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THE DEFENCE OF DURESS FOR INTERNATIONAL CRIMES AND THE EXPECTATION OF HEROISM FROM ORDINARY CITIZENS

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ABSTRACT

Raising the defence of duress for crimes against humanity and war crimes has always been contentious due to the tense relationship between law and morality. It poses serious philosophical, moral and legal challenges as it requires the judge to balance the accused life against the victims'. "How can a judge satisfy himself that the death of one person is the lesser evil that the death of another?" While the defence of duress is a well-established defence, substance of the defence under the Rome Statute is still rather elusive and ambiguous. This thesis aims to examine whether the current standard of duress under the Rome Statute reflects the realities of individuals experiencing duress. This thesis will analyse the criteria for a duress claim to succeed, the shortfalls of the current standard under the Rome Statute and balance the defendant's justice with the wider goal of international criminal law.

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INTRODUCTION

Statement of the Problem

In order to evade criminal liability, a defendant accused of a crime may wish to raise a defence, a feature that exists in both national and international law. Defences aim to either justify or excuse a criminal act that would otherwise be criminal and punishable. Thus, defences are, in Schabas' words, 'answers to a criminal charge'¹. Duress, being one of the few general defences is the interest of this thesis. Raising the defence of duress in the context of mass atrocity has always been contentious due to the tense relationship between law and morality. It poses serious philosophical, moral and legal challenges as it requires the judge to balance the accused life against the victims'. 'How can a judge satisfy himself that the death of one person is the lesser evil that the death of another?'² With such complex balancing task, how does the defence operates within the realm of international criminal law that concerns the most heinous crimes known to mankind?

The Charter of past international criminal tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) were silent on the availability of duress as a defence to the killings of innocent civilians. Till date, the most notable case regarding duress is the *Erdemovic* case, where the majority of the judges refused to admit duress as a defence to the killings of civilians to 'assert an absolute moral postulate... for the implementation of international humanitarian law.'³ However, with the establishment of the International Criminal Court (ICC), duress defied the *Erdemovic* judgment as the defence was codified within the Rome Statute. So unlike in the ICTY or ICTR era, duress could potentially be successfully raised for crimes against humanity and war crimes.

¹ William Schabas, *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2010), p238.

² Prosecutor v. Erdemovic, 'Separate and Dissenting Opinion of Judge Cassese', Case No.IT-96-22-S (Appeals Chamber, 7th October 1997) [Cassese's Opinion] para42 <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>>.

³ Prosecutor v. Erdemovic, 'Joint Separate Opinion of Judge McDonald and Judge Vohrah', Case No.IT-96-22-S (Appeals Chamber 7th October 1997 [McDonald's and Vohrah's Opinion] para83 <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>>.

Because of the ICC's and previous international tribunals' minimal case law on duress, the provisions and the criteria of the defence remain relatively ambiguous. Undoubtedly, one would expect the threshold of a successful plea of duress would be high to avoid the abuse of this defence. However, when the accused's will have been so severely constrained to a point where he has to choose either to preserve his own life or the life of others, does this high threshold represents an injustice for the accused? The foundation of law is to set a reasonable standard for the society to adhere to. When law goes beyond the standard of a reasonable man to require the accused to sacrifice his life, in essence, heroism has become the reasonable standard. Nonetheless, if we lower this threshold, this would represent an injustice for the victims. Therefore, this thesis aims to uncover the uncomfortable difficulties in admitting duress as a complete defence to crimes against humanity and war crimes.

Research Question

This study shall answer the following question:

- Does the defence of duress under Article 31(d) of the Rome Statute reflects the realities experienced by individuals under duress?

This question shall be answered by exploring the following sub-questions:

- What are the criteria required for an accused to successfully raise the defence of duress before the ICC?
- Does the defence of duress expect the accused to go beyond what a reasonable man would do in his/her position?
- If so, would it be an injustice to hold the accused to such high standards, keeping in mind the wider goal of international criminal law?

Research Methodology

This study will be carried be utilising qualitative research methodology by way of desktop research. Primary sources and secondary sources will be utilised, and the research will be carried out by analysing statutes, cases, books and journal articles.

Thesis Structure

This paper comprises five chapters. Chapter 1's emphasis is on the definition of duress and necessity. The difference between duress and necessity will be discussed, followed by the classification duress and necessity as excuse and justification. The impact of the duress defence on the *mens rea*. This chapter ends with a section discussing the impact of duress on the *mens rea* in national courts and the ICC.

Chapter 2 contains an analysis of the development of duress in international law before the codification of duress in the Rome Statute. The analysis will be focused on the (i) the civil law regime; (ii) the common law regime; (iii) the Second World War International Military Tribunals; (iv) the ICTY; and (v) the ICC. References will be made to the selected international and national case law of concerning duress.

Chapter 3 contains the statutory analysis of the defence of duress under Article 31(d) of the Rome Statute. The *Erdemovic* case and the Second World War jurisprudence will be heavily utilised in this analysis. This chapter ends with a section on the classification of duress under Article 31(1)(d) of the Rome Statute, whether it represents a justification or an excuse or neither.

Chapter 4 contains the application of the standard of duress before the ICC to a hypothetical case to examine the shortfalls and the contentious issues regarding the current standard of duress under Article 31(1)(d) of the Rome Statute. Four issues pertaining the duress defence will be discussed: 1) the recognition of an indirect and implied threat as a threat; 2) the requirement of prior fault; 3) the definition of imminent; and 4) the concept of proportionality.

Chapter 5 represents a balancing exercise of the duress defence under the Rome Statute from the perspective of the defendant and the international community. The impact of the recognition of duress as a full defence on the purpose of punishment under international criminal law will be discussed. This chapter ends with a section discussing the limitation on the applicability of the duress defence to mass atrocity crimes of extreme gravity.

CHAPTER 1 – The Foundations of Duress

1.1) The Differences between Duress and Necessity

The defence of duress has always been founded on criminal law's concession to human frailty. The assumption is that one should not be held criminally liable for crimes committed "due to factors beyond his or her control such as... a threat from another that the accused or another person would be killed or grievously injured if he or she refused to commit a crime".⁴ Due to the overwhelming threat of violence, the defendant is deprived of the effective opportunity to make a choice on whether to commit the crime and is regarded to have acted involuntarily against his will.⁵ Thus, it would be unfair to punish the coerced person as he is not morally blameworthy.

The defence of necessity, on the other hand, resembles closely the defence of necessity. The main distinction between the two defences lies in the source of the threat.⁶ "Duress arises from the wrongful threats or violence of another human being and necessity arises from any other objective dangers threatening the accused".⁷ While both defence of duress and necessity 'compels' the accused to commit a crime, the source of the threat for necessity originates from a non-human being. For duress, the threat originates from the intentional action of a human being. Thus, in a plea of necessity, the defendant would claim that because of the surrounding circumstances that he was in, he had no other alternatives but to commit the crime as "the evil of obeying the letter of the law is socially greater... than the evil of breaking it. In other words, the law has to be broken to achieve a greater good."⁸

1.2) Is Duress a Justification or Excuse?

Defences can be broadly classed into two groups: justification and excuse. Justificatory defences "are not alterations of the statutory definition of the harm sought to be prevented or punished by an

⁴ Kenneth J. Arenson, 'The Paradox of Disallowing Duress as a Defence to Murder' (2014) Vol. 78 (No. 1) The Journal of Criminal Law, p65.

⁵ C.M.V Clarkson and H.M. Keating, *Criminal Law: Text and Materials* (4th edn, Sweet & Maxwell 1998), p325.

⁶ Clarkson and Keating (n5), p321–322.

⁷ R v. Howe [1986] UKHL 4, p8 <<http://www.bailii.org/uk/cases/UKHL/1986/4.html>> accessed 30th May 2018.

⁸ Glanville Williams, *Textbook of Criminal Law* (1st edn, Stevens & Sons 1978), p553.

offense.”⁹ The harm caused is still legally recognised and one must avoid incurring the harm in other circumstances. However, in that particular circumstances, the harm is justified because the “harm is outweighed by the need to avoid an even greater harm or to further a great societal interest.”¹⁰ Contrarily, in an excusatory defence scenario, the defendant’s illegal action remains unjustified and unacceptable. However, because of the specific conditions, the defendant is not responsible for his action as “he was unable to recognise the unlawfulness of his conduct or because he could not be expected to act lawfully”¹¹. Thus, justification focuses on the act, whereas excuse focuses on the actor.¹²

Necessity is a justificatory defence because the overriding reasons for action in a necessity scenario represents an objective value, a value that “everyone has an operative reason to promote”,¹³ such as the operative reason to save lives.¹⁴ This makes duress an excusatory defence because the defendant has no operative reason to behave in such manner as his criminal action does not represent an objective value. Generally, comparative criminal law follows the above logic and recognises the distinction between necessity, a justificatory defence, and duress, an excusatory defence.¹⁵

1.3) Duress and the Impact on *Mens Rea*.

Duress and necessity do not negate the *mens rea* or *actus reus* of the crime, unlike other defences such as insanity¹⁶, intoxication¹⁷, and automatism¹⁸. It is regarded that coercive conditions such as duress

⁹ Paul H. Robinson, ‘Criminal Law Defences: A Systematic Analysis’ (1982) Vol. 82 (No. 2) *Colombia Law Review*, p213 <<https://www.jstor.org/stable/pdf/1122275.pdf?refreqid=excelsior%3A27449cd91e8258addfce60257e855fbf>> accessed 3rd June 2018.

¹⁰ *Ibid.*

¹¹ Kai Ambos, ‘Defences in international criminal law’ in Bertram S. Brown, *Research Handbook on International Criminal Law* (Edward Elgar 2011), p300.

¹² *Ibid.*, p229.

¹³ Jeremy Horder, ‘Self-Defence, Necessity and Duress: Understanding the Relationship’ (1998) Vol. XI (No. 1) *Canadian Journal of Law and Jurisprudence*, p160.

¹⁴ *Ibid.*

¹⁵ Ambos (n11), p310–311.

¹⁶ William Wilson, *Criminal Law* (1st edn, Longman 1998), p231.

¹⁷ *Ibid.*, p253.

¹⁸ Clarkson and Keating (n5), p608.

‘negates a conclusion of guilt even though the necessary *mens rea* was present’.¹⁹ This was highlighted by the Canadian Supreme Court in *R v Ruzic [2001]* that ‘although moral involuntariness does not negate the *actus reus* or *mens rea* of an offence’, it deserves protection as ‘it is a principle of fundamental justice that only voluntary conduct – behaviour that is a product of a free will and controlled body... should attract the penalty and stigma of criminal liability’²⁰. Thus, a person acting under duress are excused because of the wrongfulness of the threat, not because they acted involuntarily.²¹ The actor would be regarded as to have the ability to make a choice, regardless of whether the other choice leads to undesirable consequences such as one’s own death or serious injury.

1.4) *Mens Rea* Under the Rome Statute.

The doctrine of *mens rea* pertinent to the ICC can be found in Article 30 of the Rome Statute. The codified *mens rea* is only applicable to crimes under the ICC’s jurisdiction and has no binding effect on other international tribunals.²² The default requirement for *mens rea* under Article 30 encompasses two separate entities: intent and knowledge.²³ An individual is deemed to possess the intent if he ‘means to engage in the conduct’²⁴ or ‘means to cause that consequence or is aware that it will occur in the ordinary course of events.’²⁵ This means that unintentional conduct (e.g. reflex behaviour & accidents) and ‘mere anticipation of a possibility that illegal conduct may cause prohibited consequences’ would not satisfy the threshold of *mens rea* under Article 30(2)(b).²⁶ In relation to knowledge, it is required that the individual is aware ‘that a circumstance exists or a consequence will occur in the ordinary course of events.’²⁷ The knowledge requirement would have to be accompanied by the contextual

¹⁹ United States v. Bailey (1980) 444 U.S. 394 <<https://supreme.justia.com/cases/federal/us/444/394/case.html>> accessed 1st June 2018.

²⁰ R v. Ruzic (2001) 3 LRC 703, p688–689 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1861/1/document.do>> accessed 1st June 2018.

²¹ R v Palazoff (1986) 43 SASR 99.

²² Iryna Machuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (Springer 2014), p125.

²³ Ibid, p127.

²⁴ Rome Statute of the International Criminal Court (adopted 17th July 1998, entered into force 1st July 2002) 2187 UNTS 90 [Rome Statute], Art 30(2)(a).

²⁵ Ibid, Art 30(2)(b).

²⁶ Machuk (n22), p128.

²⁷ Rome Statute (n24), Art 30(3).

elements of the crime.²⁸ For instance, a crime against humanity requires the additional mental element of a knowledge that the conduct was part of ‘a widespread and systematic attack directed against a civilian population.’²⁹ Thus, the defence of duress, similar in a national context, does not negate the *mens rea* under the Rome Statute as acting against one’s will does not affect the individual’s intention and knowledge of his act.

²⁸ Machuk (n22), p133.

²⁹ Rome Statute (n24), Art 7(1).

CHAPTER 2 – Historical Development of Duress and the Application to Murder

This part will analyse the development of the duress defence through five jurisprudences: (i) civil law system; (ii) common law system; (iii) the Second World War International Military Tribunal; (iv) the International Criminal Tribunal for the Former Yugoslavia (ICTY); (v) the International Criminal Court (ICC).

4.1) Civil Law System

Generally, the civil law systems recognise duress as a complete defence to all crimes, including murder. The criminal code of civil law nations usually provide that the accused is not to be held criminally responsible if he acted under duress. For instance, the French Penal Code states that a person is not to be held criminally responsible if he ‘acted under the influence of a force or compulsion which he could not resist’³⁰. The German Penal Code provides the exculpation of guilt if the accused ‘commits an unlawful act to avert the danger from himself, a relative, or person close to him’³¹. Similar provisions regarding duress can also be found in the penal codes of Belgium, The Netherlands, Spain, Italy, Norway, Sweden, Finland and Mexico.³² The emphasis of the defence of duress in civil law jurisdictions appears to be the mental state of the actor, whether the actor’s free will had been overcome by the wrongful threats.³³ Thus, the determination of the actor’s free will is not dependant on the accused crimes.³⁴

2.2) Common Law System

³⁰ Code Pénal (France), Article 112-2.

³¹ Übersetzung des Strafgesetzbuches, Section 35(1).

³² McDonald’s and Vohrah’s Opinion (n3), para59.

³³ Benjamin J. Risacher, ‘No Excuse: The Failure of the ICC’s Article 31 “Duress” Definition’ (2014) Vol. 89 (No. 3) Notre Dame Law Review, p1408 <<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1791&context=ndlr>> accessed 8th June 2018.

³⁴ Ibid.

It was confirmed by the majority of the House of Lords in *R v. Howe* [1986] that the English criminal law does not ‘allow duress as a defence to murder’³⁵. Although some American state jurisdictions have accepted duress as a defence to murder³⁶, generally, the common law system does not recognise duress as a complete defence for murder. This exclusion of the defence to murder can be traced to Lord Hale’s statement from his Pleas of the Crown in the 19th century, where he stated that:

*“If a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commits the fact for he ought rather to die himself, than kill an innocent.”*³⁷

Hale’s position was reiterated by William Blackstone in his Commentaries when he stated that ‘escaping death... by killing an innocent person... shall not acquit him of murder; for he ought rather to die himself than escape by the murder of innocent’³⁸. The rationale for this exclusion is ‘based upon the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another’s life.’³⁹ Thus, unlike in civil law jurisdictions, the common law’s position is that the sanctity of human life is of utmost importance and it trumps any other considerations, such as the defendant’s free will.⁴⁰

2.3) Second World War International Military Tribunal

³⁵ *R v. Howe* [1986] (n7), p18.

