choice made which was ‘infinitely the right thing to do,’<sup>428</sup> and therefore is acceptable conduct in the circumstances. The distinction is invariably rejected by ‘pragmatists’ within the field, who note that both ‘types’ of defence require an acquittal. However, the argument which concerns this thesis is the consequences of justifying or excusing a criminal act. This is

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<sup>423</sup> 2.09 (4), Model Penal Code.

<sup>424</sup> K. Greenawalt, *The perplexing borders of justification and excuse*, 84 Colum L R 1897-1927; J. D. Ohlin, *The bounds of necessity*, J.I.C.J. 2008, 6(2), 289-308; P. Westen and J. Mangiafico, *A justification, not an excuse – and why it matters*, 6 Buff Crim L Rev 2002-2003 833-950; P Robinson, *Criminal law defenses: A systematic analysis*, Colum L R 82(2) 199-291 1982.

<sup>425</sup> E. Milhizer, *Justifications and excuses: What they were, what they are, and what they ought to be*, in S. Kadish, S. Schulhofer, and S. Steiker, *Criminal law and its processes: cases and materials*, Aspen, 2007 at 831

<sup>426</sup> *Ibid.* at 831.

<sup>427</sup> *Ibid.*

<sup>428</sup> M. Moore, *Placing blame: A general theory of the criminal law*, Clarendon, 1997 at 675.

because although both defences may acquit the accused, the consequences for the criminality of the act are very different.

### 5.3 France

France is a civil law jurisdiction with a criminal code. The current version in force is the Criminal Code of 1994, but the French Parliament can make amendments as it sees fit, and periodically does so.<sup>429</sup> This is the main source of criminal law, as decisions from French courts do not constitute a binding source of law, and therefore the focus of this part of the chapter will largely be on the Code. The legal theory underpinning French criminal law will also be of value when determining the application of these defences to serious crimes and the relevance of the Declaration of the Rights of Man<sup>430</sup> will also be discussed as a restraint on the power of freeing individuals from criminal liability which may otherwise be imposed by provisions of the Code. The use of the Declaration as a source of constitutional principle through which the State's power is limited is affirmed by the Constitution of the Fifth Republic.<sup>431</sup>

The revised French criminal code has its own versions of duress and necessity, the former being termed 'constraint'.<sup>432</sup> As to the wording of the defence, the Code states:

*'N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contrainte à laquelle elle n'a pu résister.'*<sup>433</sup>

There is no further exclusion of circumstances in which this defence would not be permitted nor further elaboration as to what a constraint or force might amount. The generally understood principle is that the defence of constraint refers to a 'psychological' constraint, such as that which relates to threats made by another individual.<sup>434</sup> The defence of necessity is then stated by the Code as follows:

*'N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la*

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<sup>429</sup> The defences to which reference is made in this part have been revised as recently as 2008; Law no 2008-174 25 February 2008, article 4(v).

<sup>430</sup> La Déclaration des droits de l'Homme et du citoyen 1789.

<sup>431</sup> Preamble to the Constitution of the Fifth French Republic 1958.

<sup>432</sup> Article 122-2, French Criminal Code 1994.

<sup>433</sup> 'A person is not criminally responsible who acted under the influence of a force or a constraint which he or she could not withstand,' Article 122-2, French Criminal Code 1994.

<sup>434</sup> C. Elliott, *French criminal law*, Willow, 2001 at 117.

*sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.*<sup>435</sup>

The only restraint here on the method employed is therefore the potential lack of proportionality between the threats suffered by the individual and the means he or she uses to avert it. In this context, the means used would be the intentional killing of an innocent individual, and from a cursory reading of the text, it is ambiguous as to whether either defence would be available to answer such a charge. However it should be noted that the Code has been amended in part by additions to the criminal procedure code and these state that the power is divulged to the juge d'instruction<sup>436</sup> to determine the applicability of the defence in the particular circumstances of a case. This line of discourse is arguably self-defeating, as the Code is the main source of law and, in the absence of any restraining principles contained therein, the defence would be applicable to all charges, regardless of the seriousness.

A critical point to be made in relation to both defences is that the defence of necessity has never been admitted in respect of charge of serious crime against the person,<sup>437</sup> despite there being no explicit constitutional principle which prevents a balancing exercise being made in respect of one person's right to life against another. The French Constitution, and its corollary human rights principles, does not extend to such a prohibition. It is thus solely a principle of criminal law which prevents the application of such a defence to a serious crime against the person of an individual.

The subtle differences between the defences can be seen, as the commentary in this area suggests,<sup>438</sup> through the categorisation of such defences as 'subjective' and 'objective.' This distinction is, as with the Anglo-American distinction between justifications and excuses, a theoretical one as an admissible defence from either category would still exclude the imposition of criminal liability. Constraint would fall under the heading of a 'subjective' defence,<sup>439</sup> as the test for determining whether an individual could rely on constraint would

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<sup>435</sup> 'A person is not criminally responsible when, faced with a present or imminent danger which threatens him or her, another individual or property, commits a necessary act to safeguard the person or property, except if there is a lack of proportion between the means used and the gravity of the threat,' Article 122-7, French Criminal Code 1994.

<sup>436</sup> The French investigating judge has the power to apply or disapply the defence under Article 177, French Criminal Procedure Code 1995.

<sup>437</sup> J. Bell et al., *Principles of French law*, Oxford University Press, 2007, 210.

<sup>438</sup> C. Elliott, *A comparative analysis of defences in English and French criminal law*, 8 Eur. J. Crime, Crim. L. and Crim. Just. 319-326 2000, 319.

<sup>439</sup> *Ibid.*

have to be determined on an individual basis. Such defences reflect an inability on an individual basis to comply with the law, as a uniform conception of constraint, or what constitutes pressure, would be too difficult a standard to create in law. The wording of the provision reflects this, in that the pressure was something which ‘he or she could not withstand,’<sup>440</sup> rather than an objective standard of what ought to be tolerable to individuals in general.

Necessity, as codified in French law, breaks away at this point from duress and would thereby be categorised as an objective defence.<sup>441</sup> This, again, relates to the way in which the defence is phrased within the Code. The defence of necessity relates more to a positive action which is consciously and deliberately committed in support of an aim which is considered to outweigh in importance the law which the individual violates. The objectivity of the standard is greater than that which would be applied in order to determine the availability of the defence of constraint as the concept of ‘an immediate or actual danger’<sup>442</sup> is clearly not thought to have the same variance between individuals as what may constitute psychological pressure. Accordingly the defences are separated in terms of how they may be applied, rather than the Anglo-American distinction of their effect on criminality. However a closer examination of the way in which French crimes are formulated within the law leads to similar conclusions as the effect of defences which justify and those which excuse.

In French law, the components of an offence are threefold, those being legal, moral and material.<sup>443</sup> The legal part to the crime refers to the law which prohibits or restrains such conduct, preventing such acts from being legal. The moral aspect to the crime is the intention to commit the act, and the material aspect to the criminal act links the two, in that the individual who intended to commit the crime through his act must have caused the harm labelled as a result of his act. The first two parts to such a crime can be likened to *actus reus* and *mens rea* respectively in English and US law,<sup>444</sup> with the last part broadly reflecting the concept of causation. Separating the act into two distinct parts in such a way allows defences to be applied in a different way than in the two previous jurisdictions discussed. Similarly to both, the Code reflects that the admission of a defence nullifies the existence of any

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<sup>440</sup> Article 122-2, French Criminal Code 1994.

<sup>441</sup> C. Elliott, *A comparative analysis of defences in English and French criminal law*, 8 Eur. J. Crime, Crim. L. and Crim. Just. 319-326 2000, 319.

<sup>442</sup> Article 122-7, French Criminal Code 1994.

<sup>443</sup> J. Bell *et al.*, *Principles of French law*, Oxford University Press, 2007, 205.

<sup>444</sup> J. Bell, *Principles of French law*, Oxford University Press, 2007, 205.

offence,<sup>445</sup> but it is the position of the defence within the analysis of an offence which leads to different consequences for the criminality of an offence. It should be noted that the lack of *mens rea* for an offence in English / US law would constitute a defence in itself, whereas the admissibility of a defence would be argued on the grounds that there was an alternative explanation, or a further answer to a criminal charge. In French law, intention is always required for the commission of an offence.<sup>446</sup>

This demonstrates in which criminality is affected by the positioning of defences. French criminal law would arguably apply an objective defence to 'block' or remove the material element of the crime, which would then decriminalise the act.<sup>447</sup> This allows the defence to function as a justification and is claimed to be separate from a defence in this sense,<sup>448</sup> as the act is fully decriminalised and therefore would not require any defence to be pled. It thereby follows from this that the act was correct and appropriate behaviour in the circumstances without having to argue or defend the conduct in question following this. The concept of a subjective defence, it is then argued, relates to the moral element of the offence.<sup>449</sup> Subjective defences relate rather to removing the criminal liability from the individual<sup>450</sup> and thereby make the act in question the right choice in the circumstances. The individual is then not criminally liable for the act labelled at that point in time.

Although the net effect of subjective and objective defences is the same as justifications and excuses, there is a clearer indication, possibly as a result of the codified form of the French system, that the justified conduct is correct in the circumstances. This clarifies why the defence of necessity, functioning as a justification and removing the criminality of the act, has not been admitted as a defence for crimes against the person. Such clarity can assist when deciding as to how these defences ought to be applied and whether their application is appropriate for charges of serious crimes. In the case of France, it is clear that as a justification or excuse, and whether necessity or duress as such defences may be termed, are not acceptable grounds for denying the existence of the legal or moral elements of a crime.

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<sup>445</sup> Article 327-328, French Criminal Code 1994.

<sup>446</sup> Article 121-3, French Criminal Code 1994.

<sup>447</sup> J. Bell *et al.*, *Principles of French law*, Oxford University Press, 2007, 206 and 210.

<sup>448</sup> B. Dickson, *Introduction to French law*, Pitman, 1994, 103.

<sup>449</sup> B. Dickson, *Introduction to French law*, Pitman, 1994, 103.

<sup>450</sup> C. Elliott, *French criminal law*, Willow, 2001, 116.

The German legal system is, similarly, a civil law system in which the German Criminal Code forms the basis of the criminal law. As with the US, Germany is a federal state but criminal law remains a federal issue and therefore the Criminal Code has binding force throughout the jurisdiction. The propellant for development in the criminal law within the German system is doctrine<sup>451</sup> and the approach to defences in particular demonstrates a degree of clarity which has been absent from the positive law within the jurisdictions heretofore examined. German law also must comply with constitutional principles, specifically those enumerated within the Basic Law.<sup>452</sup> This Law sets out the Constitution of the German Federal Republic and places certain restraints on the legislative function of the Government, as well as limits on the interpretation of the law. The constitutional principle pertinent to this study is ultimately the inviolability of human dignity,<sup>453</sup> which must be upheld by all State authorities. The corollary to this is that the State cannot legislate in a way which would impugn the dignity of the individual and State organs such as courts are prohibited from interpreting a law which would equally have such an effect. This restriction will be examined in the context of the codified defences of justified<sup>454</sup> and excused necessity<sup>455</sup> within German criminal law. Although precedent does not form a source of German law, cases can demonstrate the court's approach to the interpretation of the Code, through the application of defences in relation to serious crimes against the person, specifically where the argued admissibility of the defences to such crimes<sup>456</sup> conflicts with the rulings of the court.

German law does not distinguish between duress and necessity *per se*, but rather has developed a fundamental theoretical distinction between two forms of necessity.<sup>457</sup> The component parts of a German criminal offence allow for the accused to raise a justification before guilt is determined<sup>458</sup> and so necessity is divided in two categories: justified and excused. The first form, justified necessity, is phrased thus:

*‘Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib, Freiheit, Ehre, Eigentum oder ein anderes Rechtsgut eine Tat begeht, um die Gefahr von sich oder einem anderen abzuwenden, handelt nicht rechtswidrig, wenn bei Abwägung der*

<sup>451</sup> M. Bohlander, *Principles of German criminal law*, Hart, 2008, 7.

<sup>452</sup> Basic Law for the Federal Republic of Germany 1949, as updated in 2008.

<sup>453</sup> Article 1(1), German Basic Law 1949.

<sup>454</sup> s34, German Criminal Code 1998.

<sup>455</sup> s34, German Criminal Code 1998.

<sup>456</sup> M. Bohlander, *Principles of German criminal law*, Hart, 2008, 101.

<sup>457</sup> s34-35, German Criminal Code 1994.

<sup>458</sup> M. Bohlander, *Principles of German criminal law*, Hart, 2008, 101.

*widerstreitenden Interessen, namentlich der betroffenen Rechtsgüter und des Grades der ihnen drohenden Gefahren, das geschützte Interesse das beeinträchtigte wesentlich überwiegt. Dies gilt jedoch nur, soweit die Tat ein angemessenes Mittel ist, die Gefahr abzuwenden.*<sup>459</sup>

The central part of this defence is that, first, the individual has to commit a positive act and second, the act is nominally unlawful. In the circumstances, however, the individual's action is wholly appropriate provided it is proportionate to the harm avoided. The analogy here between justification and excuse theory and this form of categorising the defences is evident, but the difference here is that this distinction is represented by positive law. Another unique feature of this form of the defence is that an exercise in balancing competing interests must be undertaken, in which the interest protected by the otherwise unlawful act must be prior in importance to the one affected by the act. This standard is slightly higher than the other incarnations of the defence, and is more difficult to accept theoretically when used to answer a charge of a crime against the person.

The second form of necessity within the Code is that of excused necessity, which is worded as follows:

*‘Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib oder Freiheit eine rechtswidrige Tat begeht, um die Gefahr von sich, einem Angehörigen oder einer anderen ihm nahestehenden Person abzuwenden, handelt ohne Schuld. Dies gilt nicht, soweit dem Täter nach den Umständen, namentlich weil er die Gefahr selbst verursacht hat oder weil er in einem besonderen Rechtsverhältnis stand, zugemutet werden konnte, die Gefahr hinzunehmen; jedoch kann die Strafe nach § 49 Abs. 1 gemildert werden, wenn der Täter nicht mit Rücksicht auf ein besonderes Rechtsverhältnis die Gefahr hinzunehmen hatte.’*<sup>460</sup>

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<sup>459</sup> s34, German Criminal Code 1994; Bohlander, M., *Principles of German criminal law*, Hart, 2008 translates this as ‘A person who, faced with an imminent danger to life, limb, freedom, honour, property or any other legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act is an adequate means to avert the danger’ at 101.

<sup>460</sup> s35(1), German Criminal Code 1994; Bohlander, M., *Principles of German criminal law*, Hart, 2008 translates this as ‘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, a relative or person close to him, acts without guilt. This shall not apply if and to the extent that the offender could be expected, under the circumstances, to accept the danger, in particular, because he himself had caused the danger or was under a special legal obligation to do so, the sentence may be mitigated, unless the offender was required to accept the danger because of a special legal obligation to do so’, 108.

Again the individual in question must commit a positive act, but this time the act remains unlawful and instead the person is not to be considered guilty. The difference here, therefore, is to distinguish between the lawfulness of the act and the guilt of the individual. In German law, it is held that the individual ought to suffer less of a punishment<sup>461</sup> where he or she is less guilty, as the individual's guilt ought to be the 'basis for measuring his punishment.' Therefore the distinction between justified and excused necessity centres on whether the law removes criminality from the act or from the actor. Removing criminality from a serious offence effectively permits its commission in certain circumstances, and the effect of this on serious crimes against the person is not to be underestimated, particularly where a balancing exercise of one person's rights against another's has to be undertaken.

One fundamental tenet which may restrict the possible use of this balancing exercise is a principle contained within the German Basic Law. The Basic Law forms the foundation of German law and is especially relevant to criminal law as a restraint on the legislative power of the State. The article in question<sup>462</sup> speaks in unqualified terms: '*Human dignity shall be inviolable.*'<sup>463</sup> This inviolability cannot be restricted by any State provision, as the wording is absolute. Similarly to the French and American Constitutions, the Basic Law represents the source of power from which the law derives its authority. Therefore it is not possible for codified law to override this provision as there is no qualification or limitation which would permit the restriction of individual dignity. The silence of the Basic Law as to the kind of dignity referred implies that both physical and psychological integrity ought to be absolutely respected and consequently, the application of either version of the necessity defence in respect of crimes against the person is not possible. German law prevents one person's physical or mental integrity being subjugated to the ends of necessity. It is also relevant to note that this line of argument, concerning the Basic Law, ought to apply to the duties of the State through its own agents and also its duties in protecting society as a whole. Therefore it is submitted that the State could neither act through its own agents whom may use the defence of necessity, nor permit the defence of necessity to be used in the criminal law by individuals accused of crimes against the person.

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<sup>461</sup> E. Binavince, *The structure and theory of the German penal code*, 24 Am. J. Comp. L. 594-601 1976, 597.

<sup>462</sup> Article 1(1), German Basic Law 1949.

<sup>463</sup> *Ibid.*



Here, it is also relevant to note the importance of the principle promulgated by Gustav Radbruch,<sup>464</sup> which applies in circumstances where statutory law conflicts with the ends of justice. It holds that if the written law does not match the requirements of justice ‘to an intolerable degree’ then it ought to be disregarded.<sup>465</sup> It is in cases of serious crimes against the person that it is arguable that this principle, espoused by subsequent decisions delivered by German courts, would equally require the court to disregard the applicability of either version of the necessity defence.

A case which demonstrates the German courts reluctance, even in compelling circumstances, to allow the necessity defence to operate in respect of crimes against the person is that of Wolfgang Daschner.<sup>466</sup> The Daschner case concerned a police chief who authorised the threat of torture to an individual under interrogation. The individual in question was suspected of abducting a child and the aim of the threat was to uncover the child’s whereabouts. Upon being threatened, he confessed to killing the child and disclosed the location of the body. The police chief was then charged and convicted of threatening to torture the individual and the judgment discussed at length the application of the defence of necessity, particular in the form of a justification.<sup>467</sup> It was held by the court that there could be no justification of such a threat and particularly that the dignity of the individual could not be balanced against a protected interest as required by the defence of necessity, and also denied the application of the excused form of the necessity defence. This indicates that the application of the defences, theoretically available to charges of serious crimes against the person, is restricted where serious injury is likely to result, even if the likelihood of death is severely restricted by the presence of medical personnel. The legal foundation of the Basic Law is that which is considered to be prior to the interests and demands of the codified criminal law.

