DEFENCES IN INTERNATIONAL CRIMINAL LAW

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1. INTRODUCTION

The discussion on defences in war crimes law was for many years solely concerned with the defence of superior orders, but in recent years, it has expanded to include other grounds for excluding criminal responsibility as well. Since the ICTY ruling in the case of *Erdemovic*[1], the defence of duress has received an increasing amount of attention, as did the defence of mistake of fact after a NATO bomb had hit the Chinese embassy. Despite lively debates in literature and academia, practice at international courts and tribunals has shown that there is a reluctance to allow a defence to exclude criminal responsibility for war crimes, crimes against humanity, and genocide. This reluctance was shared by some of the founding fathers of the ICC Statute. Nevertheless, the Rome Statute contains a catalogue of defences in Articles 31-33.

2.PRELIMINARY OBSERVATIONS

The Nuremberg Judgement marked the end of the act of State doctrine and the *respondeat superior* or *Befehl ist Befehl* theory. According to the former doctrine, propounded most vigorously by Hans Kelsen, no State has jurisdiction over the acts of another State, and accordingly, when an individual in his capacity as an organ of a State violates provisions of international law, the delict should be attributed to that State. The individual cannot be brought to trial before a court of a foreign State. The *Befehl ist Befehl* theory considers obedience to superior orders an automatic and complete defence against criminal prosecution. It was professed by Oppenheim at the beginning of the twentieth century as follows:

> [v]iolations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations *by order* of their Government, they are not war criminals and cannot be punished by the enemy; the latter can however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy.[2]

[?] This paper is based on the PhD research recently published at T.M.C. Asser Press: E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law,* The Hague (2003)

[1] ICTY, Judgement, *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, A. Ch., 7 October 1997 (*Erdemovic* Appeal Judgement).

[2] L. Oppenheim, *International Law,* Vol. 2, London (1906), pp. 264-265 cited in Y. Dinstein, *The Defence of 'Obdience to Superor Orders' in International Law,* Leiden (1965), p. 38. During the Second World War opinion changed and Oppenheim's International Law, edited by Lauterpacht, adopted the absolute liability approach, L. Oppenheim, *International Law* (ed. by H. Lauterpacht), London (1952).

Although different in their starting-points, conclusions, and applicability, both doctrines 'lend international offenders a mantle of immunity from responsibility'.[3] In Nuremberg, the Judges cast both doctrines aside, ending a period in which only States could be held responsible for international offences and in which the individual accountability of a soldier was considered to be a matter of national rather than international law. One could say that in Nuremberg international law had been replaced by international *criminal* law, a legal system in which the individual rather than the State is an subject to the law. This development is best illustrated by the development of a system of 'defences' or 'grounds excluding criminal responsibility' for war crimes, crimes against humanity, or genocide.

(a) International law defences and criminal law defences

The fact that, since Nuremberg, the 'Kelsenian view' of international law was ousted in *attributing* responsibility does not mean that the international law defences *as such* were refuted. Classic 'international law defences' such as military necessity, reprisals, and *tu quoque* still play a role in barring conviction for international crimes.[4] Together with the so-called 'criminal law defences', which have a national criminal law pedigree and are recognised as defences under the ICC Statute, 'international law defences' form a catalogue of defences that individuals can invoke when charged with international crimes under IHL. However, as the latter are governed by principles closely connected to the concept of State responsibility, thus aiming at shielding of the State rather than protecting the individual, the fusion of both groups is not necessarily a happy marriage.[5] It is clear that some of the classic international law defences are not admissible in international criminal law.

(b) Justification and excuse

The term 'defence' derives from Anglo-American law and is a rather broad and undifferentiated concept comprising both, substantive and procedural bars to punishability and prosecution. Most civil law systems refrain from putting both types of exoneration under one heading. They keep a strict separation between the substantive elements of a crime and the procedural requirements for its prosecution. Although the ICC Statute contains procedural defences,[6] they will not be discussed in the ambit of this research, which is primarily focused on 'substantive defences' and the concept of criminal responsibility.

Most criminal law systems recognise the distinction between justifications and excuses, between wrongdoing in the sense of wrongfulness or unlawfulness of the act, and culpability in the sense of blameworthiness of the actor.[7] Some systems, like the German and the Dutch systems, cultivate the distinction between justification and excuses as basic elements in the structure of criminal acts. These systems, in doctrine and in law, construct a crime in three stages or units. Conduct is only punishable when, firstly, it satisfies the definitional elements of a crime, secondly, it is unlawful, and, finally, it is blameworthy. Anglo-American law does not utilise this differentiation in the same fundamental way; the criteria for justification and excuse are interwoven. This has been attributed partly to the 'common law's affection for reasonableness' and its non-structured way of legal reasoning on

[3] Dinstein (1965), p. 59. According to Dinstein, 'The acts of State doctrine imputes the international delict, performed by the individual in his capacity as an organ of the State, to the State itself, and declares that the only applicable sanctions are those directed against the State – according to Kelsen: reprisals and war. Conversely, the doctrine of respondeat superior removes the responsibility from the shoulders of one person, the recipient of the order, and places it on the shoulder of another, the superior who issued the order (…)', Dinstein (1965), pp. 59-60.

[4] G.J. Knoops, *Defenses in Contemporary International Criminal Law*, New York (2001), pp. 30-31 and p. 37; C. Nill-Theobald, '*Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA*, Freiburg (1998), pp. 59-60.

[5] See Trials of War Criminals before the Nuremberg military tribunals under Control Council Law No. 10, (hereafter TWC), Washington (1949-1953), Vol. XV, pp. 155-188.

[6] For instance, 'ne bis in idem' in Article 20; 'non-retroactivity *ratione personae*' in Article 24; and 'exclusion of jurisdiction over persons under eighteen' in Article 26. As to the latter, despite its phrasing in procedural terms, Article 26 can also be seen to include a ground for excluding criminal responsibility under a certain age. See A. Eser in O. Triffterer (ed.), *Commentary on the Rome Statute*, Baden-Baden (1999), margin No. 7, p. 541.

[7] See A. Eser, 'Justification and Excuse', in A. Eser and G.P. Fletcher (eds.), *Rechtfertigung und Entschuldigung, Rechtsvergleichende Perspektiven/ Jstification and Excuse, Comparative Perspectives*, Vol. I, Freiburg (1987), pp. 20-21.

this point.[8] Assuming this proposition bears truth, the difference in legal reasoning can be explained by the fact that the Anglo-American systems (but also the French and the Belgian systems in a limited number of cases) employ a jury-system in which only one question needs to be answered: guilty or not guilty. Greenawalt's submission seems to confirm this:

> If the law's central distinction between justification and excuse is to follow from ordinary usage, it will be drawn in terms of warranted and unwarranted behaviour. That, indeed, is the central distinction in existing American law insofar as one can be discerned (…).[9]

In the following, the distinction between justification and excuse will be utilised to illustrate the differences between Anglo-American and continental law in excluding punishability. This is of particular importance in the context of duress.

Not every defence, when successfully pleaded, leads to the exclusion of conviction. Some pleas result in mitigation of punishment rather than exemption. Unlike justification and excuse, mitigation presupposes that the person is convicted and liable to be punished. Mitigating circumstances playing a role in the sentencing stage reduce the severity of a punishment.

(c) *Mens rea*/mental element

In Anglo-American theory and legal practice, *mens rea* covers various *cognitive* gradations. The knowledge element is the main fault element constituting *mens rea.* As one commenator points out, intentional conduct basically turns on a person's 'conscious object' and his 'beliefs'.[10] The knowledge element is, however, limited to the world of fact. It does not extend to awareness of legal rules. Making a mistake of law is seen as denying intention in Anglo-American law.[11] This is not because the Anglo-American concept of intention/knowledge includes awareness of legal rules and lawfulness of conduct. On the contrary, Anglo-American law employs a so-called 'neutral intention'. In the words of the MPC in § 2.02(9),

> *Culpability as to Illegality of Conduct*
> Neither knowledge nor recklessness or negligence as to whether conduct constitutes an offense or as to the existence, meaning or application of the law determining the elements of an offense is an element of such offense, unless the definition of the offense or the Code so provides.

The neutral intention precludes the possibility of raising mistake of law as a 'failure of proof defence'.[12] How then does mistake of law negative the mental element in Anglo-American legal systems? The answer lies in the absence of a distinction between justifications and excuses enabling a perpetrator to be *excused* despite the fact that his conduct was unlawful. No general culpability requirement, that is independent from a statutory provision, underlies the Anglo-American concept of intent/*mens rea.* Its scope is strictly linked to the *actus reus.* Only when the violated provision comprises a specific intention or separate 'knowledge' element can a mistake of law be a complete defence. Such an element can also be included through judicial interpretation. Take, for instance, the case of *Liparota v. U.S.*, where the Supreme Court interpreted the element of 'knowingly' to require,

> [a] showing that the defendant knew his conduct to be unauthorized by statute or regulations.[13]

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[8] G.P. Fletcher, 'The Right and the Reasonable', in A. Eser and G.P. Fletcher, *Justification and Excuse. Comparative Perspectives*, Freiburg (1987), Vol. I, pp. 70, 89.
[9] K. Greenawalt, 'The Perplexing Borders of Justification and Excuse', 84 *Columbia LR* (1984), p. 1903.
[10] G.P. Fletcher, *Rethinking Criminal Law*, Boston (1978), pp. 440-441.
[11] See also Smith & Hogan, *Criminal Law*, London (1996), pp. 58-59.
[12] The term 'failure of proof defence' is taken from P.H. Robinson, 'Criminal Law Defenses: A Systematic Analysis', 82 *Columbia LR* (1982), pp. 204-208, 221-229 and P.H. Robinson, 'Causing the conditions of one's own defense: A Study in the limits of Theory in Criminal Law Doctrine', 71 *Virginia LR* (1985), p. 3, footnote 7.
[13] 471 US 419 (1985), see W.R. LaFave, *Modern Criminal Law*, St. Paul (1988), pp. 175-186.

By interpreting 'knowingly' this way, the Supreme Court in *Liparota* expanded the neutral intention concept to include awareness of unlawfulness and thus enabled the defendant to successfully raise the defence of mistake of law. A different technique, but generating the same result, is the insertion of an element of 'unlawfulness' into a crime's definition. This was done in the English case of *R. v. Beckford*, where the Privy Council ruled that,

> (i) Unlawfulness is an element in all crimes of violence (ii) intent, knowledge or recklessness must be proved as to the element and therefore (iii) a person who mistakenly believes in the existence of of circumstances which would make the conduct lawful should not be criminally liable.[14]

However, both cases constitute exceptions rather than rules. As will be set out later, the rule that ignorance or mistake of law is not a defence is deep-rooted in Anglo-American law.[15] In any event, the above shows that the defence of mistake of law in Anglo-American law is regarded as negativing *mens rea* because of its strict connection with the *actus reus*.

In the past, civil law systems employed a so-called *dolus malus*. This *dolus malus* notion differed from neutral intention in that it required - besides a will to commit the crime - an awareness of the unlawfulness of the act.[16] These systems have now reverted to a concept of 'neutral intention'. While Germany and the Netherlands have embraced the neutral intention concept, Belgium and France still apply a type of *dolus malus* intention. Intention comprises an element of awareness that the act is unlawful. Desportes and Gunehec define the French 'dol' as,

> La faute intentionelle peut être définie comme *la volonté de commettre un acte que l'on sait interdit* ou autrement dit, comme *l'intention de violer la loi pénale.*[17]

This means that, in Belgium and France, a mistake of law, when successfully raised, will lead to an acquittal as it qualifies as a failure of proof defence.[18] In Germany and The Netherlands (and Switzerland and Austria), on the other hand, a mistake of law will *excuse* the perpetrator and exclude any further legal proceedings. While the net result is the same – the accused will not be punished – the approach is different. In the latter case an offence is committed, while in the former case no offence has been committed.

It appears from the above that there are neutral and non-neutral intention concepts. Moreover, there seem to be different ways to allow mistake of law, utilising different intention concepts. Firstly, by broadening a neutral intention concept through judicial interpretation, as in *Liparota* and *R. v. Beckford*. Secondly, by applying a non-neutral or *dolus malus* type of intention, as in Belgian and French criminal law. Lastly, by embracing a general culpability requirement underlying a neutral intention concept. The disparity amongst the various national notions of intention should be borne in mind when discussing defences on the international level, especially when discussing the defence of mistake of law in Article 32(2) of the ICC Statute.