³⁶ M. Sornarajah, ‘Duress and Murder in Commonwealth Criminal Law’ (1981) Vol. 30 (No. 3) *The International and Comparative Law Quarterly* 660-681, p664
<<https://www.jstor.org/stable/pdf/759291.pdf?refreqid=excelsior%3Abf7d6275d334816ae8db415212a79bd8>> accessed 8th June 2018.

³⁷ Rosa Ehrenreich Brooks, ‘Law in the Heart of Darkness: Atrocity & Duress’ (2003) Vol. 43 *Virginia Journal of International Law*, p878–879 <<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2141&context=facpub>> accessed 10th June 2018.

³⁸ Russell Shankland, ‘Duress and the Underlying Felony’ (2009) Vol. 99 (No. 4) *Journal of Criminal Law and Criminology*, p1237 <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7342&context=jclc>> accessed 10th June 2018.

³⁹ *R v Howe* [1986] (n7), p18.

⁴⁰ Sornarajah (n36), p661–662.

The Second World War International Military Tribunals (IMT) case law did not give rise to a general consensus on the applicability of duress to murder. It is important to note that duress is often termed ‘necessity’ or ‘coercion’ in the IMT case law and often raised in conjunction with superior orders, though duress has little necessary connection with superior order. Although Article 8 of the Charter of the IMT prohibits the application of the defence of superior orders as a complete defence, the United States Military Tribunal stated in the *Einsatzgruppen* case that ‘the true test... is not the existence of the order, but whether moral choice was in fact possible.’⁴¹ Because the law does not require an innocent man to sacrifice his life in order to avoid a crime which he condemns, if the defendant was coerced into executing an unlawful order, it constitutes duress.⁴² However, one needs to prove that (i) the defendant has acted under coercion; and (ii) the defendant has made attempts to evade the order every time an opportunity arises.⁴³ The general rule regarding duress is best encapsulated by the following statement in the *Einsatzgruppen* case:

*“Let it be said at once that 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. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever.”*⁴⁴

The *Flick*⁴⁵, *I.G. Farben*⁴⁶ and *Krupp*⁴⁷ Trials represent the three ‘industrialist trials’ where the accused claimed that they were under duress when they employed forced labour, insisting that the dire consequences from not reaching the production quotas set by the Third Reich left them with no other choice but to employ forced labour. Although not all three cases resulted in the successful plea of

⁴¹ United States v. Ohlendorf, ‘The Einsatzgruppen Case’ Military Tribunal Case No. 9 (8th April 1948), p471 <<https://www.legal-tools.org/doc/74e839/pdf/>> accessed 11th June 2018.

⁴² Ibid, p480.

⁴³ Ibid, p480–481.

⁴⁴ Ibid, p480.

⁴⁵ Trial of Friedrich Flick and Five Others, ‘Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10’ (U.S. Government Printing Office 1952) [Flick Trial], p1200–1202 <https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf> accessed 12th June 2018.

⁴⁶ Trial of Carl Krauch and Twenty-two Others, ‘Law Reports of Trials of War Criminals’ (United Nations War Crimes Commission 1949) [I.G. Farben Trial], p54–57 <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf> accessed 12th June 2018.

⁴⁷ Trial of Alfried Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, Ibid, [Krupp Trial], p146–150.

duress, the Tribunal did not outright reject the duress defence either. In fact, the Tribunal agreed that the four accused in the *Flick* case were under duress and acquitted them of the crime of enslavement and deportation.⁴⁸ It stated:

“We have already discussed the Reich reign of terror... The Reich, through its hordes of enforcement officials and secret police, was always "present," ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.

In considering the application of rules to the defense of necessity, attention may well be called to the following statement: “The law of cases of necessity is not likely to be well furnished with precise rules; necessity creates the law, it supersedes rules, and whatever is reasonable and just in such cases is likewise legal. It is not to be considered as matter of surprise, therefore, if much instituted rule is not to be found on such subject.”⁴⁹

However, when one looks at the *Hölzer* and *Fëurstein* case, the general rule on duress established by the US Military Tribunal began to diverge. The *Hölzer* case concerns the killing of a Canadian airmen by three German soldiers. The three German accused raised the defence of superior orders and duress, claiming that they were coerced by the Lieutenant at gunpoint to kill the airman.⁵⁰ The Canadian Military Court rejected *Hölzer*'s plea of superior order (which amounted to duress or coercion) and refused to extend the above mentioned general rule on duress to heinous crimes such as murder. Although the Judge-Advocate recognised that *Hölzer* was subjected to a serious imminent threat, duress is not applicable to heinous crimes. He stated that:

“As to the law applicable upon the question of compulsion by threats, I should advise the Court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable... There is

⁴⁸ Flick Trial (n45), p1202.

⁴⁹ Ibid, p1201.

⁵⁰ William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2010), p247 – 248.

no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified."⁵¹

The *Fëurstein* case too followed the same logic and held that duress is unavailable for an accused charged with the killings of civilians.⁵²

Hence, there appears to be no consistent rule to the controversy over the applicability of duress to the murder of innocent civilians as there are case law that supports both side of the arguments. Discussion about duress that appeared in the IMT judgments also often remain merely a dictum⁵³ and tribunals tend to employ their national law⁵⁴, most evident in the *Hölzer* case, which undoubtedly would end up in different outcomes of applicability of duress.

2.4) The International Criminal Tribunal for the Former Yugoslavia (ICTY)

Perhaps the most influential case regarding duress in the context of mass atrocity is the *Erdemovic* case.

Background

Drazen Erdemovic, a self-identified Bosnian Croat, was born in 1971 in Bosnia and Herzegovina in the Socialist Federative Republic of Yugoslavia.⁵⁵ He was raised in a 'multi-ethnic surroundings in a non-nationalistic environment' and 'had friends from all groups – Serbs, Croats, Muslims'⁵⁶. He opposed the Bosnian war and had previously ignored the summons to join the army of Bosnia and Herzegovina in May or July 1992.⁵⁷ In November 1993, he left the Croatian Defence Council (HVO) as he believed his position there was insecure for he 'had been arrested and beaten by HVO soldiers for having helped

⁵¹ Prosecutor v. Drazen Erdemovic, 'Separate and Dissenting Opinion of Judge Li', Case No. IT-96-22-A (Appeals Chamber 7th October 1997) [Li's Dissenting Opinion], para7 <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojli971007e.pdf>> accessed 13th June 2018.

⁵² Judge Cassese's opinion (n2), para25.

⁵³ Ibid.

⁵⁴ Ibid, para26.

⁵⁵ The Prosecutor v. Drazen Erdemovic, 'Sentencing Judgment', IT-96-22-T (29th November 1996) [Initial Trial Chamber Decision], para102 <<http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>> accessed 7th June 2018.

⁵⁶ Ibid, para105.

⁵⁷ Ibid, para79.

Serbian women and children return to their territory’⁵⁸. He attempted to escape the war and the Balkan region altogether for Switzerland, however, he failed to obtain the identity papers.⁵⁹ Out of financial desperation and other personal reasons, he joined the Bosnian Serb Army in April 1994, and specifically chose the more ethnically diverse, non-combative 10th Sabotage Unit.⁶⁰

On the 16th July 1995, Erdemovic and seven other members of his unit were ordered to Branjevo farm at Pillica without any knowledge of the mission. It was only when they arrived on-site, were they ordered to ‘massacre hundreds of Muslims’⁶¹. Erdemovic refused to comply at first but he surrendered to the orders after being threatened with death by the commander.⁶² In Erdemovic’s own words:

*“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’re 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.”*⁶³

Erdemovic also asserted that prior to this, he had witnessed the killing of someone who refused to obey orders.⁶⁴ Of the approximately 1,200 Muslims who were executed that day by the 10th Sabotage Unit⁶⁵, it was estimated that Erdemovic was responsible for the killing of between 10 and 100.⁶⁶ Approximately a month after the incident, he confided in a journalist and was arrested by the State Security Services of the Republic of Serbia.⁶⁷ On the 30th March 1996, Erdemovic arrived in The Hague and confessed to the Office of the Prosecutor of the ICTY, where he ‘continuously reiterated his loathing of war and nationalism and how deeply he regretted his criminal act’⁶⁸.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Ibid, para80.

⁶² Ibid.

⁶³ Ibid, para10.

⁶⁴ Ibid.

⁶⁵ Ibid, para77.

⁶⁶ Ibid, para85.

⁶⁷ Ibid, para81.

⁶⁸ Ibid.

Appeals Chamber Decision

Initially, the ICTY Trial Chamber accepted Erdemovic's guilty plea and sentenced him to 10 years' imprisonment.⁶⁹ The penalty was then reduced to five years' imprisonment after the appeal.⁷⁰ As the ICTY Statute is silent on the defence of duress and only mentioned 'military necessity'⁷¹ as a ground of justification and 'superior orders'⁷² as a ground of mitigation, the Appeal Chamber judges' main dilemma was whether duress could be a complete defence to war crimes and crimes against humanity involving the killings of civilians. The majority of the Appeals Chamber (Judge McDonald, Vohrah and Li) rejected the notion that duress could be a complete defence where the crime involves the killings of civilians.⁷³

In rejecting the notion, Judges McDonald and Vohrah first concluded that the decisions of the Second World War World IMT did not establish 'a clear rule recognising duress as a defence to the killing of innocent persons'⁷⁴, dismissing the general rule laid down by the *Einsatzgruppen* case, claiming that the United States military tribunal failed to 'cite any authority for its opinion that duress may constitute a complete defence'⁷⁵. They also held that the legal systems of the world are also inconsistent on the availability of the defence, thus, no customary international law can be derived on the availability of duress as a complete defence to the killing of innocent persons.⁷⁶ Seeing there was none, they then examined the 'practical policy considerations' of international criminal law.⁷⁷ They noted that the Tribunal operates within the realm of international humanitarian law, which main objective is to protect

⁶⁹ Initial Trial Chamber Decision (n55), para83.

⁷⁰ Prosecutor v. Drazen Erdemovic, 'Sentencing Judgment', IT-96-22-Tbis (5th March 1998) [Subsequent Trial Chamber Decision], para23 < <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf> > accessed 13th June 2018.

⁷¹ Statute of the International Criminal Tribunal for the Former Yugoslavia, Art 2(d).

⁷² Ibid, Art 7(d).

⁷³ Prosecutor v. Drazen Erdemovic, 'Judgment', IT-96-22-A (7th October 1997) [Appeals Chamber Decision], p17 < <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf> > accessed 13th June 2018.

⁷⁴ McDonald's and Vohrah's Opinion (n3), para45.

⁷⁵ Ibid, para43.

⁷⁶ Ibid, para55.

⁷⁷ Ibid, para75.

the weak and vulnerable.⁷⁸ ‘Without engaging in a complex and tortuous investigation into the relationship between law and morality, they held that if national common law refuses to admit duress as a complete defence when it concerns the murder of a single innocent life, then it would be unacceptable for international law to admit duress as a complete defence when it concerns ‘the slaughter of innocent human beings on a large scale.’⁷⁹ Thus, their refusal to admit the duress defence was to ‘assert an absolute moral postulate... for the implementation of international humanitarian law.’⁸⁰ Judge Li wrote a separate opinion supporting Judges McDonald and Vohrah on the admissibility of duress.⁸¹

Nonetheless, Judges Cassese and Stephen dissented, arguing that duress should be admitted as a complete defence to a charge of crimes against humanity and war crimes.⁸² Judge Cassese argued that as there was no specific international rule on duress, the defence should prevail based on law and logic as ‘if no exception to a general rule be proved, then the general rule prevails.’⁸³ Cassese’s also disagreed with the majority of the judges’ investigation of ‘practical policy considerations’ that, in his opinion, has been ‘substantially based on English law.’⁸⁴ Cassese contended that the examination has been ‘extraneous to the task’ of the Tribunal as the Tribunal was called upon to apply international law⁸⁵. Thus, the Tribunal should avoid ‘relying exclusively on notions, policy considerations or the philosophical underpinnings of common-law countries, while disregarding... other systems of law.’⁸⁶ He stated that:

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid, para83.

⁸¹ Judge Li’s Opinion (n51)

⁸² Cassese’s Dissenting Opinion (n49), para 50; Prosecutor v. Drazen Erdemovic, ‘Separate and Dissenting Opinion of Judge Stephen’, Case No. IT-96-22-A (Appeals Chamber 7th October 1997), para 66
<<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojste971007e.pdf>> accessed 13th June 2018.

⁸³ Cassese’s Opinion (n2), para11(i).

⁸⁴ Ibid, para11(ii).

⁸⁵ Ibid.

⁸⁶ Ibid.

“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”⁸⁷

According to Cassese, the four requirements that need to be satisfied to raise the defence of duress that are based on international case law is as follow:

- (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.”⁸⁸*

Although Cassese’s four-part-test did not prevail in the *Erdemovic* case, it did heavily influence the drafters of the Rome Statute and the Rome Statute’s duress contains many elements of Cassese’s four requirements.

2.5) The International Criminal Court

The Rome Statute represents the first comprehensive codification of international criminal law. The will to codify international criminal law as much as possible to the Rome Statute was clear during the Rome Conference as States were unwilling to give the judges as much liberty as in ICTY Statute.⁸⁹ However, in the beginning, the draft statute for the ICC did not contain any provisions that include

⁸⁷ Ibid, para47.

⁸⁸ Ibid, para 16.

⁸⁹ Jeremie Gilbert, ‘Justice not revenge: the international criminal court and the ‘grounds to exclude criminal responsibility’: defences or negation of criminality’ (2006) Vol. 10 (Issue 2) The International Journal of Human Rights, p3
<https://eprints.mdx.ac.uk/4268/1/Gilbert-Justice_not_revenge.pdf> accessed 29th June 2018.

defences⁹⁰ as the diverse opinion on the availability of defences made it almost impossible to reach agreement on a detailed list of defences.⁹¹ There were much debate on whether defences should be codified or could mass atrocities be even justified or excused.⁹² Eventually, the Preparatory Committee included defences in their draft statute which resembled the current Article 31 of the Rome Statute, breaking the trend of refusing to codify defences as seen in the IMT and ICTY. Article 31 contains the rules on ‘grounds for excluding criminal responsibility’, which includes general defences such as mental disease or defect, intoxication, self-defence and duress. The drafters intentionally avoided the term ‘defences’ in the Statute. According to Ambos, this is due to the drafters’ intention to dodge ‘certain ‘catch words’ too closely associated with either the common law or the civil law system’⁹³. By utilising the more general term of ‘grounds for excluding criminal responsibility’ to describe defences, the Statute appears to be ‘truly universal’ and not interpreted in a way that it is ‘a recourse to a specific type of national system.’⁹⁴

⁹⁰ Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (n50), p482.

⁹¹ Ibid.

⁹² Ibid, p483.

⁹³ Ambos (n20), p299.

⁹⁴ Ibid.

CHAPTER 3 – Statutory Analysis of Article 31(d) of the Rome Statute

Duress under Article 31(1)(d) of the Rome Statute represents the clear departure from the majority opinion in the *Erdemovic* case as the drafters did not explicitly exclude the applicability of this defence to the killings of innocent civilians and made it admissible for all crimes within the jurisdiction of the Court, making it a complete defence. According to Article 31(d) of the Statute, duress is defined as follow:

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:

...

(d) 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 other circumstances beyond that person's control.

4.1) The Three Criteria of Article 31(1)(d)

Duress under Article 31(1)(d) can essentially be broken down into three criteria:

- 1) Threat of imminent death or serious bodily harm;
- 2) The acts are necessary and reasonable to avoid the threat; and
- 3) No intention to cause a greater harm than the one sought to be avoided.