Interestingly the Court favoured a ‘guilty, but not to be punished’<sup>468</sup> verdict which incorporated the grounds for mitigation that the Court saw in Daschner’s actions. It is this aspect that is most intriguing about the German approach. The codified law reflects a progressive and straightforward view of the defences of excused and justified necessity, yet the application of the defences indicates a stronger inclination towards respecting the dignity

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<sup>464</sup> See K. Luderston, *Enlightened criminal policy or the struggle against evil*, Buff. Crim. L. Rev. 3(2) Jan. 2000, 687-700.

<sup>465</sup> *Ibid.* at 697.

<sup>466</sup> Judgment of 20 December 2004, District Court of Frankfurt am Main.

<sup>467</sup> F. Jessberger, *Bad torture – good torture*, J.I.C.J. 3 (2005), 1059-1073, 1064.

<sup>468</sup> Jessberger, F., *Bad torture – good torture*, J.I.C.J. 3 (2005), 1059-1073, 1073.

of the individual. The deep-rooted pragmatism of this approach is evident in the judgment delivered by this case.

## 5.5 South Africa

The South African system is a mixed legal system, with elements of other jurisdictions incorporated in a system with its own unique approaches in certain areas.<sup>469</sup> A common law approach is favoured for the criminal law aspect to the system and civil law principles apply in most areas of private law.<sup>470</sup> Case law is therefore an important source of law for the criminal law, all of which ought to be decided in compliance with the provisions of the Bill of Rights.<sup>471</sup> The enduring influence of English law, particularly in the area of defences, is not to be underestimated,<sup>472</sup> although the precedent on compulsion set by the South African courts has replaced English authority in this area.<sup>473</sup> The legal theory of justifications and excuses, in terms of the categorising defences, is also evident even in early cases relating to the defence of necessity, characterised in South African law as compulsion.<sup>474</sup>

The domestic criminal law in this jurisdiction is lead by the courts, which have recognised the existence of a defence of compulsion which covers both duress and necessity, with the theory applied in case law that the defence may be a justification or excuse depending on the circumstances in which it is raised.<sup>475</sup> The argument presented by noted authors has been raised that there is much in common with German law in this area.<sup>476</sup> Compulsion, rather than necessity, can emanate from both internal and external pressures and no legal distinction is made between the two.<sup>477</sup> The definition of the defence of compulsion in South African criminal law is:

*‘the endangering of a legal interested of the accused by a threat which has already commenced or is imminent, which threat is not caused by the accused fault making it*

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<sup>469</sup> J. Burchell and J. Milton, *Principles of criminal law*, Juta, 2007, 138.

<sup>470</sup> *Ibid.*, 138.

<sup>471</sup> J. Burchell, *South African criminal law and procedure: Volume 1 – General principles of criminal law*, Juta, 2011 at 13; see also Chapter 2, Bill of Rights, Constitution of the Republic of South Africa 1996, as amended.

<sup>472</sup> J.M. Burchell, *Duress and intentional killing*, 94 S. African L.J. 282-290 1977, discussing *Abbott v The Queen* [1977] A.C. 755 and *DPP v Lynch* [1975] A.C. 653; this effect is arguably reciprocal in part as discussed earlier in relation to the English context.

<sup>473</sup> *S v Goliath* 1972 (3) SA 1 (A).

<sup>474</sup> *R v Werner* 1947 (2) South African Law Reports 828 (A), in which the idea of compulsion justifying a crime is rejected, and its potential as an excuse is not discussed by the court.

<sup>475</sup> *S v Bailey* 1982 (3) SA 772 A [51].

<sup>476</sup> J. Burchell, and J. Milton, *Principles of criminal law*, Juta, 2007, 279.

<sup>477</sup> *S v Goliath* 1972 (3) SA 1 (A).

*necessary for the accused to avert the danger (using means which) are reasonable in the circumstances.*<sup>478</sup>

It is clear, therefore, that the conception of a threat may relate to circumstances which threaten or to an individual who applies psychological pressure to another, with the only two caveats being that the individual cannot rely on the defence if he or she has placed him or herself in the threatened position and that the means used must be reasonable in the circumstances. The threat, however, must be of a physical nature and the threat of losing money is held to be insufficient to allow for the defence to be admitted.<sup>479</sup> Similarly to German Law, the required promotion of the values of the Constitution<sup>480</sup> would create a prohibition on balancing one innocent life against another. However the wording of the South African Constitution is not as strong as the German Basic Law, as it simply states that the individual has the right to respect for their dignity.<sup>481</sup> The more flexible conception of 'respect for' rather than 'inviolability of' human dignity makes for a difference in the application of the defence within the case law. South Africa's approach, particularly where the charge is that of a serious crime against the person, is the most distinct, and extensive, of all the legal systems examined thus far.

One of the first cases which discussed the idea of compulsion in South African law concerned German soldiers who were held in a prisoner-of-war camp in South Africa.<sup>482</sup> The case did not discuss any specific formulation of the concept of compulsion and instead referred broadly to the idea of necessity under English law. Compulsion was raised as a defence to a charge of murder, of which a German soldier had been accused following the 'execution' of another prisoner who was deemed to be an informer to the camp authorities. Using the English concept of necessity as the basis of the South African idea of compulsion, the court held that the accused was attempting to stretch the limits of the defence of necessity in this case to cover the crime of murder, and additionally that there was limited evidence of any compulsion under which the accused might have acted. The Court held that *'the killing of an innocent person is never legally justifiable by compulsion or necessity'*<sup>483</sup> and would not be drawn on the extent to which such a defence might excuse the accused.<sup>484</sup> The case also

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<sup>478</sup> S. Yeo, *Compulsion and necessity in African criminal law*, J.A.L. 2009, 53(1), 90-110, 94.

<sup>479</sup> *R v Canestra* 1951 (2) SA 317 (A).

<sup>480</sup> s39(2), Bill of Rights, Constitution of the Republic of South Africa 1996, as amended.

<sup>481</sup> s10 Bill of Rights, Constitution of the Republic of South Africa 1996, as amended.

<sup>482</sup> *R v Werner* 1947 (2) South African Law Reports 828 (A).

<sup>483</sup> *Ibid.*, Judgment of Watermeyer C.J. at 837.

<sup>484</sup> *Ibid.*, 837.

referred to earlier authorities<sup>485</sup> which concurred with the perspective that South African law did not accept that compulsion could justify the commission of a murder.

The law was further developed in this area to reject the defence of compulsion where the individual had placed themselves in danger,<sup>486</sup> the case in question concerning a gang member who was compelled to kill. The aim of the defence in this case, however, was not to justify the act but rather to escape the death penalty, which was mandatory at that time for murder. As an extenuating circumstance, rather than a defence, compulsion was accepted and the sentence commuted.

The real change to South African criminal law, which distinguishes it from all other legal systems discussed in this study, emanates from the *Goliath*<sup>487</sup> judgment which was handed down in 1972. In this case, the court held that compulsion was acceptable grounds on which to defend a charge of murder, when the individual in question had assisted the principal in his commission of the crime. The court held that the previous rejection of the defence was based on 'emotive rather than legal grounds' and this approach ought to be replaced by a more pragmatic acceptance that individuals can be justified in committing murder in certain circumstances as a result of the pressures that they may face. The main reason given for the court's decision was that the law as it stood set an unreasonable standard of conduct in which individuals were expected to sacrifice their most dearly-held interest, that of their own life, for the life of another individual. The court considered it unacceptable to set such a standard as a principle of criminal law, as it claimed that the ordinary man would be required, in order to comply with the law, to become a hero and conduct which did not amount to this standard would be rendered criminal activity.

Indeed this was welcomed as rejecting the English-derived 'blueprint for saintliness'<sup>488</sup> and embraced as approaching the issue of compulsion in a more reasonable fashion. In particular, the decision in the English case of *Dudley* was held to have been made on such emotional grounds and, from this perspective, on a flawed basis. The potential of the criminal law to send out 'clear moral messages' has been recognised by the literature<sup>489</sup> which makes the justification for killing as held within the domestic law of this jurisdiction difficult to reconcile with the concept of murder as a very serious breach of the criminal law, and

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<sup>485</sup> Specifically *Rex v. Mtetwa* (1921, T.P.D. 227) and *Rex v. Garnsworthy* (1923, W.L.D. 17).

<sup>486</sup> *S v Bradbury* 1967 (1) SA 387 (A).

<sup>487</sup> *S v Goliath* 1972 (3) SA 1 (A).

<sup>488</sup> J. Burchell and J. Milton, *Principles of criminal law*, Juta, 2007 at 142.

<sup>489</sup> P. Eden, *Criminal liability and the defence of superior orders*, 108 S. African L.J. 640-655 1991 at 644.

particularly as the most serious assault possible on the dignity of the individual. One voice within the literature argues that the idea of punishment may be the answer to such an incongruity,<sup>490</sup> whereby sentencing may be diminished on account of the lack of guilt of the individual who acts under duress. However the law as determined by South African judicial precedent at present demonstrates that the importance of a reasonable standard, to which individuals can be held in difficult circumstances, is more critical than a rigid adherence to the concept of the dignity of the individual.

Despite the settled authority, an examination of some of the literature in this area demonstrates an understanding of the conflict between setting reasonable standards against the contention that an innocent life ought to be balanced against another in certain circumstances. Particularly difficult is the assertion that, effectively, that killing can be justified in the context of an innocent life, as opposed to an aggressor. One author writes:

*It is not morally, or legally, defensible (or possible) to weight human lives in the balance and conclude that one life is more important than another. All lives are equal in the eyes of God and should also be equal under the law.*<sup>491</sup>

Despite this strongly-worded rejection of the priority of any one innocent life over another, he continues to state that if the compulsion is ‘of a sufficient degree’<sup>492</sup> then the individual’s act ought to be justified. This indicates the judicial applicability, but philosophical incongruity, in deciding whether to prioritise dignity or an act deemed to be that which a reasonable individual would commit under extreme circumstances, even when the law in the area of necessity, duress or compulsion, however termed, appears to be settled within the jurisdiction. The priority of international obligations, as contained within the Constitution,<sup>493</sup> only serves to further complicate this area, and an investigation of international standards, which prioritise the application of international human rights law, leads to the conclusion that the standards espoused by the South African jurisdiction may not be as robust internationally as they are binding domestically.

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<sup>490</sup> J.J. Taitz, *Compulsion as a defence to murder: South African perspectives*, 7273 Law and Just. – Christian L. Rev. 10-23 1982, 23.

<sup>491</sup> J. Burchell, *Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion*, 1 S. Afr. J. Crim. Just. 18-34 1988 at 27.

<sup>492</sup> *Ibid.*, 30.

<sup>493</sup> s39(1)(b), Bill of Rights, Constitution of the Republic of South Africa 1996, as amended.

The jurisdictions outlined above may appear to take disparate approaches to the notions of duress and necessity, and it could be surmised that there is indeed no customary rule on the concepts of duress and necessity, as discussed in chapters three and five. However, some common or general principles may be deduced. One is that the defence unquestionably exists in customary international law: all of the jurisdictions outlined above contained some form of the defence and note that unreasonable demands should not be made of individuals where they are compelled to act. Some systems may make reference to duress as a separate defence and there appears to be a lack of consistency in respect of this. The Rome Statute's approach of unifying the defences of duress and necessity appears more logical in this light.

Resistance to the defence is evident, however, where the action is that of depriving an individual of their life: the English and American systems reject outright the availability of the defence even where the accused was not the principal actor in the case. The German system appears to have a very clear view on the availability of the defence, unlike the French system which is more nebulous in its approach to the concepts. However both systems discreetly reject the availability of the defence where the charge involves murder: French law by non-application and German law through recourse to constitutional principles. In a manner similar to the Rome Statute, the legal provisions do not appear to be used much in practice. The South African jurisdiction remains the only one analysed above which allows for compulsion to be raised as a justification for acting where the act involved committing murder. However, the case precedent here appears to chime discordantly with the principles of the South African Constitution and the consistency of the law with its own domestic principles is at issue.

The difficulty with the defence effectively appears to be sanctioning murder of an innocent individual in order to preserve the compelled person's life. There appears to be considerable tension between the defence of duress and the State's responsibility to protect human dignity. It is perhaps for this reason that the concept of necessity is more commonly seen in the jurisdictions above than duress, where circumstances outwith an individual's control are more easily reconcilable with the concept of dignity than the idea that an individual chose to act in order to protect themselves.

The study above demonstrates the problematic nature of the defence of duress and the related concept of necessity, and that the failure to create nuances in the defence can lead to further problems. The issues highlighted by South Africa's approach foretell the problems which may have been created for the Rome Statute through drafting the defence of defence as such. The above comparative work indicates that there are customary provisions determining the availability of the defence in international law, and this is further supported by the work conducted in chapters three and five. However, the applicability of such a defence to war crimes, crimes against humanity and genocide is questionable. The reluctance to apply the defence at the national level to a charge of murder demonstrates a general uneasiness with its use in respect of serious crimes against the person, particularly when viewed as something which may undermine the dignity of the individual. The Rome Statute's recognition of victim the defence all the more inconceivable when viewed in this light.

## 6. Framing duress in the Rome Statute

- 6.1 Duress in the Rome Statute
- 6.2 The purpose of its inclusion: *Erdemovic* at the ICTY
- 6.3 The application of duress to charges of serious crimes against the person
- 6.4 Complete exoneration on the basis of duress for serious crimes against the person

As demonstrated in the immediately preceding chapter, it is clear that there are greater issues with some defences in the Rome Statute than others. In particular, the defences of duress and necessity appear to have been melded together; a development which does not ring true with the ideas found in customary international law and the general principles of law. In chapter five, a comparative analysis of the defences of duress and necessity at the national level was undertaken to evidence this. Following this, the problem of duress in the Rome Statute shall be examined in more detail.

Duress is the most contentious of the grounds excluding criminal responsibility in the Rome Statute primarily because of the lack of agreement on how these ought to be applied in national law. These defences are not even available in a uniform fashion to the most serious crime against the person at the domestic level, murder, and yet the decision has been taken to include these in a Statute which regulates the prosecution of ‘the most serious crimes of concern to humanity as a whole.’<sup>494</sup> In order to illustrate best the haphazard fashion in which defences have been placed in the Statute, the problem of duress will be examined in this chapter. The problem, as framed, is that the situations of duress tend to be good examples of circumstances in which the availability of defences should be questioned for serious crimes committed against the person. The feature common to both duress and necessity is that of pressure, where an individual was compelled to act. It is that compulsion which cannot, in general, be subjected to external scrutiny. Even in situations of natural disaster, the compulsion to act is not uniform and represents an individualised response. As such, both defences represent a highly subjective view of the circumstances, which may sanction criminal acts and the underpinning reasoning for their inclusion or even their application is not clear. In this way, the grounds excluding criminal responsibility effectively permit the commission of a criminal act under certain circumstances.

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<sup>494</sup> Preamble, Rome Statute.



In this chapter and throughout the thesis, the focus of duress is as a defence to serious crimes against the person. The principle of duress is thus examined in its availability for serious crimes against the person and, in the domestic context, murder, to examine the reasoning for making the defence available for defendants before the International Criminal Court. It is recognised that not all crimes within the scope of the ICC are crimes against the person, but the focus is on the availability of duress for such crimes, as the availability of duress for a property crime is not at issue in this work. The restriction of the defence of duress to property crimes is something which is discussed in chapter 7, as part of a wider discussion on the judicial interpretation of the treaty provisions.

Following this, it is not contested that a system of international criminal justice ought to make provision for grounds upon which an individual may be relieved of criminal responsibility otherwise imposed for the same acts committed in different circumstances or in a different state of mind. However, the defences within the Rome Statute are problematic because of the way in which they have been drafted, particularly as there is no restriction on how these are to be applied or used. The defences and the wording thereof allows duress in particular to have a wider application than perhaps they would have in other jurisdictions, with no caveats placed on their application for even the crime of genocide. The only restriction is the Court's ability to determine the admissibility of a defence before it.<sup>495</sup> At the heart of the issue is the idea that the making of a difficult decision can result in the removal of criminal responsibility, despite the Rome Statute targeting those who are likely to be leading the operations rather than foot soldiers. As such, it appears that the inclusion of duress in the Rome Statute has an undermining effect on the purpose of the Court.

This chapter will focus on the way in which the defence of duress has been framed in the Rome Statute, with a particular examination of the wording which has been used and the effect that this will have on the availability of such a defence, as well as the work conducted by the Preparatory Committee to draft the Statute. The reasons for including duress will also be examined, including an analysis of the work of noted jurists in this area and jurisprudence from previous international criminal tribunals. Turning to the application and operation of the defence, a look at the limits which may be placed on its application by the Statute itself and by customary international law is of interest, particularly where the use of defences is barred in respect of certain crimes. There is potential for customary international law to be

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<sup>495</sup> Article 31(2), Rome Statute.

preferred over treaty law in this area, as put forward by Akande,<sup>496</sup> and this idea will be given further treatment. The consequences of complete exoneration on the grounds of duress for serious crimes against the person in international law also form part of the discussion, as it is not clear that the drafters of the Rome Statute have given this due consideration. The reasoning for such exoneration and an analysis the impact of it on the purported aim of the International Criminal Court, the defeat of impunity, will also be discussed.