(d) The 'reasonable man standard' and *Garantenstellung*

Municipal courts, in judging if and when a person can rely on a ground excluding criminal responsibility, are often confronted with the question as to whether 'a reasonable person' in the defendant's circumstances would have perceived the (accused's) conduct as necessary. The ICC will also have to find a standard to test illegal conduct. The concept of 'reasonableness' plays a central role in allowing defences such as self-defence, intoxication,

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[14] (1988) 1 AC 130, see A. Ashworth, *Principles of Criminal Law*, Oxford (1999), p. 241.
[15] Hall (1960), p. 383 and O. W. Holmes, *The Common Law*, Lecture II, the Criminal Law, S. M. Novick (ed.), *The collected works of Justice Holmes*, Chicago (1995).
[16] J. Remmelink, *Mr. D. Hazewinkel-Suringa's Inleiding tot de studie van het Nederlandse strafrecht*, Deventer (1996), pp. 225-226.
[17] F. Desportes and F. Le Gunehec, *Le Nouveau Droit Pénal*, Paris (2000), para. 470, p. 398.
[18] For Belgium: C.J. Vanhoudt and W. Calewaert, *Belgisch Strafrecht (*1976), p. 261.

and duress. At this point, we should concentrate on self-defence as it provides the most cogent examples to make the point.

The reasonable man standard is an 'objective' standard, in that it ignores the defendant's subjective or actual mental state. It seems to be rooted in the law's search for generally accepted standards of conduct applicable to all individuals. However, numerous attempts have been made by (national) Courts to 'particularise' or 'individualise' this standard by taking into account a defendant's personal characteristics when determining the objective reasonableness of having acted in self-defence. Four standards can be distinguished.[19] An objective standard (1); a purely subjective standard eliminating the reasonableness requirement (2); a standard that retains a reasonableness requirement based on a defendant's belief (3); and a standard that retains a reasonableness requirement while taking into account a person's personal characteristics.

The objective standard does not take into account subjective elements, *i.e.* personal (non-universal) elements concerning the defendant, in judging whether a defence can be relied upon. This test is applied in those legal systems that regard self-defence as a justification, thus exonerating the wrongfulness of the act.[20] Here the test is (predominantly) objective in that the standard of an imaginary third person, 'a reasonable or ordinary man', is applied in establishing whether the defendant's belief that he had to act in self-defence was reasonable.

The second test, the subjective standard, is the most radical challenge to the first in that it eliminates the objective reasonableness requirement entirely. All that is relevant is the actor's honest belief that it was necessary to deploy a defence. Examples of the use of this standard are rare, but this test was applied in a few American self-defence cases.[21] The reasoning behind the application of a purely subjective test is often the right of self-defence as a "natural right (…) based on the natural law of self-preservation.

The third test lies between the two extremes of the first and second test. It is a mix of an objective reasonableness-test and a subjective 'belief-test'. This is the standard drawn up in the context of the MPC:

> [t]he use of force upon or toward another person is justifiable when the actor *believes* that such force is immediately *necessary* for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion. [italics added, *EvS*][22]

Unlike the objective standard, the MPC standard values the objective reasonableness of the defendant's act - caught in the term 'necessary'- in the light of what he *perceived* was reasonable. It can be referred to as 'presumed or perceived self-defence'.[23]

The fourth standard - the so-called particularising test - inquires into the reasonableness of a person's perception and can, therefore, be positioned between the MPC standard and the objective standard. This standard applies an objective-reasonable test to the defendant's perceptions and acts, but particularises that standard by taking into account certain non-universal, personal characteristics which can be judged as being causally relevant to the defendant's act of self-defence. The particularising standard is often applied in domestic courts as an alternative or complement to the objective standard.[24] The particularising standard does not, however, allow that every non-universal characteristic influences perception and action in judging the reasonableness of a resort to a defence. The

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[19] K.J. Heller, 'Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases', 26 *AJIL* (1998), p. 5.

[20] For instance, *Notwehr* in Germany (Article 32 of the German Penal Code) and *noodweer* in the Netherlands (Article 41(1) of the Dutch Penal Code).

[21] Heller (1998), p. 57 and Appendix, pp. 109-120.

[22] § 3.04 (1) MPC.

[23] In German law it is referred to as 'Putativnotwehr' and, in Dutch law, as þutatief noodweer'. Both systems recognise this plea as self-defence. In cases of presumed self-defence, exemption from criminal responsibility will be granted through the defence of mistake of fact. See H.H. Jescheck and T. Weigend, *Lehrbuch des Strafrecht. Allgemeiner* Teil, Berlin (1996), pp. 490, 464-467; Remmelink/Hazewinkel-Suringa (1995), p. 327.

[24] For instance, in Dutch criminal law, where courts have allowed for personal circumstances to play a role in judging whether a defence could be relied upon: Dutch Supreme Court, 1 March 1983, *NJ* 1983, 468 and 23 October 1984, *NJ* 1986, 56.

standard is based on the presumption that, to a certain extent, a (reasonable) person can control the influence of his/her non-universal characteristics. This brings us to the concept of *Garantenstellung*, a concept that brings into account the fact that persons in a certain capacity have a connected duty of extra good care.

The notion of *Garantenstellung* can be described as a special type of particularising standard. However, instead of *allowing* a defence, which is often the case when applying a particularising standard, it can *bar* resort to a defence. In some cases, taking into account a person's special responsibilities effectively establishes a higher standard than that of an ordinary (reasonable) man. A person can be required to act in a more firm and steadfast way than the ordinary citizen because of his or her function (police officer, soldier, doctor) or capacity (parent, superior). It is hardly surprising that (a form of) *Garantenstellung* has often played a role in war crime trials, particularly in the context of command/superior responsibility.

(e) The *culpa in causa* or 'conduct-in-causing' analysis

Can a person rely on self-defence when he provoked the act of violence against which he defended himself? Can one who voluntarily gets drunk and commits a war crime in his state of drunkenness rely on a plea of intoxication? All legal systems encounter the question of whether criminal liability should be imposed on a person who, through his own fault, has placed himself in a state that would normally have negated liability for his offence. Instances such as those described above have been dealt with in different ways.

There are two routes to a common destination. One route is to consider the action to be a one-stage event and deny the resort to a defence because of the previous behaviour. The prior fault affects the offence directly and does not provide a ground for defence that is independent of the definition of the offence. Liability will be incurred through the concept of recklessness. The *actio libera in causa* doctrine provides for another, slightly different approach. Under this doctrine, which has been developed in continental legal systems, particularly in cases of voluntary intoxication, the actor cannot rely on a defence as he is blamed for having caused his own incapacity. Prior fault and offence are *connected*, but, unlike the one-stage approach, considered separately. This way, complicated discussions on the mental element that in reality *precedes* the (criminal) act are avoided. *Actio libera in causa* relates to a situation comprising two stages. In the first stage, the actor can choose between alternative courses of conduct – to drink or not to drink alcohol – leading him to the second stage, in which the offence is committed in a state or situation which negates its criminality: intoxication, duress, necessity, or self-defence. In the two-stage process the previous behaviour 'corrects' resort to the defence and possibly nullifies it.

An example to illuminate the distinction: the culpability for an accident caused by failing brakes lies in not having properly checked the brakes beforehand while the driver *knew* that they had to be replaced. In the first approach, the driver will be held culpable for having recklessly caused the accident. In the second approach, he will be held responsible for the accident, as his defence - that he did not *intend* to cause the accident – will fail as a result of his failure to have the brakes repaired/replaced when he knew they were not working properly.

3. ARTICLE 31 OF THE ICC STATUTE

According to one of its drafters, Article 31 of the ICC Statute was 'perhaps the most difficult one to negotiate in the Part on general principles, because of the conceptual differences which were found to exist between various legal systems'.[25] Article 31 of the ICC Statute is entitled 'grounds for excluding criminal responsibility' and not 'defences'. This reminds of civil law rather than Anglo-American law. Furthermore, the provision does not differentiate between

[25] P. Saland , ' International Criminal Law principles', in R. Lee, *The International Criminal Court. The Making of the Rome Statute - Issues, negotiations, results*, The Hague/Boston/London (1999), p. 206.

justifications and excuses. It is not clear whether a given ground justifies the wrongful act or simply excuses the perpetrator. Here, the Anglo-American approach prevailed.

It follows from the first paragraph of Article 31 that the provision does not pretend to contain an exhaustive list of grounds excluding criminal responsibility:

In addition to other grounds for excluding criminal responsibility provided for in the Statute, a person shall not be criminally responsible if, at the time of that person's conduct (….)(Italics, *EvS*).

The defences listed in Article 31 are: mental defect (subparagraph a), intoxication (subparagraph b), self-defence (sub-paragraph c), and duress (subparagraph d). Other defences under the ICC Statute are: abandonment (Article 25 paragraph 3(f)), exclusion of jurisdiction of persons under 18 (Article 26), mistake of fact and law (Article 32), and superior orders (Article 33). The possibility for the Court to apply defences outside its Statute is provided for in paragraph three of Article 31:

At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21.

This means that the Court can resort to rules of international law or to general principles of law derived from municipal criminal legal systems. As to the former, general and/or military necessity, reprisals, and *tu quoque* can be included. As to the latter, consent of the victim, conflict of interests, self-defence, and necessity exist as possible grounds for excluding punishability. Not all of the above-mentioned 'defences' are admissible within the context of international crimes. Two defences are explicitly rejected in the ICC Statute: the immunity of Head of State or Government (Article 27) and the 'statute of limitations' defence (Article 29).

(a) Mental incapacity

The defence of mental incapacity is obviously derived from national criminal law, where it has been an accepted plea for many centuries. It played a limited role in the (subsequent) Nuremberg proceedings and has only recently been recognised in international criminal law. The Nuremberg Tribunal seemed to have recognised that insanity can affect criminal responsibility. This can be taken *a contrario* from its reasoning relating to Rudolf Hess, who resorted to the plea of insanity:

There is no suggestion that Hess was not completely sane when the acts charged against him were committed.[26]

The ICC defence of mental incapacity demands *destruction* of the defendant's capacity to know or control his or her conduct. It leaves no room for diminished responsibility. However, like the ICTY and ICTR, the ICC provides for diminished responsibility in its Rules of Procedure and Evidence. It provides for a plea of '*substantially* diminished mental capacity' as a mitigating circumstance in determining a sentence.[27] In its Rules of Procedure and Evidence, the ICTY enables the Defence to rely on 'any special defence, including that of diminished or lack of mental responsibility'.[28] The ICTY Appeals

[26] Nuremberg Judgement in L. Friedman, *The Law of war. A documentary history*, New York (1972), Vol. II, pp. 971-972. In the trial of Wilhelm Gerbsch, the Court accepted a 'defect' in his mental state as a mitigating circumstance. United Nations War Crimes Commission, *LawReports of Trials of War Criminals* (hereafter UNWCC), London (1947-1949), Vol. XIII, pp. 131-137, referred to in Ambos (2002), p. 158. (*U.S. v. Peter Back* (1947) TWC, Vol. III, p. 60 *et seq*. See also W.A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute. Part III', 6 *Eur. J Crime, Crim. L & Crim. Justice* (1998), p. 422.

[27] See Article 78(1) of the ICC Statute and Rule 145(2) of the ICC Rules of Procedure and Evidence: In addition to the factors mentioned above, the Court shall take into account, as appropriate: (a) Mitigating circumstances such as:
(i) The circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (…)

[28] Rule 67 (a)(ii) of the ICTY Rules of Procedure and Evidence: As early as reasonably practicable and in any event prior to the commencement of the trial: the defence shall notify the Prosecutor of its intent to offer: (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and

Chamber in *Celebici* established that the 'defence' of diminished mental responsibility in Rule 67(A)(ii)(b) is not a complete defence, but can be raised by the defendant as a matter in mitigation of sentence.

