

**Justice not Revenge:  
The International Criminal Court and the ‘grounds to exclude criminal  
responsibility’: defences or negation of criminality?**

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In recent years, two areas of international law have particularly developed: human rights law and international criminal law. Whereas traditionally human rights law has developed based on notions such as fair trial and on the rights of the accused, recently the focus has shifted towards the needs to prosecute person responsible of gross violations of human rights such genocide, crime against humanity or war crimes. In this ‘weeding’ between human rights law and international criminal law one of the main questions is concerned with finding the right balance between prosecution and defence in order to ensure that the international justice remains based on the ideal of reconciliation and not revenge. At the international level the debates relating to the grounds to exclude the criminal responsibility of the accused were intense during the Rome Conference for the adoption of the Statute of the International Criminal Court (Rome Statute).<sup>1</sup> Because the crimes, which are under the jurisdiction of this Court, are of the most heinous nature, the question of the possibility of invoking defences for such crimes was certain to be one of the difficult issues to arise during the discussions. The issue was especially tense as the Conference involved bringing together many different national criminal law perspectives for the same international statute. There are wide differences between the questions of the defences in all the different national jurisdictions. The difficulty was to ‘harmonize’ these different approaches, knowing that the ICC is unique by its universality and permanence. Thus, the Rome Statute accomplished the challenge in a short period of time, in bringing together the continental-European system and the common-law approaches to defences. Article 31 of the Rome Statute uses the term ‘grounds to exclude criminal responsibility’; a term that is broad enough to accommodate the different legal traditions. In exploring the

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<sup>1</sup> Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9

defences as set up in article 31 of the Statute, this article has two main purposes. First, to appreciate whether the Rome Statute represents a codification of existing laws or an evolution of the ground to exclude criminal responsibility in international law. To this purpose, this article analyses the relevant sources and content of international criminal law, thus explores the defences of insanity, intoxication, self-defence and duress as recognised in article 31 of the Statute. Secondly, this paper is aimed at scrutinising the confusion that has been raised concerning such grounds of exclusion in cases of genocide, crimes against humanity and war crimes. One of the issues during the Rome Conference was to define what sort of defences would be acceptable in the Statute to exclude the criminal responsibility of person who by definition would be responsible for the ‘most horrible crimes’. There has been much confusion between defences and negation of responsibility. The present article seeks to highlight that the recognition of grounds to exclude criminal responsibility and the negation of crimes are two different notions. Overall, the purpose is to show that allowing defences based on the recognition of the ‘human fragility’ within the Statute does not mean the ignorance of the horrible character of the crimes. It is not because the ICC deals with the most heinous crimes, that persons accused must be recognised culpable with no possibility to prove that their intention was not criminal. Ultimately, a different view would be contrary to the evolution of criminal law and human rights law.

## **I. A Long Way to Rome**

The first international war crimes tribunal established by the Nuremberg Charter provided that the accused have “the right to give any explanation relevant to the charges made against him”.<sup>2</sup> Nevertheless, the Charter did not give any definition or list of the defences permissible. The only exception was with regard to the defence of superior orders.<sup>3</sup> Control Council Law No. 10 also dealt solely with the defence of superior order.<sup>4</sup> In terms of the jurisprudence, the Law Reports of Trials of War

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<sup>2</sup> Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military tribunal (IMT), (1951) 82 UNTS 279, Article 16 (b), (d) and (e).

<sup>3</sup> Nuremberg Charter, Article 8, and Tokyo Tribunal Article 6, International Military Tribunal For the Far East, 19 January 1946, T.I.A.S. No. 1589

<sup>4</sup> Control Council Law No.10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council of Germany*, No.3, Berlin, 31 January 1946, pp.50-5, See: Article II (4) (b): “the fact that any person acted pursuant to the

Criminals points out that most of the pleas before war crimes tribunal include three categories of arguments. The argument that the accused acted under superior orders (plea of superior orders), the argument that the accused acted under a threat to himself (plea of duress), and the argument that the crime was for the accomplishment of a military mission (plea of military necessity).<sup>5</sup> The 1949 Geneva Conventions make no reference to specific defences in case of war crimes.<sup>6</sup> The 1948 Genocide Convention includes only one provision relating to the defence of head of State immunity and declares it to be inadmissible.<sup>7</sup> The Draft Code of Crimes Against Peace and the Security of Mankind of the International Law Commission states that the Court shall determine the admissibility of the defences “in accordance with the general principles of law, in the light of the character of each crime.”<sup>8</sup> The Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>9</sup> only mentioned ‘military necessity’ as a ground of justification<sup>10</sup> and ‘superior orders’ as a ground of mitigation.<sup>11</sup> Thus, the first issue in Rome was to answer the question: should the ICC statute mention specific grounds to exclude criminal responsibility?

During the Rome Conference there was a clear will to codify as much as possible the international criminal law within the Rome Statute, it was clear that most of the States did not want to leave as much liberty as the Statute of the ICTY did to the judges. The 1995 Ad Hoc Committee divided defences into three categories: negation of liability, excuses and justifications and defences under public international law. It was only in

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order of his government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.”

<sup>5</sup> *Law Report of trials of War Criminals*, Vol. XIV, XV, London, Published for the United-Nations War Crimes Commissions by his majesty’s stationery office, 1949, p.156; The Rome Statute distinguishes the plea of superiors order but amalgamates the two other pleas in the same category, as the plea of military necessity is included in the defence of self-defence (see discussion below)

<sup>6</sup> Geneva Conventions, Adopted on 12 August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, held in Geneva from 21 April to 12 August, 1949

<sup>7</sup> Convention on the Prevention and Punishment of the Crime of Genocide, Article 4, (1951) 78 UNTS 277.

<sup>8</sup> See: Report of the Commission to the General Assembly on the Work of Its Forty-Third Session, A/CN.4/SER.A/1991/Add.1

<sup>9</sup> The full appellation of the Tribunal is: ‘International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991’, see: Security Council Resolution, UN Doc. S/RES/827, Adopted 25 May 1993.

<sup>10</sup> ‘Statute of the International Tribunal for the Former Yugoslavia’, Article 2 (d) and 3 (b)

<sup>11</sup> *Id.*, Article 7.