## 6.1 The defence of duress in the Rome Statute

The Rome Statute's drafting of the defence of duress does not reflect the customary position or the general principles of law, primarily because of the way in which the Statute unifies two defences. Duress and necessity are typically separate defences in domestic jurisdictions<sup>497</sup> and some jurisdictions permit one defence but not the other.<sup>498</sup> The conceptual distinction between the two is generally the source of the threat: duress is pressure applied by the threat made by another individual to cause serious harm to the person suffering it, whereas necessity is an act borne out of circumstances which compel the individual to act, such as a natural disaster. The decision by the Rome Statute to make both available and to unify them in this manner is curious. To explore this further, the wording of the defence of duress shall be examined. This will be supplemented by an analysis of the work of the Preparatory Committee for the Rome Statute in relation to the drafting of the grounds within the Statute.

Under article 31(1)(d), duress will constitute grounds on which criminal responsibility can be excluded where:

*“The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be: (i) Made by other persons; or (ii) Constituted by circumstances beyond that person's control.”*

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<sup>496</sup> D. Akande, *Sources of international criminal law*, 41-54 in A. Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009 at 50; see article 31(3), Rome Statute of the International Criminal Court 1998.

<sup>497</sup> See chapter five for a more detailed analysis.

<sup>498</sup> See chapter five; England is one such jurisdiction which recognises necessity as a defence, but not duress, and neither are available in respect of a murder charge.

The framing of the defence in this way, with the two specific ‘types’ of duress at the end indicates a ‘conflation’<sup>499</sup>, according to Taulbee and evident following a brief analysis, of two separate defences: duress and necessity. It rejects the supposition that the defences are separate in character or application and that they are simply two different expressions of the same basic reasoning: those who are compelled to act, for whatever reason, ought to have a full defence. Colvin rejects the conflation of any type of defence, noting the importance of separating such defences which relate to ‘contextual permission and defences of impairment.’<sup>500</sup> He further discusses the difficulties inherent in the application of duress and necessity, noting the more consistent application of the principles underlying self-defence<sup>501</sup> and the general failure to clearly identify duress and necessity as justifications, excuses or respectively as an excuse or a justification. Colvin’s conception would be to identify both as defences of contextual permission and then to develop a framework of principles around this notion. This would appear to tie in with the model favoured by the Rome Statute.

Bassiouni uses the American Model Penal Code<sup>502</sup> in his draft international criminal code and draft Statute for an international criminal tribunal<sup>503</sup> as the basis for his proposed inclusion of duress and necessity, despite the fact that the Model Penal Code recognises a rather confused version of duress and restricts its application, in that it should only be admissible for harm which was unlikely to result in death.<sup>504</sup> The Rome Statute goes directly against the theoretical points made by both Colvin and Bassiouni, without much explanation for such in the works of the Preparatory Committee.<sup>505</sup>

The wording is however similar to both duress and necessity in that there is, in general, reference made to a reasonable response in respect of an imminent danger which follows a proportionate logic.<sup>506</sup> This wording represents a blend of the features of duress and necessity in that there is only a latent reference to the source of the threat being from pressure applied by an individual or pressure arising from circumstances. It is in this respect that the distinction between duress and necessity truly comes to light: duress as a result of

<sup>499</sup> J. L. Taulbee, *International crime and punishment: A guide to the issues*, Praeger Security International, 2009, 178.

<sup>500</sup> E. Colvin, *Exculpatory defences in criminal law*, 10 Oxford J. Legal Stud. (1990) 381-407, 407.

<sup>501</sup> E. Colvin, *Exculpatory defences in criminal law*, 10 Oxford J. Legal Stud. (1990) 381-407, 401.

<sup>502</sup> See P. Robinson and M. Dubber, *The American Model Penal Code: A brief overview*, 10 New Crim. L. Rev. 319 (2007).

<sup>503</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987.

<sup>504</sup> *Ibid.*, 109.

<sup>505</sup> Preparatory Committee on the establishment of an international criminal court 1-12 December 1997 UN Doc. A/AC.249/1997/L.9/Rev.1 18 December 1997.

<sup>506</sup> See chapters four and five for a discussion of proportionality in context.

circumstances can be scrutinised more than duress arising from a threat made by an individual. The ‘reasonable firmness’ test in such cases may fall down where there is no general standard or degree of reasonableness in terms of human bravery when faced with threatening behaviour, and represents something of an unnecessary hurdle where the threat is generated by external circumstances, such as a natural disaster.

Further to this, it is difficult to understand the kind of war crime or crime against humanity which may constitute the sort of behaviour described by the defence. It refers to an individual who ‘acts necessarily and reasonably to avoid th(e) threat’ which has been made or arises and would respond by committing an act tantamount to a war crime or a crime against humanity. Even when considering the situations which arose in the former Yugoslavia, one of the worst examples of creative barbarity in recent history, and noting Cassese’s caution that no situation in the context of potential atrocities should be rejected as ‘fanciful or far-fetched’<sup>507</sup> it is difficult to see how an individual would have a justification in this manner for committing torture, genocide, slavery or similar crimes. The context of the crimes indicate a position of power: duress indicates precisely the opposite position. It is for this reason, rather than the idea that the use of a defence for any of the crimes under the Rome Statute may be distasteful or a dishonour to those who have suffered, that the defence as worded remains problematic.

There is a further restriction placed on the use of the defence in that the Court may decide whether any of the defences may be admissible for the crime in question.<sup>508</sup> This provision effectively allows the Court to disregard any of the defences put forward, presumably where the conduct is considered too grave for a defence to be admitted. This is, however, undermined by the preceding paragraph which notes that other defences, not listed within the Statute but which emanate from other sources of applicable law<sup>509</sup> may be used by an accused before the Court.<sup>510</sup> The drafting of this part of the Statute, as Scaliotti<sup>511</sup> agreed with Triffterer,<sup>512</sup> was not completed particularly well and the inconsistencies such as these point to a general misunderstanding about the concept of defences and how these might be used.

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<sup>507</sup> *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997, para 47.

<sup>508</sup> Article 31(2), Rome Statute.

<sup>509</sup> Article 21, Rome Statute.

<sup>510</sup> Article 31(3), Rome Statute.

<sup>511</sup> M. Scaliotti, *Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility*, Part II, 2 Int’l Crim L Rev, 1-46, 2002, 46.

<sup>512</sup> See O. Triffterer, (ed.) *Commentary on the Rome Statute of the International Criminal Court*, Beck Hart Nomos, 2008.

Drawing on other sources of law in such a contentious area is not necessarily something which ought to form part of the Statute, given the lack of domestic consensus on the issue of defences for serious crimes. In a way most contrary, it appears that the Court would be free to draw in other defences as it sees fit, disregard any defences under the Statute and yet still be bound to apply the law under the Statute first and foremost as a source of international criminal law.<sup>513</sup>

The work of the Preparatory Committee for the Rome Statute and the discussions had by the members of the group ought to shed some light on why such contradictory provisions were included in the Statute. However, its work in relation to grounds excluding criminal responsibility has not been discussed extensively,<sup>514</sup> reflecting the lack of focus on defences by the Committee. Saland's chapter indicates that the work was the most contentious of all discussions on the general principles of law, given the distinctions between the domestic legal systems on the topic of defences<sup>515</sup> and that the Canadian delegation initially proposed the defences as being part of the general principles of public international law. It is noted by Saland that a proposal put forward by the Argentinian delegation and ten other legal systems represents the current formulation in the Rome Statute.<sup>516</sup> Indeed, the report on the work of the Preparatory Committee<sup>517</sup> appears to adopt the articles wholesale and there is no substantive discussion on why these defences have been selected, or why defences ought to be included in the first instance. Rather, the debate focuses on how the defences ought to be framed, and does refer to duress as being limited to situations where the death of an individual was not likely, as desired by Bassiouni. However this proposal was not accepted and did not appear in the final draft. As noted by Saland, it was desirable to have a proportionality test,<sup>518</sup> but the extent to which this has been included in the final treaty is limited. In this way, it is clear that there was no extensive discussion of the reasoning for the defence or the applicability of duress to situations which involve the most serious kind of harm possible to an individual which would be, in the case of crimes against humanity, on a large scale.

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<sup>513</sup> Article 21(1)(a), Rome Statute of the International Criminal Court 1998.

<sup>514</sup> One of the few pieces of work was written by the Swedish delegation to the Preparatory Committee; see P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999.

<sup>515</sup> P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999 at 206.

<sup>516</sup> *Ibid.*

<sup>517</sup> Preparatory Committee on the establishment of an international criminal court 1-12 December 1997 UN Doc. A/AC.249/1997/L.9/Rev.1 18 December 1997.

<sup>518</sup> P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999 at 206.

The limited discussions on the inclusion of duress in the Statute and defences more broadly indicate that the noting of defences in the Rome Statute was perceived by those participating in the Conference and the work of the Preparatory Committee to be a natural development, despite there being no such inclusion in previous statutes or treaties, nor in the draft Statute put forward by the International Law Commission. Indeed, there are a number of jurists who identify that the defence of duress ought to be recognised, particularly following Judge Cassese's dissent in *Erdemovic*.<sup>519</sup> As such, it would be useful to examine the perceived purpose of including such a defence in the Rome Statute by those drafting and those who comment on the law, including the underlying reasoning and justification for its or their inclusion.

## 6.2 The purpose of its inclusion: *Erdemovic* at the ICTY

The Amnesty International report<sup>520</sup> on principles of international criminal law which was submitted to the Preparatory Committee during the Rome Statute negotiations quoted Morris and Scharf's<sup>521</sup> work regarding the International Tribunal for the former Yugoslavia, where they noted that care ought to be taken when establishing defences for those accused of such serious crimes. Indeed, 'it is one thing to reduce the sentence to be imposed; it is quite another to negate the existence of any crime.'<sup>522</sup> The defence of duress represents well the contentious nature of the inclusion of defences and reflects well the misinterpretation of national law in formulating the defences, given the dissent on the concept of duress in domestic legal systems. Indeed, as shown above and in chapter six, it is clear there is a strong degree of variation in terms of how duress is recognised across a number of jurisdictions. Its inclusion must serve a purpose and this part of the work will seek to identify and analyse the purpose of including duress in the Rome Statute. This part of the work will look at the way in which duress has been perceived by jurists as a defence to serious crimes, including the discussion on the defence which was brought about by the *Erdemovic*<sup>523</sup> case and the way in which this case has failed to clarify the customary position on the defence of duress.

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<sup>519</sup> *Prosecutor v Erdemovic* IT-96-22- A.

<sup>520</sup> *Making the right choices Part I: Defining the crimes and permissible defences and initiating a prosecution*, Amnesty International, 1 January 1997, AI Index IOR 40/01/97.

<sup>521</sup> V. Morris & M. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, Transnational Publishers, 1995.

<sup>522</sup> *Ibid.*, 111.

<sup>523</sup> *Prosecutor v Erdemovic* IT-96-22- A.

The case of Drazen Erdemovic<sup>524</sup> was particularly important for the ICTY because, firstly, he was the first individual to be sentenced by the tribunal<sup>525</sup> and secondly, because of the way in which it offered to shed light on the complex issue of defences for the Tribunal. It was also important for international criminal law more broadly because of the way in which Erdemovic dealt with his guilty plea and the discussion which took place thereafter. The case is often thought of as representing the first foray by an accused into the area of defences, but Erdemovic did not lodge a defence with the Tribunal. Rather, he made a statement with his guilty plea which amounted to a plea in mitigation, of which the court discussed the potential to become a full defence. Erdemovic was an ordinary soldier, rather than an individual in any position of command responsibility, who had acted under orders and contributed to the Srebrenica massacre by the Bosnian Serb Army. Erdemovic was initially charged with murder as a crime against humanity<sup>526</sup> and, in the alternative, violations of the laws and customs of war.<sup>527</sup> He pleaded guilty to the first charge, which was accepted, but was held not to have understood what this meant and the nature of his guilty plea,<sup>528</sup> with the caveat that he had no choice but to take part in the massacre, was the subject of much discussion. Before remitting the case to a new trial chamber following this confusion, the appeals chamber discussed the defence of duress for war crimes and crimes against humanity extensively, despite neither Erdemovic nor his defence counsel having requested that a defence be submitted.

The rights of the defence before the court of the International Military Tribunal at Nuremberg included a right to explain one's actions<sup>529</sup> as libelled by the Court, this being the only reference made to any form of defence made by the accused during the proceedings, possibly to supplement any plea in mitigation that may be put forward. Although the Statute of the ICTY included no such provision, focusing more on 'fair trial' rights similar to those under the International Covenant on Civil and Political Rights,<sup>530</sup> there is reference elsewhere to the notion of defences. It can be found in the rules of procedure and evidence for the Tribunal<sup>531</sup> in relation to disclosure by the defence, noting that the Prosecutor must be

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<sup>524</sup> *Prosecutor v Erdemovic* IT-96-22- T; *Prosecutor v Erdemovic* IT-96-22- Tbis; *Prosecutor v Erdemovic* IT-96-22-A and associated dissenting opinions.

<sup>525</sup> S. Ratner and J. Abrams, *Accountability for human rights atrocities in international law*, Oxford University Press, 2001, 198.

<sup>526</sup> *Prosecutor v Erdemovic* IT-96-22- T, Sentencing judgment 29 November 1996, para 3.

<sup>527</sup> *Ibid.* at para 3.

<sup>528</sup> *Prosecutor v Erdemovic* IT-96-22- A, Concurring judgment of Judges Vorah and McDonald 7 October 1997, para 15.

<sup>529</sup> Article 16(b), Charter of the International Military Tribunal 1946.

<sup>530</sup> 1966, article 14.

<sup>531</sup> Rule 67, International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence 10 December 2009.

informed if the accused intends to submit a defence of alibi<sup>532</sup> or ‘any special defence’<sup>533</sup> with the examples of diminished or lack of mental responsibility offered. No mention of any other defences is made, although the list is not exhaustive by virtue of the way in which it has been drafted. There is no direct mention of duress, although the position at that time was greatly informed by the previous international criminal tribunals, wherein the defence of superior orders was limited to a plea in mitigation.

The case of *Erdemovic* was both complex and unusual: Erdemovic submitted to the Tribunal’s authority and co-operated, even going so far as to submit a guilty plea. He stated along with his guilty plea that his circumstance were such that there was no choice for him other than to follow orders and, had he not follow instructions at Srebrenica, he would have been killed. Thus he argued that he had acted under duress.<sup>534</sup> The first Trial Chamber noted that in cases in the previous international criminal tribunals had taken the concept of duress on a ‘case-by-case basis’<sup>535</sup> and that the idea of duress, ‘depending on the probative value and force’ which may be attributed to the circumstances, could be considered a plea in mitigation or a defence.<sup>536</sup> Interestingly, the defence was not rejected on conceptual grounds, but rather on the basis of a lack of evidence.<sup>537</sup> This demonstrates a common problem with defences at the international level and demonstrates cogently the need for clarity in the area of defences. This was overturned by the Appeals Chamber,<sup>538</sup> the judgment of which noted that the Trial Chamber had ‘occasioned a miscarriage of justice’<sup>539</sup> by accepting his participation but not the fact that he had done so on the basis of superior orders.

However, it rejected the idea that duress could ever be a complete defence to a crime against humanity or a war crime where innocent lives were lost.<sup>540</sup> The reasons for this were set out in the Joint Opinion of Judges Vorah and McDonald, from which Judges Cassese and Stephen dissented. The Joint Opinion held that Erdemovic did not understand what was meant by his guilty plea, because of the caveat that he acted under duress to which it was

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<sup>532</sup> Rule 67(B)(i)(a), International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence 10 December 2009.

<sup>533</sup> Rule 67(B)(i)(b), International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence 10 December 2009.

<sup>534</sup> *Prosecutor v Erdemovic* IT-96-22- T, Sentencing judgment 29 November 1996, para 14.

<sup>535</sup> *Ibid.*, at para 19.

<sup>536</sup> *Ibid.*, at para 14.

<sup>537</sup> *Ibid.*, at para 20.

<sup>538</sup> *Prosecutor v Erdemovic* IT-96-22- A, Appeals judgment 7 October 1997.

<sup>539</sup> *Ibid.* at para 12.

<sup>540</sup> *Prosecutor v Erdemovic* IT-96-22- A, Appeals judgment 7 October 1997, para 19.



attached, and that such a plea should usually be unequivocal.<sup>541</sup> As such, his statement was taken as an intention to plead duress as a defence and the Chamber explored whether duress may constitute a full defence to a charge of crimes against humanity.<sup>542</sup> The Trial Chamber directed that Erdemovic should be allowed to plead again in full knowledge of the consequences of his plea and he plead guilty to a charge of violating the laws and customs of war before a new trial chamber, which was accepted by the Prosecutor.<sup>543</sup>

The Joint Opinion undertook a survey of a number of legal jurisdictions and concluded that there was no single rule reflecting customary international law on the subject of duress.<sup>544</sup> This reflects well the contentious nature of duress and the extensive survey of jurisdictions and international criminal tribunals<sup>545</sup> indicates that it is not possible to formulate a rule from such a disparate set of principles. The point is put well by van Sliedregt, who noted that the context of war crimes and crimes against humanity does not affect the idea of duress and that the issue hinges on the same problem which exists at the national level: ‘the concept of proportionality...(and) the weighing of human lives’<sup>546</sup> which van Sliedregt holds to be incompatible.

Judge Li disagreed the idea that duress was to be put forward as a defence and noted that the consistent repetition of the appellant’s circumstances was more akin to a plea in mitigation, stating that the guilty plea was thus unequivocal.<sup>547</sup> This approach resonates more with the way in which the defendant conducted himself and put forward his circumstances, and also is more consonant with the approach in international criminal law in general. It is sought to demonstrate that this was a missed opportunity to draw in the idea of pleas in mitigation more formally, through the jurisprudence of the ICTY, into international criminal law. This is further supported by Cryer et al., who wonder why the defences in the Rome Statute have been codified if the defence in Erdemovic could never be admitted in relation to the ‘killing of innocents.’<sup>548</sup>

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<sup>541</sup> *Prosecutor v Erdemovic* IT-96-22- A, Concurring judgment of Judges Vorah and McDonald 7 October 1997, para 29.