It is important to note that the ICC has yet to develop the standard of duress under Article 31(d). The *Ongwen* case, where the defence is raising the defence of duress⁹⁵, is currently ongoing before the Trial Chamber of the ICC. Thus, this section's materials are mainly comprised of case law from national jurisdiction and previous International Tribunals and scholars' opinions.

i) *Threat of Imminent Death or Serious Bodily Harm*

Article 31(1)(d) is clear that the source of the threat of death or serious bodily harm is irrelevant. The threat could be emanated from other persons (duress) or other circumstances beyond that person's control (necessity). However, the threat must be beyond the control of the accused. If the threat was within the control of the accused or caused by the accused himself, then, the accused would fail to satisfy this first criteria.⁹⁶ Although a limitation of the defence to defendants who have not contributed to the circumstances of duress is not explicit stated in Article 31(1)(d), it is expected that an accused who joined an armed group that was notorious for carrying executions would be regarded as to have brought the threat upon himself even if he did not intend to carry out the executions. The threat need not to be directed solely towards the accused. It could be directed against a third person, even if the third person has no relationship with the accused.⁹⁷ The threat must also be real and not merely believed to exist by the accused only.⁹⁸ A mere increased in probability of harm or an abstract danger will not be sufficient.⁹⁹ As the *Krupp* case states, '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.'¹⁰⁰ Lastly, the threat must be imminent. The 'imminence' criteria appears to act as a temporal restriction on defence of duress. The length of time between the issuance of the threat and the 'potential' materialisation of the threat that would satisfy this 'imminence' criteria remains unclear. This 'imminence' dilemma will be further explored in Chapter 4.

⁹⁵ Third Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", Pre-Trial Chamber II, ICC-02/04-01/15 (25 May 2016), para 50 – 57 <https://lib.ugent.be/fulltxt/RUG01/002/349/623/RUG01-002349623_2017_0001_AC.pdf>.

⁹⁶ Ambos, *Defences in international criminal law* (n11), p311.

⁹⁷ *Ibid*, p312.

⁹⁸ Gerhard Werle, *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009), p206.

⁹⁹ Ambos, *Defences in international criminal law* (n11), p312.

¹⁰⁰ *Krupp Trial* (n47), p148.

ii) *The Acts Are Necessary and Reasonable to Avoid the Threat*

The second requirement is comprised of a necessity element and a reasonable element. According to Eser, ‘necessary’ should be assessed in terms that no other means are available to avoid the threat.¹⁰¹ Ambos agreed in that the harm caused by the accused’s reaction should ‘be limited to that absolutely necessary to avoid the threat’¹⁰². This appears to be consistent with Cassese’s second condition for the duress defence set out in the *Erdemovic* case, where it stated that there must be ‘no adequate means of averting such evil’.¹⁰³ As the US Military Tribunal held in the *Krupp* case that as:

*“Wharton himself says ‘that the danger of the attack is to be tested from the standpoint of the party attacked... We have no doubt that the same thing is true of the law of necessity. The effect of the alleged compulsion is to be determined not by objective but by subjective standards.’”*¹⁰⁴

According to Ambos, although a proportionate reaction is not explicitly required for duress, unlike in Article 31(c) of self-defence where it explicitly states that the use of force must be proportionate to the degree of danger, the term ‘reasonable’ under Article 31(d) is an ‘umbrella term’ encompassing ‘necessary’ and ‘proportionate’.¹⁰⁵ Thus, it is essentially a proportionality test that incorporates the necessary element and the reasonable element, where the reaction should not cause greater harm than the one sought to be avoided.¹⁰⁶ Eser agrees with Ambos on the outcome of the reasonable element. He stated that although the proportionality requirement is not explicitly stated, ‘it comes out more or less the same’¹⁰⁷ and reasonable should be assessed in terms of the action taken not being ‘unreasonably disproportionate’ to achieve the desired effect.¹⁰⁸

¹⁰¹ Albin Eser, ‘Article 31 – Grounds for excluding criminal responsibility’ in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Nomos 1999), p551.

¹⁰² Ambos, *Defences in International Criminal Law* (n11), p313.

¹⁰³ Cassese’s Opinion (n2), para16.

¹⁰⁴ *Krupp Trial* (n47), p148.

¹⁰⁵ Ambos, *Defences in International Criminal Law* (n11), p313.

¹⁰⁶ *Ibid.*

¹⁰⁷ Eser (n101), p551.

¹⁰⁸ *Ibid.*

There is a consensus among scholars that the ‘reasonable’ element encompasses a proportionality test. However, the nature of the proportionality test remains unclear. The proportionality test proposed by Ambos appears to be a strict one. An action could only be regarded as ‘reasonable’ if the harm inflicted by the accused is less than the one he sought to avoid. On the other hand, Eser’s proportionality test appears to be looser. In theory, an action could be regarded as ‘reasonable’ even if it is disproportionate. Eser’s proposal appears to resemble the proportionality test set by the English High Court in *R (Collins) v Secretary of State for Justice* [2016]. Although the *Collins* case concerns the determination of the reasonableness of the use of force in a self-defence scenario, the standard of the proportionality test could provide us directions in assessing the reasonableness of the accused reaction under duress. The court in the *Collins* case came up with a two-prong test in assessing the reasonableness:

“Was the degree of force the defendant used grossly disproportionate in the circumstances as he believed them to be? If the answer is “yes”, he cannot avail himself of self-defence. If “no”, then;

Was the degree of force the defendant used nevertheless reasonable in the circumstances he believed them to be? If it was reasonable, he has a defence. If it was unreasonable, he does not.”¹⁰⁹

The *Collins* case demonstrates that as long as the use of force is not grossly disproportionate, it may satisfy the reasonableness test even if it is disproportionate. In assessing the reasonableness of the accused’s reaction under Article 31(1)(d), this thesis is in favour of a looser proportionality test, similar to the *Collins* case. A proportionality test that strictly requires the crime to be the ‘lesser of two evils’, as suggested by Ambos, would defeat the purpose of the defence as it often leads to an imputation of an expectation of heroism in the defence of duress. The culpability of a person acting under duress is never clear-cut issue. It is highly ambiguous, contested and often involves scenarios that one has never foreseen. Thus, a looser proportionality test would provide the judges with the much needed discretion

¹⁰⁹ R (On the application of Collins) v. The Secretary of State for Justice [2016] EWHC 33, para20
<<https://www.judiciary.uk/wp-content/uploads/2016/01/collins-v-sos-for-justice-householder-defence.pdf>> accessed 25th June 2018.

to contextualise the duress scenario and to assess whether the accused falls under the protection of Article 31(d). It is important to note that the accused's plea of duress would still fail if his disproportionate reaction is nevertheless unreasonable. By making the reasonableness test flexible, one would ensure that the threshold of duress remains high while ensuring the relevance of this defence towards the many scenarios that we have not foreseen.

Factors to take into consideration when determining the reasonableness

In determining the reasonableness of the accused's reaction, one needs to prove that a 'reasonable person' in the same position as the accused would have done the same and succumb to the threat.¹¹⁰ As the US Military Tribunal stated in the *High Command* case that 'there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent peril as to deprive him of freedom to choose the right and refrain from the wrong.'¹¹¹ According to Cassese, factual circumstances such as 'the various ranks of the military or civilian hierarchy' would need to be taken into account in the assessment.¹¹² In fact, the Prosecution in the *Fëurstein* case contended that although the low-ranked, private soldiers perpetrated the concerned killings, they should not be held responsible as 'those private soldiers had no option; they had to do it.'¹¹³ This need for the distinction of ranks was also highlighted by the Canadian Supreme Court in *R v. Finta [1994]* when it stated that 'the lower rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice.'¹¹⁴ Thus, as the commander in a military unit possesses more authority and assumes greater risk, the standard of the reasonable man for the commander would be more demanding than the one for a low-ranked soldier.

¹¹⁰ Werle (n98), p206.

¹¹¹ The United States of America v. Wilhelm von Leeb et al [1948] 'High Command Trial' The US Military Tribunal Nuremberg (27th October 1948), p36 <<http://werle.rewi.hu-berlin.de/High%20Command%20Case.pdf>> accessed 25th June 2018.

¹¹² Cassese's Opinion (n2), para 45.

¹¹³ Trial of Valentine Feurstein and Others, Proceedings of a Military Court held at Hamburg (4th – 24th August 1948), p4 <<https://www.legal-tools.org/doc/6ed39c/pdf/>> accessed 28th June 2018.

¹¹⁴ *R v. Finta* [1994] 1 SCR 701, p838 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1124/1/document.do>> accessed 25th June 2018.

Another factual circumstance that should be taken into consideration, especially when it involves the killing of innocent civilians, is whether the actor's resistance to the threat would actually avoid the greater harm. Cassese argued in *Erdemovic* that the person under duress should be relieved from criminal responsibility if 'it is highly probable, if not certain, that if the person acting under duress had refused to commit the crime, the crime would in any event have been carried out by persons other than the accused.'¹¹⁵ He used the situation where an execution squad has been assembled to kill victims as an example. If the actor under duress refused to comply with orders at first but later succumbed to the orders, he should be excused.¹¹⁶ In this case, the evil of not complying with the order would be greater as the actor would have been killed anyway if he resisted.¹¹⁷ His death would serve 'no benefit to anyone and no effect whatsoever apart from setting a heroic example for mankind'¹¹⁸. This was the line of logic the Court of Assize utilised when it stated that:

*"The possible sacrifice [of their lives] by Masetti [the accused] and his men [the members of the execution platoon] would have been in any case to no avail and without any effect (vano ed inoperoso) in that it would have had no impact whatsoever on the plight of the [two] persons to be shot, who would have been executed anyway even without him [the accused]."*¹¹⁹

iii) *No intention to cause a greater harm than the one sought to be avoided*

The US Military Tribunal held in the *Krupp* case that 'if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal conduct.'¹²⁰ Article 31(1)(d) appears to follow this logic when it introduced the subjective requirement of an intention to not cause a greater harm than the one sought to be avoided. The introduction of this subjective element is described by Ambos as 'unprecedented' in comparative law¹²¹ as it diverged away from the classical

¹¹⁵ Cassese's Opinion (n2), para 44.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Cassese's Opinion (n2), para 35.

¹²⁰ Krupp Trial (n45), p149.

¹²¹ Ambos, *Defences in International Criminal Law* (n11), p314.

understanding of necessity and duress. In a classical necessity case, it must be shown that the actor's criminal action actually avoided the greater harm and in a classical duress case, the actor is excused regardless of the severity of the harm if it is established that the actor could not be fairly expected to withstand the threat. However, Article 31(1)(d) appears to be in-between the justificatory necessity and excusatory duress as the standard is lower than necessity but higher than duress. The inclusion of the mental aspect in Article 31(1)(d) would mean that it is not required to show that the harm caused by the actor's reaction actually constitute the lesser harm. However, on a subjective level, he needs to have an intention to do so.¹²² Thus, in theory, if the prosecution is able to prove that the actor intended to cause a greater harm, even if the actual harm constitutes the lesser harm, the actor may be excluded from duress.¹²³ However, the likelihood of this happening in reality is highly unlikely as it would be hard to imagine how one could intend to cause harm but still believed that the harm caused would be the lesser evil in the context of the serious nature of crimes under the ICC's jurisdiction. Thus, the inclusion of this subjective element would essentially be an additional, stricter proportionality test to the proportionality test under the criteria of 'necessary and reasonable', as a strict requirement of lesser evil is required. Nonetheless, how this plays out in reality has yet to be determined by the Court.

4.1) Criticism of Article 31(1)(d): A Hybrid Between Justification and Excuse?

Perhaps the most apparent criticism of Article 31(d) voiced by scholars like Albin Eser is its 'ill-guided and... failed attempt... to combine two different concepts: (justifying) necessity and (merely excusing) duress.'¹²⁴ Kai Ambos also described this lack of clear distinction as 'unfortunate' and stated that 'well-established and reasonable distinctions should not be blurred'.¹²⁵ In fact, it was only in the final stage of the Rome Conference that 'for whatever unclear reasons' were the two defences combined into one.¹²⁶ Thus, duress under Article 31(1)(d) is a hybrid between duress and necessity. It has a requirement that applies to both necessity and duress – the threat of imminent death or serious bodily harm; a requirement that applies to necessity only – the necessity and reasonableness of the reaction; and a subjective requirement that is usually present in neither necessity nor duress – the intention to not

¹²² Eser (n101), p552.

¹²³ Ambos, *Defences in International Criminal Law* (n11), p314.

¹²⁴ Eser (n101), p550.

¹²⁵ Ambos, *Defences in International Criminal Law* (n11), p311.

¹²⁶ Eser (n101), p550.

cause a greater harm than the one sought to be avoided.¹²⁷ This has made duress under Article 31(1)(d) neither a justification nor an excuse but somewhere in between.

To a certain extent, Article 31(1)(d) resembles the English law stance on refusing to establish a clear distinction between necessity and duress. Under the English law, necessity, commonly named as ‘duress of circumstances’, often arises as duress¹²⁸, an excuse. It was deemed that the distinction between duress and necessity is irrelevant as ‘duress is only that species of the genus of necessity which is caused by wrongful threats’¹²⁹. The English criminal law’s refusal to recognise necessity as a justification could stem from its historical unwillingness to charter into the unknown consequences of claiming that an otherwise criminal and immoral action as moral and justified. Doing so would force the English criminal law to provide clear positions on complex moral issues. As Lord Coleridge stated in *R v. Dudley and Stephens* [1884]:

*“Though law and morality are not the same, and though many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence, and such divorce would follow if the temptation to murder... were to be held by law an absolute defence of it... Who is to be the judge of this sort of necessity? Is it to be strength, or intellect, or what? ... Was it more necessary to kill him than one of the grown men? The answer must be “No” ... ”*¹³⁰

Article 31(1)(d)’s combination of both justificatory necessity and excusatory duress into the defence of duress appears to be in agreement with the above statement. Interestingly, in the year 2000, after the adoption of the Rome Statute in 1998, the ICTY Appeals Chamber in the *Aleksovski* case also deemed it ‘unnecessary to dwell on whether necessity constitutes a defence under international law’ or ‘whether

¹²⁷ Ibid, p311-312.

¹²⁸ R v. Martin (1989) 88 Cr App R 343, para11 <<http://www.bailii.org/ew/cases/EWCA/Crim/1988/2.html>> accessed 6th June 2018.

¹²⁹ R v. Howe (1986) [n7], p8.

¹³⁰ R v. Dudley and Stephens [1884] 14 QBD 273, p9–10 <<https://la.utexas.edu/users/jmciver/357L/QueenVDS.PDF>> accessed 20th June 2018.

it is the same as the defence of duress'¹³¹. One could speculate that modern international criminal law, similar to English law, is still unwilling to conclude a moral evaluation on highly contentious cases that not only challenges the court legally but also morally and philosophically. This is particularly true when one considers the ICC's jurisdiction over 'the most serious crimes of concern to the international community as a whole' as stated in the Preamble of the Rome Statute. Although the Rome Statute did not go as far as to prohibit duress altogether, it also refuses to rely on the 'problematic' utilitarian notion of using necessity to justify an otherwise criminal conduct. Thus, in theory, a defence that constitutes a hybrid between justification and excuse would allow the court to stay silent on whether acts of crimes against humanity, war crimes and genocide is justified in certain circumstances while allowing a person genuinely under duress to be free from criminal liability, provided he satisfied the requirements.

¹³¹ Prosecutor v. Zlatko Alekovski, 'Judgment' IT-95-14/1-A (24th March 2000), para55
<<http://www.icty.org/x/cases/alekovski/acjug/en/ale-asj000324e.pdf>> accessed 20th June 2018.