December 1997 that the Preparatory Committee had titled a general provision ‘grounds for excluding criminal responsibility’.<sup>12</sup>

A large part of the drafting debates focused on the question of the inscription of the defences as possible factors of mitigation or of exclusion of responsibility. Amnesty International advocated a clear-cut distinction between the two notions; duress or superior orders would have been mitigating factors only.<sup>13</sup> The non-governmental organisation affirmed that under international law there was a precedent for the exclusion of a codification of specific defences regarding the gravity of the offences. One of the major issues was to appreciate whether defences should be regarded as a justification or excuse.<sup>14</sup> A defence could be seen either as justifying acts that would have been criminal (justification) or as excusing the accused that have acted criminally (excuses). The Rome Statute favours the approach that defences could act as grounds for excluding the criminal responsibility. In its article 31, the Rome Statute puts together defences such as self-defence, which is usually regarded as a justification, and intoxication or insanity, which are usually classified as excuses. The association of such different defences is based on the idea that all are linked with the issue of *mens rea*. All existing international or national crimes have two constitutive elements: the criminal act by itself (*actus reus*) and the criminal intent (*mens rea*). Insanity or intoxication involve the incapacity to appreciate the unlawfulness of the act. Self-defence excludes the criminal intention, as the intention was to protect life. The consequence of duress is the suppression of the freedom of choice of the person, thus related to the *mens rea* of the author. In the Statute, even though the judges of the ICC have the power to refer to these defences as mitigating factors when sentencing the accused,<sup>15</sup> all these defences are potentially “absolute defences”,<sup>16</sup> or in other terms ‘complete defences’ which may allow the judges to find the accused non-culpable.

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<sup>12</sup> See: UN Doc. A/AC.249/1997/L.9/Rev.1 and UN Doc. A/AC.249/1997/W.G.2/CRP.7, and for further comments on the drafting of the Rome Statute concerning the defences, See: W.A. Schabas, *General Principles of Criminal Law, in the International Criminal Court Statute (Part III)*, European Journal of Crime, Criminal Law and Criminal Justice (The Hague, Kluwer international law, 1998-14)

<sup>13</sup> See: Amnesty International, *The Quest for international justice: defining the crimes and defences for the international criminal court*, AI-index IOR 40/006/1997, 01/02/97, para.3.2.

<sup>14</sup> For example the German doctrine makes such a differentiation.

<sup>15</sup> See: Chapter 7, Rule 145, UN Doc. ICC-ASP/1/3

<sup>16</sup> Yoram Dinstein, *War Crimes in International Law*, Martinus Nijhoff Publishers, The Hague, p.272.

## II. INSANITY and INTOXICATION

Defences based on insanity or intoxication are clearly linked with the question of the *mens rea* of the accused at the moment of the crime. Rather than relating to the criminal intent, such defences relate much more to the criminal consciousness. The author was not conscious of his/her act. The Rome Statute states that mental disease or intoxication have destroyed the person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform the requirement of law.

### A. Insanity

Both systems, common-law<sup>17</sup> and civil law systems have recognised a defence based on insanity as a complete defence when the total insanity of the accused is proven. The test to prove insanity defined by the American Institute has been adopted by a large number of states, this test adopted by the Model Penal Code states:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law.<sup>18</sup>

In 2001, the Appeals Chamber of the ICTY dealt with the defence of insanity in the *Celebici case*, in which the judges made reference to the ICC statute. In this case, one of the four accused, Esad Landzo invoked a defence based on his "diminished mental responsibility".<sup>19</sup> The judges rejected his defence and sentenced him to fifteen years of imprisonment. The Trial Chamber found him guilty of grave breaches of the Geneva

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<sup>17</sup> For example, see : M'Naghten' Case (1843) 10 Cl. & Fin 200, 8 E.R. 718.

<sup>18</sup> Quoted in Black's Law Dictionary, Definitions of the terms and Phrases of American and English Jurisprudence, Ancient and Modern, Henry Campbell Black (ed), Fifth edition, St. Paul Minn, West Publishing Co., 1979, p.714.

<sup>19</sup> See: Rules of Procedure and Evidence, Initial Document adopted 11 February 1994. Rule 67 (A) (ii): "As early as reasonably practicable and in any event prior to the commencement of the trials: (...) the defence shall notify the Prosecutor of its intent to offer: (a) the defence of alibi (...); (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence."

Conventions. The accused filed one ground of appeal directed to the issue of ‘diminished mental responsibility’; a defence that can be found in the ICTY rules of procedure and evidence. The accused argued that “the refusal of the Trial Chamber to define the ‘special defence’ in advance of evidence being given in relation to it denied him a fair trial.”<sup>20</sup> The Appeals Chamber pointed out that Article 15 of the ICTY Statute gives power to the judges to adopt ‘rules of procedure and evidence’, thus no power to adopt new defences as such, and that therefore, the accused’s claim that the Statute makes reference to such defence of diminished mental responsibility was unfounded.

Based on customary international law, the Appeals Chamber notably highlighted that the defence based on diminished mental responsibility was clearly different from the defence of insanity included in the ICC Statute. The defence of insanity refers to the destruction of the defendant’s capacity and such annihilation would lead to an acquittal, whereas the defence of diminished mental capacity refers only to the impairment of mental capacity. Such a defence could be relevant only in the matter of mitigation of a sentence. On this point, the Appeals Chamber followed the decision of the Trial Chamber that the accused “was quite capable of controlling his action” and thus rejected his appeal. Thus, in invoking the defence of insanity the defence must demonstrate that the accused was unable to control his or her action at the moment of the illegal act. To be an acceptable defence the mental disease or defect must have completely destroyed the mental capacity of the accused. One can regret that the Rome Statute does not address the situation of the accused that would be found insane. On this issue, Amnesty International have highlighted that “the Statute or rules will have to establish procedures consistent with international law and standards for addressing the situation of a person acquitted on this ground who continues to suffer from that disease or defect.”<sup>21</sup> Thus, whereas most national systems organise a procedure for addressing the situation of the person acquitted because of insanity, the Rome Statute remains silent on this issue.