<sup>542</sup> *Ibid.* at para 15.

<sup>543</sup> *Prosecutor v Erdemovic* IT-96-22- A, Sentencing judgment 5 March 1998 at para 8.

<sup>544</sup> *Prosecutor v Erdemovic* IT-96-22- A, Concurring judgment of Judges Vorah and McDonald 7 October 1997, para 49.

<sup>545</sup> *Ibid.* at para 59-65.

<sup>546</sup> E. Van Sliedregt, *Individual criminal responsibility in international criminal law*, Oxford University Press, 2012, 258.

<sup>547</sup> *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Li 7 October 1997, paras 15 and 27.

<sup>548</sup> R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An introduction to international criminal law and procedure*, Cambridge University Press, 2010 at 411-2.

The dissenting opinion of Antonio Cassese is the most notable aspect of the whole case, as Cassese disagreed fundamentally with the idea that an individual should be deprived of the defence of duress, even where crimes against humanity and war crimes were concerned. His position focused on that of the accused in the first instance, and can be summarised with reference to the oft-cited quote that the law ‘should not set intractable standards of behaviour which require mankind to perform acts of martyrdom.’<sup>549</sup> He rejected the idea that duress would never be available to such a charge, but rather that its application should be ‘realistic and flexible’<sup>550</sup> accepting that duress may be available ‘when the killing would be in any case perpetrated by persons other than the one acting under duress (since then it is not a question of saving your own life by killing another person, but of simply saving your own life when the other person will inevitably die, which may not be ‘disproportionate’ as a remedy)’.<sup>551</sup> The foregoing, however, does not address the idea of balancing one life against another, which this invariably does. International criminal law rests on the concept of individual criminal responsibility, in that the State machine cannot operate if its wheels and cogs do not turn. Ascribing the responsibility to the individuals who operate as the ‘wheels and cogs’ of the State machine means that it is in precisely this kind of situation that defences ought to be unavailable. This is further reflected in the most unusual of sources: the statements of Erdemovic himself. He did not seek to defend his actions; rather he sought to explain them as an individual. In the foregoing, it was only Judge Li who noted this. The purpose of the defence as a means of removing guilt from the individual is not an acceptable stretch of international criminal law; the discussion above demonstrates the importance of permitting pleas in mitigation, but not the decriminalisation of conduct committed under duress where the conduct involves participation in a massacre.

### 6.3 The application of duress

The preceding discussion on the Erdemovic case demonstrates the difficulty of defences at the international level and the intractable nature of the defence of duress in particular. The application of duress in respect of crimes against humanity was rejected in the case of

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<sup>549</sup> *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997, para 47.

<sup>550</sup> *Ibid.*

<sup>551</sup> *Ibid.* at para 12.

Erdemovic but, less than a decade later, was made available for future defendants before the International Criminal Court by the Rome Statute. Cassese's caveat,<sup>552</sup> that the applicability of the defence be determined by the Court, has been incorporated.<sup>553</sup> The aim herein is to examine the application of the defence, exploring Cassese's formulation of duress, and the way in which customary and treaty law may operate in this area. Akande's contention that customary law may supersede treaty law in this area will be explored and the possibility of a different outcome of the Erdemovic case, had it been heard before the International Criminal Court today, will also be discussed.

In his dissenting opinion for Erdemovic, Antonio Cassese provided a formulation of duress which he noted was unanimously supported by the case law from international criminal tribunals where discussed.<sup>554</sup> He noted that there were four main criteria for the defence to apply:

- “(i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;*
- (ii) there was no adequate means of averting such evil;*
- (iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;*
- (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.”<sup>555</sup>*

The threat of death where the threatening individual was able to carry out his violent promise immediately, evidenced by bearing arms or similar, would satisfy the first criterion. The second simply underlines the first, in identifying the situation as coercive and not one in which the individual pleading the defence consents to be. The fourth requirement is again one which would deny the defence to those who are in support of the aims of the group. In other words, it rejects the availability of the defence for those who display an element of agency in respect of their current predicament. The third criterion is the most difficult to square with the idea of killing innocent individuals: when is the killing of another to be

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<sup>552</sup> *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997, para 42.

<sup>553</sup> Article 31(2), Rome Statute of the International Criminal Court 1998.

<sup>554</sup> *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997, para 16.

<sup>555</sup> *Ibid.*

deemed a proportionate response? Drawing on German<sup>556</sup> and Israeli constitutional law,<sup>557</sup> as well as the common law approach to duress,<sup>558</sup> it is clear that one life cannot be balanced against another. To be clear, the argument put forward by Cassese is to remove the criminality of these acts in circumstances which meet these four criteria. It is difficult to argue this position, much more so than the idea that those who act under duress and select their own life over the life of another should not be punished as harshly. To say that an individual in such circumstances did not act criminally, be their actions justified or excused, appears a step too far where the ‘most serious crimes of international concern’<sup>559</sup> are at issue. It should also be noted that the above formulation does not create any real separation between duress and necessity, unless the reference to ‘evil’ were construed to mean a man-made threat (a construction for which there is little evidence to support) thus conflating the defences at an earlier stage than the Rome Statute and rendering any discussion of justifications and excuses void.

Be that as it may, the decision taken by the drafters of the Rome Statute was to include a defence similar to Cassese’s in the final version of the treaty. The version in article 31(1)(d) retains the features of a threat and a proportional response, augmenting the former to that which is ‘resulting from a threat of imminent death or of continuing of imminent serious bodily harm’. The harm may be directed at the actor or someone whom she is seeking to protect. The proportional response requirement is revised to remove the reference to ‘choice of evils’ situations and replaces this with a situation where an individual acts ‘necessarily and reasonably’ to avoid the threat in question. It goes on to specify that the threat may be made by ‘other persons’<sup>560</sup> or created by ‘circumstances beyond that person’s control.’<sup>561</sup> The other features of Cassese’s formulation are removed. The current form of the defence in the Rome Statute is arguably broader than Cassese’s, applying to both natural disasters and threats made by other individuals.

It is conceptually tortured, seeking to apply to only the most difficult of circumstances and at the same time, to represent a measured response to an impossible situation. The difficulty of reaching the thresholds and arguing that any crime within the Rome Statute constituted a ‘reasonabl(e) and necessar(y) response is not something which appears to have been

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<sup>556</sup> Article 1(1), German Basic Law 2010.

<sup>557</sup> Article 2, Israeli Basic Law: Human dignity and liberty 1992.

<sup>558</sup> See chapter five, particularly the studies of English and United States law.

<sup>559</sup> Article 1, Rome Statute.

<sup>560</sup> Article 31(1)(d)(i), Rome Statute.

<sup>561</sup> Article 31(1)(d)(ii), Rome Statute.

properly considered. It is in such circumstances that it may be beneficial to look to custom when interpreting the defences and where the use and value of customary international law may be particularly apparent. This is an unusual situation, in which a treaty does not represent the positive rule but may be overtaken by existing law, not least of all because the section permits the Court to look around and outwith the Statute to supplement the rule propounded by its reasoning.<sup>562</sup>

Akande, in writing about the sources of international criminal law,<sup>563</sup> proposed that it was common for previous war crimes tribunals to ‘incorporate by reference’<sup>564</sup> customary international law into their founding treaties, permitting the judges presiding over them to apply customary international law in relation to the jurisdiction of their tribunal. In this way, he argues that customary international law could ‘overtake’ treaty law,<sup>565</sup> particularly in the area of the definition of crimes and in relation to what may constitute a war crime or a crime against humanity. The tension in this area, between the customary position, the law of the ICTY and the Rome Statute, demonstrates the retrograde step made by the Rome Statute. If the impact on individual criminal responsibility could be demonstrated as sufficient, there is scope to argue that the Rome Statute’s primary position as the applicable law of the ICC is misguided. The defences of duress in the Rome Statute have not been as thoughtfully considered as they ought to have been.

In light of this, it is worth considering how a case similar to *Erdemović* would run at the International Criminal Court. In the first instance, it should be noted that it is the policy of the Prosecutor of the International Criminal Court<sup>566</sup> to ensure that ‘low-hanging fruit’<sup>567</sup> and lower-ranking soldiers become the focus of national prosecutions rather than those initiated by the International Criminal Court. Thus it is likely that a case such as *Erdemović* would not have been prosecuted by the ICC, which may have focused its prosecutorial efforts on those who gave orders to carry out the massacre rather than those who fired the shots.

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<sup>562</sup> Article 31(3), Rome Statute.

<sup>563</sup> D. Akande, *Sources of international criminal law*, 41-53 in A. Cassese (ed.), *The Oxford Companion to international criminal justice*, Oxford University Press, 2009.

<sup>564</sup> *Ibid.* at 44.

<sup>565</sup> *Ibid.*, 50.

<sup>566</sup> *Paper on some policy issues before the Office of the Prosecutor*, ICC-OTP, September 2003 at 3 (available at [http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf)).

<sup>567</sup> William Schabas mentioned this idea at a lecture held in Dublin; W. Schabas, *Unimaginable atrocities*, National University of Ireland, Dublin, 18 November 2011.

However, if the scale of the disaster<sup>568</sup> had meant that Erdemovic became a legitimate object of the Court's attention, it is possible that such a case could be tried. The issues before the ICTY were twofold: firstly, whether a guilty plea must have been unequivocal in order to have been accepted and secondly, whether duress was available in this instance. For the first issue, the Trial Chamber of the ICC is tasked with ensuring that the accused understands the charges,<sup>569</sup> the nature and consequences of a guilty plea<sup>570</sup> and ensuring that the plea is voluntary.<sup>571</sup> The latter requirement is evidenced through 'sufficient consultation with defence counsel' but otherwise no further evidence need be produced. Therefore, Erdemovic's plea of guilty and his accompanying statements could be accepted by the ICC without any further discussion.

However, given that defences are now codified within the Statute, he may have wished to plead duress under the Statute. Erdemovic's circumstances would satisfy the criteria of a threat of imminent death and of that threat being made by a person. However it is difficult to see, in the clear light of codification, how his actions at Srebrenica could ever be characterised as a necessary and reasonable response. The whole purpose of international criminal law is to ensure that individuals are held to account for their participation in serious violations of international criminal law, echoing the maxim that 'crimes against international law are committed by men, not by abstract entities'<sup>572</sup> and following the logic that each participant makes a contribution to the atrocity. Erdemovic's situation, where he participated in the genocide in Srebrenica where over 7,000 individuals died,<sup>573</sup> albeit against his will, may exclude the possibility of arguing duress in this instance. It supports the idea that to include duress as a plea in mitigation, or to clarify it as a partial defence, wherein individuals who participate in such horrendous crimes under extreme duress may benefit from a clearly outlined reduction in punishment without undermining the criminality of their actions, may be more desirable.

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<sup>568</sup> See A. Bowers, *A concession to humanity in the killing of innocents - validating the defences of duress and superior orders in international law*, 15 Windsor Rev Legal and Soc Issues 31-72 2003.

<sup>569</sup> Article 64(8)(a), Rome Statute.

<sup>570</sup> Article 65(1)(a), Rome Statute.

<sup>571</sup> Article 65(1)(b), Rome Statute.

<sup>572</sup> Judgment of the International Military Tribunal 1950, p. 447.

<sup>573</sup> See *Serbs admit Srebrenica death toll*, BBC News, 14 October 2004 (available at <http://news.bbc.co.uk/1/hi/3743176.stm>).

#### 6.4 Complete exoneration on the basis of duress

It is under the banner of proportionality that makes defences in general, and duress in particular, so difficult to comprehend in the context of the Rome Statute. The notion of complete exoneration in the case of duress is difficult to fathom, particularly given the jurisdiction that the Court has over serious crimes.<sup>574</sup> The underlying idea of the Court's creation was to end impunity and arguably, such a flexible defence would undermine this aim. In light of this, it is necessary to examine the consequences of complete exoneration where a plea of duress is accepted by the Court. In particular, the tension between such exoneration and the aim of ending the commission of serious crimes against the person with impunity will be explored.

In the Rome Statute, the defence of duress as defined<sup>575</sup> is placed under the heading of grounds excluding criminal responsibility. The heading as such makes no reference to defences and the only reference to defences elsewhere in the Statute relates to the rights of the accused to a fair hearing<sup>576</sup> and the duties of disclosure<sup>577</sup> he or she may bear. Knoop's idea that the right to plead a defence is part of the right to a fair trial<sup>578</sup> appears as an unsupported assertion and the link instead is made from the trial to the removal of criminal responsibility, rather than the defensible nature of the conduct. The removal of criminal responsibility by pleading duress is interesting because of the way in which it affects the idea of ending impunity. The reduction of superior orders to a plea in mitigation by previous international criminal tribunals<sup>579</sup> indicates the way in which excuses and justifications have a far more limited scope at the international level, where the transgression will invariably be more serious than at the national level, and it is for this reason that the admission of duress as a full defence appears counterintuitive. On the idea of a distinction between complete exoneration and a reduction of penalty, Gross notes that 'our response to crime must take its full circumstances into consideration and then decide how great a defection from a punitive response is possible without exciting the demons of impunity.'<sup>580</sup> He further notes that the imposition of punishment on an individual must be justified and, in the case of serious

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<sup>574</sup> Article 5, Rome Statute.

<sup>575</sup> Article 31(1)(d), Rome Statute.

<sup>576</sup> Article 67, Rome Statute.

<sup>577</sup> Rule 79, Rules of Procedure and Evidence of the International Criminal Court ICC-ASP/1/3 and Corr.1 2002, as amended.

<sup>578</sup> G.J. Knoop, *Defenses in contemporary international criminal law*, Martinus Nijhoff, 2008, 2

<sup>579</sup> Article 8, Charter of the International Military Tribunal at Nuremberg 1945, article 6, Charter of the International Military Tribunal for the Far East 1946, article 7(4), Statute of the International Criminal Tribunal for the former Yugoslavia 2009 and article 6(4), Statute of the International Criminal Tribunal for Rwanda 2010.

<sup>580</sup> H. Gross, *Crime and punishment: A concise moral critique*, Oxford University Press, 2012, 176.

violations of international criminal law, it would appear that a contribution to violence on a grand scale ought to be sufficient to justify this. Indeed, at the national level, sentencing and retributive policy in general would usually impose a punishment for crimes against the person, unless a defence could be sufficiently proved. The uncertainty of the application of duress at the national level for crimes against the person, particularly murder, ought to sound a warning to the continuation of duress as a fully exonerating defence within the Rome Statute.

The discussion above relating to the Erdemovic case demonstrates the difficulty of explicitly permitting the defence of duress in the Rome Statute. The case has been extensively discussed by jurists and it is clear that it represented a classical ‘hard case’ in which a punishment would be imposed on an unwilling perpetrator. In some ways it represented the classic idea of duress and one might argue that a humane and progressive international criminal court ought to prevent such a case occurring in the future. As Knoops notes, it relates more to the accused<sup>581</sup> than to the idea of proportionality. However progressive this perspective may appear, it does not take into account a key aspect of international criminal justice: restoration of the rule of law and justice for the victims. The system exists in order to offer justice at the international level, and it seems incongruous to hinge that justice on the context of the position of the aggressor, particularly when the crimes are so heinous.

In this way, the progressive element of the Court’s development could benefit from the lessons taught in the Erdemovic judgment through providing pleas in mitigation set out clearly. The full exoneration which exists at present creates a degree of impunity, in that duress is too flexible a concept to be permitted as a response to a charge of a serious violation of international law, and potentially a degree of unfairness, where it is not guaranteed that an individual will have a reduced punishment if they have acted under extreme duress and contributed to an atrocity.

Duress in the Rome Statute at present undermines the doctrine of individual criminal responsibility because of the way in which behaviour falling under the headings of the crimes within the jurisdiction of the Statute would be permitted in certain areas. This is not a development that the work of Bassiouni<sup>582</sup> predicated when the international criminal code was drafted as a law project, given that his version of duress was not available where deadly

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<sup>581</sup> G.J. Knoops, *Defenses in contemporary international criminal law*, Martinus Nijhoff, 2008, 97.

<sup>582</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 109 and 112.



force was likely. Even with this caveat the following two reactive international criminal tribunals, created in the aftermath of the massacres in the former Yugoslavia and Rwanda, did not see fit to introduce the concept of duress in this way. It is clear that a drafting process which begins in peacetime may consider defences an integral part of a modern and developed international criminal justice system, but the way in which this may impact on the doctrine of individual criminal responsibility has not been fully considered. The humanity of the accused, the humanity of the victim and the endurance and legitimacy of the system are all important parts of this system: a balance ought to be struck to avoid the further denigration of any individual before the Court.

The idea of duress in the Rome Statute was clearly heavily influenced by the dicta of Antonio Cassese in the Erdemovic case, as well as the work of Bassiouni<sup>583</sup> in drafting an international criminal code. Their work in both instances has reinvigorated a necessary discussion on the place of defences in international criminal law and the way in which we may be able to demand certain standards of behaviour from each other in society, even during armed conflict. The concept of duress within the Rome Statute is interesting because of the way in which it disregards the traditional separation of duress of circumstances and duress created by a threat from another individual. Although some jurisdictions have unified the defence, there remains incoherence in situations of serious crimes against the person, as the subjective nature of duress appears sharper where an individual has been killed. This discord at the national level is not silenced at the international level and it appears curious that such a radical idea, that those who act under duress should be freed of any kind of criminal responsibility, has gained traction where the most serious crimes against the person are concerned. It is even more curious when it is noted that prosecutorial policy is that of prosecuting those who are in positions of responsibility for the crimes.<sup>584</sup>

There is a lack of consistency in these ideas which the above research has highlighted, concluding that there is a need for significant reform in the area of defences. The wording of the defence has equally been narrowed and broadened by the Statute: it may now apply to those who are protecting others, yet only where the response was reasonable and necessary. It seems difficult to understand which of the crimes against the person within the jurisdiction

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<sup>583</sup> *Ibid.*

<sup>584</sup> See the ICC website at [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/Pages/prosecutions.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/prosecutions/Pages/prosecutions.aspx) (accessed 20.10.14).

of the Statute might ever be considered a reasonable or necessary response to an action and, as such, the threshold of the defence appears to be set far above its potential utility.