CHAPTER 4 – Application of Article 31(1)(d) on Hypothetical Case

The law of duress could be easily connected to the many abhorrent stories from Rwanda, the Former Yugoslavia, Sierra Leone, Iraq and many other conflict zones. Although duress is a well-established defence, its precise contours nonetheless remain largely a grey area. The following hypothetical case study serves as an example of this statement. Although it may be accurate to say that the prosecutor of the ICC would unlikely pursue a case similar to the following hypothetical case as it is the policy of the Prosecutor to initiate prosecutions of those leaders who bear the most responsibility and lower-ranked perpetrators are to be encouraged to be prosecuted nationally¹³², it is also important to ensure that our legal tool should be nuanced enough to comprehend the many complex realities of people that are not trapped in the binary notion of ‘good’ and ‘evil’, ‘innocent’ and ‘guilty’. This will be useful if a similar case in reality has satisfied the scale of gravity for it to become a legitimate target of the Prosecutor. It is noted that the aim of the hypothetical case is not to ascertain whether duress should be granted in this scenario, it aims to discuss the short fallings and contentious areas regarding Article 31(1)(d).

4.1) The Case of Omar¹³³

Nabaria is a fictional state. The Nabarian government is known for its brutality in its long-history of crackdown on freedom of speech and association. The Nabarian population are closely monitored by the security and intelligence services. Any signs of opposition are met with brutal force. Individuals perceived to be disloyal towards the government, most evident when members of the opposition vocally criticise the government, are often arbitrarily detained, tortured and sometimes killed. As the stories of the victims of state violence became widespread rumours within the Nabarian society, it

¹³² ‘Paper on some policy issues before the Office of the Prosecutor’, *ICC-OTP* (September 2003), p3 < http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> accessed 14th July 2018.

¹³³ Omar Hashim is a fictional character developed for the purpose of this thesis. His narrative is inspired by the Syrian conflict and contains elements from the *Erdemovic* case, reports from the United Nations Human Rights Council, human rights organisations and scholarly articles. Of particular relevance are reports regarding the torture and death of detainees in State-controlled facilities. See, for example, ‘Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria’ *Amnesty International* (2016) [Amnesty International Saydnaya Prison Report] <https://www.amnestyusa.org/files/human_slaughterhouse.pdf>; UN Human Rights Council, ‘Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic’ A/HRC/31/CRP.1 (3rd February 2016) <https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf>; Jennifer Bond and Meghan C Fougere, ‘Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law’ (2014) Vol. 14 (No. 3) *International Criminal Law Review*.

represents an effective tool for the government to terrorise the population as Nabarians acknowledge that ‘not just punishment, but cruelty is taking place’.¹³⁴ This created the conditions for public discourse in Nabaria to be ‘structured by tacit fear of incarceration and torture.’¹³⁵ Protests against the government’s brutal policies began in July 2017 but was violently suppressed by the government. The violence between the government security forces and opposition groups have escalated since then and in September 2017, the International Committee of the Red Cross formally declared that the situation in Nabaria amount to an armed conflict. Both parties to the conflict have been reported to have committed numerous atrocities. It is widely reported that the government is responsible for committing countless severe human rights violations against those who it perceives to be part of the opposition. These violations include severe beatings, torture, arbitrary detention and killings. It is widely reported that defectors from the government forces, particularly from the security and intelligence service have been tracked down, torture and killed. Their families were also often targeted. To deter people, mainly defectors, from escaping the government held territories, the Nabarian forces have employed a ‘shoot-to-kill’ policy against those suspected of leaving the territories at the borders without any reasons.

Omar is a fictional character. He lives together with his wife and two children in Nabaria. Ever since the violence escalated, Omar has been planning to leave the country. However, he could not make the proper arrangements due to financial and logistics reasons. He is also worried about the ‘shoot-to-kill’ policy. Out of financial and personal desperation, he started to work as a prison guard in Nejmeah prison as the only reliable source of income at the time was with the ever-expanding security and intelligence service. He hoped that the job would provide him more time and money to make the arrangements. Although Omar has yet to perform any acts of torture or arbitrary execution, he is aware that these violations are systematic in Nejmah prison, even before he started his job. While he is against the violent practices of the prison, he remained silent as speaking against it would risk him being labelled as a potential defector, subjecting him and his family to a high risk of torture and even death. One day at work, four opposition fighters were captured and were transported to Nejmeah prison. Upon arrival, Omar was being ordered by the prison’s high-ranking official to beat the newly-arrived detainees to death by utilising various lethal tools. He was told by the same official to show no sympathy towards

¹³⁴ Sune Haugbolle. ‘The Victim’s Tale in Syria: Imprisonment, Individualism, and Liberalism’ in Laleh Khalili and Jillian Schwelger, *Policing and Prisons in the Middle East: Formations of Coercion* (London Hurst & Company 2010), p224.

¹³⁵ Ibid.

the ‘traitors’. The official also specifically warned Omar that he should have known the ‘consequences’ for not complying with orders. Although not explicit, Omar is aware that the ‘consequences’ refers to the disappearances of some of his colleagues who had refused to carry out certain orders. It is well known rumour within the prison that those colleagues and their families have been abducted, transported to other prisons, tortured and some have even been killed. Defying orders in Nejmah prison could be considered as an ‘attempt to overthrow the government’. Omar believed he could not defy the orders without subjecting himself and his family to high risk of torture or even death. He complied with the orders and was directly responsible for the death of all four captured opposition fighters that day.

4.2) Could Omar’s implied and indirect threat constitute a threat?

It is clear that Article 31(1)(d) requires the threat of imminent death or serious bodily harm to be targeted against the defendant or a third person. However, the provision is silent on whether an indirect or implied threat that is not explicitly directed against any individual could constitute a threat under Article 31(1)(d). It is true that the majority of the traditional duress claims are explicit (i.e. If do not do A, B will happen) and direct (i.e. If you do not do A, B will happen to C).¹³⁶ However, this thesis views that an implicit and indirect threat could constitute a real threat and the defendant should not be excluded from the defence because of this. Depending on various environmental factors the defendant is subjected to, a person could still have an honest and reasonable belief that serious harm could be inflicted upon someone even if the threat is implicit and indirect and the law should not automatically preclude the defence in these instances. As Jennifer Bond and Meghan Fougere argued that there should be ‘space in the law of duress to recognise omnipresent threats.’¹³⁷

Omar’s case is illustrative of this as his narrative has departed from the traditional understanding of duress. Obviously, Omar’s threat lacks important information that are crucial in the determination of one’s genuine and reasonable belief in the threat, such as the nature of the threaten harm, the identity of the perpetrator, and who represents the target of harm. The high-ranking official simply alluded to the fact that he should have known the consequences for not complying with orders. To a layman, the implicit and indirect nature of the threat could not have point towards a serious harm as it is devoid

¹³⁶ Bond and Fougere (n133), p492.

¹³⁷ Ibid.

from any context. However, it is submitted that it is not entirely unreasonable for him to view the threat as real and inevitable. In determining whether Omar could have a genuine and reasonable belief in the threat, the environment that he was subjected plays a crucial role in our assessment. The main difference between Omar's duress case and most other duress cases is that Omar's threat was issued in a setting that is in a state of civil war, where violence is rampant and state protection is absent. Thus, Omar's interpretation of the alluded 'consequences' would undoubtedly be different from someone living in a stable country where the rule of law is present as his perception of danger would be contextualised by his unstable surroundings.

An additional factor that needs to be considered in assessing Omar's belief is the Nabarian government's systematic perpetration of intimidation and fear on the population to silence its critics. This has significantly lowered Nabarians' trust in government organs such as the police and the judiciary. If the same threat is issued against an individual somewhere else where there is a certain level of trust in government institutions, one would expect that individual to seek police protection. However, in Omar's case the efficacy of state protection has been substantially lowered, to the point where the police are responsible for widespread terrorisation. For Omar to seek state protection in this case would be a suicide mission for him and his family. The fact that a few of his colleagues and their families have disappeared is a testament of the precarious situation he operates in. Cumulatively, the high level of violence due to the conflict, the evident culture of fear and intimidation among the Nabarian society and the general population's distrust towards the government play a significant role in shaping Omar's thinking and perception of danger. Thus, when one looks at the threat in context, it is not surprising for Omar to view the threat as real and inevitable despite being indirect and implicit. It is submitted that the assessment of an indirect and implicit threat should not be viewed from the perspective of an abstract standard, rather it should reflect the human reality

Perhaps, the most influential case that highlighted the idea of contextualising one's perception of a threat is the *Krupp* case when the US Military Tribunal held that the perception of threat '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.'¹³⁸ The

¹³⁸ *Krupp Trial* (n47), p148.

inclusion of this approach in assessing one's reasonable and genuine belief as part of the duress analysis has also been discussed by domestic courts. Bond and Fougere opine that this demonstrates 'the utility of this approach' and it offers 'implicit support to recognition of implied and indirect threats as part of the defence.'¹³⁹ For instance, the Court of Appeal of Ontario in Canada held in *R v. Mena [1987]* that for a threat to constitute duress, it is not required to be explicit and direct. However, 'when an implied threat is relied upon to constitute duress..., the threshold question is whether the acts, conduct or words of the person alleged to have made the threat could reasonably be construed as a threat of the required kind.'¹⁴⁰ This was further confirmed by the Canadian Supreme Court in *R v. Ryan [2013]* when it was held that one of the elements of duress under common law is 'an explicit or implicit threat of death and bodily harm'¹⁴¹. The UK House of Lords also held in *R v. Hasan [2005]* that in addition to the defendant genuinely believe in the efficacy of the threat, he has to have a reasonable belief too, stating 'there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine.'¹⁴²

Hence, the defendant's genuine and reasonable belief in the efficacy of the threat should be the emphasis of the assessment of whether the threat could constitute a real threat under Article 31(1)(d). An outright preclusion of duress based on the form and nature of the threat would constitute an injustice as it fails to consider the impact of an implicit and indirect threat on one's perception of danger. This is not to say that any implicit or indirect threat could constitute a threat under Article 31(1)(d). If the defendant's belief failed to satisfy both the genuine and reasonable element of the assessment, the defence would nonetheless fail. However, the mere absence of an explicit and direct threat should not pose as a barrier for claiming duress.

4.3) Does Omar's threat constitute a threat beyond his control?

¹³⁹ Bond and Fougere (n133), p496.

¹⁴⁰ *R v. Mena* [1987] 20 OAC 50, para 55
<<https://www.canlii.org/en/on/onca/doc/1987/1987canlii2868/1987canlii2868.html>> accessed 8th July 2018.

¹⁴¹ *R v. Ryan* [2013] SCC 3, para 55 <http://www.leaf.ca/wp-content/uploads/2013/02/Ryan_en.pdf> accessed 8th July 2018.

¹⁴² *R v. Hasan* [2005] UKHL 22, para 23 <<http://www.bailii.org/uk/cases/UKHL/2005/22.html>> accessed 6th July 2018.

Unlike in many national legal systems, the Rome Statute did not explicitly mention that in order for a threat to constitute beyond one's control, the actor's prior own fault must have not contributed to the presence of the threat. In other words, Article 31(1)(d) is silent on whether a threat can be regarded as beyond the actor's control, if he willingly exposed himself to the conditions that led himself to be threatened. This form of culpability is described as a 'prior fault'.¹⁴³ According to Yeo, the Rome Statute's silence on this requirement is 'very likely to have been an oversight rather than a deliberate decision by the Rome Conference'¹⁴⁴ as there is a large body of international case law supporting this doctrine of prior fault. For instance, it was held in *R v. Heath [1999]* that duress should be precluded if the defendant put himself in a situation despite being aware of the 'risk of compulsion'.¹⁴⁵ This position was further confirmed in *R v. Harmer [2001]* when it was held that duress would not be available if 'a man voluntarily exposes himself to unlawful violence'¹⁴⁶. The main purpose of the doctrine is to deter people who associated themselves with violence from claiming duress as they would be culpable in the first place. Yeo argues that the 'necessity component of the ICC Statute provision does allude to such doctrine' when it requires the threat to be beyond the actor's control.¹⁴⁷ Hence, an actor may be denied the defence of duress under Article 31(1)(d) if he loses control of circumstances where he previously had control of. Thus, this thesis proposes that the Rome Statute explicitly recognise this in its duress provision to prevent the defence from being abused.

In situation that concerns a prior fault, one needs to question to what extent, does the individual's voluntary association with the risk (prior fault) affects his control over a particular threat? Should the Rome Statute immediately deny the duress defence to all actors who voluntarily expose themselves to any circumstances that may lead to duress? Or should the Rome Statute allow certain circumstances of voluntary exposure to prevail? While it is true that the law should preclude duress to individuals who knowingly and voluntarily joined a violent organisation but was later coerced into committing a crime,

¹⁴³ Stanley Yeo, 'Commonwealth and International Perspectives on Self-Defence, Duress and Necessity' (2007) Vol. 19 (No.3) Current Issues in Criminal Justice, p358 <<http://www5.austlii.edu.au/au/journals/CICrimJust/2008/5.pdf>> accessed 3rd July 2018.

¹⁴⁴ Stanley Yeo, 'Compulsion and Necessity in African Criminal Law' (2009) Vol. 53 (No. 1) Journal of African Law, p106 <<https://www.jstor.org/stable/pdf/40646827.pdf?refreqid=excelsior%3A9af549e7e579c659932548a35a7e0e12>> accessed 3rd July 2018.

¹⁴⁵ *R v. Heath* [2000] Crim LR 109.

¹⁴⁶ *R v. Harmer* [2002] Crim LR 401.

¹⁴⁷ *Ibid.*

it is submitted that the first option of a blanket prohibition to all forms of prior fault would be excessively harsh and unprincipled. For instance, a person may have voluntarily joined a group that practices petty crimes like vandalism but was later forced by the same group into committing torture due to unforeseen circumstances.¹⁴⁸ It would be unfair to regard him as to have brought upon the coercive circumstances upon himself because the link between his prior fault of joining the group and his subsequent acts of torture could not be established clearly. Therefore, it is submitted that in order for the actor's threat to constitute 'within his control', there must be a clear establishment of the link between the actor's prior fault of voluntary association and his subsequent need for the duress defence.¹⁴⁹ So in Omar's case, in order for his threat to constitute 'within his control', the link between his prior fault of starting his job at Nejmeah prison after realising the systematic nature of violence, and his subsequent plea for duress must be established with clarity.

This thesis will utilise the concept of foreseeability established in *R v Hasan [2005]* as a guidance for us to determine the links between Omar's prior fault and his subsequent need for duress. Lord Bingham held in *R v. Hasan [2005]* that duress would be excluded when 'as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.'¹⁵⁰ Lord Bingham further elaborated this test in *R v Ali [2008]* when he stated that it is 'the risk of being subjected to compulsion by threats of violence that must be foreseen or foreseeable', not 'the nature of the activity in which the threatener is engaged.'¹⁵¹ In essence, the above test centres upon whether the defendant had voluntarily placed himself in a situation where he knows that he will be subjected to duress in the future. Thus, when we apply this test to Omar's case, the prevailing question is whether Omar could have foreseen or ought to have reasonably foreseen the risk of being subjected to threats of violence when he started his position at Nejmeah prison?

¹⁴⁸ Ibid, 107.

¹⁴⁹ Ibid, p106 – 107.

¹⁵⁰ R v. Hasan [2005] (n142), para 39.

¹⁵¹ R v. Ali [2008] 4 All ER 685, para39.

It is submitted that Omar is unlikely to satisfy the foresight test as the Nabarian government's tactic of utilising torture and execution as a fear and intimidation tactic to terrorise the population is well known by Nabarians, including him. The moment when Omar voluntarily started his job at Nejmeah prison despite knowing that torture and arbitrary executions are systematic should be construed as him voluntarily associating with the high risk of duress, thereby, this constitutes a prior fault. His financial and personal reasons, although unfortunate, should not be an excuse for joining a violent organisation, as he should have or ought to have foreseen the high risk of being compelled to commit such acts. Omar may have fared better in the foresight test if he was not aware of the systematic violence happening inside Nejmeah prison when he first started his job as he could argue that his subsequent crime falls outside of the organisation's (Nejmeah prison) usual activities, therefore, he could not or is not expected for him to have foreseen such risks.¹⁵² However, in the stated alternative scenario, one could question whether Omar is required to escape once he knew that the practice of torture and arbitrary execution is systematic within the prison.