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<sup>20</sup> ICTY, Appeals Chamber, *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Judgement, 20 February 2001, para. 446 (<http://www.un.org/icty/celebici/appeal/judgement/index.htm>, Last Consulted 04/04).

<sup>21</sup> Amnesty International, *16 Fundamental Principles for a just, fair and effective international criminal court*, AI-Index IOR 40/010/1998, 01/05/1998. William A. Schabas suggests: “the public health

## B. Intoxication

The state of intoxication refers to situations where the accused by reason of consuming drugs or alcohol was unable to have “the normal use of his physical or mental faculties, thus rendering him incapable of acting in the manner in which an ordinarily prudent and cautious man, in full possession of his faculties, using reasonable care, would act under like conditions.”<sup>22</sup> At Rome, a large part of the debates focused on the issue of voluntary intoxication. In the past, the British Military Court in the case of *Yamamoto Chusaburo* had recognized that intoxication was an admissible defence in case of war crimes.<sup>23</sup> However, in this case, while the accused pleaded the defence of drunkenness the Court rejected such a defence on the ground that the intoxication was voluntary. The issue of voluntary or involuntary intoxication is linked with the question of the intent of the author. In cases of voluntary intoxication it is possible to support the idea that the accused has had a pre-existing intent, or that he knew that the circumstances that led to the crime could arise. During the debates for the establishment of the ICC statute, the Working Group pointed out that:

Some delegations have doubts about accepting voluntary intoxication as a ground for excluding criminal responsibility. It was the understanding that voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in case of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes. One delegation was of the view that one should not differentiate between types of crimes.<sup>24</sup>

The Rome Statute includes such a distinction, as article 31 paragraph 1 (b) states that intoxication is a complete defence “unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk,

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authorities in the Netherlands, where the Court will have its seat, can be expected to take the appropriate measures.” *Genocide in International Law* (Cambridge University Press, 2000) p.344.

<sup>22</sup> Black’s Law Dictionary, Supra note 16, p.738.

<sup>23</sup> British Military Court, *United Kingdom v. Yamamoto Chusaburo*, Law Report of the Trials of War Criminals, Vol.3, p.76, 1946.

that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court.” Thus, in case of voluntarily intoxication this defence is excluded only if the accused knew, or disregarded the risk that he or she was likely to commit.

### **III. SELF-DEFENCE**

In international law the notion of self-defence tended to apply only to inter-states relationships. Vattel has made the point that for states self-defence is not only a right but also one of the most sacred duties of the state. Nowadays, the right to self-defence for states is part of both customary and conventional international law.<sup>25</sup> Nevertheless, such a right to ‘self-protection’ is conceded to the State under attack and not to the individual facing a charge of war crimes before a court. Thus, such a defence might be recognised for the soldier only in a derivative manner. The Rome Statute clearly makes the difference between the two notions of individual and state self-defence. Article 31 (c) reads: “The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph”. Therefore, even though the state is engaged in a self-defence action, the person involved in such an operation cannot claim that he/she was acting in self-defence.

In criminal law, self-defence is a frequently recognised defence. In the history of criminal law such a right to self-defence was justified by the urgency of the situation, usually laws authorised the victim to protect themselves. This right was to protect another right that was threatened. In such cases public authorities transfer a power which is usually only rightfully exercise by those authorities. Today such a defence is recognized in both common law and civil law. Internationally, the Tokyo tribunal has highlighted that: “[A]ny law, international or municipal which prohibits recourse to force, is necessarily limited by the right of self-defence”.<sup>26</sup> During the trial of *Willi*

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<sup>24</sup> UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1, p.4, n.8, Quoted in William A. Schabas, *Supra* note 20, p.343.

<sup>25</sup> See Article 51 of the United Nations Charter

<sup>26</sup> *Hirota and Others*, International Military Tribunal for the Far East, Tokyo, 1948, A.D. 356, 364.



*Tessmann and others* by the British Military Court in Hamburg in 1947, the Judge Advocate stated:

The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant; and of course, such considerations as the nature of the weapon in the hands of the accused, the question whether the assailant had any weapon and so forth, have to be considered. In other words, was it a last resort? Had he retreated to the uttermost before ending the life of another human being?<sup>27</sup>

However, it is worth noting that few accused had successfully pleaded self-defence in cases tried following the Second World War.<sup>28</sup> Article 2 (2) (a) of the European Convention for the protection of Human Rights and Fundamental Freedoms also recognises self-defence as a derogation from the obligation of the right to life.<sup>29</sup> Recently, the Trial Chamber of the ICTY has stated that the defence of self-defence “may be regarded as constituting a rule of customary international law.”<sup>30</sup> Article 31 paragraph 1 (c) of the Rome Statute introduces the right to self-defence as follows:

The person acts reasonably to defend himself or herself or another person or, in case of war crimes, property which is essential for the survival of the person or another person, or property, which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph.

There are three categories of requirement in the plea of self-defence:

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<sup>27</sup> Quoted in *Law Report of trials of War Criminals*, Vol. XIV, XV, Supra note 11, p.177.

<sup>28</sup> Erich Weiss and Wilhelm Mundo before a United States Military Government Court, See: *Law Report of trials of War Criminals*, Vol. XIV, XV, Supra note 11, p. 177.

<sup>29</sup> *Convention for the Protection of Human Rights and Fundamental Freedoms*, Council of Europe, Rome, November, 4 1950. See Article 2 (2) (a), “in defence of any person from unlawful violence”.

- (1) the person must have acted ‘reasonably’
- (2) in response to an ‘imminent and unlawful use of force’
- (3) and this act must have been ‘proportionate to the degree of danger’.

The person that claims to have acted under self-defence must have done so ‘reasonably’. Such a notion refers to the reasonability of the act during the circumstances of the case; the accused must have reasonably believed that the use of force and thus the criminal act was necessary to defend himself or someone else. The court would appreciate the perception of the danger of the accused and to what extent the threat was real at the moment of the act. In highlighting that the framing of the ‘Model Penal Code’ contains nearly the same definition of self-defence as the ICC Statute, Bassiouni emphasised that requirement that the defender reasonably believe that forceful response is necessary is a common law requirement which is superfluous for civil law systems. The requirement that the response must be to an imminent and unlawful use of force “may be viewed under the common law as surplusage.”<sup>31</sup> In this regard, the Rome Statute established a balance between the common-law requirement and that of the civil law system.