> The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.[29]

From an Anglo-American point of view this position might raise questions, as diminished mental responsibility is regarded as negating specific intent, premeditation and deliberation on a charge of murder. In other words, 'diminished' is regarded as affecting *mens rea* and *actus reus*. Reduced punishment is then coupled with a lesser offence, for instance manslaughter instead of murder.[30]

The *Celebici* Appeals Chamber agreed that the mental defect defence as it is formulated in Article 31(1)(a) of the ICC Statute is different from the 'special defence' of diminished mental responsibility as stipulated in the Rules of Procedure and Evidence at the ICTY:

> This (Article 31(1)(a) ICC Statute, *EvS*) is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant's capacity and it leads to an acquittal. It is akin to the defence of insanity. There is no express provision in the ICC Statute that is concerned with the consequences of impairment to such a capacity.[31]

It has been suggested that the Court could resort to paragraph 3 of Article 31 to include this plea.[32] It is, however, contentious that the plea of diminished responsibility is considered a complete defence under the 'general principles of law derived from national laws of legal systems of the world' of Article 21 to which Article 31(3) refers. In this, the ICC is in line with the ICTY jurisprudence. Consider the ruling of the ICTY Appeals Chamber in *Celebici.*

> The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal.[33]

Bearing in mind the Anglo-American position on diminished responsibility, I would argue that the Appeals Chamber too readily accepted that it is a general rule that diminished mental responsibility is solely relevant to sentencing. In common law systems diminished mental capacity is considered to alter *mens rea* and *actus reus*, giving rise to a lesser offence for which a lesser sanction is appropriate.

(b) Intoxication

The provision on intoxication in the ICC Statute is composed of three elements. The basic structure resembles that of the mental incapacity defence in sub-paragraph (a). It first

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any other evidence upon which the accused intends to rely to establish the special defence. ICTY Rules of Procedure and Evidence, <http://www.un.org/icty/legaldoc/index.htm >(IT/32/REV.26).

[29] ICTY, *Celebici* Appeal Judgement, para. 590.

[30] LaFave (1988), p. 409 *et seq*.; Archbold (2000), § 19-88.

[31] ICTY, *Celebici* Appeal Judgement, para. 587.

[32] He submits that the Preparatory Committee proposed a special rule for 'diminished responsibility' with possible reduction of sentence (art. L Prop. I, 1996 PrepCom Report Vol. II). Eser in Triffterer (1999), margin No. 22, footnote 33.

[33] ICTY, *Celebici* Appeal Judgement, para. 590. The Appeals Chamber based its reasoning on a comparative research of different criminal legal systems on the extent and nature of the diminished responsibility 'defence'. See paras. 588-590 and footnote 986.

requires a state of intoxication, secondly that the person's capacity to appreciate and control is destroyed and, finally, that the accused was not voluntarily intoxicated.

As to the first requirement, intoxication implies a toxic impact caused by the consumption of an exogenic substance, and rules out any state of excitement or acceleration. While the first drafts of this provision had required intoxication to be caused by alcohol or drugs, the Statute eventually opened the defence to other means

The second requirement relates to the capacity to appreciate or control. As with the defence of mental incapacity in subparagraph (a), a person's capacity to appreciate the unlawfulness or nature of his conduct, or capacity to control his conduct to conform to the requirements of law', must be *destroyed*. It is not sufficient that the intoxication merely diminishes the person's ability to appreciate that his behaviour is unlawful.[34] Intoxication is a complete defence in the ICC Statute, leading to acquittal. It is not a defence of diminished responsibility resulting in a mitigation of sentence (or reduced *mens rea* and *actus reus* to alter the offence).

The third requirement is the most important one. It is this part of the provision that excludes exculpation if the person became 'voluntarily intoxicated' himself. This invokes the Anglo-American voluntary/involuntary intoxication discussion and the civil law notion of *culpa in causa.* When the accused puts forward a plea of intoxication and produces evidence of a state of intoxication, the prosecution has the onus of proving that the accused either a) intentionally became drunk/intoxicated to give himself courage to commit the crime, or b) that he knowingly took the risk that, as a result of intoxication, he would commit a crime.[35] In other words, intoxication can be invoked as a defence if the person was involuntarily intoxicated or, although voluntarily intoxicated, was not aware of the risk that he could engage (or was engaging) in criminal conduct as a consequence of the intoxication. The latter contention is difficult to uphold when drugs or alcohol caused the voluntary intoxication. In practice, it is only *bona fide* voluntary intoxication, such as intoxication caused by 'other means' than drugs or alcohol, that can exculpate.

In Schabas' view, the inclusion of an intoxication plea in the ICC Statute 'borders on the absurd'.[36] He argues,

> While soldiers and thugs under the influence of drugs and alcohol may commit many individual war crimes, the court was established for a relatively small numbers of leaders organisers and planners, in cases of genocide, crimes against humanity and large-scale war crimes. The nature of such crimes, involving planning and preparation, is virtually inconsistent with a plea of voluntary intoxication. In practice, examples in case law, even for mere war crimes, are as infrequent as in the case of insanity.[37]

Indeed, Article 31(1)(b) is not likely to be applied frequently. However, there are cases in which the plea of intoxication can be invoked. There have been instances where armies supply drugs to their forces to keep them alert when patrolling for extended periods of time. The intensifying and boosting effects of drugs are well known and the chances of behaviour being influenced as a result of taking them, in that behaviour exceeds the normal standards (*i.e.* without drugs), should not be excluded.

The inclusion of an intoxication plea in war crimes law is new, and not only on the international level. Some national military laws have traditionally excluded a plea of voluntary intoxication when it involved a breach of international humanitarian law committed in a military capacity.[38] The ICC Statute, more than the Statutes of the *ad hoc* Tribunals, displays features of a Penal Code as we know it from national legal systems. It is in that context that one should embrace the intoxication plea laid down in Article 31(1)(b). To claim that the defence is redundant would be an exaggeration.

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[34] See also Eser in Triffterer (1999), margin No. 26, p. 547.
[35] See Eser in Triffterer (1999), margin No. 27, pp. 547-548.
[36] Schabas (1998), p. 423.
[37] Ibidem.
[38] For instance, the German Military Penal Code. See J. Schölz, *Wehstrafgesetz*, München (1975), pp. 78-80 and Jescheck and Weigend, (1996), p. 448.

(c) Self-defence

The concept of self-defence in the context of breaches of international humanitarian law raises three complications. Firstly, the defence exists on *two levels*, on micro-individual and on macro-State level. Secondly, a distinction can be made between two *types* of self-defence: self-defence in the context of the laws of war, and self-defence in the context of criminal law. Thirdly, we need to distinguish between combatants acting in a public capacity (as state agents) and in a private capacity (as mere individuals).

As to the first point, on a State level self-defence is regulated, on the one hand, by Article 51 of the UN Charter and is as such part of *ius ad bellum*, and, on the other hand, by the law on belligerent reprisals as part *of ius in bello*. Article 31(1)(c) of the ICC Statute, however, refers to individuals rather than States. It ignores the reality of individuals committing crimes for which a State incurs international responsibility.

The second point requires us to make a clear distinction between two types of self-defence: self-defence in the context of the laws of war, and self-defence in the context of criminal law. The former type concerns self-defence by acts that are *lawful* under the rules of war. It covers situations of 'regular' combat, *i.e.* where the rules of war - often specified in ROE's - are respected. The latter type of self-defence concerns violations of the rules and principles of war. Here war crimes law provides the individual soldier with a defence exonerating liability.

The third point is the most important as it might clarify a lot of misunderstandings in the debate surrounding self-defence in the context of war crimes law. International crimes such as war crimes, crimes against humanity and genocide, can be committed by individuals in their public capacity, acting as organs of the State, and in their personal capacity. In both capacities they can be held accountable under international law.

The laws of war and criminal law are connected but different legal systems. Criminal law has rules and principles of its own. This proposition demonstrates itself most prominently in the context of self-defence. An individual might not have a plea of self-defence under the laws of war, in his public capacity, because, under the circumstances, the laws of war do not provide for this, but in his private capacity, he might still have a right of self-defence. After all, the right of self-defence is an inherent right of every human being

'A classic defence to a crime is self-defence', as the ILC submitted in its Commentary to the 1996 Draft Code of Crimes.[39] It was in the ICC Statute that this was codified on the international level for the first time.[40] Article 31(1)(c) of the Statute encapsulates the defence of self-defence. The subparagraph proved to be 'the real cliff-hanger' in drafting Article 31 and its phrasing remained controversial until the very last moment.[41]

The first sentence of Article 31(1)(c) stems from an American proposal of June 1998.[42] This proposal, however, did not specify the element of 'property'. Attempts had been made to narrow the meaning of the word 'property' by restricting it, but no single term was acceptable to the parties. Eventually, the clause 'essential for accomplishing a military mission' was inserted. In earlier drafts, this clause was conceived in terms of military necessity as a separate ground excluding criminal responsibility.[43] Narrowing down the defence of property even further, it was argued that the defence of property could never excuse genocide or crimes against humanity and, therefore, could only

[39] ILC Commentary to the 1996 Draft Code, Article 14, para. 7.
[40] It had been included in the Preparatory Committee's compilation of proposals in 1996 under Article N, 1996 PrepCom Report Vol. II.
[41] 1998 Working Group Report, UN Doc. A/CONF.183/C.1/WGGP/L4/Add.1, p. 5, footnote 13 referred to by Eser in Triffterer (1999), margin No. 28, p. 548; Saland (1999), p. 208.
[42] Paragraph 1(b) of this proposal reads, 'The person acts reasonably to defend himself or herself or another person or property against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or property protected', 1998 Working Group Report, UN Doc. A/CONF.183/C.1/WGGP/L.2 (1998).
[43] The Report of the Preparatory Committee on the establishment of an International Criminal Court contained a provision in which military necessity was a 'possible defence specifically referring to war crimes and grave breaches of the Geneva Conventions of 1949', Article R, 1996 PrepCom Report Vol.II.

exonerate in war crimes cases. Saland points out that, from a legislative point of view, this was to the detriment of the Statute as the general principles of criminal law (part III of the Statute) were deemed to be applicable to all the crimes within the jurisdiction of the Court.[44] Some have contended that the special intent of genocide and the knowledge requirement of crimes against humanity is not met by the mere intent to defend oneself, which excludes the exoneration from self-defence for those crimes.[45]

The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission.

In essence, four requirements need to be met to grant an accused the defence of self-defence under Article 31(1)(c). The accused must have been acting a) reasonably, and b) proportionately against, c) an imminent, and d) unlawful use of force. Moreover, the defence must be consistent with Article 21(1a-c). This means that the claims of self-defence cannot be granted when that would violate (1a) the Statute, Elements of Crime, Rules of Procedure and Evidence; (1b) applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict; or, (1c) general principles of law derived by the Court from the national laws of the legal systems of the world including the national laws of States that would normally exercise jurisdiction over the crime (1c).

Reasonableness

The first criterion is that the defence is 'reasonable'. Which standard will the Court apply in judging what is 'reasonable', a subjective or an objective one? Applying a subjective standard would mean approaching the matter from the viewpoint of the accused. What was reasonable in his mind? An objective standard, on the other hand, would consider the defence in the light of what a reasonably prudent person would have done under similar circumstances. The latter test can be made more subjective by using the following test: 'did the accused reasonably believe that he was unlawfully attacked'. This 'reasonable belief' test appeared in earlier drafts of Article 31(1)(c) but was not reiterated in the final draft and text.[46] Article 31(1)(c) contains an objective test and does not allow for an excusable excess. It encapsulates a justification. The Court might take the exceeding of the limits of necessary defence into account in the sentencing stage. Moreover, in an exceptional case, an emotion brought about by an attack may amount to mental disease for which the defence of mental incapacity is available (Article 31(1)(a)). The term 'reasonable' is one of the two elements constituting the objective test for the Court to go by. Although the subsidiarity principle is not expressly mentioned, it can be taken to form part of 'acting reasonably'. This is likely, as Anglo-American law on self-defence understands the notion of 'reasonableness' to encompass necessity and proportionality.[47] 'Reasonable' means that the defence must be necessary and adequate to avoid the danger.

Proportionality

Self-defence is not an unlimited right; it requires a proportionate reaction. Consequently, it is hard to imagine situations in which genocide and crimes against humanity can be justified as measures that for lack of less radical means, were necessary and proportionate. However, excluding self-defence *a priori* in cases of genocide and crimes against humanity is undesirable. After all, reality often provides us with a richer catalogue

[44] Saland (1999), p. 208.
[45] See G. Abi-Saab, L. Condorelli, G. Rona and D. Vandermeersch in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, pp. 406-407, 447, and 454.
[46] See Article N 1996 PrepCom Report Vol. II; *Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands*, A/AC.249/1998/L.13 ('Zutphen Draft Statute') (Article 25 (L)(c)).
[47] G. Williams, *Textbook of Criminal Law*, London (1983) p. 503.

of examples than even our imagination does. Keijzer uses the following example to illustrate a possible case of genocide in self-defence:

> A certain country suffers from strong racial tensions between the white-skins and the red-skins. A genocide breaks out; many red-skins are killed by white-skins. A certain white-skin named John, although he would like to see red-skins wiped out, does not participate in the killing, aware as he is of the criminal consequences that would have. On a certain day, however, three red-skins trespass in his home with the apparent purpose of raping his wife. John kills the three red-skins. This gives him double satisfaction: he has saved the honour of his wife and has by the same act added to the destruction of the red-skins as a group. When prosecuted on a charge of genocide, can John successfully invoke Article 31(1)(c)?[48]

Some have said that in the above example the special intent was lacking and that it was not a case of genocide but only of 'killings' committed in self-defence.[49] It has further been argued that not only the objective requirements of self-defence (necessity and proportionality), but also the subjective requirement (the will to defend oneself against an unlawful attack) are incompatible with the special intent of genocide.[50] Both arguments essentially turn on one and the same point; that self-defence is inconsistent with the special nature and concept of genocide. This applies equally to the concept of crimes against humanity and its special knowledge requirement.