The *Erdemovic* case at the ICTY demonstrated a particularly ‘hard case’ for the tribunal and despite the painful circumstances which were related by Erdemovic to the Court, it was held that his contribution to a disaster of the magnitude of Srebrenica could not be overlooked. Despite the fact that he was a footsoldier at the time of commission, with little authority and even less power, it is clear that the Court still struggled to apply duress in this instance. The idea of a different decision in the case of Erdemovic demonstrates that the defence as drafted in the Rome Statute is problematic: no crime against humanity or war crime involving a crime against the person is ever likely to be a reasonable or necessary response, and as such the defence would fail each time. Even where it may be of use, the thresholds set are too high and the defence is shown as one which is difficult to apply. If available, it represents an undesirable degree of exoneration for the worst acts against other individuals that it is possible to commit. There appears to be no middle ground with the defences as codified by the Rome Statute, and it is this failure which creates issues for the foundational doctrine of individual criminal responsibility in international criminal law. It is more important to protect this doctrine than to ascribe features of a ‘developed’ system to international criminal justice.

## 7. Remedying the problem of defences in the Rome Statute

- 7.1 The issues with the drafting of defences at present
- 7.2 The value of distinction: justifications, excuses and pleas in mitigation
- 7.3 The proposal
- 7.4 Judicial interpretation of the Rome Statute

Thus far, this thesis has looked at the issue of defences in the Rome Statute and the problems which arise from the Rome Statute's concept of defences.. Earlier parts of this work have demonstrated the significant contribution made by national law to the development of international criminal law, which makes the way in which defences are codified in the Rome Statute more perplexing. If the aim of the Rome Statute is to prevent impunity, restore the rule of law, provide justice for victims and engender legitimacy in the system of international criminal justice, then the theory underpinning it must be consistent with this aim. The current structure of defences in the Statute, duress in particular, indicates that the drafters of the Rome Statute have elected a 'third way' to conceptualise and draft defences, one which does not rely on customary international law or on general principles. Building on the previous discussion, and to better understand the problems this creates, this chapter looks to identify the problems inherent in the defence of duress, in particular, in the Rome Statute and discusses the ways in which these issues could be remedied, through judicial interpretation, within the existing Statute. There is also a discussion of the ways in which the Rome Statute could be reformed in order to remedy the issues in a more structured manner, in order to restore consistency to the Statute.

At present the grounds for excluding criminal responsibility available to an accused before the ICC are grouped together in the same section.<sup>585</sup> Each defence demands the same response from the Court, in the event of an acceptance: full criminal responsibility is removed from the individual and, consequently, the criminality of the act is negated. No distinction is made between the defences and no difference is made of their differing effect on the criminality of the act in question before the Court. This blunt approach demonstrates the lack of full discussion during the negotiations; the selection of defences can be traced back to a single proposal<sup>586</sup> during the negotiations and lack a connection with general

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<sup>585</sup> Article 31, Rome Statute.

<sup>586</sup> Preparatory Committee on the establishment of an international criminal court 1-12 December 1997 UN Doc. A/AC.249/1997/L.9/Rev.1 18 December 1997.

principles and customary international law.<sup>587</sup> The reasoning behind this is unclear and the purpose of their inclusion, a significant part of the Rome Statute due to the removal of criminality from serious violations of international criminal law, is not discussed extensively in the reports of the Rome Conference<sup>588</sup> or in any of the literature which examines the Rome Statute.<sup>589</sup> At the international level, the inclusion of defences is particularly important because of the effect they have on the criminal act and thus on individual criminal responsibility. Defences and their application to war crimes and crimes against humanity ought to be carefully considered, particularly given the lack of coherence generated by national legal systems in this area, and this does not appear to have happened in the present case of the Rome Statute.

This final chapter, prior to concluding, proposes that the lack of coherence at the domestic level should be interpreted as a caution for the international system, and the lack of a clear customary rule in this area ought to have demonstrated that careful consideration was required if there was a desire to create a new rule in this area. Following on from previous argumentation, there appears to be good reason for including defences in the Rome Statute. The precise issue at present is the way in which this has been done, with the unification and availability of duress being a prime example of a defence which should not be available for serious crimes against the person. This part of the thesis looks to examine the potential to reform the Rome Statute by differentiating between the defences, and to explore the potential for reforming the Rome Statute by restructuring defences. It also looks at the potential for judicial interpretation of the defences, in order to create a degree of coherence between the concept of defences and the object and purpose of the Statute, as well as considering the necessity of the defences in order to create a balance between the fight against impunity and the rights of the accused.

The structure of the defences in the Rome Statute at present will be the initial focus of the present discussion, which seeks to identify any distinctions which may have been created by their wording. Issues with the structure, as well as their contents and consequent effect will

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<sup>587</sup> Intoxication is recognised in few jurisdictions and is considered by some Islamic states, such as Saudi Arabia, to constitute an aggravating factor.

<sup>588</sup> See United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an international criminal court, Rome, 15 June – 17 July 1996, Volume II UN Doc A/Conf.183/13.

<sup>589</sup> See R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010; O. Triffterer, (ed.) *Commentary on the Rome Statute of the International Criminal Court*, Beck Hart Nomos, 2008.

then be discussed, along with a demonstration of the value of distinction between the defences. This will involve identifying those which are full and partial defences together, as well as those which ought to be considered pleas in mitigation and exploring the potential for the use of justification and excuse theory in the Statute. The final part to this last substantive chapter proposes such a distinction and examines how it may be incorporated into the Statute to protect and serve the doctrine of individual criminal responsibility. The aim of this is to provide a bridge between customary international law and general principles and the Rome Statute's approach to defences.

## 7.1 The issues with the structure at present

As discussed in chapter four, the defences in the Rome Statute are grouped together in three consecutive sections under the heading of 'general principles of criminal law'.<sup>590</sup> There are four grounds in article 31 which, *prima facie*, have not been distinguished from one another: mental defect or disease, intoxication, self-defence and duress, the latter of which incorporates the concept of necessity with duress in order to create one unified defence. There are a further two grounds of mistake, of law or of fact,<sup>591</sup> and superior orders<sup>592</sup> in the subsequent two articles. The defences all refer to the exclusion of criminal responsibility, with the exception of superior orders which speaks of 'relieving' criminal responsibility. Thus the defences appear to be placed on an equal footing with one another, meaning that self-defence has the same effect on criminal responsibility as duress. Given the arguments outlined in chapters five and six, it is clear that most national systems distinguish between duress and necessity, and there is little to suggest that both would be consistently considered as justifications for acting,<sup>593</sup> particularly in relation to a crime against the person. When contrasted with self-defence, the unique feature of duress is that the crime is not perpetrated against the aggressor but rather an innocent victim. In this light, it is difficult to countenance the reasoning which argues that it should be placed on an equal footing with the idea of the justification of self-defence. These similarities and distinctions between some of the defences, in structure and content, and these shall be discussed below.

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<sup>590</sup> Part III, Rome Statute.

<sup>591</sup> Article 32, Rome Statute.

<sup>592</sup> Article 33, Rome Statute.

<sup>593</sup> Fletcher considers both necessity and duress to be an "excusing condition"; see G. Fletcher, *The individualization of excusing conditions*, 47 S. Cal. L. Rev. 1269 1973-1974. Self-defence, unless a mistake has been made, would more commonly be considered a justification; see F. Leverick and J. Chalmers, *Criminal defences and pleas in bar of trial*, W. Green, 2006 at 43-44.

The six defences in articles 31-33 represent the grounds for excluding criminal responsibility as decided by the drafters of the Rome Statute. As discussed previously, the initial proposition for defences was put forward by the Canadian delegation<sup>594</sup> to the Preparatory Commission for the Rome Statute by dint of the fact that they represented general principles of criminal law. The precise reasoning for the inclusion of each defence is not explicitly discussed, although the idea that some defences represent general principles of law is well-founded.<sup>595</sup> Self-defence is one such example: it is a commonly accepted defence across jurisdictions to crimes against the person. It is also, in a slightly different context, a defence for States in public international law and it rests on the widely-accepted proposition that no individual (or State, for that matter) need willingly submit to his, her or its own demise.<sup>596</sup> The inclusion of the defence demonstrates the principle of understanding in international law that an individual has the right to preserve their own existence when confronted with an aggressor, subject to certain limitations. Such limitations, of proportionality, an imminent threat and the seriousness of the threat to the individual or country, are commonly found in most incarnations of the concept.

The first two defences in article 31, mental defect or disease and intoxication, speak of the individual failing to understand the unlawfulness of the action which he or she has committed. Both mental disease or defect and intoxication must affect the individual to the extent that it ‘destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct’<sup>597</sup> to abide by the law. There is a caveat attaching to intoxication that it may not be voluntary where the individual ‘disregarded’<sup>598</sup> the risk that he or she may commit a crime within the jurisdiction of the Court. Bassiouni<sup>599</sup> notes that the defence of intoxication here is approached similarly to the American defence and rejects the German approach,<sup>600</sup> indicating that perhaps that the rules of some systems have been preferred over others – an approach which does not reflect the comparative studies which are supposed to underpin the determination of general principles of law. Schabas further notes that the inclusion and final draft of the intoxication defence

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<sup>594</sup> P. Saland, *International criminal law principles*, 189-216 in R. Lee, *The International Criminal Court: The making of the Rome Statute*, Kluwer Law International, 1999.

<sup>595</sup> Self-defence is recognised in most domestic jurisdictions and even functions as a defence for States at the international level, see article 51, UN Charter 1951, meaning that it operates as a general principle in international law.

<sup>596</sup> Article 51, United Nations Charter 1945.

<sup>597</sup> Article 31(1)(a) and Article 31(1)(b), Rome Statute of the International Criminal Court 1998.

<sup>598</sup> Article 31(1)(b), Rome Statute of the International Criminal Court 1998.

<sup>599</sup> M.C. Bassiouni, *Introduction to international criminal law*, Martinus Nijhoff, 2012.

<sup>600</sup> *Ibid.*, 473.

‘had the benefit of satisfying no-one’,<sup>601</sup> as well as creating an inconsistent approach which permits those who were organising or planning the commission of such crimes to plead intoxication in order to remove responsibility. More interesting that this however, is the similarity between the concepts placed in the Statute, in that either must affect the individual until they cannot control their conduct or cannot appreciate the unlawfulness inherent in their actions. This wording would indicate an attempt to create excuses of these defences, maintaining the criminality of the action without placing full responsibility on the shoulders of the accused. The action remains unlawful, but the accused should not be condemned for it. This idea is interesting, not least of all because the defence of intoxication is sometimes accepted as a mitigating factor and sometimes as an aggravating factor. It is not generally recognised as a full defence, for which reason an individual may be exonerated from criminal responsibility. It has been augmented to a full defence in the Rome Statute, alongside the idea of mental disease or defect, which would generally qualify as an excuse in domestic law. As Schabas demonstrates, the defence of mental disease is generally ‘uncontroversial’<sup>602</sup> and the wording of the defences in this fashion indicates that the same underlying principle applies.

When viewed in this light, the idea of including intoxication, with the same underlying restriction on its application as a mental defect, appears to undermine the purportedly compassionate approach of the Rome Statute to defences. The idea of intoxication and mental incapacity stemming from the same root and having the same underlying reasoning is incongruent with the idea of both defences. It is accepted that in cases such as that of François Minani,<sup>603</sup> intoxicating agents may play a role. However they were used to overcome his resistance, rather than destroying his understanding of morality and, more significantly, criminality. Equally, he was also tortured and thus his ability to resist the orders given was removed. This type of situation bears more relation to that of duress and of a plea in mitigation, conceptually, rather than to the idea of mental defect, wherein the individual would remain incapable of understanding the ‘wrongness’ or criminality of their actions beyond the commission of the crime. Applying the same type of reasoning to both concepts blurs the distinction between pleas in mitigation and excusatory defences, as well as ignoring the purpose of not punishing those who cannot be expected to perceive the distinction between criminal and non-criminal conduct. Equally, it disregards the usual provision for

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<sup>601</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 486.

<sup>602</sup> *Ibid.*

<sup>603</sup> Affaire François Minani 25 September 1997.

those suffering from a mental defect in domestic law: Scotland as a jurisdiction, for example, may acquit someone on the grounds of mental defect but will not release them. Most jurisdictions would follow the same logic, as the threat to the public and to the peace would remain. There is no provision for this difference of approach within the Statute.

The remaining two defences, self-defence and duress, are drafted quite differently from the other defences in article 31. The idea of self-defence has the usual restrictions of ‘reasonable’ action, and includes defence of property, where that property may be essential for the survival of one or a group of individuals.<sup>604</sup> The action must be undertaken with proportionate means and the threat must stem from an ‘imminent and unlawful use of force.’ In a similar way, duress is phrased as that which originates from a ‘threat of imminent death or imminent serious bodily harm’<sup>605</sup> and may relate to the person seeking the defence or another. A further qualification rests on the action being ‘reasonabl(e) and necessar(y)’ in that situation and proportionality makes another appearance in Article 31 as part of the drafting of this defence. The unique aspect to this defence is that the threat can stem from other persons<sup>606</sup> and from circumstances, so long as these are ‘beyond that person’s control’.<sup>607</sup> The imminence requirement is present in both, in a similar fashion to Bassiouni’s<sup>608</sup> draft of both defences, both of which are predicated on an instinctive response to an immediate threat. Thus, the defences have been woven together on the basis that the defence is available where a threat has been made, regardless of the source of the threat.

As stated above, the inclusion of self-defence is the recognition of a concept which has some traction already in international law as a general principle. However, David has taken particular issue with the inclusion of self-defence stating that it is ‘vain, useless and dangerous.’<sup>609</sup> The same could be said about any of the defences, although Schabas refutes this criticism in respect of self-defence by highlighting examples where an individual may require recourse to self-defence in the context of war.<sup>610</sup> Neither of these critical points relates to the conceptual underpinning of the defence nor reflects on its similarity with necessity as drafted in the Rome Statute. Generally speaking, self-defence would be considered a

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<sup>604</sup> Article 31(1)(c), Rome Statute.

<sup>605</sup> Article 31(1)(d), Rome Statute.

<sup>606</sup> Article 31(1)(d)(i), Rome Statute.

<sup>607</sup> Article 31(1)(d)(ii), Rome Statute.

<sup>608</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 109.

<sup>609</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 486.

<sup>610</sup> E. David, *Self-defence and the state of necessity in the Rome Statute*, 757-778 in J. Doria, H-P. Gasser and M.C. Bassiouni, *The legal regime of the International Criminal Court: Essays in honour of Professor Ignor Blishchenko*, Brill, 2009, 776.



justification for action in criminal law, as well as a full defence. Where recognised, necessity can be termed a justification, particularly in French and German law, whereas duress (again, where recognised) would normally fall within the parameters of an excuse, particularly in Canadian and U.S. law. The only jurisdiction which unifies the concepts of duress and necessity, South Africa, does not make any attempt to cloak the concept as a justification. Another reason for identifying both self-defence and duress in the Rome Statute as justifications is because of the higher threshold which justifications often require individuals to reach, in order to successfully plead the defence. It is a more desirable type of defence, because of its vindicating power, but it is also harder to access. Reflecting on the Rome Statute, it would appear that the intention behind the similar wording is to place the same thresholds on both defences. It cannot escape notice that the wording used and the thresholds applied appear to aim at the characterisation of both as justifications.

The concept of mistake, of both fact and law, can be found in article 32 as further grounds for excluding criminal responsibility. Mistakes of fact or law must, in the first instance, ‘negate the mental element’<sup>611</sup> in respect of the crime. Mistake of law may also be available in relation to the defence of superior orders, where there is a mistaken belief in relation to an unlawful order. Both forms of the defence appear to be adequately covered by other grounds within the Statute: there is reference in article 30 to the mental element required for the crime and article 33 clearly outlines the test for superior orders. This reflects entirely the formulation put forward by Bassiouni in his draft code<sup>612</sup> in a rather uncritical fashion: if provisions exist to deal with a lack of *mens rea* then it makes little sense to replicate analogous provisions elsewhere in the Statute. Schabas makes this very point, but argues that the purpose of outlining the defences in this way is to restrict their application and to avoid leaving such situations to the discretion of judges, thus limiting the general rule of *mens rea*, or intention.<sup>613</sup> A similar approach can be found in other jurisdictions as well where the defence of mistake is provided alongside rules which require criminal conduct to be intentional.<sup>614</sup> However, the cross-reference of the article on mistake to the notion of intention makes this defence unique and links the idea of a failure to possess sufficient intention with the idea of making a mistake of fact.<sup>615</sup> Instead of a more precise approach, as described by Schabas, the reliance placed on article 30 creates a degree of redundancy in

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<sup>611</sup> Article 33(1), Rome Statute.

<sup>612</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 110.

<sup>613</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, 501.

<sup>614</sup> See s15-17, German Criminal Code 1994.

<sup>615</sup> Article 32(1), Rome Statute.

respect of article 32. Scaliotti equally notes that the existence of a mistaken belief correctly relates to the facts of the case,<sup>616</sup> rather than a legal principle. In this way, it bears greater relation to the concept of a plea in mitigation which speaks to a more flexible approach, depending on the context in which the crime was committed, than that of a defence, an accepted reason for committing the crime.

The inclusion of mistake as a full defence, it is submitted, should be reconsidered. Its wording indicates that it should be considered a full defence, yet it does not stand alone conceptually and requires reference to other articles in order to clarify its application. It is also highly flexible depending on the circumstances and there is little legal principle to guide its application, offering the judges a great deal of discretion in determining whether the action taken was based on a mistaken belief. In this way, it would appear to have far more in common with the idea of a plea in mitigation, relating to a situation in which an individual acted, but for which he or she ought not to be fully punished. In this way, an individual is not harshly punished for a mistake made but there is recognition of the seriousness of the offence. No justification in this instance is appropriate, nor is a full defence with an excusatory character given the gravity of the crime and the reason for the transgression.