The second requirement that the accused must have acted in reaction to an “imminent and unlawful use of force” can be explained by the fact that the response to the danger must have followed the unlawful use of force. If it is not the case that the accused had responded to such a use of force by another person, it is no longer a case of self-defence but one of assault.

The third condition is classical and can be found in most of the national criminal systems, the force used to respond to the attack must be proportionate to such an attack. If the response is superior to the degree of danger, such response is no longer justified and regains its illegal character. It is not the result of the act of the defence that will be taken in consideration but rather the intention of the accused. The Rome Statute distinguishes different situations. For all the crimes that might fall under the competence of the ICC the accused might have acted to protect his life or another life.

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<sup>30</sup> ICTY, Trial Chamber, *Prosecutor v. Dario Kordic & Mario Cerkez*, Judgement, 26 February 2001, para. 367.

<sup>31</sup> C. Bassiouni and Paust, *International Criminal Law*, Durham, Carolina Academic Press, 1996, p.1390.

In cases of war crimes solely, the person might have act to protect ‘property which is essential for accomplishing military mission.’ This aspect of the definition of self-defence in the ICC Statute is open to much criticism.<sup>32</sup>

Even though there is no international consensus concerning the invocation of self-defence for the protection of property, the Rome Statute recognizes such a possibility in case of war crimes. This defence can only be invoked for the protection of property which is essential for life or for the accomplishment of a military mission. However, it is quite difficult to imagine what kind of property might justify the perpetration of a war crime in a ‘proportionate’ way. Even though such a defence is ‘only’ available in case of war crimes, such war crimes involve for example torture, use of poisoned weapons or attacking or bombarding towns, village, etc.<sup>33</sup> David argued that this provision is “a Pandora’s box that is rigorously incompatible with the law of armed conflict.”<sup>34</sup> It is fully human and understandable that law would justify the preference given to life rather than to property, the opposite seems unacceptable. Thus, it is quite difficult to comprehend in what situation the defence of property might be an acceptable defence for war crimes. However, such an inclusion should not be of much concern as the conditions that frame the defence of self-defence are strict and judges would certainly not allow such a defence in many cases. In this regard, this reference to property must be seen as one of the most scandalous concession of a multinational conference where the most important thing was finally to arrive at a consensus.

Under Article 31 (c), the Statute recognises self-defence for a person who ‘acts reasonably’ to defend a property that is ‘essential for accomplishing a military mission.’ Even though the defendant would have to respect legal methods of combat, *a priori* such a position includes the idea that ‘the end justifies the means’; for military objectives any act necessary for the victory might be a way of defence. Concerning this part of the Rome Statute, Cassese has highlighted that “this extension is manifestly outside *lex lata*, and may generate quite few misgivings.”<sup>35</sup>

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<sup>32</sup> See: Synthèse des débats, Revue Belge de Droit International, 2000/2, pp.355-488

<sup>33</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.138/9, See : Article 8.

<sup>34</sup> Eric David, *Principes de droit des conflits armés* (2nd ed. Brussels: Bruylant, 1999) p.693

<sup>35</sup> A. Cassese, *The statute of International Criminal Court: Some Preliminary Reflections*, European Journal of International Law, Oxford, University Press, vol. 10, Issue 1, 1999.

The origin of the concept of military necessity can be found in the Lieber Code of 1863, and such a Code used that concept only to restrain military operations, not as a defence to war crimes.<sup>36</sup> This defence does not extend to the deliberate killing of civilians, as it is this an action that is never justified.<sup>37</sup> Article 48 of Protocol I of the Geneva Convention states: “Parties to the conflict shall at all the times distinguish between the civilian population and the combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>38</sup> The Charter of the Nuremberg Tribunal recognised the defence based on the military necessity.<sup>39</sup> Article 2 (d) of the ICTY Statute states “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” are war crimes<sup>40</sup>. Thus, making an *a contrario* interpretation this means that military necessity might justify such acts. Until today such a provision has not allowed any war criminal to find any defence in case of war crimes. In the *Hostages* case, the United States Military Tribunal rejected the defence of military necessity to war crimes and stated “The rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation.”<sup>41</sup> The same Tribunal has also rejected such a defence in the *High Command* case and declared the acceptance of this defence “would eliminate all humanity and decency and all law from the conduct of war and it is a contention which this Tribunal repudiates as contrary to the accepted usages of civilized nations.”<sup>42</sup> In doing so the Tribunal clearly stated that such military necessity does include the right of doing anything that contributes to winning the war. More recently, such an issue was raised in the trial of *Kordic & Cerkez* before the Trial Chamber of the ICTY.<sup>43</sup> Mostly based on the interpretation of the Rome

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<sup>36</sup> See: Amnesty International, *16 Fundamental Principles for a just, fair and effective International Criminal Court*, AI-index IOR 40/010/1998 Part V, *International Criminal Court: Making the rights choices*, (comments on Draft Article 33)

<sup>37</sup> However there are situations where killing civilians can be justified – reprisal killings are not unlawful in internal armed conflicts for example, see Shane Darcy, ‘The Evolution of the Law of Belligerent Reprisals’ 184 *Military Law Review* 175 (2003)

<sup>38</sup> Protocol additional to the Geneva Convention of 12 August 1949, and relating to the protection of Victims of International armed Conflicts, (Protocol I), 1125 U.N.T.S. 3, entered into force Dec. 7, 1978

<sup>39</sup> Article 5 (b) of the Nuremberg-IMT-Charter, *Supra* note 3.

<sup>40</sup> See also Article 3 (b): “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

<sup>41</sup> United Nations War Crimes Commission, *Law Reports of the Trials of the War Criminals, Hostages case*, Vol. XI, p.1272.

<sup>42</sup> *Law Reports of the Trials of the War Criminals*, Vol. XII, p.93.

<sup>43</sup> ICTY, Trial Chamber, *Prosecutor v. Dario Kordic & Mario Cerkez*, *Supra* note 28.