As recognised by many domestic jurisdiction, there is a requirement for the defendant to escape if such opportunity arises. For instance, the Court of Appeal held in *R v. Hudson and Taylor [1971]* that if:

*“the accused failed to avail himself of some opportunity which was reasonably open to him... the threat in question can no longer be relied upon by the defence. In deciding whether such an opportunity was reasonably open to the accused the jury should have regard to his age and circumstances, and to any risks to him which may be involved in the course of action relied upon.”*¹⁵³

This position was reaffirmed by the House of Lords in *DPP v. Lynch [1975]* when it stated that the court must consider whether there was a 'safe avenue of escape' for the defendant to reasonably extricate himself in its duress analysis.¹⁵⁴ Similarly, the Canadian Supreme court highlighted in *R v. Ruzic [2001]* the need for 'an objective-subjective assessment of the safe avenue of escape test' and 'the law does not require an accused to seek the official protection of police in all cases. The

¹⁵² Yeo, 'Compulsion and Necessity in African Criminal Law' (n144), p106 – 107.

¹⁵³ *R v. Hudson and Taylor [1971]* 2 All ER 244 <<http://www.bailii.org/ew/cases/EWCA/Crim/1971/2.html>> accessed 9th July 2018.

¹⁵⁴ *D.P.P v. Lynch [1975]* UKHL 5 <<http://www.bailii.org/uk/cases/UKHL/1975/5.html>> accessed 13th June 2018.

requirement of objectivity must itself take into consideration the special circumstances in which the accused found herself as well as her perception of them.¹⁵⁵ Thus, it would make sense that Omar's safe avenue of escape test would have to be viewed from the perspective of a reasonable person living in Nabaria, a conflict zone with the knowledge of the perpetration of institutionalised terror by the government on the population, including the 'shoot-to-kill' policy implemented by the government to deter defectors from escaping. Hence, it is highly likely that Omar's situation would satisfy the requirement to escape and the requirement of prior fault had he not known the systematic practice of torture and arbitrary executions within Nejmeah prison when he first started his position there.

Therefore, although the phrase 'beyond that person's control' in Article 31(1)(d)(ii) may allude to the doctrine of prior fault which many national jurisdictions have recognised it as a requirement in assessing a threat of duress, it is submitted that the Rome Statute should explicitly state this requirement to prevent confusion and probable abuse of the duress defence. It is also submitted that the test that should govern the standard of prior fault should be one that is based on foresight.

4.4) Could Omar's threat constitute an imminent threat?

Article 31(1)(d) of the Rome Statute is explicit about the requirement of an imminent threat of death or serious bodily harm. This appears to reflect the traditional 'gun to head' scenario of duress, similar to the *Erdemovic* case. The requirement of an imminent threat is often contemplated with the understanding of an impending or fast approaching harm. According to Bond and Fougere, 'the term 'imminence' clearly invokes requirements of close proximity in time'¹⁵⁶, but 'the time frame dictated by the concept of imminence' is still not certain.¹⁵⁷ As pointed out by Yeo, it is still uncertain whether the concept is limited merely to a few minutes or hours or it could be even extended to days.¹⁵⁸ Hence, this thesis proposes that the Rome Statute should not impose a strict temporal requirement in assessing the urgency and inevitability of the threat as there are situations where although the efficacy of the threat is not immediate, the defendant's understanding and perception of the situation may lead them to

¹⁵⁵ R v. Ruzic [2001] (n20).

¹⁵⁶ Bond and Fougere (n133), p500.

¹⁵⁷ Yeo, 'Compulsion and Necessity in African Criminal Law' (n144), p99.

¹⁵⁸ Ibid.

have an honest and reasonable belief that they have no other alternatives but to comply with the criminal orders. Thus, the term ‘imminent’ should not be understood merely in the traditional sense of immediacy but also in the sense of inevitability, where the availability of alternatives should be examined.

Omar’s case is illustrative of how a threat could be inevitable despite its efficacy being not immediate. If we subscribe to the traditional understanding of imminence, Omar’s threat would not satisfy the requirement of an imminent threat as the temporal proximity between the issuance and the materialisation of the threat is absent. For all we know, the efficacy of his threat could be at any moment. It could be in a few minutes, hours, days or even weeks. Thus, his threat lacks temporal immediacy and it would likely preclude him from claiming duress under the strict interpretation of Article 31(1)(d). While it is accurate to state that the presence of an imminent threat is a strong indication that a person was ‘operating under intense pressure to avoid a threat that was about to happen’¹⁵⁹, it is submitted that this should not be the only indication. This thesis agrees with Bond’s and Fougere’s view that in a scenario where a threat lacks temporal immediacy, the question that we should focus on is whether the person ‘had a reasonable belief that... the only way to avoid the threatened harm’¹⁶⁰ is to comply with the criminal orders. Hence, in Omar’s case, we have to analyse whether other alternatives were available for him when the threat was issued.

Again, the environment that he was subjected to is key in this assessment. Because Omar’s narrative happened in a conflict setting, he is deprived of the many alternatives that are usually afforded to someone living in a non-conflict setting. For instance, a prison guard in London who received an identical threat would have many options to avoid the threatened harm. He could have choose to quit the job, or report to a higher authority, or seek state protection, or even leave the country if need be.¹⁶¹ All of these alternatives were simply not available in Omar’s case. Due to the Nabarian government’s long history and ever increasing utilisation of the security and intelligence services to monitor and terrorise the population since the conflict begun, he could not have quit his job or report his situation to

¹⁵⁹ Yeo, ‘Commonwealth and International Perspectives on Self-Defence, Duress and Necessity’ (n143), p356-357.

¹⁶⁰ Bond and Fougere (n133), p501.

¹⁶¹ Ibid.

a higher authority or even seek state protection without risking being labelled as a dissident. Leaving the country would also be a difficult task due to the ‘shoot-to-kill’ policy implemented at the borders. If he were to pursue the usual alternatives available to the prison guard in London, it would be highly likely that him and his family would be subjected to torture or even death. The disappearance of his colleagues who defied orders serves as another strong testament of the irrationality and brutality of the environment Omar operates in and how a mistake could cost him and his families’ lives. Thus, even if Omar’s threat lacks temporal immediacy, it could not be stated that he is in any less danger or possess more alternatives than a person who received a threat of immediate harm. Therefore, the environment where the actor operates in should be the crux in our assessment of whether other alternatives were available. The utilisation of a restrictive interpretation of imminence as a precursor in determining the urgency of a threat would represent a complete ban on the duress defence for individuals who received a threat that failed to constitute an immediate harm but nonetheless, they experienced ‘the same sort of intense pressure’¹⁶² exerted by a threat of immediate harm.

It is acknowledged that a proposal for a liberal interpretation of the term ‘imminent’ in the Rome Statute is not without contention as many national jurisdictions continue to impose such a strict interpretation of the requirement. For instance, the criminal codes of Canada¹⁶³, New Zealand¹⁶⁴, India¹⁶⁵, Malaysia¹⁶⁶ and Singapore¹⁶⁷ all require the threat to be ‘immediate’ or ‘instant’. Other common law jurisdictions such as Ireland¹⁶⁸ and Scotland¹⁶⁹ also impose such a restriction through its case law. However, scholars like Yeo have been critical about the insistence of an ‘immediate’ or ‘instant’ harm. According to Yeo, the insistence on a temporal immediacy serves two aims. First, it is to ensure that ‘the accused’s choice was substantially undermined by the threat’, and second, to ensure

¹⁶² Yeo, ‘Commonwealth and International Perspectives on Self-Defence, Duress and Necessity’ (n143), p357.

¹⁶³ Criminal Code, R. S. C., 1985, c C-46 (Canadian Criminal Code), S 17.

¹⁶⁴ Crimes Act 1961 (New Zealand Criminal Code), S 24(1).

¹⁶⁵ Indian Penal Code 1860, S 94.

¹⁶⁶ Act 574 Penal Code (Malaysian Criminal Code), S 94.

¹⁶⁷ Penal Code (Chapter 224) [Singaporean Penal Code], S 94.

¹⁶⁸ Attorney-General v. Wheelan [1934] IR 518, para 8 <<http://www.bailii.org/ie/cases/IEHC/1933/1.html>> accessed 9th July 2018.

¹⁶⁹ Thomson v. H. M. Advocate [1983] SLT 682 <http://www.bailii.org/scot/cases/ScotHC/1983/1983_JC_69.html> accessed 9th July 2018.

that the defence is unavailable to an accused who had the option of taking other ‘evasive action’ and seek police protection.¹⁷⁰ He argued that the first aim could be achieved without any temporal restriction by simply requiring the accused to ‘reasonably apprehend that the threat will be carried out’ either ‘immediately upon non-compliance or after an interval.’¹⁷¹ He also warned against using temporal restriction to achieve the second aim as it fails to consider scenarios like Omar’s, where the lack of alternatives could happen with or without an instant harm.¹⁷² Thus, he advocated for the removal of the requirement of instant harm under the penal code of Singapore as it ‘takes an unduly narrow view of circumstances when an accused can be said to lack free choice between breaking the law and self-preservation.’¹⁷³

Interestingly, the proposal for removing the temporal restriction for the defence of duress is not an entirely foreign idea. In fact, the absence of the requirement of imminence is one of the key difference between duress under the Australia’s Commonwealth Criminal Code (Commonwealth Code) and the Rome Statute. Whereas the Rome Statute requires the threat to be imminent, the Commonwealth Code recognises ‘any form of threat or circumstances of emergency... so long as they induced the defendant to commit the crime charged.’¹⁷⁴ It is the view of the Model Criminal Code Officers Committee that:

*“Once a person is under the influence of a threat, whatever he or she does depends on what the threatener demands. The crime demanded might be trivial or serious, but it has no necessary connection with the type of threat confronting the accused. Policy reasons would, however, insist that the accused’s response was reasonably appropriate to the threat.”*¹⁷⁵

¹⁷⁰ Stanley Yeo, ‘Considerations of Time and Space in Duress’ (2004) Vol. 16 (September Issue) Singapore Academy of Law Journal, p362.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Yeo, ‘Commonwealth and International Perspectives on Self-Defence, Duress and Necessity’ (n143), p356.

¹⁷⁵ Ian Leader-Elliott, ‘The Commonwealth Criminal Code: A Guide for Practitioner’ Commonwealth *Attorney General’s Department in association with the Australian Institute of Judicial Administration* (March 2002) p232
<<https://www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMarch2002/GuideforPractitioners.pdf>> accessed 8th July 2018.

Thus, under the Commonwealth Code, as long as the threat satisfies the three criteria of the concept of reasonableness: i) the threat must be real or reasonably apprehended as real; ii) the threat must be unavoidable; and iii) the response of the threat must be reasonable¹⁷⁶, the defendant should not be excluded from the defence of duress. Several national jurisdictions have also produced judgments that have supported the discontinuation of utilising temporal restriction. For instance, the Australian High Court stated in *Osland v The Queen [1998]* that ‘the significance of the perception of danger is not its imminence’ but whether the defendant believes that he had no other alternatives.¹⁷⁷ Although this case concerns self-defence, the defendant’s perception of the danger is nonetheless relevant and could be applied in a duress scenario. Furthermore, the UK Court of Appeal held in *R v. Hudson and Taylor [1971]* that a person could be under duress even if ‘the threatened injury may not follow instantly, but after an interval’ as long as the threat could constitute ‘a “present” threat in the sense that it is effective to neutralise the will of the accused at that time.’¹⁷⁸ This position was reaffirmed in *R v. Abdul Hussain [1998]* when the Court of Appeal stated that ‘the period of time which elapses between the inception of the peril and the defendant’s act, and between that act and execution of the threat, are relevant but not determinative factors... in deciding whether duress operates.’¹⁷⁹ In supporting this statement, the court provided the following analogy:

“... if Anne Frank had stolen a car to escape from Amsterdam and been charged with theft, the tenets of English law would not, in our judgment, have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door.”

Therefore, it is submitted that a liberal interpretation of the term ‘imminent’ under Article 31(1)(d) is necessary so people who are truly under intense pressure and possess no other alternatives could potentially claim duress regardless of whether the threatened harm is instant or not. Imminence should not be equated as immediacy. The term ‘imminent’ should be understood as whether alternative options

¹⁷⁶ Ibid.

¹⁷⁷ *Osland v. The Queen [1998]* 73 ALJR 173, para 172 <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1998/75.html>> accessed 9th July 2018.

¹⁷⁸ *R v. Hudson and Taylor [1971]* (n153).

¹⁷⁹ *R v. Abdul Hussain [1998]* EWCA Crim 3528 <<http://www.bailii.org/ew/cases/EWCA/Crim/1998/3528.html>> accessed 9th July 2018.

exists. The presence of a threat of an immediate harm is an indication of the imminence of the threat but it is not determinative. The assessment needs to take various factors such as the hostility of the environment and the prospects of an escape into consideration.

4.5) Could Omar's threat satisfy the proportionality test?

i) *Removal of the intention requirement*

As discussed in Chapter 3, an actor claiming duress must have acted necessarily and reasonably to avoid the threat and does not intend to cause a greater harm than the one sought to be avoided. Yeo highlighted the difficult relationship between the two requirements of the act to be both objectively necessary & reasonable and subjectively intended to cause a lesser harm.¹⁸⁰ He argued that the mixture of both requirements are 'rife with difficulty both in term: of comprehensibility and application.'¹⁸¹ He posed the following question:

“How... does the proviso with its subjective intention of the defendant fit in? What would the outcome of a case be were, the tribunal of fact to decide that the defendant's act was unreasonable, but at the same time found that the defendant had not intended to cause a greater harm than the one sought to be avoided? Or conversely, what would the outcome be if it was determined that the defendant's act was reasonable but that he or she intended a greater harm than the one sought to be avoided?”¹⁸²

Thus, this thesis agrees with Benjamin J. Risacher¹⁸³ and Yeo¹⁸⁴ that Article 31(1)(d) would be better off without the requirement of an intention to cause less harm as it would be extremely difficult to implement on a practical level. Only in a pure necessity scenario is it possible for the defendant's act to satisfy both the criteria of necessary & reasonable and intention to cause a less harm than one sought to be avoided. It is almost impossible to imagine any duress scenario that would satisfy the current standard of duress under Article 31(1)(d). It is submitted that as long as the defendant acted necessarily

¹⁸⁰ Yeo, ‘Commonwealth and International Perspectives on Self-Defence, Duress and Necessity’ (n143), p358.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Risacher (n33), p1421.

¹⁸⁴ Yeo, ‘Compulsion and Necessity in African Criminal Law’ (n144), p102.

and reasonably to avoid the threat, it should be sufficient. As discussed in Chapter 3, the necessity and reasonableness criteria already acts as a proportionality test. This proportionality is sufficient in ensuring that Article 31(1)(d) operates ‘neither too restrictively nor too broadly’¹⁸⁵ as it is able to maintain the high threshold of the defence by disqualifying acts that are necessary but not reasonable. The reasonableness of an act could be decided by the judge depending on each circumstances. It is unnecessary to include a separate subjective proportionality test based on pure intention as it serves no real purpose but to disqualify other duress scenarios that would otherwise be admissible.

Omar’s case is illustrative of how the current standard of duress under Article 31(1)(d) is unaccommodating towards situations where the harm incurred is greater than the harm one sought to avoid, even if the incurred harm is only slightly greater than the threatened harm. As discussed in the previous sub-chapter, Omar possess no other alternatives in avoiding the threat. Thus, his act that claimed five lives could constitute as a necessary act relatively easy. The reasonable aspect of his action would be more contentious. If it was certain that a failure to comply with orders would mean that he and his family would be tortured and killed and the court decided to adopt a more relaxed proportionality test to assess the reasonableness of Omar’s act, he may be successful in pleading duress as the death of five fighters to potentially save the lives of four is unlikely to constitute a gross disproportion. Assuming that the court decided to apply a relaxed proportionality test for the ‘necessary and reasonable’ criteria, the court will then move to assess whether Omar had intended ‘to cause a greater harm than the one sought to be avoided’ or not, as required by Article 31(1)(d).