It may be that the above example is somewhat contrived. It seems unlikely that genocide can be committed 'by chance'. The argument that genocide and crimes against humanity can never live up to the requirement of proportionality is especially persuasive. However, it is far from established that the subjective element of self-defence is incompatible with the special intent and knowledge elements of respectively genocide and crimes against humanity. Here the example provides us with a useful 'mental experiment'. There is no fundamental reason why one could not have the special genocide intent and on top of that the will to defend oneself or another person. Consider examples derived from national law where one can commit 'murder' in self-defence.[51] The special intent for premeditated murder (malice aforethought) is thus combined with the will to defend oneself, or another. Self-defence and special intent seem to be reconcilable as long as the situation in which one finds oneself poses a *continuous threat.*

Imminent and unlawful use of force

Turning to the third and fourth criterion, we see that the danger must constitute 'an imminent and unlawful use of force'. Force is not specified and can be understood to extend to both a physical attack and psychic threat. The use of force can be regarded as 'imminent' when there is a direct threat of force, or the force is already deployed/taking place, or is ongoing. Self-defence is not allowed once the danger has been averted or the attack has ended. The use of force must be 'unlawful' to exempt the act of defence from criminal liability. 'Unlawful' must be construed in the light of applicable treaties and principles of the law of armed conflict.[52] In war, killing another person, if he is an enemy combatant, is not a crime. As we saw earlier, two types of self-defence can be distinguished. Each is regulated by different rules: one by the laws of war and the other by criminal law, more specifically, Article 31(1)(c). If one were confronted with an unlawful attack carried out by a civilian or a POW, the latter would lose his special status and the act of defending oneself could not be qualified as a war crime.[53] In such a case, the justification of the defensive act stems from the macro-level, and resort to Article 31(1)(c) is unnecessary.

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[48] N. Keijzer in a conference paper at the congress entitled 'Preparing for the ICC. Course for Policymakers, Lawyers and the Military, 19-21 December 2001', The Hague (unpublished). A similar example can be found in 'Débats', 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, p. 478.

[49] Szurek and Rona in 'Débats', 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, p. 478.

[50] Abi-Saab and Condorelli in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2.

[51] Dutch Supreme Court 8 May 1990, 87, *DD* 90.291.

[52] In this context the UN Secretary General's Bulletin and the 1994 UN Safety Convention are relevant.

[53] Consider, for instance, Article 51(3) of the API, 'Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities'.

Culpa in causa

A *culpa in causa* reasoning might prevent a person from successfully resorting to the defence of self-defence. Although *culpa in causa* is not an explicit part of the provision as it is with intoxication, it can be interpreted as implied in Article 31(1)(c). National law doctrine on this point has concentrated on whether or not a *culpa in causa* reasoning can be applied in cases of provocation and foreseeable assault. In most cases, in both Anglo-American and civil law legal systems, courts have been reluctant to bar resort to self-defence because of *culpa in causa*.[54] Only when it could be shown that a person *intentionally* put himself in a state in which he could claim self-defence, *culpa in causa* (or better: *dolus in culpa*) was relied upon to find the defendant liable despite his plea of self-defence.

The ICC must judge on a case-by-case basis whether it will apply the exception to the defence of self-defence, *i.e. culpa in causa,* or not. It should not be excluded beforehand. In allowing self-defence under Article 31(1)(c), the Court can resort to the rule that committing a war crime in self-defence is allowed despite *culpa in causa* when the initiative of the unlawful conduct lies with the attacker. In this, the Court can apply a *Garantenstellung*. After all, in cases of provocation, a peace-keeper, because of his training and qualification, could be expected to have more resistance to temptation than an ordinary citizen.

The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph

The last sentence of the self-defence provision in the ICC Statute was inserted to limit the resort to self-defence, which was made available by the clause on defence of property 'essential for accomplishing a military mission'. In reality, the clause is superfluous, as a defensive operation does not qualify as a reaction to an 'unlawful use of force'

The fundamental flaw of the self-defence provision in the ICC Statute is that its unclear wording might be interpreted as allowing for a plea of military necessity. The clause 'property which is essential for accomplishing a military mission' might be taken to constitute a blank and open-ended allowance for a plea of military necessity, which would, however, be a violation of the laws of war. According to Cassese,

> [I]t is highly questionable to extend the notion at issue (self-defence, *EvS*) to the need to protect 'property which is essential for accomplishing a military mission'. This extension is manifestly outside *lex lata*, and may generate quite a few misgivings. Firstly, via international criminal law a norm of international humanitarian law has been created whereby a serviceman may now lawfully commit an international crime for the purpose of defending any 'property which is essential for accomplishing a military mission' against an imminent and unlawful use of force. So far such unlawful use of force against the 'property' at issue has not entitled the military to commit war crimes. They could only react by using lawful means or methods of combat or *ex post facto*, by resorting to lawful reprisals against enemy belligerents.
> Secondly, the notion of 'property essential for accomplishing a military mission' is very loose and may be difficult to interpret.[55]

In the Nuremberg trials, self-defence was not granted the autonomous status it has in the ICC Statute. It was considered either in the collective sense (Germany did not have the right of self-defence as the attack of the Allies was legitimate)[56] or, on the individual

[54] M. Gur-Arye, *Actio libera in causa in criminal law*, Jerusalem (1984), pp. 82-91
[55] A. Cassese, The Statute of the International Criminal Court: Some preliminary Reflections', 10 *EJIL* (1999), pp. 154-155.
[56] *U.S. v. von Weizsäcker et al*, TWC, Vol. XIV, p. 329, referred to in Ambos (2002), p. 121; K. Ambos, 'Other Grounds for Excluding Criminal Responsibility', in A. Cassese *et al.* (eds.),*The Rome Statute of the International Criminal Court: a commentary,* Oxford (2002), pp. 1004-1005.

level, in connection with necessity.[57] The defence was recognised in some of the war crimes trials conducted after the Second World War documented by the UNWCC. In the case of *Willi Tressmann and others*, it was allowed but only as the 'last resort'. As the Judge Advocate acting in the trial advised the court,

> So far as the defence of self-defence is concerned, I need add but little to that which has been said. The law permits a man to save his own life by despatching that of another, but it must be in the last resort. He is expected to retreat to the uttermost before turning and killing his assailant (…).[58]

The Yugoslavia and Rwanda Tribunals do not provide for the defence of self-defence in their Statutes. However, the defence is mentioned in case law. In the *Kordic & Cerkez* case, the defence in vain argued that the Bosnian Croats were victims of Muslim aggression in Central Bosnia and that they "fought a war of self-defence".[59] The ICTY Trial Chamber noted, however, that,

> "Defences" however form part of the general principles of criminal law which the International Tribunal must take into account in deciding cases before it.[60]

Referring to Article 31(1)(c) of the ICC Statute, the Trial Chamber ruled that,

> The principle of self-defence enshrined in this provision reflects provisions found in most national criminal codes and may be regarded as constituting a rule of customary international law.[61]

In relation to the defence's argument that the acts were committed in a 'defensive operation', the Chamber referred to the last paragraph of Article 31(1)(c):

> Of particular relevance to this case is the last sentence of above provision to the effect that the involvement of a person in a 'defensive operation' does not 'in itself' constitute a ground for excluding criminal responsibility. It is therefore clear that any argument raising self-defence must be assessed on its own facts and in the specific circumstances relating to each charge. The Trial Chamber will have regard to this condition when deciding whether the defence of self-defence applies to any of the charges. The Trial Chamber, however, would emphasise that military operations in self-defence do not provide a justification for serious violations of international humanitarian law.[62]

(d) Duress

The duress-provision in the ICC Statute is a mixture of two types of duress: duress as a choice of evils and duress as compulsion. It appears from the legislative history that the ILC recognised the different forms of duress, but did not attach any legal consequences to that distinction.[63] The Special Rapporteur held that necessity (choice of evils) and duress are in essence one and the same concept as it is applicable under the same requirements.[64] It appears better, however, to identify the two duress-concepts in subparagraph (d), if only to understand the ICC duress concept as to its content and scope. Basically, three elements can be distinguished:[65]

1. a threat of imminent death or continuing or imminent serious bodily harm against the person concerned or another person
2. a necessary and reasonable reaction to avoid threat

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[57] *U.S. v. Krupp et al.*, TWC, Vol. IX, p. 1438, referred to in K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts*, Berlin (2002), p. 122.
[58] British Military Court in Hamburg, 1st-24th September, 1947, UNWCC, Vol. XV, p. 177.
[59] ICTY, *Kordic and Cerkez* Judgement, para. 448, footnote 625.
[60] Ibidem, para. 449.
[61] Ibidem, para. 451.
[62] Ibidem, para. 452.
[63] See *Yearbook ILC* (1986), Vol. II/2, p. 51; *Yearbook ILC* (1987), Vol. II/2, p. 11. See Ambos in Cassese *et al.* (2002), pp. 1015-1016.
[64] M. Thiam, Twelfth Report (A/CN.4/460), para. 159, '[p]resent and immediate danger, not caused by the actor's behaviour proportionality between the protected and violated legal interest'.
[65] See also and Ambos in Cassese *et al.* (2002), p. 1037.

3. the intent not to cause a greater harm than the one sought to be avoided

The first element applies to both, choice of evils-duress and compulsion-duress. The second element embodies the proportionality and subsidiarity requirement, which is 'traditionally' a characteristic of choice of evils-duress. The third element concerns the mental element and is phrased in wording appropriate to a 'choice of evils wording', as a balancing exercise. The distinction between different sources of threats is reminiscent of the Anglo-American distinction between duress by threat and duress by circumstances.

Anglo-American law

Two distinctions can be made when discussing duress in Anglo-American law: one between duress as a justification and duress as an excuse, and the other between duress by threats and duress of circumstances. The first distinction concerns the nature of the defence of duress, whereas the second is a mere factual distinction.

As to the first distinction, when duress is a justification, the defendant is confronted with a *choice of evils*, and having made the right choice, his act will be deemed justified. When duress is an excuse, the defendant has acted under such a *severe threat* that refraining from the crime could not be reasonably demanded; he would not be considered blameworthy.

Unlike the first distinction, the second is of appearance rather than principle. Duress by threat and duress by circumstances are distinguished as to the source of threat. Duress by threat (duress *per minas*) emanates from a human threat while duress by circumstances implies a threat of natural origin: a 'circumstantial threat'.[66] Both duress by circumstances and duress by threat qualify as *excuse*. Both defences excuse the perpetrator who acted under severe threat. In this, they are regarded as part of the overall category of necessity. To quote Lord Simon of Glaidsdale in *Lynch*, 'duress (…) is merely a particular application of the doctrine of "necessity".[67]

The duress/necessity terminology in Anglo-American law is confusing. As duress by circumstances is also referred to as 'necessity', it confounds the exact meaning of the latter defence. Necessity, can also be referred to as 'state of necessity', which has long been recognised in common law, and qualifies as a *justification* for the commission of a crime.[68] Another term for it is choice of evils. 'Necessity' as duress by circumstances, however, is a form of duress and thus an *excuse*. This leaves us to conclude that necessity has a hybrid character in Anglo-American law.