Statute, the judges highlighted that in case of war crimes; the principle of military necessity must be appreciated in relation to the requirement that the act of defence must be “proportionate to the degree of danger”. The Trial Chamber’s conclusion concerning this defence based on military necessity was ‘that military operations in self-defence do not provide a justification for serious violations of humanitarian law.’<sup>44</sup> This specific part of the definition of self-defence must be seen as part of the acknowledgement of military necessity, which is not new in international criminal law. In 1954, Glaser wrote that the construction of international criminal law has evolved based on a compromise between military exigencies and the aspiration for justice.<sup>45</sup> In this regards the Statute fulfil its task as the Statute imposes some restrictions as to the invocation of self-defence. First the Statute insists that self-defence is evocable only if it takes place during a legal operation.<sup>46</sup> This excludes for example, that such a defence may justify the practice of ‘human shield’ as article 8 of the Statute states that such practice is a war crime, thus illegal.<sup>47</sup> David was concerned about the fact that self-defence could have been a successful defence in case of the use of a ‘human shield’ to protect some property essential for the accomplishment of a military operation.<sup>48</sup> The Statute also adds that ‘the fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility.’ A second restriction to such defence adds that such a defence is not valid in case of the use of force by the state.<sup>49</sup> Thus, when the principle of public policy (‘*raison d’état*’) is invoked the rule of public international law will be applicable. There will be a distinction between the military necessity invoked by an individual which represents the engagement of the person in the conflict as such person also has an interest in the victory, and the military necessities claimed by the state.

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<sup>44</sup> Id., para. 368.

<sup>45</sup> S. Glaser, *Introduction à l’étude du droit International Pénal*, Établissements Émile Bruylant, 1954, p. 106. (“toute la construction du droit international pénal a évolué notamment vers un compromis entre les exigences militaires d’une part, et les aspirations de la justice d’autre part.”)

<sup>46</sup> UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.3, p.2, fn.3.

<sup>47</sup> Rome Statute of the International Criminal Court, Supra note 31, Article 8 para. 2 (xxiii) : "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations".

<sup>48</sup> Éric David, *Principes de Droit des Conflits Armés*, Bruxelles, Bruylant, 1994, P. 693.

<sup>49</sup> UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.3, p.2, fn.2.

#### IV. DURESS

Most national criminal systems admit that criminal responsibility disappears when a person acts in circumstances which have effectively remove the possibility of exercising his or her free will by the effect of a threat to him/her or to a relative. This defence is often call ‘necessity’, ‘compulsion’, or ‘coercion’.<sup>50</sup> On the nuances between these notions, Professor Hall has stated:

There are valid grounds in support of the above noted differences between the doctrines of necessity and coercion. In the former, the pressure which influences the action is physical nature, while coercion it is the immoral and illegal conduct of human beings that create the problem.<sup>51</sup>

Some legal systems include the two different types of compulsion under the general term of ‘necessity’. The Statute establishes the same link between coercion by another person and compulsion by the circumstances.<sup>52</sup> The common law regime excludes this defence as a complete defence in cases of ‘the most serious crimes’, such as murder, treason, piracy or sexual assault.<sup>53</sup> Such a position is based on the fact that duress is justified by the idea that the accused has avoided a greater harm, thus it does not apply when an individual, to save his or her own life has killed another person. In most of the civil law systems such a defence is admissible.<sup>54</sup>

##### *Duress, necessity, and superior order*

At the international level, prior to the Rome Statute, the defence of duress was often linked with the plea of superior orders, and such a defence was considered more as a mitigating factor than as a complete defence. The defence of duress was used several times during the trials following the Second World War. The term used for such

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<sup>50</sup> *Krupp Trial*: “ The defence of necessity in municipal law is variously termed as ‘necessity’, ‘compulsion’, ‘force and compulsion’, and ‘coercion and compulsory duress’”. See: LRTWC, Vol. X, p.147.

<sup>51</sup> J. Hall, *General Principles of Criminal Law*, 1947, 377-415, Quoted in C. Bassiouni, *Crimes Against Humanity in International criminal Law*, Dordrecht, Martinus Nijhoff Publishers, 1992, p. 440.

<sup>52</sup> This aspect of the Rome Statute will be discusses further.

<sup>53</sup> Bassiouni, *Crime Against Humanity in International law*, Supra note 46, p.441.

defence was ‘necessity’.<sup>55</sup> In the *Krupp Trial* the judges affirmed that necessity is a defence ‘when it is shown that the act charged was done to avoid an evil severe and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.’<sup>56</sup> In the *Einsatzgruppen* case, the U.S. Military Tribunal stated:

(...) there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns...No Court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.<sup>57</sup>

Article 8 of the Nuremberg Charter excluded the defence of superior orders, but it was interpreted by the Tribunal that such a defence, if linked with ‘absence of moral choice’, was acceptable as a defence.<sup>58</sup> This was based on the idea that the defence of superior orders might include some situations in which the accused argues that the consequences of disobedience might constitute a direct threat to his or her physical integrity, that is to be related to the defence of duress as this defence covers situations in which the accused acted under an immediate threat. Nevertheless, the distinction between the two different defences remained clear. Even though they were often pleaded together, the judgement in *High Command Case* explained the distinction:

The defendants in this case who received obviously criminal orders were placed in a difficult position, but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognised as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in

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<sup>54</sup> For example, in France, duress (la contrainte morale) is admissible, and one of the requirements is that such duress must be irresistible.

<sup>55</sup> See: Law Report of the Trials of the War Criminals, Vol. XIV, XV, *Supra* note 11, ‘defence pleas’, pp. 170-176.

<sup>56</sup> See: LRTWC, Volume X, pp. 147-149.

<sup>57</sup> Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume IV, (Washington, D.C.: U.S. Government Printing Office).

<sup>58</sup> For further developments on this point, See: William A. Schabas, *Genocide in International Law*, Cambridge University Press, 2000, p.330-331.

such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.<sup>59</sup>

Nevertheless, the plea of superior orders without a link with coercion was not found admissible, an approach that was confirmed by one of the majority judges at the ICTY in the trial of *Erdemovic*.<sup>60</sup> The Rome Statute clearly distinguishes between the plea of obedience to superior orders and duress and thus codifies such a difference. There is a specific provision in article 33 of the ICC statute concerning superior orders. The plea of duress refers to a “threat of imminent death or of continuing or imminent bodily harm”, whether the threat comes from a superior or not.