As the very language of ‘the person does not intend to cause a greater harm than the one sought to be avoided’ under Article 31(1)(d) requires the court to assess one’s intention based on a strict balancing exercise (proportionality test), Omar needs to prove that the torture and the death of five fighters constitute a lesser harm than the high probability of torture and possible death of his family of four when he decided to comply with the order. Because of the strict nature of this second proportionality test, even assuming that a failure to comply with orders would be fatal for Omar and his family, the death of five fighters simply could not justify the death of four as it fails to constitute the lesser evil. Thus, Omar would be unable to claim duress even if his action was necessary and reasonable to avoid

¹⁸⁵ Ibid.

the threat he received. The only event where Omar could potentially succeed in raising duress under the current standard is when the killing of five fighters is reduced to three, as this would likely constitute a lesser evil, provided that death and not torture was certain for Omar and his family if he failed to comply with the order.

In an alternative scenario, where the death of the fighters is reduced to four, this thesis is unsure about the outcome of the duress claim. In this case, how could the court possibly be certain that the death of four opposition fighters constitutes the lesser harm than the death of a family of four? Would factors like the age, criminal history, educational and employment background of the potential victim be part of the strict balancing exercise? For instance, does the killing of four children constitute a greater harm than the killing of four adult men? Or does the killing of four engineers constitute a greater harm than the killing of four homeless men? It is almost impossible for the court to judge in these scenarios and to arrive into a conclusion about who's death would constitute a greater harm. Despite this moral and philosophical challenges, Omar could nonetheless argue that the killings of the fighters, regardless if the number of death is three, four, five or even ten, would have been carried out by another person anyway.

As mentioned in Chapter 3, Cassese viewed this scenario would satisfy the strict proportionality test even if the harm incurred does not constitute the lesser evil.¹⁸⁶ It is not difficult imagine that when the culture of fear and intimidation is so apparent in a society and the practice of such extreme violence is systematic within the prison, the killings of those fighters would have carried out with or without Omar's contribution. Omar's perception of his surroundings should not be viewed as completely different from the perception of other individuals working in Nejmeah prison. It is likely that they would all understand the workings of the prison system, regardless of whether they oppose the prison's systematic practice of torture and arbitrary killing. Hence, if Omar were to defy the order, it would not be inconceivable for the prison's official to simply replace Omar with someone who, like him, would succumb to the pressures of the environment and carry out those violent acts against those captured fighters.

¹⁸⁶ Cassese's Opinion (n2), para 44.

Thus, it is submitted that the requirement of an intention to cause less harm should be lifted from the Rome Statute for the ICC to avoid this binary situation where it has to conclude moral evaluations on highly contentious cases. The requirement of necessity and reasonableness, which already constitutes a proportionality test would ensure that the duress defence operates neither too restrictively nor too broadly.

ii) *Recognising the role of human emotions in duress*

In the language of practical rationality, duress is often touted as an ‘impediment to practical reasoning’.¹⁸⁷ From the perspective of rationality, the concept of exculpating an individual because of human frailty is irrational and to ‘defend the abstract legal conception of individual rationality yet explain the defence of duress’ ultimately leads into inconsistencies.¹⁸⁸ One could not deny the crucial role of human emotions in shaping our understanding of duress. As Varona Gómez noted that it is because society has a shared understanding that an individual that has been coerced ‘cannot turn away from his concrete interests when he is evaluating the [dilemmatic choice with which he is confronted]’¹⁸⁹, it is deemed acceptable to excuse that individual. If we accept Gómez’s proposition, we would allow people under duress to ‘give more weight to his own personal interests and to those of his loved ones’ than to the interests of strangers.¹⁹⁰ Thus, in Omar’s case, it is not entirely incomprehensible for him to prioritise his family’s interests over the five captured fighters’.

As Luis E. Chiesa highlighted, the presence of a danger to a loved one would have a greater impact on the person’s reasonable firmness than a danger to himself.¹⁹¹ He also argued that this prioritisation of family interest would be in favour of upholding ‘communitarian duties stemming from familial relationships’ which is more apparent in a parent-child relationship.¹⁹² So while people do not have an

¹⁸⁷ Alan Norrie, ‘Practical Reasoning and Criminal Responsibility’ in Derek B. Cornish and Ronald V. Clarke (eds), *The Reasoning Criminal: Rational Choice Perspectives on Offending* (Transaction Publishers 2014), p222 – 223.

¹⁸⁸ Ibid, p223 – 224.

¹⁸⁹ Luis E. Chiesa, ‘Duress, Demanding Heroism, and Proportionality’ (2012) Vol. 4 (No. 3) *Vanderbilt Journal of Transnational Law*, p762 – 763 <<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1403&context=lawfaculty>> accessed 10th July 2018.

¹⁹⁰ Ibid, p763.

¹⁹¹ Ibid, p767.

¹⁹² Ibid.

obligation to keep themselves out of harm, they may have an obligation to keep their children free from harm because the decision to save the child is ‘understandable both because of the difficult nature of the choice and because saving the child’s life fulfils the parent’s communitarian duty to protect his family.’¹⁹³ If we apply this logic to Omar’s case, he could satisfy the proportionality test even if the harm incurred does not constitute a lesser harm as his wider goal is to save his family, including two children from harm. Thus, Omar’s prioritisation his self-interest over the fighters’ would not be disproportionate under this theory.

Therefore, this thesis proposes in assessing whether the defendant’s act satisfies the proportionality test, the communitarian duty to protect one’s family should be taken into consideration. It is submitted that in certain scenarios, it may be permissible for the defendant to inflict a greater harm than the one sought to be avoided, provided that it is not grossly disproportionate. This thesis also recognises that this contextualisation has to be constructed carefully to prevent a contagion effect that extends this consideration to other more trivial and contentious factors such as bad social conditions, education and employment.¹⁹⁴

¹⁹³ Ibid, p767 – 768.

¹⁹⁴ Norrie (n187), p223.

CHAPTER 5 – Reconciling Duress and Mass Atrocity Crimes

“The purview of the International Tribunal relates to war crimes and crimes against humanity... We must bear in mind that we are operating in the realm of international humanitarian law ... Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of domestic crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war, to punish perpetrators of crimes against humanity and war crimes, and to deter the commission of such crimes in the future?”¹⁹⁵

The above statement by Judge McDonald and Vohrah highlighted the reality that international criminal law does not operate in a vacuum. ‘It would be naïve to believe that international law operates and develops wholly divorced from considerations of social and economic policy.’¹⁹⁶ Thus, it is also important that we do not view the defence of duress solely from the perspective of the defendant, which this thesis has done so far. We need to also view this defence from the perspective of the international community and whether it interferes with the aim of international criminal law. Is the inclusion of duress as a defence for mass atrocity crimes compatible the wider goals of international criminal law? Conversely, what can we achieve if we were to exclude duress as a defence and subject the defendant to punishment? To answer this, one needs to answer the fundamental question: Why is it necessary for international criminal law to punish? The rationale for punishment under international criminal law is dominated by the theory of retribution and theory of deterrence.

5.1) Duress and the Theory of Retributivism

Although many divergent schools of retributivism have existed since the time of Immanuel Kant, retributivists still generally share the understanding that ‘the infliction of punishment rectifies the moral

¹⁹⁵ McDonald’s and Vohrah’s opinion (n3), para 75.

¹⁹⁶ Ibid, para 78.

balance insofar as punishment is what the perpetrator deserves. Punishment, therefore, is to be proportionate to the nature and extent of the crime.’¹⁹⁷ The theory of retributivism has been the major propulsion for modern international criminal law. As the ICTY Trial Chamber stated in *Prosecutor v. Momir Nikolić* that the primary objective of international criminal proceedings is to convict and punish those responsible for their crimes.¹⁹⁸ Thus, the aim of retribution in international criminal law is guided by the basic idea that ‘the guilty deserve to be punished’¹⁹⁹ to provide a sense of justice for victims, ‘that a criminal has received his just deserts and the imbalance created by his crime has been restored.’²⁰⁰

Since the theory of retributivism requires the punishment to be just and proportionate, proponents for the duress defence in international criminal law have argued that it will not be in the interest of justice to punish someone who is not morally culpable as this punishment is misplaced.²⁰¹ An individual who commits a crime under duress should be distinguished from an individual who actively commits a crime in the absence of a threat of violence. A person who commits a crime despite having the opportunity to not do so is a person who actively seeks to disconnect himself from the society’s accepted value. This voluntary disconnection would signify moral culpability because the person chose to do so despite knowing that the reasonable person in his situation, where freedom of choice is available, would not do so. Conversely, in a situation of duress, a person does not actively seek to disconnect himself from those accepted values. It is precisely because of the intense pressure that he operates in that forces him to commit acts that disconnect him from those accepted values. This ‘involuntary’ disconnection should not be equated to as being morally culpable as the reasonable person in his situation would have done the same. Thus, if the theory of retributivism champions the

¹⁹⁷ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007), p61.

¹⁹⁸ *Prosecutor v. Momir Nikolić*, Case No. IT-02-60/1-S (ICTY Trial Chamber, 2nd December 2003), para 59 <<https://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf>> accessed 12th July 2018.

¹⁹⁹ Alexander K.A. Greenawalt, ‘International Criminal Law for Retributivists’ (2014) Vol. 35 (No. 4) University of Pennsylvania Journal of International Law, p986 <<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=http://scholarship.law.upenn.edu&httpsredir=1&article=1873&context=jil>> accessed 12th July 2018.

²⁰⁰ Risacher (n33), p1420.

²⁰¹ *Ibid.*

justification of allocating punishment based on one's guilt²⁰², then duress should be allowed in cases where the defendant is entitled to exculpate his culpability due to the severe restriction on his free will.

Because much of the emphasis of the theory of retributivism is on punishment, international tribunals have been cautious in expressing this rationale in its judgments as it could easily be perceived as equating punishment with revenge.²⁰³ This cautious approach adopted by international tribunals has pushed the development of the theory of retributivism to a new direction. For instance, the ICTY Appeals Chamber in *Prosecutor v. Kordić and Čerkez* warned against the confusion of retribution with revenge or vengeance.²⁰⁴ It was held in *Prosecutor v. Momir Nikolić* by the ICTY Trial Chamber that retribution should be understood as 'the expression of condemnation and outrage of the international community at such grave violations'.²⁰⁵ This new development of retribution has been characterised by scholars like Mark A. Drumbl as a move in the direction of expressivism.²⁰⁶ Punishment under the theory of expressivism is to 'strengthen faith in rule of law among the general public' because criminal proceedings, including punishment cultivates public respect for law.²⁰⁷ Thus, unlike traditional retributivists who punish criminals because they deserve it, expressivists view the process of trial, conviction and punishment as being able to craft historical narratives and authenticate truths for the dissemination to the public.²⁰⁸ As David Garland posits that punishment 'communicates meaning... power, authority, legitimacy, normality, morality, personhood, social relations, and a host of other tangential matters.'²⁰⁹

Assuming that this importation of elements of expressivism into retributivism is not to be considered a separate theory and merely a divergent school of retributivism, this thesis still posits that duress should

²⁰² Frederick Rauscher, 'Kant's Social and Political Philosophy', *The Stanford Encyclopaedia of Philosophy* (Spring 2017 edn) <<https://plato.stanford.edu/entries/kant-social-political/#Pun>> accessed 12th July 2018.

²⁰³ Drumbl (n197), p61.

²⁰⁴ *Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-A (ICTY Appeals Chamber, 17th December 2004), para 1075 <http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf> accessed 12th July 2018.

²⁰⁵ *Prosecutor v. Momir Nikolić* (n198), para 86.

²⁰⁶ Drumbl (n197), p61.

²⁰⁷ *Ibid*, p173.

²⁰⁸ *Ibid*.

²⁰⁹ *Ibid*, p174.

be allowed as a defence, even in the context of mass atrocities. As discussed in Chapter 1, duress is an excuse, it does not justify an otherwise criminal act. It simply recognises that because of the unfair situation the defendant was in, it would be unfair to hold him morally culpable as a reasonable person would have committed the same crime anyway. Although Article 31(1)(d) contains elements of necessity, it still operates under the defence of duress. So the ICC will not be forced upon to decide whether the defendant's act was justified or not. Thus, when duress exculpates the defendant, it does not interfere with the 'expression of condemnation and outrage of the international community'. The defendant's action would still be immoral and condemned. However, the understanding is that the outrage and punishment should be focused more on the coercer rather than the defendant. Thus, the inclusion of duress would not contradict the theory of retributivism, even if it contains elements of expressivism.

5.2) Duress and the Theory of Deterrence

The theory of deterrence, in its most direct form, advances the idea of a rational individual weighing the potential gains and potential loss of their behaviour. If the level of potential gains is higher than the potential loss, then a particular action will be taken. The purpose of law is to make 'acts more painful or more costly than the benefits, thereby generating general deterrence in a population... through ascribed punishments.'²¹⁰ General deterrence refers to the dissuasion of a whole population from committing crimes in the future and specific deterrence refers to the dissuasion of the specific defendant from reoffending in the future.²¹¹ As punishment has a consequentialist effect that reduce crime under the theory of deterrence, it is essentially a consequentialist rationale.²¹²

This general idea of deterrence is best encapsulated in the case of *Prosecutor v. Beno* when the East Timor Tribunal justified its prescription of punishment as necessary to deter future crimes because 'just across a hard-to-guard border live hundreds of recalcitrant ex-militia men with the capability of once

²¹⁰ Christopher W. Mullins and Dawn L. Rothe, 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) Vol. 10 (No. 5) *International Criminal Law Review*, p773.

²¹¹ Drumbl (n197), p61.

²¹² *Ibid*, p62.

again destabilizing this country by means of murder.’²¹³ Thus, by prosecuting and punishing individuals responsible for mass atrocity would act as a general deterrence to dissuade other people from committing the same crime in the future. Although ‘a survey of all the cases of the ad hoc tribunals over time... reveals a preference for retributive motivations’²¹⁴, the importance of deterrence has been emphasised by ad hoc tribunals, particularly the ICTY. For instance, the ICTY Trial chamber held in *Prosecutor v. Stakić* that specific and general deterrence are as important as retribution²¹⁵ and in *Prosecutor v. Delalić* that deterrence is ‘the most important factor in the assessment of appropriate sentences for violations’ to deter the accused and people in similar situations in the future.²¹⁶

Since the goal of deterrence has much emphasis on the impedance of the re-perpetration of a similar crime by the defendant or the population, it is submitted that the duress defence would not act as an obstruction to this goal. In regards to general deterrence, it is argued that had the person under duress known the punishment for his acts before committing a crime, he would still have committed it as his reasons to do so would be unaffected because his free will would be still be overcome by the overwhelming pressure, which no reasonable person could resist.²¹⁷ The only scenario where the defendant would refrain from committing the crime would be if he does not prioritise his own self-interest, which would be a heroic standard that most of us would likely fail to satisfy. This is apparent if the duress scenario involves a death threat. This is also particularly true when one takes into account the ICC’s lack of competence in imposing a death penalty and the restriction of imposition of the life imprisonment penalty to cases where ‘it is justified by the extreme gravity of the crime and the individual circumstances of the convicted person’²¹⁸ in the ICC’s jurisdiction of an already heinous-natured crimes. For instance, from a rational perspective, assuming that a person under duress had weighed the potential gains and loss before committing his crime, it is still likely that he would view

²¹³ *Prosecutor v. Beno*, Case No. 4b/2003 (District Court of Dili Special Panels for Serious Crimes, 16th November 2004), para 22 <http://www.worldcourts.com/un_etta/eng/decisions/2004.11.16_Prosecutor_v_Beno.pdf> accessed 13th July 2018.