The Anglo-American debate on duress has been referred to as 'a bewildering array of theories concerning the definition of duress and the distinction between duress and necessity'.[69] Robinson, in his study on criminal law defences, suggests that - at least in American jurisdictions - the distinction between sources of threat (natural versus human) has been abandoned. The fact that the Model Penal Code codifies necessity under "General Principles of Justification" and duress under "General principle of Liability", a division which is reflected in most modern American codes, shows a growing awareness of the distinction between duress and choice of evils as one between excuse and justification. Section 3.02 of the MPC[70] encapsulates choice of evils and section 2.09 of

[66] J.B. Brady, 'Aufsätze-Duress', 85 *Archiv für Rechts- und Sozialphilosophie* (1999), p. 384.
[67] *D.P.P. for Northern Ireland v. Lynch*, (1975) AC 653, p. 692.
[68] Hall (1960), pp. 415-436 and LaFave (1988), pp. 527-530.
[69] Robinson (1982), p. 235.
[70] Section 3.02 Justification Generally: Choice of Evils
(1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged;
(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved;
(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.
(2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

the MPC[71] encapsulates duress. Both notions are very close to, in particular German, civil law concepts of duress and choice of evil/state of necessity. We should, however, not overstate this fact as only a minority of States has incorporated the MPC and the majority still seems to adhere to the traditional common law distinction between duress by threat and duress of circumstances.

In the following Iwill use the term 'duress' when I mean duress as an excuse (including duress by circumstances and duress *per minas*), and 'choice of evils' when I mean duress as a justification (necessity).

Duress and murder charges

At present, duress is not considered a defence against a murder charge in Anglo-American law. In a few American jurisdictions, it can, however, exonerate a person from a felony murder charge.[72] The developments in England on this point can be briefly discussed by mentioning a few landmark cases.

Until 1975, the generally accepted view in England was that duress could not exempt a person from liability for murder. However, in that year, the House of Lords in *D.P.P. for Northern Ireland v. Lynch*[73] held that the defence was available to a charge of being an aider or abettor to murder. In *Lynch*, the defendant played a minor role in the killing of a police officer:

> The defendant drove a motor car containing a group of the I.R.A. in Northern Ireland on an expedition in which they shot and killed a police officer. On his trial of aiding and abetting the murder there was evidence that he was not a member of the I.R.A. and that he acted unwillingly under the orders of the leader of the group, being convinced that, if he disobeyed, he would himself be shot.[74]

The rule that duress is no defence to murder can be traced back to, and has been heavily influenced by, Hale's Pleas of the Crown,[75] Blackstone's Commentaries on the Laws of England, Stephen's *History of the Criminal Law*[76], and the (in)famous case of *Dudley and Stephens* where two shipwrecked men killed the cabin boy and ate him in order that they might survive.[77] *Lynch* left unanswered the question whether duress could be a defence for the principal (in the first degree), *i.e.* the perpetrator. The answer came two years later in *Abbott*, when the Privy Council ruled that duress was not a defence if the person was the actual killer.[78] Finally, in *Howe*[79], the House of Lords departed from *Lynch* and ruled that duress cannot be a defence to any charge of murder, thus returning to how the law had been prior to *Lynch*. In *Howe*, the appellants jointly assaulted and killed the victims:

> In the first appeal, the two appellants with an intended victim were driven by M. to an isolated area where the appellants and M assaulted the victim and then M killed him. On a second similar occasion the appellants jointly strangled a victim. On a third occasion the intended victim escaped. The appellants were tried on

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[71] Section 2.09 Duress
(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.
(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged (...)

[72] C.L. Carr, 'Duress and Criminal Responsibility', 10 *Law and Philosophy* (1991), p. 170.
[73] (1975) AC 653.
[74] *D.P.P. for Northern Ireland v. Lynch* (1975) AC 653, p. 653.
[75] 1 Hale PC 51.
[76] J.F. Stephens, *A history of the criminal law of England,* London (1883).
[77] (1884) 14 QBD 273, [1881-5] All ER 61. The leading case in the United States on duress/necessity and murder is *U.S. v. William Holmes et al.*, Fed. Cas. 360 (No. 15,383) where Holmes a member of the crew of a ship that had struck an iceberg, had thrown overboard some of the passengers in order to save himself and some others. See J. Hall, *General principles of Criminal Law*, New York (1960), pp. 427-430.
[78] *Abbot v. R.* (1977) AC 755.
[79] *R. v. Howe* (1987) AC 417; 1 All ER 771.

indictment on two counts of murder and one of conspiracy to murder. Their defence was that they feared for their own lives if they did not do as M. directed.[80]

As to the test to be applied, it was held in *Graham*[81]and *Howe* that 'mistaken belief' is not a defence. This way, a subjective test was rejected. The actor is required 'to have the self-control reasonably to be expected of an ordinary citizen in his situation'.[82] Since *Abbott* the Law Commission examined the question of duress, setting out in its report the arguments for and against the defence and dealing in particular whether it should apply to murder. They balanced the argument of the sanctity of human life, which denies the defence to a murder charge against the argument put forward in *Lynch* that the law should not demand more than human frailty can sustain.[83] In Howe, the former was thought to weigh heavier than the latter. As Lord Hailsham judged in *Howe,*

> In general, I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest, as did the majority in Lynch and the minority in Abbott that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in Dudley and Stephens. But many will not, and I do not belief that as a "concession to human frailty" the former should be exempt from liability to criminal sanctions if they do.[84]

At this point, it is opportune to return to the difference between justification and excuse. The rationale of distinguishing between excuse and justification, and between duress and necessity, is to answer the question whether a plea of duress for murder should succeed. It is conspicuous that the *Dudley and Stephens* case is often quoted and referred to in the context of duress. The latter authority has played an important role in the debate on duress and necessity. Taking a closer look at the judgement reached by the Queen's Bench Division in *Dudley and Stephens*, voiced by Lord Coleridge CJ, we see that the plea put forward by the two defendants was regarded an appeal for justification by necessity:

> Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognised excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what was called "necessity".[85]

The resort to *Dudley and Stephens* in *Howe,* coupled with the rejection of the 'concession to human frailty' puts duress in a negative light. The defence of duress almost becomes one of *justifying* criminal behaviour. This would explain why the public policy argument has been put forward as an argument against a general defence of duress.[86]

If the Lords in *Lynch* and *Howe* had clearly distinguished between justification and excuse, classifying duress (including the *Dudley and Stephens* necessity) as an *excuse,* thus not justifying the defendant's behaviour but merely excusing him, duress might not have such a contested status in English criminal law. Indeed, as Smith, one of the English scholars who recognises the importance of the distinction between justifications and excuses, observes:

> To allow a defence to crime is not express approval of the action of the accused but only to declare that it does not merit condemnation.[87]

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[80] Ibidem (1987) AC 417, p. 417.
[81] (1982) 1 WLR 294. The Law Commission's Draft Criminal Code does not follow this ruling; a subjective test putting emphasis on the actor's knowledge and belief applies. See The Law Commission's Consultation Paper No. 122 (1992), *Legislating the Criminal Code: Offences against the Person and General Principles*, para. 18.9.
[82] *R v. Graham* [1982] 1 All ER 801, p. 806; *R v. Howe* [1987] All ER 771, p. 800.
[83] The Law Commission's Report No. 83 (1977), *Defences of General Application.*
[84] *R. v. Howe* (1987) AC 417, p. 432; 1 All ER 771, pp. 779-780.
[85] [1881-5] All ER 61, p. 67.
[86] Lord Simon Glaisdale for the minority in *Lynch* speaks of the 'social evils which might be attendant on the recognition of a general defence of duress', *D.P.P. for Northern Ireland v. Lynch*, (1975) AC 653, p. 687.
[87] J. C. Smith, 'A Note on Duress', *Crim. LR* (1974), p. 352. Cited by Lord Edmund-Davies, *D.P.P. for Nothern Ireland v. Lynch* [1975], AC 643, p. 716.

He further submits that 'A court may be more ready to acknowledge the existence of a defence if it is not seen to be given approval to what has been done'.[88]

At this point it serves to recall the three-step process of attributing liability in civil law systems. As was mentioned earlier, civil law systems tend to construct a crime in three stages. Conduct is only punishable when, firstly, it satisfies the definitional elements of a crime, secondly, the act is not justified, and, finally, the perpetrator is blameworthy. In the second stage, a justification provides exemption; it negates an act's unlawful character. This is usually the case when the actor chooses the lesser of two evils. The latter defence is not the same as 'necessity' in *Dudley and Stephens*, which – to distinguish it from state of necessity - could better be referred to as duress by circumstances and as such belongs in the third stage of the 'attribution-scheme'. It is an excuse: the act is unlawful, but the actor is not blameworthy.

Regarding both forms of duress as *excuses* that do not *justify* an act might render the public policy objection to acceptance of duress as a defence against a murder charge void. Moreover, it sheds a rather different light on the requirement of heroism and the rejection of the human frailty argument. Allowing duress as an excuse might make this reasoning somewhat unrealistic.

We should finally point out that the Law Lords have recognised the fictitious distinction between duress by threats and duress of circumstances/necessity. Lord Simon of Glaidsdale in *Lynch* touched the core of the discussion on duress by pointing to the misconceived distinction between duress and 'necessity':

> So the question must be faced whether there is a sustainable distinction in principle between "necessity" and "duress" as defences to a charge of murder as a principal. In the circumstances where either "necessity" or duress is relevant, there are both actus reus and mens rea. In both sets of circumstances there is power of choice between two alternatives; but one of those alternatives is so disagreeable that even serious infraction of the criminal law seems preferable. In both the consequence of the act is intended, within any permissible definition of intention. The only difference is that in duress the force constraining the choice is a human threat, whereas in "necessity" it can be any circumstance constituting a threat to life (or, perhaps, limb). Duress, is thus considered, merely a particular application of the doctrine of "necessity"(…) In my view, therefore, if your Lordships were to allow the instant appeal, it would be necessary to hold that *Reg. v. Dudley and Stephens* either was wrongly decided or was not a decision negativing "necessity" as a defence to murder; and, if the latter, it would be further incumbent, I think, to define "necessity" as a criminal defence and lay down whether it is a defence to all crimes, and if not why not.[89]

Civil law

German criminal law is an example of the European continental approach. It distinguishes between choice of evils as a justification[90] and duress as an excuse.[91] The defence of choice of evils justifies an act when the right choice has been made in the event of being confronted with an unavoidable choice of evils. This defence has been employed in a variety of situations, predominantly in road traffic and medical cases where the defendant was faced with conflicting interests. The defence of duress in German criminal law

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[88] J.C. Smith, *The Hamlyn Lectures. Justification and Excuse in the Criminal Law*, London (1989), p. 13.

[89] *D.P.P. for Northern Ireland v. Lynch*, (1975) AC 653, p. 692.

[90] StGB §34 Rechtfertigender Notstand (necessity as justification):
Whoever commits an act in order to avert an imminent and otherwise unavoidable danger to the life, limb, liberty, honor, property or other legal interest of himself or of another does not act unlawfully if, taking into consideration all the conflicting interests, in particular the legal ones, and the degree of danger involved, the interest protected by him significantly outweighs the interest which he harms. This rule applies only if the act is an appropriate means to avert the danger.

[91] StGB §35 Entschuldigender Notstand (necessity as excuse):
(1) Whoever commits an unlawful act in order to avert an imminent and otherwise unavoidable danger to his own life, limb, or liberty, or to that of a relative or person close to him, acts without guilt. This rule does not apply if under the prevailing circumstances the perpetrator could be expected to have assumed the risk, especially because he was himself the cause of the danger or because he found himself in a special legal relationship. If however, the perpetrator did not have to assume the risk with regard to a special legal relationship, the punishment may be reduced in accordance with the provisions of § 49(l).
(2) If, in committing the act, the perpetrator assumes the existence of circumstances which under subparagraph (1) would excuse his conduct, he shall be punished only if he could have avoided the error. The punishment shall be reduced In accordance with the provisions of § 49(l).
(Translation: *The American Series of Foreign Penal Codes. Germany*, Vol. 28 (1987))

provides for an excuse when one commits a crime under such a severe threat that refraining from it could not reasonably be expected. Exceptions to the defence are codified in the duress-provision. Firstly, the perpetrator is not excused if he himself caused the danger to occur (*culpa in causa*), and, secondly, if there is a special legal relationship, for instance, a professional obligation, by which he is obliged to withstand the danger to a certain degree (*Garantenstellung*).

It is noteworthy that the defence of choice of evils in German Criminal law is not a defence to murder ('notstandsbedingte Tötung'). This follows from the thought, so eloquently expressed in the English debate and repeated in German Courts, that one human life cannot be weighed against another.[92] Here we return to *Dudley & Stephens* and the discussion on duress in Anglo-American law. In my view the latter debate seems appropriate in the context of duress as *justification,* when duress is considered a choice of evils, but not when duress is regarded an *excuse*. German criminal law allows duress as an excuse for murder charges. German influence on this point is probably responsible for the fact that the MPC does not refuse the defence of duress in murder cases.