#### *Duress as a factor in mitigation only?*

A fundamental difference between international criminal law following the Second World War and international criminal law as codified within the Rome Statute relates to the consequences of the defence of duress. The Rome Statute includes the plea of duress as a factor for the exclusion of the criminal responsibility, whereas the post world war tribunals used this defence as a factor of mitigation. One of the clearest decision in that regard comes from the *Hölzer* Case before a Canadian Military Court in 1946, the Judge stated: “there is no doubt on these authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent can never be justified.”<sup>61</sup> In conclusion, the judge stated that duress could only be a factor in mitigation of the punishment.<sup>62</sup> During the post second world war trials, the only cases where the defence of duress was accepted as a complete defence were the cases of *Flick*, *I.G. Farben* and *Krupp*. In these cases the accused were some German industrialists charged with employing forced labour. Their defence was mainly based on the fact that if they did not reach the quota required by the government, which was only possible by using forced labour supplied by the government, they would have

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<sup>59</sup> *High Command Trial*, LRTWC, Vol. XII, p.72; See also *United States v. Ohlendorf et al.*, 4 LRTWC 411, p.480.

<sup>60</sup> See, Trial Chamber, *Prosecutor v. Erdemovic*, Supra note 14; however, See: Separate and Dissenting Opinion of Judge Cassese during the Appeal, 7 October 1997 (Case No. IT-96-226A), para.15.

<sup>61</sup> United Nations War Crimes Commission, LRTWC, Vol. XV, p.173.

<sup>62</sup> For more illustration of such a rule, See: Trial of Valentin Feurstein and Others, LRTWC, Vol. XV, p.173; Trial of Gustav Alfred Jepsen, LRTWC, Vol. XV, p. 172; and Trial of Otto Ohlendorf et al. (“Einsatzgruppen Case”), LRTWC, Vol.IV, p.3.



suffered ‘harmful and irresistible consequences’. The judges admitted this defence only because the crime of employing forced labour was not considered a heinous one. The ICTY reached the same conclusion in the *Erdemovic* case. As a member of a firing squad, Drazen Erdemovic was involved in the killing of unarmed civilians that followed the fall of the United Nations so-called ‘safe area’ of Srebrenica.<sup>63</sup> When the accused has pleaded guilty for crime against humanity, he declared:

Your honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: ‘If you are sorry for them, stand up, line up with them and we will kill you too.’ I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.<sup>64</sup>

The Statute of the ICTY makes no mention of the defence of duress, thus, in that case the judges had to look back on the precedents in international criminal law and in the national legislations. The Trial Chamber of the ICTY stated:

With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.<sup>65</sup>

The Trial Chamber rejected the plea based on duress and the accused was sentenced to ten years imprisonment.<sup>66</sup> On appeal, in a 3:2 decision, the judges concluded: “duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings.”<sup>67</sup> As the accused pleaded the defence of duress, a fundamental issue was to define whether

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<sup>63</sup> For the facts, See: para. 76 to 79. The accused was involved in one of the cold blood executions of unarmed civilians which followed the fall of Srebrenica.

<sup>64</sup> Transcript, initial appearance hearing, 31 May 1996, p.9, (IT-96-22-T.D241), Quoted in *The Prosecutor v. Drazen Erdemovic*, Sentencing Judgement, Trial Chamber, 29 November 1996, para.10.

<sup>65</sup> ICTY, , Trial Chamber, *Prosecutor v. Erdemovic*, Supra note 14, para. 19.

<sup>66</sup> ICTY, Trial Chamber, *Prosecutor v. Erdemovic*, Sentencing Judgement, Supra note 14, para. 91 and Part IV Disposition.

<sup>67</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazen Erdemovic*, 7 October 1997, (Case No. IT-96-22-A), para. 19.

the plea of the appellant was equivocal. The judges' opinions stress that the question whether the appellant's plea was equivocal depended on whether duress can be afforded as a complete defence. According to judges Vohrah, McDonald and Li, duress might be considered as a mitigating factor.<sup>68</sup> Judge Stephen in his separate and dissenting opinion based his dissent on the fact that the accused had pleaded guilty because of the possibility to plead duress as a ground to exclude his criminal liability. Thus, for judge Stephen, the guilty plea was not unambiguous and was equivocal. The conclusion of judge Stephen on the application of duress as a complete defence in international law is:

The stringent conditions always surrounding that defence will have to be met, including the requirement that the harm done is not disproportionate to the harm threatened. The case of an accused, forced to take innocent lives which he cannot save and who can only add to the toll by the sacrifice of his own life, is entirely consistent with that requirement.<sup>69</sup>

In his dissenting opinion, the president of the Appeals Chamber, judge Cassese, highlighted the fact that in international criminal law "duress may generally be urged as a defence, provided certain strict requirements are met; when it cannot be admitted as a defence, duress may nevertheless be acted upon as a mitigation circumstance."<sup>70</sup> The definition of duress used by Judge Cassese is clear on that issue: "Duress, namely acting under a threat from a third person of severe and irreparable harm to life or limb, entails *that no criminal responsibility is incurred* by the person acting under that threat."<sup>71</sup> Cassese based his reflections on the same precedents as the other judges but arrived at the conclusion that:

(...) with regard to war crimes or crimes against humanity whose underlying offences is murder or more generally the taking of life, no special rule of

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<sup>68</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazan Erdemovic*, 7 October 1997, (Case No. IT-96-22-A), Joint Separate Opinion of Judges McDonald and Vohrah, para. 82, Separate and Dissenting Opinion of Judge Li, para.12.

<sup>69</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazan Erdemovic*, 7 October 1997, (Case No. IT-96-22-A), Judge Stephen, para.67

<sup>70</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazan Erdemovic*, 7 October 1997, (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Cassese, para.12.

customary international law has evolved on the matter, consequently, even with respect to these offences the general rule on duress applies; it follows that duress may amount to a defence provided that its stringent requirements are met.