²¹⁴ Drumbl (n197), p61.

²¹⁵ *Prosecutor v. Stakić*, Case No. IT-97-24-T (ICTY Trial Chamber, 31st July 2003), para 900 <<http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>> accessed 13th July 2018.

²¹⁶ *Prosecutor v. Delalić*, Case No. IT-96-21-T (ICTY Trial Chamber, 16th November 1998), para 1234 <http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> accessed 13th July 2018.

²¹⁷ Risacher (n33), p1420.

²¹⁸ Rome Statute (n24), Art 77(b).

the potential gains of the protecting his own life as being more valuable to him than the potential loss of being imprisoned temporarily. In regards to specific deterrence, assuming the defendant finds himself under duress for the second time is highly likely that his decision on whether to commit the crime would still be the same as the structure of potential gains and losses would still remain the same.

It is acknowledged that the above argument for the recognition of duress as a full defence under the Rome Statute is merely based on the rationale of the defendant's innocence, with little considerations given to the potential abuse of the defence by 'social evils'²¹⁹. As Lord Simon of Glaisdale equated the recognition of duress as a full defence as 'inscribing a charter for terrorists'²²⁰ in *DPP v. Lynch [1975]*:

*"I spoke of the social evils which might be attendant on the recognition of a general defence of duress. Would it not enable a gang leader of notorious violence to confer on his organisation by terrorism immunity from the criminal law? Every member of his gang might well be able to say with truth, " It was as much as my life was worth to disobey ". Was this not in essence the plea of the Appellant? We do not, in general, allow a superior officer to confer such immunity on his subordinates by any defence of obedience to orders: why should we allow it to terrorists?"*²²¹

Indeed, the fear that the recognition of duress as a full defence would 'encourage' individuals with authority to abuse the defence as they would understand that the lower-ranked individuals would be conferred 'immunity' were they to be in a situation of duress should not be understated. This is a serious concern as the defence would essentially serve to 'indemnify those who assist them against criminal convictions'²²², thereby, nullifying the deterrent effect of international criminal law.

While the above concern should not be understated, this thesis posits that the solution to this well-founded fear is to develop and maintain a high threshold for the defence of duress under the Rome Statute. As long as the defence is adequately restrictive and only permissible in cases of extreme and

²¹⁹ D.P.P v. Lynch [1975] (n154).

²²⁰ Ibid.

²²¹ Ibid.

²²² Eimear Spain, *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge University Press 2011), p139.

genuine duress, an abuse of the defence would be avoided. The recognition of duress as a full defence should not be equated to the availability of the defence to anyone who has been coerced. It is only when they satisfy the conditions, were they able to claim duress. Hence, limitations such as the requirement of prior fault as discussed in Chapter 4 is crucial in maintaining the high threshold of the defence. Therefore, it is submitted that the recognition of duress as a full defence under the Rome Statute would not nullify the deterrent effect of international criminal law.

5.3) Limiting Duress in Situations of Extreme Gravity

Despite the rational arguments that strongly support the recognition of duress as a full defence, ‘the notion of complete exoneration’ is still ‘difficult to fathom’, particularly given the ICC’s jurisdiction over serious crimes.²²³ Although a person who commits a crime under duress is generally seen by the society as not morally culpable, the fact that he is still somewhat responsible for the mass suffering nevertheless does not sit well with our conscience. This will be particularly evident in the event where the coercer who is responsible for the coercion is not prosecuted. Thus, to many of us, this can be seen as the sacrifice of international criminal law’s fundamental principles of ending impunity and securing justice for victims for the defendant’s understandable fault. On one hand, we recognise that the law should not force an actor to make the difficult choice of whether to sacrifice his life or not to achieve the highest ethical principles. On the other hand, we also recognise the serious harm caused by the actor’s ‘selfish’ prioritisation of his own interests. Thus, our emotion has made the application of duress as a defence for mass atrocity crime such a difficult concept to grasp, to the extent that we may view it as almost antithetical to exonerate an actor that we understand is not morally culpable.

It is in light of this that this thesis submits that although duress should be available to any crime under the jurisdiction of the ICC, there are exceptions where the defence ‘may properly be disallowed when the social harm caused by the commission of the offense is extremely disproportional to the harm averted.’²²⁴ As Gross states that ‘our response to crime must take its full circumstances into

²²³ Clare Frances Moran, ‘Under Pressure: A Study of the Inclusion of the Concept of a Defence, Specifically Duress, in the Rome Statute (PhD thesis, University of Glasgow 2015), p126 <<http://theses.gla.ac.uk/6805/13/2015MoranPhD.pdf>> accessed 13th July 2018.

²²⁴ Chiesa (n189), p755.

consideration and then decide how great a defection from a punitive response is possible without exciting the demons of impunity.²²⁵ Chiesa gave a hypothetical scenario of a nuclear physicist being coerced to design and detonate a nuclear bomb over Los Angeles, causing the death of half a million people. He claims that in this situation, duress could be properly disallowed as the law should expect heroism out of the nuclear physicist because ‘the harm that the actor is coerced to inflict is extremely disproportional to the one averted’.²²⁶ This limitation of extreme gravity on duress is best encapsulated in Joshua Dressler’s statement:

*“Society also has a right to expect a person to demonstrate a higher level of moral strength when ordered to kill a hundred innocent children than when commanded to kill one. A jury might also rightly expect people to manifest the utmost moral strength—even, at some point, to choose death—when they have reason to know that they are playing a part, even a minor role, in an especially barbaric scenario, such as the Holocaust.”*²²⁷

This expectation of heroism by the law, where it demands an individual to be self-righteous and to go beyond what an individual of ‘reasonable moral strength would have done’²²⁸ is not a foreign concept in criminal law. According to Saira Mohamed, criminal law serves two discrete purposes. First, it classifies what constitutes deviance and what constitutes normalcy by targeting conduct that diverged from a standard of ordinary behaviour. Second, it classifies behaviour that might not be ordinary or normal but nonetheless should be desirable by targeting conducts that diverged from the aspirational standard of behaviour.²²⁹ Thus, it is through this dual-function nature of criminal law, can criminal prosecutions for mass atrocity crime serve a legitimate goal ‘by giving voice to the better angels of our nature and setting out a model for behaviour in the most demanding of times.’²³⁰ Under this dual

²²⁵ Hyman Gross, *Crime and Punishment: A Concise Moral Critique* (Oxford University Press 2012), p176.

²²⁶ *Ibid*, p755 – 757.

²²⁷ Joshua Dressler, ‘Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits’ (1989) Vol. 62 Southern California Law Review, p17
<https://www.academia.edu/24123485/EXEGESIS_OF_THE_LAW_OF_DURESS_JUSTIFYING_THE_EXCUSE_AND_SEARCHING_FOR_ITS_PROPER_LIMITS> accessed 13th July 2018.

²²⁸ *Ibid*, p17.

²²⁹ Saira Mohamed, ‘Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law’ (2015) Vol. 124 (No. 5) The Yale Law Journal, p1665 – 1666 <<https://www.yalelawjournal.org/article/reconciling-mass-atrocity-and-the-criminal-law>> accessed 14th July 2018.

²³⁰ *Ibid*, p1666.

purpose lens, punishing an individual who deviated from the aspirational standard does not dismiss the very idea of human frailty, rather it acknowledges it, but because of the aim of criminal law to set a desirable standard as a norm, it demands that the individual should have acted otherwise.²³¹

Thus, it is submitted that in the event where the mass atrocity crime has reached a sufficient or extreme level of gravity, the reasonable person's moral strength ought to be beyond the 'ordinary' person's. Although the standard of a reasonable person may be the same with the standard of an ordinary person at times, the reasonable person and the ordinary person represent a different concept and we should not conflate them. The 'reasonable person' represents the criminal law's artificial construct of normalcy.²³² The reasonable person exercises a reasonable degree of care and although he is prone to irresistible impulse caused by fear or anger, his reaction will nonetheless be seen as proportionate by the law.²³³ However, the ordinary person may not reach the standard of the reasonable person. An ordinary person behaves in an average way but his decisions may be poorly reasoned and are not always reasonable, 'in a way that is typical of the ordinary person.'²³⁴ Hence, as Mohamed argued: 'If we imagine criminal law as legitimately punishing individuals only for deviating from the norm, or from behaviour that can be expected of the ordinary person in a particular situation, then it is difficult to accept international criminal law as it is currently structured.'²³⁵ To simplify her statement, she gave the example of newer crimes such as distracted driving in national jurisdictions. While the behaviour of texting while driving may be typical and normal, criminal law needs to punish this ordinary behaviour to 'modify widespread perceptions of what is ordinary behaviour.'²³⁶

Thus, in situations of extreme gravity, international criminal law should aim to declare certain non-ordinary but nonetheless desirable behaviours as the reasonable standard despite acknowledging that an ordinary person would not achieve it, in hopes that one day this desirable behaviour would be the norm. Although the materialisation of this aspirational goal is highly debatable as it is hard to envision a

²³¹ Ibid, p1637.

²³² Brooks (n37), p870.

²³³ Ibid.

²³⁴ Ibid.

²³⁵ Mohamed (n229), p1674.

²³⁶ Ibid, p1675 – 1676.

society where a heroic standard would be a norm, this thesis still advocates that international criminal law should nonetheless strive for this goal. As Lord Hailsham stated in *R v Howe [1986]*:

*"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 and casts the cloak of its protection upon the coward and the poltroon in the name of a "concession to human frailty.""*²³⁷

It is in this view that this thesis supports the availability of duress only as a partial defence to mass atrocity crimes where the harm has been particularly grievous as the gravity of the incurred harm would trump our strongly held principle that the law should not demand heroism out of ordinary citizens.

It is acknowledged that this statement represents a somewhat emotional statement because when one thinks rationally, the two main theories underpinning the purpose of punishment under international criminal law would be unaffected if duress were to be a full defence for crimes of extreme gravity. However, it is important to not exclude emotions completely from our assessment of duress as emotions play a crucial role in one's perception of the legitimacy of international criminal law, particularly those who have not engage in such balancing assessment as this thesis has done. Hence, it is submitted that the exclusion of the duress defence to mass atrocity crimes that are particularly grievous represents a balance or hybrid between rationality and emotions. As described in the words of Dressler:

*"The criminal law is not intended to correlate perfectly with our personal moral values... We attempt to live virtuous lives. We are apt to reproach ourselves when we fail to live up to our highest moral standards. Although we cannot be perfect, we try to be, and feel guilty when we fail. We do not excuse our shortcomings."*²³⁸

Perhaps what needs to be researched further should be focused on this level of gravity that transforms duress from a full defence into a partial defence. How does this 'imaginary' level of gravity translate into reality? In layman's term, this extremely uncomfortable question would be: how should the

²³⁷ *R v. Howe* (n7).

²³⁸ Dressler (n227), p15.

incurred mass suffering look like or what should be the number of death toll be before duress starts to become a partial defence?

CONCLUSION

The foregoing work has dealt extensively with the defence of duress under the Rome Statute. In Chapter 1, we discussed about the foundations of the defence of duress. It concluded that duress and necessity represents two separate defences. Necessity represents a justification as the objective value, a value that everyone has an operative reason to promote is present in a necessity scenario. As a duress scenario lacks an objective value, it constitutes an excuse. In regards to the impact of duress on the *mens rea*, it is concluded that the duress defence does not negate the requisite *mens rea* of the crime as the defendant is regarded to have the ability to make a choice, despite the fact that the other choice would lead to undesirable circumstances. Although the required *mens rea* under the Rome Statute is different to the one required in domestic systems, the defence of duress equally does not negate the *mens rea* as the severe constraint on one's free will does not affect the two entities of the *mens rea* under the Rome Statute: intent and knowledge.

In Chapter 2, we looked at the historical development of the duress defence and its availability to murder cases. While generally, civil law system recognises duress as a full defence, the common law system does not allow duress to be a full defence when it concerns the murder of an individual as it aims to uphold the fundamental concept of sanctity of human life. The case law of the Second World War International Military Tribunals revealed that a consistent approach to the availability of duress as a full defence to cases that involve the killing of innocent civilians is absent. While cases like the *Einsatzgruppen* case would demonstrates that duress should be available in those situations, cases like the *Hölzer* case demonstrates otherwise. There appears to be case law to support both sides of the arguments. The *Erdemovic* case before the ICTY represents the most comprehensive and influential case regarding the defence of duress. While the majority of judges rejected the notion that duress could be a complete defence when the crime involves the killing of civilians, Judge Cassese and Stephen dissented and argued otherwise. The establishment of the ICC represents the clear departure from the majority opinion in the *Erdemovic* case as the defence of duress was codified in Article 31(1)(d) of the Rome Statute.

In Chapter 3, we embarked on an analysis of the standard of duress under Article 31(1)(d). In order for a duress claim to succeed, three criteria would need to be satisfied: i) threat of imminent death or

serious bodily harm; ii) the acts are necessary and reasonable to avoid the threat; and iii) no intention to cause a greater harm than the one sought to be avoided. In order to satisfy the first criteria, the threat must be serious, real and beyond the control of the accused. The definition of ‘imminent’ is still uncertain. For the second criteria, it was held that the requirement of necessity and reasonableness would act as a proportionality test. This thesis posits that a more relaxed proportionality test should be utilised and it is submitted that the two-prong test in assessing the reasonableness established by the *Collins* case could act as a guidance in the Rome Statute’s duress analysis. Other factors that should be taken into account during this proportionality test include the accused’s rank within the military or civilian hierarchy and whether the accused’s resistance to the threat would actually avoid the greater harm. The third criteria essentially represent a second stricter proportionality test in addition to the proportionality test set out in the second criteria. The third criteria represent the hardest criteria for a defendant to satisfy as a strict balancing exercise weighing the harm incurred and the harm one sought to avoid will be carried out. The defence of duress under the Rome Statute possess a rather peculiar nature as it represents a hybrid between justification and excuse. It was speculated that modern international criminal law, similar to English law, is unwilling to pronounce moral evaluations on cases that pose serious legal, moral and philosophical challenges.

In Chapter 4, we applied the results of our analysis of the standard of duress under Article 31(1)(d) from Chapter 3 to a hypothetical case. Four contentious issues pertaining to the current standard of the Rome Statute’s duress were discussed. There were: i) whether an implied and indirect threat could constitute a threat; ii) whether a prior fault would affect the defendant’s control over his threat; iii) whether a threatened harm that lacks temporal immediacy could constitute as an imminent threat; and iv) whether an incurred harm that constitute a greater harm than the one sought to be avoided could satisfy the proportionality test. It is submitted that there should be no automatic prohibition of the duress defence as long as the defendant possessed a reasonable and honest belief in the harm of the implicit and indirect threat. It is also submitted that the Rome Statute should explicitly recognise the doctrine of prior fault in Article 31(1)(d) to prevent the defence from being abused. This doctrine of prior fault also includes the requirement for the defendant to escape from the duress circumstances if such opportunity arise. The ICC should avoid utilising a strict interpretation of the term ‘imminent’. ‘Imminent’ should not be understood merely from the traditional sense of immediacy but also in the sense of inevitability, where the availability of alternatives for defendant should be examined. Lastly,

for the fourth criteria, it is submitted that the second proportionality test established by the Article 31(1)(d)'s subjective requirement of an intention to cause less harm should be discarded to ensure that the defence of duress would operate neither too restrictive nor too broadly.