Duress as a choice of evils has been termed 'état de necessité'[93] in French and 'noodtoestand'[94] in Dutch law and is recognised as such in codes and case law. Both notions require a *proportionate* and *necessary* (subsidiary) reaction. This means that it is a requirement for this defence that the act, which constitutes a crime, was proportionate to the harm avoided and there was no other (or less harmful) way of avoiding the harm than by committing the crime. *Culpa in causa* and *Garantenstellung* corrections apply.[95] It is noteworthy that the French Penal Code contains a provision that excludes resort to the defence of superior orders and legal requirement in cases of 'les actes inhumains'. According to a leading commentary, this means that 'inhuman acts' can never be *justified* under Article 122-7.[96] The Dutch legislator leaves it up to the court to decide whether a case of murder or 'inhuman acts' can allow as a defence of 'noodtoestand'.[97]

Duress as an excuse is known in French law as 'contrainte' and is codified separately from 'état de nécessité'.[98] The Dutch concept of 'overmacht' is encapsulated in a broad provision that extends to both.[99] In Dutch and French law, duress emanates from an irresistible force that can be caused by man or be the result of the forces of

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[92] OGHSt 1, 321; OGHSt 2, 117; BGHSt 35, 350. See Schöncke *et al*. (2000), § 34, margin No. 23. See also Nill-Theobald (1998), p. 195.

[93] Article 122-7 Nouveau Code Pénal: N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace. (A person is not criminally responsible if that person, facing an actual or imminent danger threatening himself, herself, or another, or property, performs an act necessary for the preservation of person or property, unless there is a disproprtion between the means employed and the seriousness of the threat. Translation: *The American Series of Foreign Penal Codes*, *France,* Vol. 31 (1999)). This defence was not recognised as such in the Code Napoléon. It was adopted, however, in case law and finally codified in the 1994 Nouveau Code Pénal. See Desportes and Le Gunehec (2000), § 742-751, pp. 637-644.

[94] In Dutch law, 'noodtoestand' is not codified separately. It is a defence developed in case law (for the first time in Dutch Supreme Court 15 October 1923, *NJ* 1923, p. 1329) that has played an important role in, for instance, euthanasia cases. The defence of 'noodtoestand' can be characterised as a choice of evils, or more specifically, a conflict of duties.

[95] See H. Angevin and A. Chavanne, Juris-Classeur pénal, Paris (1998), Article 122-7; J. de Hullu, *Matrieel Strafrecht*, Deventer 2000), pp. 285-292.

[96] Angevin and Chavanne (1998), Article 122-7.

[97] This is highly unlikely, apart from the fact that the act must be proportionate and necessary in averting the threat, the defence of 'noodtoestand' requires a person to save the greater interest by committing the criminal offence. An objective test is applied in this.

[98] Article 122-2 Nouveau Code Pénal: N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contrainte à laquelle elle n'a pu résister. (A person is not criminally liable if he or she acted the influence of a force or a compulsion that he or she was not able to resist. Translation: *The American Series of Foreign Penal Codes*, *France*, Vol. 31 (1999)). Article 122-2 distinguishes between 'contrainte physique' (in common law also known as physical compulsion) and 'contrainte morale' (duress). In the former case, the force is exercised against a person's *body* and normally arises from a human or natural threat. In the latter case, pressure is exercised on a person's *will*. The difference between the two can be illustrated in the following example: if A forces B to shoot C by holding a gun against B's head, it would qualify as 'contrainte morale'. If A twists B's arm forcing him to shoot C it would qualify as 'contraite physique'. This is a factual distinction and has no further legal consequence, except for the fact that French courts have traditionally been more restrictive in allowing 'contrainte morale'. Both notions qualify as duress. See Desportes and Le Gunehec (2000), paras. 661-672, pp. 579-584.

[99] Article 41(1) Dutch Penal Code: A person who commits an offense where this is necessary in the defense of his person or the person of another, his or another person's integrity or property, against immediate, unlawful attack is not criminally liable. (Translation: *The American Series of Foreign Penal Codes*,*The Netherlands*, Vol. 30 (1997))

nature. This force is required to be imminent and must result from external circumstances. The requirements of proportionality and subsidiarity are applied less strictly than in cases concerning choice of evils. This can be explained by the fact that a person who acts under duress suffers from an abnormal mental state. If duress functions as an excuse – *i.e.* the will is overborne by threats – it should not be an impediment to invoking it for any wrongful act, including murder. This is the approach in civil law systems such as those of Germany, France and the Netherlands (and the Model Penal Code recommends the same principle for the United States).

ICTY

The leading case on duress at the *ad hoc* Tribunals is *Erdemovic*. The judgement was delivered by the ICTY on 29 November 1996. Erdemovic had participated in the killing of some 1200 innocent men in connection with the events at Srebrenica. He admitted to the charges and stated that he had killed about 70 persons. His guilty plea was, however, equivocal as he invoked the defence of duress: he claimed he had been forced to participate in the killing.[100] In dealing with the question of duress as a defence in combination with a guilty plea, the Trial Chamber held that, although neither the report of the Secretary General of the United Nations nor the Tribunal's Statute provide for such a defence, duress can be a complete defence for a violation of international humanitarian law. In drawing that conclusion, it relied heavily on post-Nuremberg case law.[101] The Trial Chamber, however, dismissed the plea of duress owing to lack of evidence and sentenced Erdemovic to a ten-year term of imprisonment.

The Appeals Chamber rejected by a 3-2 majority the Trial Chamber's findings on duress as a defence.[102] Instead of a full reasoning, the Appeals Chamber Judgement refers to several separate opinions annexed to the decision, in particular the joint separate opinion of Judge Mc Donald and Judge Vohrah.[103] Judge Li agreed with McDonald and Vohrah in their conclusion that duress is not a complete defence but merely a mitigating circumstance, but he differed in his reasoning.[104] Dissenting opinions were expressed separately by Judge Cassese and Judge Stephen.[105] The majority of the Appeals Chamber held that customary international law does not provide for a rule on duress for war crimes and/or crimes against humanity. Post-Nuremberg war crimes trials produced different and contradictory conclusions and the 'general principles of law recognised by civilised nations', the other important source of customary international law, did not provide a consistent rule either. Extensive research into duress in national law was carried out by the judges, which led to differing views. The majority sought to find a solution of policy rather than principle. In their joint and separate opinion, Judge McDonald and Judge Vohrah expressed the view that, in order to 'facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them', duress should not be admitted as a complete defence. Citing the *Abbott* and *Lynch* cases and Stephen's 'History of the Criminal Law in England', they agreed that,

> The resounding point from these eloquent passages is that the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in the light of its social, political and economic role.[106]

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[100] ICTY, Sentencing Judgement, *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, T.Ch. I, 29 November 1996 (hereafter *Erdemovic* Sentencing Judgement I), para. 10, where Erdemovic stated; '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 was nine months, and I could not refuse because they then would have killed me.'

[101] ICTY, *Erdemovic* Sentencing Judgement I, paras. 16-20.

[102] ICTY, *Erdemovic* Appeal Judgement, para. 19.

[103] ICTY, *Erdemovic* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah.

[104] Ibidem, Separate and Dissenting Opinion of Judge Li.

[105] Ibidem, Separate and Dissenting Opinion of Judge Cassese, and Separate and Dissenting Opinion of Judge Stephen.

[106] Ibidem, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75.

Cassese, dismissed McDonald and Vohrah's pragmatic approach and considered it 'extraneous to the task 'of the Tribunal.[107] Moreover, he was of the view that under international criminal law duress may *generally* be a defence, provided certain requirements are met.[108] With regard to war crimes or crimes against humanity, he found that as no *specific* rule of customary law allows for a defence of duress, the general rule on duress applies. Cassese also touched upon the question of *culpa in causa*. The defence of duress should not be allowed when a person has voluntarily put himself in a situation of duress. Relying on Nuremberg (Einsatzgruppen) and post-Nuremberg (Touvier) case law, he held the view that,

> Duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law.[109]

Cassese finally urged the Trial Chamber to take into account that Erdemovic was of a low rank, a factor that plays a role in determining whether or not the accused acted under duress. The logic appears to be, the lower the rank the greater the propensity to yield to compulsion.[110]

Stephen followed a different path to come to the same conclusion as Cassese. He pointed to the debate surrounding duress in relation to murder charges and manslaughter in Anglo-American law. He adduced abundant material to demonstrate that the exclusion of duress as a defence against murder charges is contentious within the common law system. He further contended that relevant Anglo-American case law had only dealt with situations where there was a direct choice between the life of the person under duress and the life of the victim. In the *Erdemovic* case, no such choice existed. The Appeals Chamber in the latter case had to deal with a situation in which the victim would have been killed anyway. Erdemovic could never have averted the imminent death of the victim by sacrificing himself. Stephen and Cassese agreed that in the latter situation, as in the infamous *Masetti* case,[111] duress should be allowed as a complete defence. This way, the balancing exercise and proportionality problem was circumvented, or simply not applied.[112] The other judges dismissed the '*Masetti* approach'.[113] Shahabuddeen pointed out, that despite their differences in legal reasoning and background (one has a background in the civil law and another in the common law), Stephen and Cassese 'were united in the view that duress is a complete defence in international humanitarian law to a charge of killing an innocent human being' and that 'there may be something in this position taken by them'.[114]

The Appeals Chamber's decision in *Erdemovic* did not allow the defence of duress to be a complete defence; it was to be taken into account in mitigation of punishment. As the plea of duress was thought to have invalidated the guilty plea, which in return was 'not informed', the Appeals Chamber referred the whole case back to another Trial Chamber. Before this Trial Chamber, Erdemovic pleaded guilty to a war crime and he was sentenced to a 5-year term of imprisonment.

4. NON-STATUTORY DEFENCES

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[107] Ibidem, Separate and Dissenting Opinion of Judge Cassese, para. 11.
[108] Ibidem, Separate and Dissenting Opinion of Judge Cassese, para. 12.
[109] Ibidem, Separate and Dissenting Opinion of Judge Cassese, para.17.
[110] ICTY, *Erdemovic* Appeal Judgement, Separate and Dissenting Opinion of Judge Cassese, para. 51.
[111] Special Court of Assize of Forlì, 11 October 1946 (unpublished). See ICTY, *Erdemovic* Appeal Judgement, Separate and Dissenting Opinion Judge Cassese, paras. 35-36.
[112] Ibidem, para. 50.
[113] See H.G. Van der Wilt in A. Klip and G. Sluiter, *Annotated Leading Cases*, Antwerp/Groningen/Oxford (1999),Vol. I, pp. 654-656.
[114] M. Shahabuddeen, 'Duress in International Humanitarian Law', in J. M. Ruda and C.A. Armas Barea (eds.), *Liber Amicorum 'In Memoriam of Judge José Maria Ruda*, The Hague (2000), pp. 563-574.

The third paragraph of Article 31 leaves room for the Court to consider defences not enumerated in paragraph 1 and derived from applicable law pursuant to Article 21. These could include both 'procedural defences' concerning the punishibility of the defendant and 'substantive defences' relating to the criminal liability of an individual. Although not explicitly recognised in the Statute, the *travaux préparatoires* of the ICC Statute imply their admissability.[115] Only the latter are of interest in the context of this paper and three defences come to mind: belligerent reprisals, *tu quoque*, and military necessity. All three are classical 'international' defences, in that they all originate in the international context of the laws and customs of war and, unlike most of the defences discussed above, have no national counterpart. All three defences are controversial in that they constitute a (justified) derogation of the rules of war. Each of them will be discussed briefly below.