The Trial Chamber that pronounced the second sentencing judgement in 1998 reaffirms the ruling used by the appeals chamber that duress can be taken into account only by way of mitigation, but the chamber specified that in this case “there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.”<sup>72</sup> This fact was certainly one of the factors which reduced the sentence of the accused to five years. However, as this decision ruled in favour of duress as a matter of mitigation by a 3:2 majority only, this decision from the ICTY also pointed out the lack of a clear cut rule in international criminal law to answer the question of duress as a complete defence. Thus, to some extent the door was left open when the diplomats went to Rome to discuss the issue. This was done as the Rome Statute clearly overrules the decision of the majority in *Erdemovic* case.

#### *The codification of duress by the Rome Statute*

Article 31 (1) (d) classifies duress as a ground to exclude criminal responsibility. Thus duress is admissible as a complete defence. In this regard, the Rome Statute is clearly an evolution in comparison to the previous rules of international criminal law. It is worth noting that in the Rome Statute duress is admissible for all the crimes ‘within the jurisdiction of the Court’; thus such defence is admissible in case of genocide even though if this crime is considered as ‘the crime of crimes’.<sup>73</sup> To understand such evolution it is crucial to focus on the three specific requirements that are included in the statute. In this regards, the Rome Statute operates more as codification rather than an alteration from international jurisprudence. On the

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<sup>71</sup> Id., para.14 (emphasis added).

<sup>72</sup> ICTY, Trial Chamber, *Prosecutor v. Drazen Erdemovic*, Sentencing Judgement, 5 March 1998, para. 17.

<sup>73</sup> On this issue, see : William A. Schabas, *Genocide in International Law*, Chapter 7, Defences to Genocide, pp. 333-336.

requirements, Article 31 (1) (d) states that duress should result ‘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 greater harm than the one sought to be avoided.’ Thus, the defence must be based on ‘necessity’, ‘reasonability’ and ‘proportionality’, thus the statute insures that the “stringent requirements are met.”

(a) “The stringent requirement”

*Necessity and Reasonability*

To invoke duress, the accused must have been in a situation where he/she was absolutely unable to act in conformity with the law. The accused must have undergone a considerable pressure; the doctrine uses the term ‘irresistible duress’. In the *Krupp Trial* the judges stated:

“(…) the question is to be determined from the standpoint of the honest belief of the particular accused in question...The effect of the alleged compulsion is to be determined not by objective but by subjective standards. Moreover, as in the case of self-defence, the mere fact that such danger was present is not sufficient. There must be an actual bona fide belief in danger by the particular individual.”<sup>74</sup>

The *Krupp Trial* pointed out that “the will of the accused be not thereby over-powered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct.”<sup>75</sup> This condition also refers to the fact that there must be no disproportion between the criminal act and the gravity of the threat. Thus, the fact that ‘the person does not intend to cause a greater harm than the one sought to be avoided’ within the Statute has to be seen as a codification of the practice of the judges in the matter of plea of duress. Such a requirement is certainly an answer to those who were afraid that the

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<sup>74</sup> LRTWC, Vol. X, p.148.

<sup>75</sup> Id., p.149.

inclusion of the defence of duress within the Rome Statute would be a denial to the recognition of the specific gravity of the crimes that are under the competence of the ICC. For example, it is on such a requirement that the Trial Chamber of the ICTY rejected the defence of duress as a ground to exclude the criminal intention. In its judgement the Chamber concluded that “proof of the specific circumstances which would fully exonerate the accused of his responsibility has not been provided” and therefore such a defence would have “been taken into account at the same time as other factors in the consideration of mitigating circumstances”<sup>76</sup>.

The notion of ‘reasonability’ is also widely accepted. It refers to the idea that everybody in the same situation would have feared the danger. There must be some circumstances that prove that a ‘reasonable person’ would have felt an imminent physical peril that would have deprived him of his faculty of choice. Traditionally, this notion of ‘reasonability’ refers to three ideas. The accused must have reasonably believed in the existence of the threat, he must have had some reasons to believe that such a threat would have been executed and finally the accused must have been reasonably brave<sup>77</sup>.

### *Proportionality*

In the Rome Statute, the requirement of proportionality comes from the sentence: “provided that the person does not intend to cause a greater harm than the one sought to be avoided”. It is obvious that such a requirement seriously narrows the fear that some have expressed during the drafting of the Statute that such defence will “violate(s) the literal language of the criminal law.”<sup>78</sup> Judge Cassese in his dissenting opinion in the *Erdemovic* case explained: “this requirement cannot normally be met with respect to offences involving the killing of innocents, since it is impossible to balance one life against another”. Nevertheless, Cassese added: “in exceptional circumstances this requirement might be met, for example, when the killing would be in any case perpetrated by persons other than the one acting under duress.” Thus, in this case the question is not only to save ones own life by the killing of another

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<sup>76</sup> ICTY, Trial Chamber, *Prosecutor v. Drazen Erdemovic* Supra note 14, para. 20.

<sup>77</sup> S. Glaser, *L'infraction Internationale*, Paris, L.G.D.J., 1957, p.95.

person, “but of simply saving your own life when the other person will inevitably die, which may not be ‘disproportionate’ as a remedy.”<sup>79</sup>

(b) Duress of circumstances

The Rome Statute brings an interesting contribution to international law by allowing the defence of duress based on the circumstances of the act. The Rome Statute recognises the threat against the accused might have been “constituted by other circumstances beyond that person’s control.” That subparagraph establishes a link between the traditional distinction between the defence of duress (threat created by another person) and the defence of necessity (the conduct was justified by the general circumstances of the act). During the post second world war trials there was some reference to such defence. In the *Statton* case it was said: “When a man is absolutely, by natural necessity, forced, his will does not go along with the act.”<sup>80</sup> Even though, it is not specifically mentioned in the Rome Statute, there is a clear limitation on the admissibility of the duress of circumstances.<sup>81</sup> It is clear from the precedents in international criminal law that when the accused put himself voluntary in the circumstances that have created the threat to his life, the defence of duress is not acceptable. For example, Article 9 of the Military Tribunal of Nuremberg, in the case in which the Tribunal has recognized the criminal character of one organisation, any individual who has joined such criminal organisation can be presumed responsible of his/her acts within such organisation.<sup>82</sup> This article highlighted the fact that the international criminal justice takes into account the subjective element that result of the knowledge of the methods and purposes of a group or an organisation as a factor of individual criminal responsibility when a person has deliberately adhered to such group. This was discussed in the *Einsatzgruppen* or the ‘Milch’ cases.<sup>83</sup> In a 1949 case, two accused who had been active members of the National-Socialist Party

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<sup>78</sup> See : Amnesty International, *The Quest for International Justice: Defining the crimes and defences for the international criminal court*, AI-index IOR 40/006/1997, 01/02/1997.