The concept of superior orders, the final reference to a defence in the Rome Statute, can be found in article 33. Much was made of the ‘reintroduction’ of superior orders into international criminal law by the Rome Statute and yet the defence is the most restrictive of any of those incorporated into the treaty. The article begins by excluding the defence in a general sense, in the tradition of international criminal tribunals, and then goes on to discuss the criteria for pleading the defence. Interestingly, the language of defence changes from ‘excluding’ criminal responsibility to the ‘relie(f)’<sup>617</sup> thereof. There is a direct exclusion for superior orders where the crime committed is genocide or a crime against humanity,<sup>618</sup> leaving the defence admissible only, in a realistic sense which would thus exclude aggression, to charges of war crimes. There are three requirements for those who wish to plead the defence: one, there was a legal duty on the part of the individual to follow orders,<sup>619</sup> two, the person did not know the order issued was unlawful<sup>620</sup> and three, further to the latter point,

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<sup>616</sup> M. Scaliotti, *Defences before the International Criminal Court: substantive law – part 2*, 2, Int’l. Crim. L. Rev (2001) 1-46, 13.

<sup>617</sup> Article 33, Rome Statute.

<sup>618</sup> Article 33(2), Rome Statute.

<sup>619</sup> Article 33(1)(a), Rome Statute.

<sup>620</sup> Article 33(1)(b), Rome Statute.

that the order was not manifestly unlawful.<sup>621</sup> Firstly, the change in language here is interesting: the defence is not expressly codified, but has been excluded with qualifications in respect of when it may apply. The reference to grounds excluding criminal responsibility has also been removed, in favour of relieving responsibility. Although this may seem a small issue, it makes no sense to draft each of the defences in one manner and then change in respect of another. Taken in hand with the exclusion of the defence, in the first instance, it appears that superior orders as a defence has been set apart from the others. The historical reasons for this are obvious, in that it would not be desirable to permit those guilty of such serious offences to remit responsibility to their superiors purely on the grounds that orders were followed. However, the three-pronged test would purportedly prevent any such situation arising. It again tallies with Bassiouni's understanding of defences in his draft criminal code, where superior orders were expressly included.<sup>622</sup>

The more interesting question than the debate on its inclusion relates to how it ought to affect the criminality of the act. Speaking of the 'relief' of criminality responsibility tends towards the idea of an excuse, rather than a justification. This links in with Schabas' idea that a justification to a charge of genocide appears 'unthinkable'<sup>623</sup> given the exclusion of genocide and crimes against humanity from the application of this defence. However, even scholars more inclined towards the idea of defences in international law, such as Knoops,<sup>624</sup> note that it is difficult to maintain the existence of superior orders as a defence independent from other concepts such as duress. Indeed, the only pressure that need be applied to an individual seeking to utilise the defence is the duty to follow a legal obligation. The language of the defence as it is placed in the Rome Statute would indicate that it ought to be considered an excusatory full defence, given the release of the individual from criminal responsibility, but the lack of exclusion of such responsibility from the action which was committed. This is in conflict with the previous understanding of the defence as a plea in mitigation, although links with jurisprudence prior to Nuremberg and Tokyo which supports the use of the defence for low-ranking soldiers, as stated by Best.<sup>625</sup> As a full system of international criminal justice, it is possible that the International Criminal Court could indict those who do not occupy a high level position in an organisation accused of committing serious violations of international criminal law, however the prosecutorial policy of the

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<sup>621</sup> Article 33(1)(c), Rome Statute.

<sup>622</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 109.

<sup>623</sup> W. Schabas, *Genocide in international law*, Cambridge University Press, 2000, 315.

<sup>624</sup> G.J. Knoops, *Defenses in contemporary international criminal law*, Martinus Nijhoff, 2008 at 45.

<sup>625</sup> G. Best, *War and law since 1945*, Clarendon, 1997 at 190, referencing the Ensign Maxwell case; see H.L. Scott, *Military dictionary*, D. Van Nostrand, 1863 at 267-8.

International Criminal Court means that it is unlikely that the ‘underlings’ to which Best refers would require the protection of the defence of superior orders. The current cases before the International Criminal Court all concern political and rebel leaders and commanders apart from two cases concerning perverting the course of justice.<sup>626</sup> As a consequence, the use of the defence as a ground for exoneration, in whichever language may define it, appears to undermine the focus by the Statute on the most serious crimes. The conflict in the wording appears to demonstrate that even the drafters of the Rome Statute were discordant in their acceptance of the concept as a full defence. Its partial exclusion demonstrates that it would be conceptually more comfortable as a plea in mitigation, rather than a full defence.

As noted previous, there is little available discussion on the defences from the work done by the Preparatory Committee. Most of the issues which were contentious did not appear in the final draft and indeed the final version represented ‘sensitive compromises’.<sup>627</sup> The defences as drafted have been left to rather broadly remove criminal responsibility from the act committed, without a great deal of differentiation between them. The effect of this is the broad equality between the defences and a lack of distinction in terms of how they affect the criminal behaviour. The distinctions in wording shown above can be seen to demonstrate an attempt to distinguish the defences from each other, but it is far from clear and remains concealed in the precise wording, with similarities being demonstrated upon analysis. As a consequence, it could be argued that all of the defences represent justifications and thereby permit, and acknowledge the compulsion to commit, crimes against humanity, war crimes, genocide and even acts of aggression on the part of a State under certain circumstances. The more likely conclusion, however, is that duress and self-defence are to be regarded as justifications, while intoxication and mental disease may be grounds for excusing the conduct. Mistake appears to be a restatement of the idea of failing to prove *mens rea* contained elsewhere in the Statute and a restrictive formulation of superior orders is available, possibly demonstrating its application as an excusatory defence.

However, this characterisation of the defences blurs a number of generally accepted and important distinctions for the defences themselves. Firstly, duress is rarely considered a

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<sup>626</sup> *Prosecutor v Walter Osapiri Barasa* (Warrant of arrest) ICC-01/09-01/13 (2 October 2013) and *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Confirmation of charges) ICC-01/05-01/13 (11 November 2014).

<sup>627</sup> M. Scaliotti, *Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility*, Part I, 1 Int'l Crim L Rev, 111-172, 2001, 169.

justification for action and this elevation creates an uncomfortable balance between pressure placed on an individual to act and the protection of another individual from the crimes enumerated in the Statute. Secondly, ideas such as superior orders and intoxication are more conceptually at ease as pleas in mitigation, where a lesser punishment would be imposed to restore the fairness of the system while acknowledging the damage done to the victim. In this way, there appears to be a failure to distinguish between pleas in mitigation and excuses, as well as placing duress in the bracket of defences which justify. The next part to this work will examine the value of these distinctions and why they ought to be respected at the international level.

## 7.2 The value of distinction

As demonstrated above, there is a significant value to acknowledging the theoretical and practical distinctions between the defences enumerated in the Rome Statute. The characterisation of a defence as a full defence, wherein it may be an excuse or a justification, a partial defence or a plea in mitigation has a differing effect on the guilt of the individual, the criminality of the act and even the imposition of punishment. It is useful to examine why we divide defences in this manner and how theories such as justifications and excuses may be of value and relevance to the Rome Statute. The theoretical distinctions will be discussed as a potential solution which may circumvent the problem identified by this thesis: the undermining of individual criminal responsibility by the unprecedented provision of broad defences for war crimes and crimes against humanity.

In the first instance, the value of the idea of a justification will be explored and its roots in Anglo-American theory. In the second, the potential to identify certain defences as excuses will be examined and the benefits which this will give the Rome Statute will be outlined. Classifying existing defences under the Rome Statute as pleas in mitigation and partial defences will also be considered, with a view to improving the drafting and structure of the Rome Statute.

The concept of a justification has its roots in Anglo-American legal theory, as discussed in chapter five. The idea which underpins a justification is of a defence which permits and legitimises the conduct which would otherwise be considered criminal. Indeed, ‘the law’s view (is that the act is) not unlawful.’<sup>628</sup> As Austin noted, a justification is a denial of

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<sup>628</sup> D. Luban, J. O’Sullivan and D. Stewart, *International and transnational criminal law*, Aspen, 2010, 918.

wrongdoing.<sup>629</sup> The application of a justification to the crimes under the Rome Statute is of particular interest because of the significance of doing so: effectively it would permit the commission of acts of aggression, genocide, crimes against humanity and war crimes under certain circumstances. If each of the defences under the Rome Statute were considered, as could be argued presently, justifications then the grounds excluding criminal responsibility would outline circumstances and tests which allowed these crimes to be committed. Moreover it would determine that international society approves of the action taken in those circumstances. This sanctioning effect on the conduct is something which has not been adequately considered by the drafters of the Rome Statute, which makes no reference to the concept of justifications and excuses. This is particularly interesting when it is considered that Bassiouni's version of a draft international criminal code, which was so influential in other ways, included the heading 'exoneration, justification and excusability'<sup>630</sup> when including defences.

In the context of international criminal law, it may be possible to refer to a defence as a justification, the most likely defence for this classification being self-defence. Indeed, it was the only defence Cassese considered as being fit for such a grouping at the international level.<sup>631</sup> The concept of self-defence as a justification is fairly uncontroversial and genuinely represents a general principle of law, as most jurisdictions accept that individuals are permitted to commit even murder in pursuit of self-defence, with the usual restrictions to the circumstances applying. Clarifying self-defence as a justification would acknowledge the acceptance that individuals may commit crimes in order to defend themselves and would realistically permit those who commit acts of self-defence during war to utilise the defence and to be fully exonerated. It would also compel a distinction between defending a person's bodily integrity and defending property, which rightly should not be considered a justification. This would clarify the application of the defence further and explain its purpose more explicitly in the Statute. This proposition does not receive support in all quarters and there are some jurists<sup>632</sup> who reject the idea that any defence could ever be put forward as a justification for the crimes within the jurisdiction of the Rome Statute. Admittedly, it can be a difficult concept to deal with, as the crimes within the jurisdiction of the ICC are so serious that the concept of justifying them may seem antithetical. However, as the threshold tests

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<sup>629</sup> Quoted in J. Gardner, *Offences and defences: Selected essays in the philosophy of law*, Oxford University Press, 2007, 82-3.

<sup>630</sup> M.C. Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal*, Martinus Nijhoff, 1987, 109.

<sup>631</sup> A. Cassese et al., *International criminal law: Cases and commentary*, Oxford University Press, 2012.

<sup>632</sup> W. Schabas, *Genocide in international law*, Cambridge University Press, 2000, 315.

exist for self-defence, it would be illogical to suggest that a State can defend itself using force, collective or otherwise in the international context and with all the destruction and violence that it potentially could entail, but that an individual could not.

Identifying a defence as an excuse is a fundamental acknowledgement that the act for which the defence was raised is regrettable. The effect of the defence is that the individual ought to be acquitted, because of some problem relating to their circumstances, for example in relation to a mental disease or defect. It does not, however, create any degree of acceptability for the act in question: society acknowledges that it ought not to have happened, but that the criminal conduct was unavoidable. In terms of the Rome Statute, the defence which would generally be considered an excuse is that of mental disease or defect. Mental disease or defect typifies the concept of an excuse, because the individual in question could not avoid the behaviour as a result of their circumstances and as such ought not to be blamed. The criminal act remains wrong and its criminality persists, but the individual should not be punished for its commission. This category of defence would be particularly powerful in the Rome Statute because of the way in which it maintains the border of criminality between acceptable and criminal behaviour. This focus on the offender is particularly important as it also takes a compassionate and restorative approach to justice, in that individuals who are incapable of distinguishing between right and wrong are not punished and a reason is given for their acquittal.

Duress may also be referred to as an excuse, although there is some evidence to suggest that it fits into neither category, conforming to the idea that it has ‘traditionally been very difficult to classify as either a justification or an excuse, and so it should remain because it is neither... (it) represents a subset... (which ought to result in) purely vindicating convictions.’<sup>633</sup> However the version of duress in the Rome Statute is different because it also refers to ‘circumstances beyond the person’s control’ indicating a component of the defence of necessity. Necessity has often been considered a justification, even in jurisdictions where duress is not recognised,<sup>634</sup> in that an individual is entitled to act in order to prevent devastation by a natural disaster. However, as Bassiouni notes, this element of the defence would be difficult to countenance in the face of a charge of genocide, crimes against humanity or war crimes<sup>635</sup> as it is difficult to imagine a situation where, for example, genocide or enslavement took place in response to a natural disaster. Aggression is equally that which would be committed

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<sup>633</sup> R. Schopp, *Justification defences and just convictions*, Cambridge University Press, 2008, 152.

<sup>634</sup> V. Tadros, *The structure of defences in Scots criminal law*, 7 Edinburgh L. Rev. 60-79 2007, 69.

<sup>635</sup> M.C. Bassiouni, *Introduction to international criminal law*, Martinus Nijhoff, 2012, 443.

by a State, rather than a typhoon or tsunami which would be caused by natural forces. It is thus difficult to see where duress as enunciated by the Rome Statute may fit into the categorisation. Reflecting on the foregoing, it is clear that it may be more appropriate to note duress as a partial defence, where the harm committed has been particularly grievous. A number of jurisdictions, including Germany, Israel and France, deny the availability of the defence where significant harm against the person has been caused. The characterisation of duress in the Rome Statute would be more in keeping with the general principles of criminal law should it be reduced to a partial defence.

The current thresholds for intoxication and superior orders in the Rome Statute are notably high, indicating that their inclusion was not without consideration. In the case of intoxication, it is a notable absence in most domestic jurisdictions and there are some states such as South Africa, which would identify intoxication as an aggravating factor<sup>636</sup> rather than as that which ought to mitigate. Many jurisdictions take the position that drunkenness should be considered neither a mitigating nor an aggravating factor and this proposition finds support in the work of Ashworth.<sup>637</sup> A further difficulty is presented by the way in which the defence of intoxication appears linked to that of mental disease or defect. By phrasing intoxication in the same manner as mental disease or defect, as outlined above, the Rome Statute disregards the more commonly accepted concept that intoxication should not be treated as a form of temporary ‘insanity.’<sup>638</sup> The lack of consensus in this manner would indicate that perhaps involuntary intoxication could be viewed as a formal plea in mitigation, which would allow situations like that of François Minani to mitigate the punishment without extended argument by his lawyers and permit the Rome Statute to reflect its history properly. There is no contention that many young individuals had been involuntarily intoxicated in order to give them ‘Dutch courage’ to carry out acts of violence and crimes against humanity. Formalising involuntary intoxication as a plea in mitigation would respect this tragic history without denying justice to the international community and victims of serious violations of international criminal law.

The defence of superior orders appears to continue thematically with the tradition of excluding the defence in the first instance. The wording is misleading, however, as it permits

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<sup>636</sup> s.2, Criminal Law Amendment Act no.1 of 1988.

<sup>637</sup> A. Ashworth, *Sentencing and Penal Policy*, Weidenfeld & Nicolson, London, 1983, 173.

<sup>638</sup> See, for example, Australia: s.23A, Crimes Act 1900 and Scotland: *Brennan v H.M. Advocate* 1977 J.C. 38. In the eight countries which apply Sharia as a full system, involuntary intoxication is, however, considered a form of temporary insanity; see A. Al-Sherazi, *Al-Mohazzib*, Dar al-Qalam, 1996 at 278. Eight countries with a specific form of religious law would not permit this idea to rise to the level of a general principle.



a full defence of superior orders under the Rome Statute. Given the targets of the Rome Statute and the history of the defence, it would sit more comfortably as a plea in mitigation rather than as a full defence. Phrasing the defence as that which relieves responsibility rather than to exclude it reflects the conceptual incongruity and general unease that including superior orders as a full defence would create. Its previous incarnation of a plea in mitigation, without the requirement that the order be manifestly unlawful, was a more accurate representation of situations in which military personnel are likely to find themselves. The military hierarchy dictates that orders will often be followed in highly stressful and constrained circumstances, in which time no individual has time to consult a lawyer on the manifest illegality test. If the aim of providing defences in the Rome Statute is to create a more modern and compassionate system, then this would permit it to become so.

Mistake sits apart from the rest of the defences because of its strong link to the mental intent of the crime. As such, it does not relate in particular to either a justification or excuse: it is already provided for elsewhere in the Statute and would not represent any direct threat to the criminality of the crimes within the jurisdiction of the Rome Statute nor to the doctrine of individual criminal responsibility. Any spurious claim of ignorance of the law is also guarded against by the wording and thus there is no pressing need to recruit mistake into the categories of justification, excuse or pleas in mitigation.

### 7.3 The proposal

It is proposed that the distinctions of full and partial defences, and pleas in mitigation, should be applied to the defences in the Rome Statute, in order to protect and support the doctrine of individual criminal responsibility. It would also create a greater degree of congruence with customary international law and general principles of domestic legal systems. It is acknowledged that the incorporation of defences in the Rome Statute has been influenced by previous cases and the experience of international law at the previous international criminal tribunals during the last decade of the twentieth century, as well as a desire to build a system of international criminal justice. This desire has fuelled a developed and comprehensive treaty, dealing with a more precise, enunciated version of the doctrine of individual criminal responsibility<sup>639</sup> than had been seen previously and specifically defining the crimes within its jurisdiction.

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<sup>639</sup> Article 25, Rome Statute.

To clarify the purpose of defences, retaining the compassionate and modern quality inherent in their inclusion, it is proposed that the defences ought to be classified as full defences, partial defences and pleas in mitigation. Although the latter category is arguably based on factual circumstances which a lawyer may put before the Court on behalf of his or her client, the acknowledgment of certain formal pleas in mitigation indicates the acceptance by the Court, and by international criminal law in general, that it serves no purpose to impose a harsher punishment on someone who had a limited range of choices in a given situation. This final part to this thesis will explore the way in which the defences ought to be categorised, why this is of benefit and how the Statute could be amended to highlight these distinctions.