In Chapter 5, we analysed the duress defence from the perspective of the international community. The rationale for punishment under international criminal law is dominated by two theories: i) theory of retributivism; and ii) theory of deterrence. As the theory of retributivism advocates for the allocation of just and proportionate punishment, duress should be recognised as a full defence as an individual under duress is not morally culpable for his actions. It is also submitted that the inclusion of duress as a full defence does not impede the function of deterrence as the level of potential gains would still be higher than the level of potential loss in a duress scenario, especially when one considers the ICC's lack of competence in issuing death penalty and its restriction on the imposition of the life imprisonment penalty. It is also argued that the threshold of the duress defence should be maintained at a high level to prevent the defence from being abused. Despite the strong rational arguments to support duress as a full defence in international criminal law, it is still submitted that the defence could be properly disallowed in situations where the social harm caused by the commission of the offence is extremely disproportionate to the harm the defendant sought to avoid. This is due to the dual function of criminal law: i) classification of what behaviour deviates from normalcy; and ii) classification of aspirational behaviour. International criminal law should demand heroism as the reasonable standard if it concerns a crime that is particularly grievous as it should aim to set that aspirational behaviour as a model behaviour so that one day, that aspirational behaviour would become the norm.

In conclusion, once we apply our findings from this thesis to the research questions stated in the introduction, we can see that the current defence of duress under Article 31(1)(d) does not reflect the realities experienced by individuals under duress as it requires the defendant to go beyond the standard of a reasonable person in order to satisfy the criteria. This represents an injustice on the part of the defendant. However, if the gravity of the defendant's crime is extreme, our emotional perception of the wider goal of international criminal law should trump the defendant's unfortunate injustice.

Bibliography

Primary Resources

Statutes and Legislations

Act 574 Penal Code.

Code Pénal (France).

Crimes Act 1961.

Criminal Code, R. S. C., 1985, c C-46.

Indian Penal Code 1860.

Penal Code (Chapter 224).

Rome Statute of the International Criminal Court (adopted 17th July 1998, entered into force 1st July 2002) 2187 UNTS 90 [Rome Statute].

Statute of the International Criminal Tribunal for the Former Yugoslavia.

Übersetzung des Strafgesetzbuches.

International Cases

Prosecutor v. Beno, Case No. 4b/2003 (District Court of Dili Special Panels for Serious Crimes, 16th November 2004)

<http://www.worldcourts.com/un_etta/eng/decisions/2004.11.16_Prosecutor_v_Beno.pdf> accessed 13th July 2018.

Prosecutor v. Delalić, Case No. IT-96-21-T (ICTY Trial Chamber, 16th November 1998)

<http://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf> accessed 13th July 2018.

Prosecutor v. Drazen Erdemovic, 'Judgment', IT-96-22-A (Appeals Chamber, 7th October 1997)

<<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-aj971007e.pdf>> accessed 13th June 2018.

Prosecutor v. Drazen Erdemovic, 'Sentencing Judgment', IT-96-22-T (Trial Chamber, 29th November 1996) <<http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>> accessed 7th June 2018.

Prosecutor v. Drazen Erdemovic, ‘Sentencing Judgment’, IT-96-22-Tbis (Trial Chamber, 5th March 1998) <<http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf>> accessed 13th June 2018.

Prosecutor v. Drazen Erdemovic, ‘Separate and Dissenting Opinion of Judge Li’ IT-96-22-A (Appeals Chamber 7th October 1997) <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojli971007e.pdf>> accessed 13th June 2018.

Prosecutor v. Drazen Erdemovic, ‘Separate and Dissenting Opinion of Judge Stephen’ IT-96-22-A (Appeals Chamber, 7th October 1997) <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojste971007e.pdf>> accessed 13th June 2018.

Prosecutor v. Erdemovic, ‘Joint Separate Opinion of Judge McDonald and Judge Vohrah’, Case No.IT-96-22-S, (Appeals Chamber, 7th October 1997) <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf>>.

Prosecutor v. Erdemovic, ‘Separate and Dissenting Opinion of Judge Cassese’, Case No.IT-96-22-S, (Appeals Chamber, 7th October 1997) <<http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf>>.

Prosecutor v. Kordić and Čerkez, Case No. IT-95-14/2-A (ICTY Appeals Chamber, 17th December 2004) <http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf> accessed 12th July 2018.

Prosecutor v. Momir Nikolić, Case No. IT-02-60/1-S (ICTY Trial Chamber, 2nd December 2003) <<http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf>> accessed 12th July 2018.

Prosecutor v. Stakić, Case No. IT-97-24-T (ICTY Trial Chamber, 31st July 2003) <<http://www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>> accessed 13th July 2018.

Prosecutor v. Zlatko Aleksovski, ‘Judgment’ IT-95-14/1-A (Appeals Chamber, 24th March 2000) <<http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>> accessed 20th June 2018.

The United States of America v. Wilhelm von Leeb et al [1948] ‘High Command Trial’ The US Military Tribunal Nuremberg (27th October 1948) <<http://werle.rewi.hu-berlin.de/High%20Command%20Case.pdf>> accessed 25th June 2018.

Third Public Redacted Version of “Defence Brief for the Confirmation of Charges Hearing”, Pre-Trial Chamber II, ICC-02/04-01/15 (25 May 2016) <https://lib.ugent.be/fulltxt/RUG01/002/349/623/RUG01-002349623_2017_0001_AC.pdf>.

Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others, 'Law Reports of Trials of War Criminals' (United Nations War Crimes Commission 1949)

<https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf> accessed 12th June 2018.

Trial of Carl Krauch and Twenty-two Others, 'Law Reports of Trials of War Criminals' (United Nations War Crimes Commission 1949) <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-10.pdf> accessed 12th June 2018.

Trial of Friedrich Flick and Five Others, 'Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10' (U.S. Government Printing Office 1952)

<https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-VI.pdf> accessed 12th June 2018.

Trial of Valentine Feurstein and Others, Proceedings of a Military Court held at Hamburg (4th – 24th August 1948) <<https://www.legal-tools.org/doc/6ed39c/pdf/>> accessed 28th June 2018.

United States v. Ohlendorf, 'The Einsatzgruppen Case' Military Tribunal Case No. 9 (8th April 1948) <<https://www.legal-tools.org/doc/74e839/pdf/>> accessed 11th June 2018.

National Cases

Attorney-General v. Wheelan [1934] IR 518 <<http://www.bailii.org/ie/cases/IEHC/1933/1.html>> accessed 9th July 2018.

D.P.P v. Lynch [1975] UKHL 5 <<http://www.bailii.org/uk/cases/UKHL/1975/5.html>> accessed 13th June

Osland v. The Queen [1998] 73 ALJR 173 <<http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1998/75.html>> accessed 9th July 2018.

R (On the application of Collins) v. The Secretary of State for Justice [2016] EWHC 33 <<https://www.judiciary.uk/wp-content/uploads/2016/01/collins-v-sos-for-justice-householder-defence.pdf>> accessed 25th June 2018.

R v Palazoff (1986) 43 SASR 99.

R v. Abdul Hussain [1998] EWCA Crim 3528

<<http://www.bailii.org/ew/cases/EWCA/Crim/1998/3528.html>> accessed 9th July 2018.

R v. Ali [2008] 4 All ER 685.

R v. Dudley and Stephens [1884] 14 QBD 273

<<https://la.utexas.edu/users/jmciver/357L/QueenvDS.PDF>> accessed 20th June 2018.

R v. Finta [1994] 1 SCR 701 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1124/1/document.do>>
accessed 25th June 2018.

R v. Harmer [2002] Crim LR 401.

R v. Hasan [2005] UKHL 22 <<http://www.bailii.org/uk/cases/UKHL/2005/22.html>> accessed 6th July
2018.

R v. Heath [2000] Crim LR 109.

R v. Howe [1986] UKHL 4 <<http://www.bailii.org/uk/cases/UKHL/1986/4.html>> accessed 30th May
2018.

R v. Hudson and Taylor [1971] 2 All ER 244

<<http://www.bailii.org/ew/cases/EWCA/Crim/1971/2.html>> accessed 9th July 2018.

R v. Martin (1989) 88 Cr App R 343 <<http://www.bailii.org/ew/cases/EWCA/Crim/1988/2.html>>
accessed 6th June 2018.

R v. Mena [1987] 20 OAC 50

<<https://www.canlii.org/en/on/onca/doc/1987/1987canlii2868/1987canlii2868.html>> accessed 8th July
2018.

R v. Ruzic (2001) 3 LRC 703 <<https://scc-csc.lexum.com/scc-csc/scc-csc/en/1861/1/document.do>>
accessed 1st June 2018.

R v. Ryan [2013] SCC 3 <http://www.leaf.ca/wp-content/uploads/2013/02/Ryan_en.pdf> accessed 8th
July 2018.

Thomson v. H. M. Advocate [1983] SLT 682

<http://www.bailii.org/scot/cases/ScotHC/1983/1983_JC_69.html> accessed 9th July 2018.

United States v. Bailey (1980) 444 U.S. 394

<<https://supreme.justia.com/cases/federal/us/444/394/case.html>> accessed 1st June 2018.

Secondary Resources

Books

Ambos K., 'Defences in international criminal law' in Bertram S. Brown, *Research Handbook on International Criminal Law* (Edward Elgar 2011).

Clarkson C. M. V. and Keating H. M., *Criminal Law: Text and Materials* (4th edn, Sweet & Maxwell 1998).

Drumbl M. A., *Atrocity, Punishment, and International Law* (Cambridge University Press 2007).

Eser A., 'Article 31 – Grounds for excluding criminal responsibility' in Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos 1999).

Gross H., *Crime and Punishment: A Concise Moral Critique* (Oxford University Press 2012).

Iryna Machuk, *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (Springer 2014), p125.

Norrie A., 'Practical Reasoning and Criminal Responsibility' in Derek B. Cornish and Ronald V. Clarke (eds), *The Reasoning Criminal: Rational Choice Perspectives on Offending* (Transaction Publishers 2014).

Schabas W., *An Introduction to the International Criminal Court* (4th edn, Cambridge University Press 2010).

Schabas W., *The International Criminal Court: A Commentary on the Rome Statute* (2nd edn, Oxford University Press 2010).

Spain E., *The Role of Emotions in Criminal Law Defences: Duress, Necessity and Lesser Evils* (Cambridge University Press 2011).

Werle G., *Principles of International Criminal Law* (2nd edn, TMC Asser Press 2009).

Williams G., *Textbook of Criminal Law* (1st edn, Stevens & Sons 1978).

Wilson W., *Criminal Law* (1st edn, Longman 1998).

Journal Articles

Arenson K. J., 'The Paradox of Disallowing Duress as a Defence to Murder' (2014) Vol. 78 (No. 1) *The Journal of Criminal Law*.

Bond J. and Fougere M. C., 'Omnipresent Threats: A Comment on the Defence of Duress in International Criminal Law' (2014) Vol. 14 (No. 3) *International Criminal Law Review*.

Brooks R. E., 'Law in the Heart of Darkness: Atrocity & Duress' (2003) Vol. 43 *Virginia Journal of International Law*

<<https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2141&context=facpub>> accessed 10th June 2018.

Chiesa L. E., 'Duress, Demanding Heroism, and Proportionality' (2012) Vol. 4 (No. 3) *Vanderbilt Journal of Transnational Law*

<<https://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1403&context=lawfaculty>> accessed 10th July 2018.

Dressler J., 'Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits' (1989) Vol. 62 *Southern California Law Review*

<https://www.academia.edu/24123485/EXEGESIS_OF_THE_LAW_OF_DURESS_JUSTIFYING_THE_EXCUSE_AND_SEARCHING_FOR_ITS_PROPER_LIMITS> accessed 13th July 2018.

Gilbert J., 'Justice not revenge: the international criminal court and the 'grounds to exclude criminal responsibility': defences or negation of criminality' (2006) Vol. 10 (Issue 2) *The International Journal of Human Rights* <https://eprints.mdx.ac.uk/4268/1/Gilbert-Justice_not_revenge.pdf> accessed 29th June 2018.

Greenawalt A. K. A., 'International Criminal Law for Retributivists' (2014) Vol. 35 (No. 4) *University of Pennsylvania Journal of International Law*

<https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=http://scholarship.law.upenn.edu&https_redir=1&article=1873&context=jil> accessed 12th July 2018.

Haugbolle S., 'The Victim's Tale in Syria: Imprisonment, Individualism, and Liberalism' in Laleh Khalili and Jillian Schwelder, *Policing and Prisons in the Middle East: Formations of Coercion* (London Hurst & Company 2010).

Horder J., 'Self-Defence, Necessity and Duress: Understanding the Relationship' (1998) Vol. XI (No. 1) *Canadian Journal of Law and Jurisprudence*.

- Mohamed S., 'Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law' (2015) Vol. 124 (No. 5) The Yale Law Journal
<<https://www.yalelawjournal.org/article/reconciling-mass-atrocity-and-the-criminal-law>> accessed 14th July 2018.
- Mullins C. W. and Rothe D. L., 'The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment' (2010) Vol. 10 (No. 5) International Criminal Law Review.
- Risacher B. J., 'No Excuse: The Failure of the ICC's Article 31 "Duress" Definition' (2014) Vol. 89 (No. 3) Notre Dame Law Review,
<<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1791&context=ndlr>> accessed 8th June 2018.
- Robinson P. H., 'Criminal Law Defences: A Systematic Analysis' (1982) Vol. 82 (No. 2) Columbia Law Review
<<https://www.jstor.org/stable/pdf/1122275.pdf?refreqid=excelsior%3A27449cd91e8258addf6e60257e855fbf>> accessed 3rd June 2018.
- Shankland R., 'Duress and the Underlying Felony' (2009) Vol. 99 (No. 4) Journal of Criminal Law and Criminology,
<<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7342&context=jclc>> accessed 10th June 2018.
- Sornarajah M., 'Duress and Murder in Commonwealth Criminal Law' (1981) Vol. 30 (No. 3) The International and Comparative Law Quarterly
<<https://www.jstor.org/stable/pdf/759291.pdf?refreqid=excelsior%3A27449cd91e8258addf6e60257e855fbf>> accessed 8th June 2018.
- Yeo S., 'Commonwealth and International Perspectives on Self-Defence, Duress and Necessity' (2007) Vol. 19 (No.3) Current Issues in Criminal Justice
<<http://www5.austlii.edu.au/au/journals/CICrimJust/2008/5.pdf>> accessed 3rd July 2018.
- Yeo S., 'Compulsion and Necessity in African Criminal Law' (2009) Vol. 53 (No. 1) Journal of African Law
<<https://www.jstor.org/stable/pdf/40646827.pdf?refreqid=excelsior%3A9af549e7e579c659932548a35a7e0e12>> accessed 3rd July 2018.

Yeo S., 'Considerations of Time and Space in Duress' (2004) Vol. 16 Singapore Academy of Law Journal.

PhD Thesis

Moran C. F., 'Under Pressure: A Study of the Inclusion of the Concept of a Defence, Specifically Duress, in the Rome Statute (PhD thesis, University of Glasgow 2015)

<<http://theses.gla.ac.uk/6805/13/2015MoranPhD.pdf>> accessed 13th July 2018.

Reports

'Human Slaughterhouse: Mass Hangings and Extermination at Saydnaya Prison, Syria' *Amnesty International* (2016) <https://www.amnestyusa.org/files/human_slaughterhouse.pdf>

Leader-Elliott Ian, 'The Commonwealth Criminal Code: A Guide for Practitioner' Commonwealth Attorney General's Department in association with the Australian Institute of Judicial Administration (March 2002)

<<https://www.ag.gov.au/Publications/Documents/CriminalCodePractitionerGuidelinesMarch2002/GuideforPractitioners.pdf>> accessed 8th July 2018.

Paper on some policy issues before the Office of the Prosecutor', *ICC-OTP* (September 2003), p3 <http://www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf> accessed 14th July 2018.

UN Human Rights Council, 'Out of Sight, Out of Mind: Deaths in Detention in the Syrian Arab Republic' A/HRC/31/CRP.1 (3rd February 2016) <

https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf>

Website

Rauscher F., 'Kant's Social and Political Philosophy', *The Stanford Encyclopaedia of Philosophy* (Spring 2017 edn) <<https://plato.stanford.edu/entries/kant-social-political/#Pun>> accessed 12th July 2018.

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