(a) Belligerent reprisals

The defence of 'belligerent reprisal' can be defined as, 'an act, in breach of a rule of the law of armed conflict, directed by one belligerent party against the other, with a view to inducing the latter party to stop violating that or another rule of this branch of international law'.[116] It is a *justified* violation of the law of armed conflict and should, therefore, be distinguished from other forms of retaliation.[117] Although the four Geneva Conventions (GC I-IV)[118] and the First Additional Protocol (AP I)[119] have considerably limited the scope of the defence of reprisal, it still plays a role in international humanitarian law. Firstly, because the Protocol does not have the same uncontested customary law status as the Geneva Conventions, especially since a number of States have expressed reservations about becoming party to the Protocol designed to limit the effect of the reprisal provisions.[120] Secondly, because its ban is limited. The prohibition applies to reprisals in derogation of rules designed to protect certain categories of persons and (arguably) not rules concerning the methods and means of warfare.[121] The biggest problem relating to the application of reprisals remains the complete silence on the issue in the context of non-international armed conflicts. Additional Protocol II does not contain any provision on belligerent reprisals. Kalshoven, rather than interpreting the silence as a general permission to resort to reprisals, pleads for analogous application of the prohibition contained in Additional Protocol I and the Geneva Conventions on international armed conflicts. His most convincing argument - which applies with equal force in non-international armed conflicts – in rejecting their application is, however, the 'general futility and escalating effect' of reprisals.[122]

Reprisal as a defence has not been included in any of the ILC Draft Statutes or Codes. Nor is it part of the Statutes of the Tribunals of the Former Yugoslavia and Rwanda. It would have to be brought within the ambit of international criminal law through applicable treaties and general principles of law.[123] Bearing in mind the above, it is doubtful whether the ICC

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[115] 1995 *ad hoc* Committee Report, annex II, p. 60; *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), United Nations General Assembly Official Records, Fifty-first Session, Supplement No. 22, A/51/22 (1996) (1996 PrepCom Report Vol. I); UN Doc. E/AC.25/SR.6, para. 209, p. 47; 1996 PrepCom Report Vol. II, p. 103; UN Doc. A/AC.249/1997/L.9/Rev.1, p. 23; UN Doc. A/AC.249/1997/WG.2/CRP.8.

[116] F. Kalshoven, 'Belligerent Reprisals Revisited', 21 *NYIL* (1990), p. 44 and F. Kalshoven, *Bellgerent Reprisals*, Leiden (1971) pp 1-44.

[117] C. Greenwood, 'Belligerent Reprisals in the Jurisprudence', in Fischer *et al.* (eds.), *International and National Prosecution of Crimes under International Law*, Berlin (2002), p. 41; F.J. Hampson, 'Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949, 37 *ICLQ* (1988), pp. 819-820.

[118] Art. 46 of the GC I; Art. 47 of the GC II; Art. 13(3) of the GC III; Art. 33 of the GC IV.

[119] Articles 20, and 51-56 of the AP I.

[120] The UK, Italy, and Germany have made statements retaining a right of reprisal. See Greenwood (2002), pp. 543-546; F. Kalshoven and L. Zegveld, *Constraints on the waging of war*, Geneva (2001), pp. 145-146; Hampson (1988), pp. 832-835.

[121] Kalshoven and Zegveld (2001), p. 144.

[122] Kalshoven (1990), p. 78.

[123] See C. Nill-Theobald, *'Defences'bei Kriegsverbrechen am Beispiel Deutschlands und der USA*, Freiburg (1998), pp. 297-298, who points to Article 14 of the 1991 ILC Draft Code and Article 33 of the 1994 ILC Draft Statute as both referring to 'applicable treaties and general principles of law'. It is noteworthy that the Siracusa Draft I contains a reference to reprisals in a list of public international law defences (Article 33 IV(B)(3)). See Nill-Theobald (1998), pp. 454-455.

will allow resort to the defence of reprisal under Article 31(3) and Article 21 of the Statute. On the other hand, when requirements of proportionality, express warning in advance, and termination as soon as the adversary has discontinued its unlawful attacks are adhered to, and when the decision is made at the highest level of government, reprisals can have a useful part to play. Hampson points out that reprisals can prevent the escalation of a conflict, for instance, when a warring party knows of the opponent's possession of a weapon and willingness to use it by way of reprisal.[124]

The defence of reprisal has been raised in various criminal trials, *e.g.* in the *Hostages*[125] and *Einsatzgruppen*[126] cases, where it was allowed *in principle*, and in the *Calley*[127] and *Priebke*[128] cases, where it was denied. Most recently, the defence of reprisal was rejected by the ICTY in the *Kupreškic* case.[129] The Trial Chamber ruled (*obiter*) that,

> [w]hile reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner.[130]

It then embarked on an enquiry into the customary law status of the concept of reprisals and concluded that reprisals are also precluded in internal armed conflicts as

> [t]he demands of humanity and the dictates of public conscience, as manifested in opinio necessitates, have by now brought about the formation of a customary rule (…).[131]

The findings of the Trial Chamber have been convincingly opposed and it remains to be seen whether the ICC will adopt the Trial Chamber's position.[132] It can be observed that a gap seems to exist between international law and criminal law thinking on the matter. The latter is in favour of excluding the defence from the array of defences in international criminal law adopting a teleological reasoning, while the former points to treaty and customary law in upholding the defence.

It can be taken from what was said on self-defence in paragraph 6 that criminal law can provide an individual with a defence while the laws of war do not. Does this also work the other way around? Can an individual in his public capacity have a defence which he would not have when acting in his private capacity? This is true when discussing any of the international defences. When a soldier bombs a church as a reprisal measure and his action complies with the requirements mentioned above, he acts justifiably under international humanitarian law in his public capacity and can, therefore, not be regarded as having committed a war crime. If this same soldier were to throw a bomb at the church in his private capacity, thus not as a representative of one of the warring parties, (in theory) he could be held criminally responsible for, at least, criminal damage.

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[124] For instance, poison gas in the Second World War and nuclear weapons in the Cold War period. See Hampson (1990), pp. 841-842.

[125] The shooting of prisoners in reprisal was considered 'justified as a last resort in procuring peace and tranquillity in occupied territory and has the effect of strengthening the position of a law-abiding occupant'. The US Military Tribunal, moreover, stipulated that it 'excessive reprisals are in themselves criminal and guilt attaches to the persons responsible for their commission'. *Hostages* case, TWC, Vol. XI, 1250-1251.

[126] 'Reprisals in war are the commission of acts which, although illegal in themselves may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future'. *Einsatzgruppen* case, TWC, Vol. IV, p. 493, cited in Ambos (2002), p. 123.

[127] Court of Military Appeals, *U.S. v. Calley*, 16 February 1973, 48 CMR 19, p. 1174.

[128] See Ambos (2002), pp. 215-221.

[129] Greenwood points in this context to another ICTY case: *Prosecutor v. Martic*. In the *Martic* case, the defendant was accused of having ordered the bombardment of Zagreb with cluster bombs following the Croatian recapture of the Krajina region from Serb forces. The bombardment killed a group of civilians and the Trial Chamber stated that customary international law contained an absolute prohibition on reprisals against civilians in both internal and international conflicts. *Martic* Decision, paras. 15-18. See Greenwood (2002), p. 548.

[130] ICTY, *Kupreškic* Judgement, para. 530.

[131] Ibidem, para. 533.

[132] For a different view see Greenwood (2002), pp. 549-556.

(b) *Tu quoque*

Closely related to the defence of reprisals is the *tu quoque* defence. This defence, which literally means 'you also', can be traced back to the Old Testament retaliation principle 'an eye for an eye, a tooth for a tooth'. It allows for the commission of a war crime to the extent of, and because of, the adversary's wrongful behaviour. The defence of *tu quoque* differs from the defence of reprisal in that it does not aspire to compel the adversary to act in accordance with international norms.

In Nuremberg, *tu quoque* was raised in the case of Dönitz. It is not entirely clear whether it played a role in establishing responsibility or it was merely considered in mitigation of punishment.[133] The Tribunal did not hold Döntiz guilty for his conduct in carrying out submarine warfare against British merchant ships. The relevant – somewhat cryptic- paragraph of the Judgement reads,

> In view of all the facts proved, and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried out in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare.[134]

It is hardly surprising that the defence was not allowed by either the Tribunal or the Judges in the subsequent proceedings because of the vulnaribility stemming from such a plea for the Allied victors.[135] In *Von Weizsäcker* and *High Command*, the defence of *tu quoque* was explicitly denied, essentially by holding that one's wrong cannot make another person's right.[136] Moreover, it was established in the *Einsatzgruppen* case that the allied violations of the laws and customs of war were not comparable to those committed by the Nazi regime:

> [t]here still is no *parallellism* between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.[137]

The defence of *tu quoque* has also been rejected by the ICTY. In *Kupreškic* the Trial Chamber ruled that a defence of *tu quoque* was 'fallacious and inapplicable'.[138] When the defence counsel produced a list of crimes allegedly committed by the adversary, the Trial Chamber pointed to post-Second World War trials and customary international law in expressing the view that *tu quoque* was not a valid defence. Moreover, it deemed the *absolute* nature of the norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity, and genocide, which it referred to as *jus cogens*, in principle insusceptible to *tu quoque* arguments.[139] The *tu quoque* reasoning was raised before the International Court of Justice (ICJ) in the case of *Bosnia Herzegovina v. Federal Republic of Yugoslavia*. The former contested claims put forward by the latter arguing that one could not rebut a genocide charge by pointing at offences committed by the opponent. The ICJ did not expressly rule on this discussion, but Vice-President Weeramantry, dissenting from the majority, endorsed the argument of Bosnia-Herzegovina.[140]

It seems that the *erga omnes* character of international humanitarian law norms makes the defence of *tu quoque* defence inapplicable in the field of war crimes law. The

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[133] See H.H. Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht. Eine Studie zu den Nürnberger Prozessen*, Bonn (1952), pp. 411-413.
[134] Nuremberg Judgement in Friedman (1972), Vol. II, p. 998.
[135] See G. Best, *War and Law Since 1945*, Oxford (1994), p. 78.
[136] See *U.S. v. Von Weizsäcker et al*, TWC, Vol. XIV, p. 322 and *High Command* case, TWC, Vol. XI, p. 482, referred to in Ambos (2002), p. 124.
[137] *Einsatzgruppen* case, TWC, Vol. IV, p. 457.
[138] ICTY, *Kupreškic* Judgement, para. 515.
[139] Ibidem, paras. 515-520.
[140] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Counter-Claims, Order of 17 December 1997, ICJ Reports (1997), 243.

defence is met by growing opposition and seems an outdated and controversial plea. It seems unlikely that the ICC would apply the defence under Articles 31(3) and 21(1) of its Statute.

(c) Military necessity

Before taking a closer look at the defence of military necessity, it is first necessary to tackle a question of terminology. As we saw in earlier, the term 'necessity' is also used to denote the *criminal law* defence of, what I have called 'choice of evils'. The latter defence exempts the defendant who, when confronted with an unavoidable choice of evils, made the right choice, and therefore, acted justifiably. Military necessity, however, is an *international law* defence. In essence, it concerns a choice of 'evils' too, namely, between military and humanitarian interests, but it will be referred to below as military necessity to distinguish it from the criminal law type of necessity/choice of evils.[141] In the same way as choice of evils was distinguished from duress in the above example, military necessity should be distinguished from *force majeure*. The latter connotes extraneous events that make compliance with the rules impossible, while military necessity always involves a deliberate choice to disregard a rule.[142] Furthermore, military necessity differs from reprisals and *tu quoque* in that it is not only justifiable if preceded by a breach of international humanitarian law by the adversary, but it "consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".[143] Put differently, it is the principle *justifying* measures which are indispensable for securing the ends of the war. Military necessity is an interest of a State or another party to an armed conflict. It is not an inherent right of every human being, such as his life, or property essential for his survival. If military necessity can be a justification under the laws of war, it can only exonerate an individual as an instrument of his State.

Taking a closer look at the laws of war, it can be seen that the laws and customs of war are a result of striking a balance between military and humanitarian interests. This would warrant the conclusion that outside those rules there is no separate place for military necessity. After all, a balance between military necessity and humanitarian concerns has been made in advance. One could argue, however, that in a limited number of cases, military necessity can still justify a violation of the laws of war, especially since some international humanitarian law provisions have explicitly left room for a resort to military necessity. This concept can be found in international instruments (mainly) concerned with the means and methods of warfare. Article 23(g) of The Hague Rules of Land Warfare (1907), Article 4-2 of the Cultural property Convention (1954), and Articles 54(5) and 62(1) of API prohibit certain conduct, unless 'imperative military necessity' requires otherwise. While the ILC Drafts do not contain any explicit reference to military necessity,[144] the ICTY Statute refers to it in Article 2(d) as encapsulating a grave breach, namely, 'extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly'. The ICC Statute contains references to military necessity as well. In Articles 8(2) sub (a)(iv) and sub (e)(xii)

[141] Nill-Theobald refers to it as a type of 'State necessity'. Nill-Theobald (1998), p. 232.

[142] See B. M. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity', 92 *AJIL* (1998), p. 218.