The categories of distinction between the defences which were outlined in chapter three are the most useful for the purposes of the Rome Statute because they go beyond the oft-cited justification and excuse theory distinction. Furthermore, they directly undermine a common criticism of such a distinction, that it is theoretical and lacks any practical effect because of the further category of partial defences. In this way, the application of the theory of justifications and excuses indicate a sliding scale of the deemed acceptability of the response to a threat. The distinction between justifications and excuses, although criticised, is of particular import to the Rome Statute because of the types of crimes within its jurisdiction. To permit the commission of these crimes in certain circumstances would be to directly undermine the serious nature of the conduct. It is for this reason that only one of the defences could be considered a justification, and even then with limited application given the thresholds created by the formulation of self-defence in the Statute.

Self-defence, as noted above and throughout this thesis, demonstrates the ‘ultimate’ justification for action: one is entitled to defend one’s own life, or the life of another individual and, within the bounds of the Rome Statute, property required for survival, against an aggressive threat. Any action committed in pursuance of this aim, fulfilling the criteria of article 31(1)(c) will fall within the ambit of this defence. The only other full defence, based on the preceding argumentation and analysis, would be that of mental disease or defect, which qualifies as an excuse. This would allow individuals who suffer from a disease which destroys their capacity to understand their actions to be relieved of punishment, and hopefully referred to the proper authorities for treatment, while acknowledging the damage done to victims by their actions. The excusatory nature of the defence would mean that the

individual ought not to be punished, as their conduct was the result of illness, but that the acts committed remain criminal and socially unacceptable, to say the least.

Duress could then properly be characterised as a partial defence for crimes against the person.<sup>640</sup> This would represent a true compromise on the part of national jurisdictions and a genuine general principle. As some jurisdictions recognised necessity, but not duress and where other jurisdictions reject the idea of either as a defence to murder, with a third variant of a unified defence of compulsion in the case of South Africa, the ‘general principle’ is one which is difficult to discern. In this way, a third way could be achieved. The defence of duress would be recognised at the international level, but it would not have the effect of removing full responsibility from the shoulders of the convicted person. Rather, it would reduce the amount of liability in law which ought to be attributed to him or her and accordingly, mitigate the punishment imposed. The concept of partial responsibility would be distinguished from the idea of a plea in mitigation because of the return of a specific verdict which denotes partial responsibility; a notion available to the court at present because of the judicial discretion offered by the provisions on applicable law<sup>641</sup> referring to such an idea as a general principle of law and under the provisions of grounds for excluding criminal responsibility.<sup>642</sup> This is distinct from the idea of partial responsibility in common law jurisdictions, wherein a partial defence would reduce the gravity of the charge and instead a charge of, for example, genocide would remain. The ICC could then deliver a verdict of partial responsibility for this crime, acknowledging that the individual committed the offence but that he or she should not be held fully responsible in law. Work on both the contentious notions of partial justifications<sup>643</sup> and partial excuses<sup>644</sup> demonstrates the theoretical possibility of such a conclusion. Although this may have a similar effect on sentencing as a plea in mitigation, it would require the acknowledgment that the individual committed the crime as libelled. In a system as symbolic as international criminal justice, the effect of such an acknowledgment should not be underestimated. The distinction would thus be theoretical.

The theoretical distinction differs from a plea in mitigation because the latter concept does not reduce any responsibility on the part of the individual; it simply imposes less of a punishment on compassionate grounds, indicating that society has no interest in fully punishing the individual because of the circumstances in which they committed the offence.

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<sup>640</sup> It may be possible to have duress as a full defence for crimes against property under the Rome Statute.

<sup>641</sup> Article 21(1)(c), Rome Statute.

<sup>642</sup> Article 31(2)-(3), Rome Statute.

<sup>643</sup> S. Eldar and E. Laist, *The misguided conception of partial justifications*, L.T. 2014, 20(3), 157-185

<sup>644</sup> S. Yeo (ed.), *Partial excuses to murder*, Federation Press, 1991.

This would also sit well with previous perspectives of the defence, including Erdemovic and those from the international criminal military tribunals following the Second World War. It also dismisses the idea that an individual can plead duress or necessity in situations where such stress is the norm, in order to escape liability from an international crime, as the commission of war crimes, crimes against humanity and genocide. These crimes are unlikely to take place in cool-headed moments and duress as a full defence does not take account of this. The proposition that it should become a partial defence allows its recognition without denying the inherent wrongness in the act, whatever the circumstances in which it was committed may be.

It is worth highlighting that the above could be rejected on the grounds that the distinction between full and partial responsibility, subdividing the former into justifications and excuses, has no real impact on the outcome of the case: both justifications and excuses would result in an acquittal, while the practical consequences of a partial defence are mirrored by the consequences of a plea in mitigation. However, Greenawalt notes that the sole purpose of criminal law is not to mete out a certain amount of punishment. Rather, 'because it reflects and reinforces moral judgments, criminal law should illuminate the moral status of various courses of action.'<sup>645</sup> This is an even greater consideration in the context of international criminal law, and a stronger reasoning for such distinctions in the operation of the Rome Statute.

There should be a further category of formal pleas in mitigation, into which intoxication and superior orders ought to fall. Intoxication is a complex factor affecting criminal responsibility given that certain jurisdictions consider it a defence, whereas others may consider it an aggravating factor. Similarly to the idea of duress, no general principle could be drawn from this but acknowledgement of the role intoxication has played in past conflicts is required. In this manner, it would be advisable to identify intoxication as a plea in mitigation rather than a defence. In the case of Minani outlined above, intoxication as a single factor did not play a role and therefore its use in conjunction with other defences ought to be anticipated. However the use of intoxicants in war time situations or cases of genocide does not give sufficient justification for its place as a full defence. Rather it should be used as a way of reducing the punishment imposed on the individual, given their lack of agency in the matter. This approach acknowledges the role of intoxication in previous situations of war, genocide

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<sup>645</sup> K. Greenawalt, Distinguishing justifications from excuses, *Law and Contemporary Problems* 1986 49(3) 89-108, 90.

and crimes against humanity, but maintains a barrier to impunity which may otherwise persist if it were to be considered a full defence.

As highlighted above, mistake need not fit into any of the above categories because of its close connection with the mental element<sup>646</sup> of the offence. In this way, it is simply a restatement of a general principle and does not truly relate to a separate defence. Thus it would not present a good conceptual fit into any of the above categories and need not be featured in any such amendment.

Superior orders, similarly, presents a number of challenges as a result of its inclusion. It is proposed here that it should be returned to a plea in mitigation, as was the previous position in international criminal law, and that the manifest illegality test ought to be removed. The current defence has high thresholds attached to it, which would bar its application from those who have acted in the heat of battle or while following orders in a military hierarchy which requires obedience in order to function. The inclusion of superior orders is clearly uncomfortable, as it is excluded in the first instance and permitted under strict conditions and it does not appear likely that these conditions could ever be met. Rather than to require such an onerous proof, it may be more constructive and compassionate to acknowledge the difficulty of refusing, particularly during a violent or socially destructive period, any orders given and instead reducing the punishment which should be imposed. A formal plea in mitigation of superior orders would satisfy the requirement that the concept ought to be included while respecting the history of international criminal law and honouring those who have suffered as a result of the crimes committed.

The purpose of the above categorisation would be to permit the inclusion of the defences without affecting the doctrine of individual criminal responsibility and creating a more reasoned expression of international criminal law. The codification of defences in the Rome Statute was an interesting and, in many ways, a bold move given the history of international criminal law. Defences are circumstances in which an individual can commit a criminal act without punishment or consequences, which can be attributed to, in the main, exceptional circumstances. The above distinctions help to balance the requirement that defences be included as part of a humane system of international criminal law with the understanding that these are the most serious crimes which can be committed by individuals, in the context of crimes against the person, while ensuring fairness for the rights of the accused. The

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<sup>646</sup> Article 30, Rome Statute.

distinctions also affirm the idea that the defences do not exonerate those pleading them in the same way and highlight their conceptual differences, making them true general principles of international criminal law which do not defer to any one jurisdiction or system of criminal law. In this way, it can be seen that the system of international criminal justice is a mature and properly considered arrangement under which individuals can be tried for the most serious crimes of concern to humanity as a whole.

#### 7.4 Judicial interpretation of the Statute

An alternative means of adopting the above proposal without formal amendment or relying on interpretation of responsibility by the Court could be through the sentencing provisions of article 76. These provisions state that the Trial Chamber may first, take into account the ‘evidence presented and submissions made during the trial that are relevant to the sentence.’<sup>647</sup> This would allow the defences to be interpreted by the judges as partial defences or pleas in mitigation. The previous discussions have highlighted the difficulty of pleading certain defences for any accused; self-defence is an excellent example of a defence in the Rome Statute which is difficult to place in the context of a serious crime against the person requiring specific intent such as genocide. Duress, similarly, creates a rather high threshold for the accused to meet and, particularly if the accused is a high-ranking individual, it may be difficult to ever successfully plead duress in respect of a crime against the person under the Statute. However, viewing the content of article 31 through the prism of article 76 would allow the judges to consider the evidence which may fall short of duress, for example, to allow for the partial removal of responsibility. It could then be considered a partial defence, as highlighted above, or even as a plea in mitigation, without any formal amendment.

Article 76 further allows additional evidence and hearings to take into account anything ‘relevant to the sentence.’<sup>648</sup> In the *Lubanga*<sup>649</sup> sentencing judgment, reference was made to the sentencing provisions in the Statute, in which it was held that the Court “must” take into account any aggravating or mitigating factors.<sup>650</sup> Similarly, this compels the bench to take account of situations of duress and self-defence should these arise. The Rules of Procedure and Evidence<sup>651</sup> indicate a number of aggravating factors, including where the victim was

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<sup>647</sup> Article 76(1), Rome Statute.

<sup>648</sup> Article 76(2), Rome Statute.

<sup>649</sup> *Prosecutor v Thomas Lubanga Dyilo* (Decision pursuant to Article 76 of the Statute) ICC-01/04-01/06 (10 July 2012).

<sup>650</sup> *Ibid.*, para 23.

<sup>651</sup> Rules of Procedure and Evidence of the International Criminal Court (ICC-ASP/1/3 and Corr.1), part II.A.

“particularly defenceless”<sup>652</sup> and offer discretion to the judges where the aggravating factor is not listed in the Rules, but is of a “similar nature”<sup>653</sup> to those enumerated. Mitigating factors are then noted as being any circumstances “falling short of grounds for exclusion of criminal responsibility”<sup>654</sup> and any efforts the person has made to make amends for the crimes, including cooperating with the court.<sup>655</sup> These provisions could in fact afford the judges greater flexibility in deciding the extent to which defences should apply, if they should relieve responsibility fully or partially, and even if they should be considered pleas in mitigation. Despite the main aim of codification being the avoidance of ‘excessive judicial activism’, as was the case at the International Criminal Tribunal for the former Yugoslavia,<sup>656</sup> it appears that the judiciary has greater power to interpret the provisions as it sees fit.

The aim of this chapter was to explore the structure of the defences within the Rome Statute and to attempt to understand the way in which they have been drafted. In doing so, it was discerned that the present structure of the defences conveys the idea that each defence, in articles 31-33 of the Rome Statute, has the same effect on criminal responsibility as the next and that each is of equal value to the next. This was explored in the context of domestic categorisation of the defences, namely justification and excuse theory, as well as the useful concept of pleas in mitigation, as discussed in chapter three. This chapter aimed to argue that the defences in the Rome Statute should not be replaced or removed, but refined. The refinement proposed is to distinguish between the defences in a manner which respects their conceptual differences and offers more detail on the way in which they would affect international criminal responsibility.

The structure of defences within the Rome Statute at present is to place them in three consecutive articles under the heading of general principles. The four main grounds in article 31 could be further subdivided into two groupings, based on the similarity of language between them. This grouping is highly unsatisfactory, however, given that it highlights parallels which exist in the wording between concepts as different as self-defence and duress, mental disease or defect and intoxication. The reference to mistake appears to be a restatement of the mental element in article 30 and superior orders is firstly excluded and then included in a highly restrictive way, purporting to ‘relieve’ criminal responsibility. This division at present is undesirable because it rejects the idea of general principles of law and

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<sup>652</sup> *Ibid.*, Rule 145(2)(b)(iii).

<sup>653</sup> *Ibid.*, Rule 145(2)(b)(vi).

<sup>654</sup> *Ibid.*, Rule 145(2)(a)(i).

<sup>655</sup> *Ibid.*, Rule 145(2)(a)(ii).

<sup>656</sup> M. Karnavas, *The ICTY Legacy: A defense counsel’s perspective*, *GoJIL* 3 (2011) 3, 1053-1092, 1066.

instead favours its own constructions. A more refined approach would involve distinctions based on the concepts of a defence outlined in chapter three: full defences, partial defences and pleas in mitigation.

Full defences can include those which justify and those which excuse the conduct and it has been argued that the only justification for the crimes within the jurisdiction of the Rome Statute could be self-defence, where an individual was threatened and adduced evidence to pass the tests outlined in its formulation. Mental defect or disease would best be characterised as an excuse, while duress could be classified as a partial defence, removing part of the responsibility from the accused for his conduct. Superior orders and involuntary intoxication could then be characterised as formal pleas in mitigation, recognising the requirement of their inclusion without affecting the criminality of the acts committed.

In this way, the need to include defences in order to support the development of international criminal justice as a system is acknowledged. The maturity of a system which deals with particularly heinous crimes but understands that there are certain situations in which an individual may act and ought not to be fully punished would be proved. However, the distinctions would remove the current impunity which rests within the Statute in articles 31-33. There is no law common or customary to all States which demonstrates agreement on all of the defences and in particular, for these defences to serious crimes. Depending on the perspective and system of the State, the current formulations and articles may look unduly harsh or comparatively lenient. It is desirable to try to achieve harmony insofar as may be possible and particularly so where the crimes are so grievous. A system of distinguishing the defences from one another would provide a rational explanation for their inclusion and a better understanding of why defences exist for such crimes in the first place. It may also provide reassurance to victims and the families of victims of those indicted before the Court of the justice that it can, and ought, to deliver. It would also reassure the international community that the system applies general principles of international criminal law, rather than principles selected to suit the mission of the court.

The time it has taken to create the ICC, coupled with the problems associated with achieving agreement on modified provisions mean that it is necessary to explore how the same distinction may be appreciated without any formal amendment to the statute. Thus, it may be possible to deal with the proposal through existing provisions of the Statute in two ways:



through judicial interpretation of the defences<sup>657</sup> or through the sentencing provisions which exist at present in the Rome Statute.<sup>658</sup>

Under article 31(2), judges who adjudicate on cases before the ICC may “determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.” As Schabas notes, this provision is rather difficult to understand given that the defences have been codified, but ultimately places the responsibility for deciding if the defences in article 31(1) should apply in the hands of the Court.<sup>659</sup> Since the hierarchy above proposes a mainly theoretical distinction, there is no reason why this could not be interpreted as such by the Court. If the judges are able to make decisions on *whether* the defences should apply, it is arguably a lesser power than this to be able to determine *the extent to which* such defences should apply. The hierarchy could be considered and enforced by the Court without the requirements for any formal amendments. An issue central to this approach would be the enhanced flexibility this offers the judges, and the possibility of a differentiated approach among cases, which would be ameliorated by a formal amendment. However, arguably this is already permitted by article 31(2) and limited by the establishment of the doctrine of judicial precedent created by the Statute.<sup>660</sup>

These provisions could be utilised by the Court to permit the distinction between the defences to be made. Thus, duress could be considered a partial defence in terms of its effect on the sentence imposed because of the mitigating factor noted above. However, even where duress was present (although the legal criteria in article 31 not satisfied fully to permit its application), if the victim was particularly defenceless, the victim’s state could be considered an aggravating factor in the commission of the crime. There is much judicial discretion in this area to determine not only the applicability of the defences, but also their impact on sentencing. The provisions under article 76 support this view.

The effect of the defences in the Statute can thus be applied or disapplied at the discretion of the judges, which also allows them to consider circumstances akin to defences which were not met in law to be taken into consideration when imposing punishment. In this way, it may be possible to respect the hierarchy detailed above through the exercise of judicial discretion,

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<sup>657</sup> Article 31(2), Rome Statute.

<sup>658</sup> Article 76, Rome Statute.

<sup>659</sup> W. Schabas, *The International Criminal Court: A commentary on the Rome Statute*, Oxford University Press, 2010, 491-2.

<sup>660</sup> Article 21(2), Rome Statute.

wherein the judges may apportion partial responsibility and accept pleas in mitigation through the provisions of article 76 and the rules of procedure and evidence.

- 8.1 Defences in the Rome Statute: The place of duress
- 8.2 Drawing together the threads of defending the indefensible
- 8.3 Developing this research

The foregoing work has dealt directly with the idea of defences, discussing extensively the place of defences in the Rome Statute and highlighting the lack of consideration which led to the codification of the concept in the Statute of the ICC. To conclude, this final part will declare the research statement and the way in which it has been explored. This concludes the examination on the place of duress as a defence, finding its roots in domestic law and its current codification in the Rome Statute as part of a wider acceptance of defences for serious crimes. However, this wider acceptance does not seem to have been fully considered and some of the defences in the Rome Statute do not appear to have a firm theoretical basis in either domestic or international law.