<sup>79</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazen Erdemovic*, 7 October 1997, (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Cassese, Para.12

<sup>80</sup> Lord Mansfield, *Statton*, LRTWC, Vol.XV.

<sup>81</sup> Formerly, this defence was included in a different sub-paragraph and called necessity.

<sup>82</sup> “Article 9 of the Nuremberg Charter states that International Military Tribunal has the power to declare at the trial of any individual member of any group or organization that the group or organization of which the individual was a member was a criminal organization”. See: LRTWC, Vol.VII, p.21.

<sup>83</sup> See: Trial of Erhard Milch, United States Military Tribunal, Nuremberg, LRTWC, Vol. VII, p.27.

during the ‘crystal night’ in 1938 had claimed during their trial that they acted under duress. The German Supreme Court dismissed such defence and stated:

As an old member of the Party, T. knew the programme and the fighting methods of the NSDAP (Nazi Party). (...) in this condition of necessity for which he himself was to blame, could he have benefited from a possible misapprehension of the circumstances that could have misled him as to the condition of necessity or compulsion.<sup>84</sup>

Recently, in 1993, a French Court of Appeal in the Touvier case confirmed such a rule.<sup>85</sup> Concerning the defence based on the necessity created by the circumstances of the crimes, the Court stated:

No justification, be it founded on the state of necessity or on the defence of a third party, can be legitimately invoked by an official of the Militia such as Touvier, by virtue of his office, was naturally under the obligation to satisfy the requirements of the Nazi authorities. The very nature of this occupation, which he freely chose, implied regular cooperation with operations such as the SD or the Gestapo.<sup>86</sup>

In his dissenting opinion in the *Erdemovic* case, Judge Cassese emphasised that:

According to the case-law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international criminal law.<sup>87</sup>

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<sup>84</sup> German Supreme Court in the British Zone, *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, Vol.1, 1949, p.201, Quoted in Dissenting Opinion of Judge Cassese, footnote 12, translation of judge Cassese.

<sup>85</sup> See : Cour d’Appel de Paris, 13 avril 1992

<sup>86</sup> Unpublished text, translation of Judge Cassese, quoted in ICTY, Separate and Dissenting Opinion of Judge Cassese in *Erdemovic* case

Thus, the reference within the Rome Statute “beyond that person’s control” must be read in conjunction with these precedents in international criminal law. If the person has deliberately chosen to be part of an organisation or a group which clearly was for the commission of act of genocide, crimes against humanity or war crimes, a defence based on duress of circumstances would certainly be rejected by the ICC. As Knoops concluded: “[T]he rationale for the defense of duress is ultimately based in the disabling of the accused from achieving a culpable state of mind.”<sup>88</sup>

## **CONCLUSION**

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In conclusion, the Rome Statute is a very accomplished codification of the most equitable human justice possible. *A priori* the requirements of the statute are clear and define what is necessary to establish the good balance required for human justice. This Statute must be seen as the codification of a very ancient reflection on the defences admissible in case of criminal offences. It is important to remember that one of the first revolutions in terms of respect for human rights was the codification of criminal offences and defences in order to protect the individual against the partiality and the sole power of the state and the judges.<sup>89</sup> We have to remember that: “law is based on what society can reasonably expect of its members. It 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>90</sup> The Rome Statute must also be seen as an accomplishment of the declaration made in 1948 in article 11 (1) of the Universal Declaration of Human rights: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” Thus, even though the evolution towards prosecution for

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<sup>87</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazen Erdemovic*, 7 October 1997, (Case No. IT-96-22-A), Separate and Dissenting Opinion of Judge Cassese, para. 17

<sup>88</sup> Geert-Jan G.J. Knoops, *Defenses in Contemporary International Criminal Law* (New-York, Transnational Publishers INC., 2001), p.63

<sup>89</sup> See: Beccaria, *Des délits et des Peines*, Paris, Flammarion, 1991.

<sup>90</sup> ICTY, Appeals Chamber, *Prosecutor v. Drazen Erdemovic*, Separate and Dissenting Opinion of Judge Cassese, para.47



deterrence and prevention of the worst crimes is certainly one of the most positive evolutions of the last decade, one should not forget the human rights face of criminal law. In this regard, the new mantra of human rights activist for prosecution only is a dangerous evolution. The Statute has succeeded in finding a balance between the necessity to punish the worst criminal and respecting the fundamental rights of the human beings when facing the human justice.

Even with the codification of the defences in case of genocide, crimes against humanity and war crimes, the balancing between one life and the life of several innocents will always be the most perilous part of the human justice. As Bassiouni comments: “Even at the risk of one’s life, how can necessity justify or excuse the taking of multiples lives.”<sup>91</sup> Finally, even though, the Rome Statute codifies the ‘ground to exclude the criminal responsibility’, however, the list contains in Article 31 is not exhaustive, paragraph 3 refers to Article 21 which provides that the Court shall apply in first place the provisions of the Statute, and “in second place, where appropriate, the principles and the rules of international law”, and “falling that, general principles of law derived by the Court from national laws of legal systems of the world.”<sup>92</sup> Thus, the admissible ground to exclude the criminal responsibility are not ‘frozen’, which is good as each personal case could be different than the framing created by the Rome Statute.

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<sup>91</sup> C. Bassiouni, *Crimes against Humanity in International Criminal Law*, Dordrecht, Martinus Nijhoff Publishers, 1992, p.439.

<sup>92</sup> Rome Statute of the International criminal Court, Supra note 31, Article 21.