It will then aim to deliver the results of the research: through the principles elucidated by domestic law and international sources, such as customary law and the general principles, the broad finding is that duress does not fit neatly as a defence for war crimes, crimes against humanity and genocide. The contribution to knowledge by this thesis is primarily that there is a particular difficulty with including duress as a defence to such serious crimes against the person. This demonstrates the general issue with including the defence at the international level, duress being the most problematic of the six defences outlined by the Rome Statute, and that the idea of defences ought to have been more carefully considered by the drafters. The theoretical implications of this analysis are that the inclusions of defences may affect the robustness of the doctrine of individual criminal responsibility. However, for reasons of time, space and coherence, this issue was not dealt with. From this point on, it is clear that proper exploration of a theory of international criminal law is required. At present the Rome Statute has sought to create a system of law, the by-product of which is the inclusion of concepts such as defences which are commonly found in established domestic systems. It makes little sense, however, that a system is created without properly considering its foundations. For this reason, it would be worthwhile to undertake future research which deals with the idea of a theory of international criminal law. The area of defences demonstrates incoherence in international criminal law with the idea of fairness: the promise of justice may be undermined by overly broad concepts or those which are overly narrow in defining criminal jurisdiction. The drafting of defences may be by no means the only concept which demonstrates this incoherence and thus further research may demonstrate

other incongruities in the Rome Statute – incongruities which must be addressed sooner rather than later, before the issues come before the ICC as problems in live cases. Prosecution remains difficult enough without the ICC being undermined by what may be perceived as an obvious lack of fairness in its operation.

## 8.1 Defences in the Rome Statute: The place of duress

The central ideas in the thesis relate to the ability to plead defences where serious crimes have been committed, justifying conduct which would otherwise be considered criminal. Ultimately, this thesis has explored the potential application of defences to a serious violation of international criminal law. In order to determine the applicability of such defences, domestic law has been used extensively. To justify the use of domestic law throughout the thesis, the sources of international criminal law were explored in the first instance, concluding that the importance of customary international law and general principles of law determined that domestic law had influenced, and continues to influence, the path of international criminal law. At this early stage, it is evident that domestic law has influenced the development of international criminal law in the past to great effect. Tentatively, one can see that any departure from the principles of domestic law ought to be carefully considered at the international level, particularly where principles of established systems are being disregarded.

The argument then looked at the use of defences before international and internationalised tribunals in order to examine where the defences had been used at the international level. This part also considered the work conducted on a draft statute for an international criminal court by Bassiouni. The work of the domestic, internationalised and international criminal tribunals, as well as the statutes and charters of the latter group of courts, was found to have demonstrated a general reluctance to apply such defences: the principle was clearly enunciated that defences established at the national level, such as self-defence, could be used in response to a charge of war crimes or crimes against humanity. The difficulty in these situations was applying the defence, where limitations such as proportionality and the context of self-defence made it difficult to imagine a situation in which it could be an acceptable answer to such a criminal charge. This was reinforced by Bassiouni's drafting, which codified a number of defences based on those included in the United States' Model Penal Code and placed familiar limitations on their application to serious crimes. The draft statute identified a number of issues with defences and saw fit to note that duress would not be available to

serious crimes against the person: a violent action against another outwith the context of self-defence would have difficulty meeting the test of proportionality.

The later international criminal tribunals equally saw issues with the application of defences and even where the case was difficult, such as in *Erdemovic* before the ICTY, it was held that the defence could not apply to such a serious charge. *Erdemovic* lays the groundwork for this thesis because of the influence that the dissenting opinion of Antonio Cassese has had on the drafting of the Rome Statute, which, for the first time in the history of international criminal law statutes and charters, includes a defence of duress. Turning to the Rome Statute, the issue broadens from self-defence and duress to the inclusion of six defences. These defences echo those which were included in Bassiouni's code, but their definitions do not necessarily conform to the same limitations he prescribed for each in the draft statute. The exploration of each defence in turn uncovered particular issues arising in relation to the defence of duress. This defence appear to be highly contentious: unlike self-defence, it is not a well-established customary principle in law and unlike intoxication, its threshold for application is not so high so as to limit its application to only the most serious and clear-cut of cases. Rather its inclusion in the Rome Statute demonstrates a gap in the understanding of how defences ought to be used at the international level, for such serious crimes on the typically widespread scale on which they tend to be committed. Thus it remained difficult to understand why duress had been included, without inferring a great deal of influence from Cassese's dissent in *Erdemovic*. The influence of this dissent, however, did not reach the drafted form of the defence in the Rome Statute, which some domestic jurisdictions would divide into the concepts of necessity and duress. In this way, a reversion to domestic law was required to highlight the specific problems with this defence.

The next rung in the ladder of the argument was a comparative study of the closely linked defences of duress and necessity at the national level. In domestic systems, the idea of duress often refers to a threat made by another whereas necessity relates to a situation created by a natural disaster or some other force beyond the control of the person acting. More often than not, it relates to circumstances beyond not only the person's control, but anyone's control thus the decision taken can be viewed in a more objective light. The Rome Statute unifies both concepts into the one defence of duress and so both concepts were examined, where separate, at the national level. It was clear from the comparative work conducted that there are some common threads between the nations in relation to duress and necessity: all of the jurisdictions studied recognised at least one of the defences in their system. The main

issue was the application of the defence to a serious crime, the one surveyed being murder. There was very little, if any consensus on this point: the application of either defence was rejected on a number of occasions by English courts, even where the individual did not carry out the murder, whereas the unified South African defence of compulsion was made available to a charge of murder where the individual considered his life to be in peril. The other jurisdictions consider the issue on a spectrum, with Germany and France including at least a variant of duress in their criminal codes but rejecting its application in practice for cases concerning murder and, in the German case, for even threatening torture. The binding nature of the constitutional principle in both Germany and South Africa gives rise to further issues with the defence of duress: if human life is sacred and dignity inviolable, how can it be proportionate to kill another who does not represent a direct threat to your own existence? These issues remain unresolved at the domestic level, demonstrating an abject lack of consensus on the concept of duress in these established and influential national jurisdictions.

Following on from the comparative work, attention then turned to the idea of duress in the Rome Statute and the effect that the defence would have on the guilt of one who pleads it. The main point here is that duress at the national level may or may not be considered a full defence, but affords the full removal of criminal responsibility at the international level. This is problematic because of the reasoning underpinning the reluctance to apply duress as a full defence at the national level: human dignity is inviolable and cannot be balanced against anything other than a direct threat to another life. Killing an innocent person cannot be justified because it was a necessary action under the circumstances or because one was threatened by a third party, an issue that causes problems with national constitutional principles even where the defence has been accepted in criminal law. It would further create issues with international human rights and customary norms to which the States studied have acceded. This part further considers the case of *Erdemovic* in the light of the Rome Statute: the influence of the case on the Rome Statute has been discussed extensively and it is determined, at this stage, that the outcome of the case would not have been any different had it been heard before the ICC. The standards set by the defence of duress in the Rome Statute still require the application of the test of proportionality, which the participation of *Erdemovic* in the Srebrenica massacre would surely not meet. If it were to meet this test, there is a clear impunity gap in the Rome Statute: one can simply argue that any crime, regardless of its gravity, was carried out under the banner of duress. In this way, the inclusion of duress in the Rome Statute for crimes against the person does not serve the purpose for which it was intended. It may not reduce the punishment of truly reluctant soldiers, those

who do act out under duress, and for them it may not even be available because of the character of the crimes within the jurisdiction of the ICC. Where available, it undermines the seriousness of such crimes by deeming a crime against humanity concerning violence against the person a proportionate action in certain circumstances. This does not appear to be a progressive development, and thus reform or reinterpretation of the provisions is required.

The final chapter to the thesis concludes that the provision of defences in the Rome Statute requires a new approach, focusing on the defence of duress as the prime example and the problems created by the inclusion of defences in this ill-considered manner. It also highlights the wider issues of creating a system of international criminal justice without first considering its theoretical foundations; the ad hoc nature of the system has led to rapid development without due consideration, which has created inconsistencies such as those evident in the Rome Statute's provision of defences. These consequences should be properly considered before a case involving defences comes before the Rome Statute, which may diminish the reputation of the ICC in the eyes of the international community. The proposals note that there is an acknowledged, but undiscussed, hierarchy of defences at the national level, with some defences such as self-defence rising to the level of customary international law to reflect the desirability of the principle it espouses. In this way, the priority of such a defence at the national level should be mirrored in the Rome Statute: it can be referred to as a full, exonerating defence because of its accepted, principled basis at both the international and national level. The defences of intoxication and superior orders would be more appropriate as formal pleas in mitigation, allowing for less stringent conceptions of these defences to be applied and reduce the punishment to avoid harsh penalties being imposed on those who have found themselves in intolerable situations, without ignoring the harm caused to the victims and the disregard during such conflicts for the rule of law. Duress then represents a midpoint between the two ideas: to allow it to fully exonerate an individual would be to reject the concerns raised by the investigation into domestic principles, but to reject its inclusion as any form of defence would be to disregard the lessons taught by Erdemovic. A happy medium can be found between the two concepts in the idea of a partial defence for crimes against the person, which would reflect the difficulty of duress as a defence, retaining the criminality of the action but allowing for a lesser form of guilt to be applied to those who find themselves in the typical situation of a 'hard case'.

In this way, the thesis centres on the idea that there is a problem with the broad inclusion of defences in the Rome Statute. Duress, as the most problematic of the defences, demonstrates this amply: there appears to have been little recourse to national law principles other than in the type of defences adopted and the problems the defences face at national level have not been investigated. The Rome Statute appears to require one of two things in order to address this problem: reform, or reinterpretation within the existing framework.

## 8.2 Drawing together the threads of defending the indefensible

The idea elucidated above demonstrated the complexity of the question: the notion of defending the indefensible may seem immediately apparent when looking at the crimes within the jurisdiction of the Rome Statute and yet it is not the case that such action could never been defended under any circumstance. The conclusion that self-defence remains a customary and general principle of international law, in addition to being a well-established defence at the national and State level, clearly demonstrates the potential for defences to be applied to such crimes. The conclusions of this thesis do not preclude such a judgment; rather they support it as an example of why defences are not equal in theory or in application to one another. Comparative work has been a major part of this thesis, demonstrating the way in which international law can learn from the workings and principles of domestic systems. There is no greater need for this than in the area of international criminal law, around which a system has been constructed and which frequently suffers from crises of legitimacy. It is in the interests of the international community to make the system as robust as possible in order to support its legitimacy and one way of doing so is to address the problem of defences, as a step in the direction of building a theory of international criminal law which supports its consistent and coherent development.

The thesis concludes that the defences in the Rome Statute should not be considered equal to one another: the defence of duress demonstrates this idea clearly, using principles of domestic law to illustrate the lack of consensus on the principle of duress, necessity and even the unified concept of compulsion. International criminal law has traditionally turned to domestic law for inspiration to determine what conduct may or may not be criminal at the international level, and this source should not be disregarded at a critical point in the development of international criminal law. Where there is such little agreement on the defence for even one murder at the domestic level, it is difficult to foresee its application for the murder of many in the context of war crimes, crimes against humanity and genocide.



Taking the examples of soldiers at Srebrenica who contributed to a massacre of thousands and situations of camp guards at the Nazi concentration camps who tortured and contributed to the death of so many, it is difficult to argue that such individuals were acting under duress and that their crimes should be nullified as a result. This argument is particularly strong where the application of domestic law would reject or disallow such a defence where used to exonerate an individual of the guilt for the murder of one person. For these reasons, the characterisation of duress as a full defence in the Rome Statute appears incongruous with the development of international criminal law to this point in time. It does not seem fair, appropriate or consistent with general principles of law to allow such a defence to be included, and to create equality among the defences in this way. The inclusion of the defences is based on the experience of international criminal law: situations of duress and involuntary intoxication are numerous in the history of armed conflict. This does not mean, however, that the heinous crimes which may be committed in such circumstances did not occur, or that the damage caused by the commission of them could be repaired by acquitting the actor responsible because he acted under duress. The aim of the court to afford justice must be met, and ought not to be derided through the application of a defence which fully exonerates the actor for such conduct. The history of international criminal law demonstrates the need for justice, not only for victims but for the international community as a whole; justice which may be impeded by a hastily constructed system with little theoretical grounding. The idea of a theory of international criminal law which would then distinguish between the defences indicates that the problems at present cannot be resolved without reform, or a specific reinterpretation of the provisions to ensure a consistently fair approach. The cogency of this theory is clear: the system must be fit for purpose. Furthermore, it is difficult enough to prosecute and for the system of international criminal justice to function effectively and well. It is not clear that the codification of defences in the way of the Statute in its current form has satisfied this requirement, or contributed to the efficacy and justice sought through the operation of the ICC.

The proposals of this thesis indicate that the first step in addressing the wider theoretical problems of the Rome Statute would be to differentiate between the defences which have been codified therein. The distinction between the defences would then allow for a more just approach generally and a fairer approach for those pleading the defences, by lessening the punishment for those who successfully pleaded duress, intoxication or superior orders. This acknowledges that a reason for acting does not mitigate the effect of the crime, but ought to

be reflected in the punishment handed down. The theoretical implications of this would then mean that the defences could be recast, which would reduce the current high thresholds and allow cases like *Erdemovic* to successfully plead duress in mitigation, without compromising on justice. This proposal is the main contribution to knowledge made by this thesis: it demonstrates the potential for reform in the Rome Statute in respect of defences, by proving that the defences which have been codified in the Statute are not equal in force or effect to one another. It goes further than simply highlighting the problem by additionally providing a reasoned means by a more effective and fairer method of distinction may be achieved. This would also create a degree of consistency with national law, which has contributed so much to the development of international criminal law. The failure to refer to domestic principles when determining the bounds of these defences or when identifying if they should be considered full defences represents evidence of a problem in the Rome Statute. The problem is not limited to defences, as there is general lack of theory in international criminal law but it is the most visible representation of it in the Rome Statute, a treaty which needs to deal with the wider theoretical problems it creates through the instigation of a system of international criminal justice.

This research has dealt with one aspect of the problem of a lack of theory of international criminal law, but there are other limitations in respect of the research. This thesis has uncovered the problem of a lack of differentiation between the defences in the Rome Statute with a focus on the defence of duress. However, there are other issues which relate to each individual defence that could be further explored in research which is not limited by the strictures of a PhD thesis. If the premise of differentiated defences is accepted, each defence ought to be explored in turn in order to redefines its bounds as a plea in mitigation or similar. There is the potential, when re-categorising the defences, to make their scope more expansive so as to allow the cases highlighted in chapter four to receive lesser punishments for war crimes, crimes against humanity and genocide, where the acts were committed in difficult situations: the clichéd ‘hard cases’. A fuller study of all the defences is outwith the scope of this particular study, which focuses on the most contentious defence instead. The research also does not examine more broadly the concept of the defence of duress from a number of domestic jurisdictions, which could be incorporated as part of a separate and wider study focused purely on that defence. The comparative aspect of this work is restricted for reasons of time and space, but there is definitely opportunity to expand upon the groundwork conducted here.

The wider aim of this research is to encourage development in this area of international criminal law in order to stimulate reform of the Rome Statute. At present, the ICC is struggling to make its mark as the propellant of international criminal justice and many obstacles lie in its way. These obstacles do not yet relate directly to the Statute and tend to be connected to practical problems: apprehending the accused, gathering evidence and ensuring that the indictments are properly framed, so as to avoid the release of those accused of horrendous crimes on the grounds of a technicality. While these pragmatic issues are ironed out, it is of value to deal with the more theoretical issues underpinning the Rome Statute. The impetus existed in the late 1990s to convene and agree upon a Statute in a short period of time. The reflection and discussion which was stimulated by this development will have, over the past thirteen years, resulted in a number of issues being raised by academics and other commentators. The window of opportunity presented by the operational problems means that these theoretical issues can be dealt with and reform can be instigated before the court begins to prosecute and hear cases on a wider scale than at present. The issue of defences is not one which may or may not arise before the Court; the question is rather one of when it arises, how it shall be dealt with. Cries of unfairness if a defence were to be rejected on the grounds of the seriousness of the crime given the accused another means by which to attempt to undermine the Court's authority. These are better dealt with in anticipation rather than when they are heard during what tend to be difficult, emotive and protracted cases.

While this window of opportunity remains open, it leaves room for development in two areas: firstly, in respect of defences and secondly, in relation to a theory of international criminal law. The issue of defences for crimes at the international level is an interesting and fruitful area for discussion: at the domestic level, it concerns the moral standards we are prepared to accept from one another and at the international level, it takes the idea of an expectation of behaviour which is then applied to the worst and more barbaric crimes which are committed by individuals against, generally, populations of people. In this way, our acceptance that these crimes can be committed in certain circumstances requests a further exploration of how we consider the effect of these crimes. The defences included in the Rome Statute are not universally accepted at the domestic level, inviting again an exploration of why these defences in particular have been selected. Certain defences such as self-defence and mental defect or disease are recognisable in most domestic systems. The defences of

intoxication and duress tend to be less familiar; intoxication is considered an aggravating factor in some countries which operate according to systems of religious law. The seemingly incoherent selection of defences warrants further study in this area to uncover why these particular defences have been selected to remove responsibility at the international level, which could develop the points raised in an earlier part to this thesis. There is also further scope to determine the application of justification and excuse theory to the defences in the Rome Statute, using Anglo-American theory to identify differences between the defences. This could possibly also present an alternative to the theory of a hierarchy of defences, following on from the point developed here that all defences are not created equal.

The main area of development identified by this thesis is that of the opportunity to debate a theory of international criminal law. Theories of international law have been discussed ever more frequently over the past decade and the international system, created in the aftermath of the Second World War, does not always present a coherent system that can be relied upon to present predictable results. In the broad area of international relations, this can be of use but in the area of international criminal law it is undesirable. The very nature of criminal law of any kind necessitates its predictable and reliable application for both those accused of crimes and those who are harmed by the commission of those criminal acts. In this way, a theory of international criminal law is required in order to create a sound theoretical basis for its future development. The various sources of international criminal law demonstrated here prove the point that reliance on treaties alone is neither desirable nor possible: international criminal law cases often put forward situations which could not have been considered at a peaceful, peacetime conference. A flexible theory of how international criminal law ought to be operate would bridge the gap between the creation of the law at international conferences, which should continue as a means of uncovering international consensus on how such serious events should be dealt with and remedied by the international community, and the requirements of ensuring justice. It would also ensure that the decisions which are taken are properly rooted in the spirit in which international criminal law was created, to further the aim of ending impunity without compromising on the rights of those who find themselves accused of the worst crimes of concern to the international community as a whole.

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