[143] Article 14 of the *Instructions for the Government of Armies of the United States in the Field (Lieber Code)*, Washington D.C. (1863). This definition is still referred to by modern authorities on the law of war: U.S. Department of the Airforce, *International Law-The Law of Armed Conflict and Air Operations*, paras. 1-3a(1); US Field Manual 27-10, para. 3a. M.S. McDougal & F. P. Feliciano, *Law and minimum world public order: the legal regulation of international coercion*, New Haven (1961), p. 528; M. Bothe *et al.*, *New Rules for Victims of Armed Conflicts: commentary on the Two 1977 Protocols additional to the Geneva Conventions of 1949* The Hague (1982), p. 194. The latter add a requirement of proportionality. Citation and references: Carnahan (1998), p. 215, footnote 20.

[144] However, the Siracusa Draft I contains the defence of military necessity in a list of Public International Law Defences (Article 33 IV(B)(2)). The Siracusa Draft II also provides for a provision recognising the defence of military necessity 'only as provided by the international law of armed conflict'. Article 33-13(3). See Nill-Theobald (1998), pp. 454-455.

destruction of property is qualified as a war crime when it is 'not justified by military necessity', or 'unless demanded by the necessities of the conflict'.

The defence of military necessity was extensively considered and allowed under certain conditions, in the post-Second World War cases of *Hostages*[145] and *High Command*[146]. In the former case, the Tribunal stipulated that Article 23(g) of the Hague Rules of Land Warfare prohibited 'the destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war'.[147] In the latter case, the U.S. Tribunal allowed a plea of military necessity to exculpate the defendant Reinecke from spoliation: 'The evidence on the matter of plunder and spoliation shows great ruthlessness, but we are not satisfied that it shows beyond a reasonable doubt acts that were not justified by military necessity'.[148] However, the defence of military necessity was more often rejected than accepted and the *Hostages* and *High Command* cases qualify as exceptions rather than rules.[149] Jurisprudence at the *ad hoc* Tribunals, of which the ICTY would be the most appropriate arena to raise a defence of military necessity bearing in mind Article 2(d) of its Statute, does not produce an acceptance or a recognition of the defence of military necessity.[150] The concept of military necessity in the context of 'Geneva law' is contentious to say the least, and the ICRC has tried to convince State representatives and others in the field of international humanitarian law that the concept is an 'evil spirit' that, along with State sovereignty, should be exorcised soon.[151]

There is, however, another way of looking at the concept of military necessity and that requires going back to the origins of the laws of war, the Lieber Code. Rather than a 'licence for mischief', Lieber's principle of military necessity was a restraint on warfare and a tool of 'enlightened advance'[152] in the laws of war in the nineteenth century. In fact, military necessity is one of the principles underlying the modern law of war. Unfortunately, Lieber's concept of military necessity has been misunderstood and was developed into a theory of *Kriegsraison* in the twentieth century by the German army who used it to justify many violations of laws and customs of war.[153] It is this extreme form of military necessity that was rejected after the Second World War and which brought about the modern denigration of the concept. In its original form, however, it still has a role to play. As mentioned earlier, certain provisions still leave room for it.[154] Consider the following example:

Suppose a lightly armed unit is charged with the protection of a village, which harbours an important historic monument, *e.g.* a medieval church. The enemy attacks this village by heavy mortar fire, especially aimed at the monument. Air support, in order to put the mortars out of action, is not available. Then, not seeing any other way to save the church, the commander of the unit decides to send saboteurs, wearing enemy uniforms, in order to destroy the enemy ammunition. The saboteurs succeed in penetrating the enemy lines and in blowing up an important ammunition depot, which results in the mortar fire dying out. After the war, one commander has to stand trial for attacking a historic monument in violation of Article 4-1 Cultural Property Convention. The other commander is charged with having violated Article 23-(f) Rules of Land warfare and

[145] *Hostages* case, TWC, Vol. XI, pp. 1230-1319.
[146] *High Command* case, TWC, Vol. XI, pp. 462-697.
[147] *Hostages* case, TWC, Vol. XI, p. 1296.
[148] *High Command* case, TWC, Vol. XI, p. 609.
[149] UNWCC, Vol XV, pp. 175-176.
[150] Bing Bing Jia in his analysis of ICTY case law on destruction of protected property, points to the cases of *Blaskic*, *Delalic et al*. (*Celebici*), *Jelisic*, *Kordic & Cerkez*, and *Rajic* where the defence of military necessity could have been, or was raised, but nevertheless put aside, or ignored completely by the respective Trial Chambers. See Bing Bing Jia, '"Protected Property" and Its Protection in International Humanitarian Law', 15 *LJIL* (2002), pp. 131-153.
[151] Kalshoven and Zegveld (2001), p. 203.
[152] Carnahan (1998), p. 217.
[153] Kalshoven (1971), p. 366.
[154] Although not explicitly referred to as such, in practice, military necessity plays a very important role in military-strategic planning and targeting. Carnahan uses the example of the Korean War (1950-1953) and the plans of the U.S. Far East Air Force to cause flooding by bombing an irrigation dam and destroying North Korean rice crop. UN command did not regard the flooding to be a military necessity and, therefore the dam was never the subject of attack. Carnahan (1998), pp. 228-230.

Article 39-2 Protocol I, which latter provisions prohibit the use of the uniforms of the adverse party while engaging in attack.[155]

The first commander could raise a plea of military necessity by claiming that the immunity of the cultural object was withdrawn for reasons of 'imperative military necessity' pursuant to Article 4-2 of the Cultural property Convention (1954) and 52(2) of the API applied through Article 31(3) of the ICC Statute, or even by relying on Articles 8(2) sub (a)(iv) and sub (e)(xii) of the ICC Statute. He must argue that the reasons for attacking the church can be qualified as 'imperative military necessity'. This defence would be available to him while acting as an organ of the state in his public capacity. Whether his conduct could be *justified* by military necessity depends on the proper weighing of the values at stake. It seems unlikely that a defence of military necessity would succeed when raised by the second commander. The only provision on military necessity that might avail him is Article 23(g) of the Hague Rules on Land Warfare. Nevertheless, the attack on the ammunition depot to defend the church hardly seems 'required by the necessities of war'.[156] Moreover, under Article 39(2) of the API the use of enemy uniforms 'in order to impede military operations' is prohibited.

The argument that the defence of military necessity can never be open to an individual seems too definite.[157] As a general rule, no violations of the laws of war are justified by military necessity. The above-mentioned provisions, however, leave room for this defence. The example of the two commanders illustrates that circumstances are conceivable where a violation of the rules of war can be justified by military necessity. Thus, the *ius in bello* military necessity provisions, which apply on the macro-State level, can have effect on the micro-individual level for a person in his public capacity. Note that the provision on self-defence in the report of the Working Group on General Principles at the Diplomatic Conference in Rome provided for the following footnote after 'military mission':

This provision only applies to action by individuals during an armed conflict. It is not intended to apply to the use of force by States, which is governed by applicable international law'.[158]

5. ARTICLE 32 OF THE ICC STATUTE: MISTAKE

(a) Preliminary observations

Before examining Article 32 we should attempt to answer the question what exactly is a mistake of fact and what is a mistake of law. Since German criminal law theory offers an elaborate discussion on the distinction between mistake of fact and mistake of law it seems useful to draw from the findings of German scholars on this point.[159] Both Eser and Triffterer in their commentaries on Article 32 devise a refined catalogue of conceivable errors and organise them in, on the one hand, mistake of fact and, on the other hand, mistake of law.[160] Rather than repeating their findings, it is worth highlighting some of the most conspicuous points.

First, a distinction should be made that relates to the *ground* of a mistake. Material elements can be divided into *descriptive* and *normative* elements. The former relates to the elements of a crime perceivable by means of the human senses, such as sight, hearing, smell,

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[155] Article 8(2)(b)(vii) of the Statute provides for jurisdiction of the ICC if the 'improper use (…) of the uniform of the enemy (…)' results in 'death or serious personal injury'. The example is taken from Keijzer in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2, p. 443.
[156] Article 23(g) Rules of Land Warfare.
[157] Andries and Verhaegen in 'L'Article 31, § 1 c, Du Statut de la Cour Pénale Internationale', *Revue Belge de Droit International* 2000/2.
[158] UN Doc. A/Conf.183/C.1/WGGP/L.4/Add.3, p. 2, footnote 1, See Schabas (1998), p. 424.
[159] Jescheck and Weigend (1996); A. Schöncke *et al.* (eds.), *Strafgesetzbuch: Kommentar*, München (2000).
[160] Eser in Cassese *et al.* (2002), pp. 921-930, 935-944; O. Triffterer in Triffterer (ed.) (1999), Article 32, margin Nos. 15-18, pp. 563-565.

taste, or touch. In most cases, these are neutral and 'objective' elements in that they are universally seen, heard, etc. Eser refers to attacks on 'vehicles' and 'installations' in Article 8(2)(b)(iii) as examples of descriptive elements.[161] An erroneous perception of a descriptive element will always qualify as a mistake of fact.

Normative elements require more than simple perception by a human sense; they require interpretation and application of a rule as well. This means that 'vehicle' is a normative element when it refers to a 'vehicle' in terms of the crime definition, thus, an object that demands immunity (as it belongs to peacekeeping missions). Another example of a normative element relates to clauses that explicitly refer to legal provisions (also termed 'referential elements'), such as imprisonment 'in violation of fundamental rules of international law'.[162] Elements that establish the status of a person, such as 'protected',[163] are also normative in nature. Lastly, elements that are inherently evaluative in nature, such as 'inhumane treatment',[164] are normative. In all these cases, normative evaluation takes place. Sometimes such an evaluation will be almost automatic, but in other cases, it might require some time. The more normative a material element, the more evaluation by the perpetrator it requires. In all this, the psychological state of the perpetrator needs to meet the standard formulated in Article 30(3) of the Statute: 'awareness that a circumstance exists or a consequence will occur'. Normative evaluation does not necessarily require the perpetrator to know the relevant legal provision, nor that he interprets the definition of a crime the way a lawyer does. It suffices that the perpetrator is aware of the existence of protective norms in the area concerned and knows the effect of his act.

Elements are seldom purely descriptive or purely normative. The material elements of a crime often have a double nature. After all, normative material elements are not abstract legal definitions but legal evaluations of facts, the false perception of which can qualify both as mistake of fact and mistake of law.

A second distinction of different types of mistake relates to the *way* in which a mistake is made: as regards descriptive norms, a mistake results from the *non-recognition* of a certain fact, while a mistake concerning a normative norm normally results from an *erroneous evaluation*.[165]

The above leads to the following list of *types* of mistakes: with regard to *all* elements, one can err as to 1) the positive material elements of a crime, for instance, when a person believes oneself to be shooting at an animal but it turns out to be a human being, 2) the negative material elements, for instance, mistaken self-defence, and 3) the exemption from criminal prosecution, as in the case of a Head of State who believes he has immunity from criminal prosecution. With regard to *normative* elements, one can 1) misinterpret a normative element, for instance, 'inhumane treatment', 2) not know the content of a referential norm such as 'fundamental violations of international law', 3) be unaware of the prohibition as such, for instance, of the use of flag of truce,[166] 4) erroneously assume a justification or excuse, and 5) mistakenly believe that the ICC lacks jurisdiction over a certain act.

Mistake of fact

Mistakes concerning descriptive elements always qualify as mistakes of fact. If a soldier doesn't realise that the building he is shooting at, has been turned into a civilian kindergarten, he can rely on mistake of fact to exempt him from criminal responsibility (provided his mistake was reasonable).[167] This is not the case, however, with a mere *error in persona*. After all, not every case of mistaken identity entails the negation of the mental element. If A intended to kill B but instead killed C, whom he held to be B, A is culpable, as the material

[161] Eser in Cassese *et al.* (2002), p. 921.
[162] Article 7(1)(e) of the ICC Statute.
[163] Article 8(2)(a)(v) of the ICC Statute.
[164] Article 8(20(a)(ii) of the ICC Statute.
[165] Eser in Cassese *et al.* (2002), p. 936.
[166] Article 8(2)(b)(vii) of the ICC Statute.
[167] Example taken from Eser in Cassese *et al.* (2002), p. 938.

element of killing a human being, regardless of his identity, would be fulfilled in any event.[168] As long as B and C qualify as the same definitional element (which is not the case with a corpse and a living human being), A can be held responsible for the crime.

As was pointed out earlier, the defence of mistake of fact relates solely to the positive material elements of a crime. Article 32(1) thus refers to cases in which a person is not aware of (or misconceives) factual circumstances or consequences that qualify as material elements of a crime's definition, provided this negatives the mental element.

Mistake of law

Mistakes relating to normative elements can qualify as both mistakes of fact and mistakes of law, depending on the *way* in which the mistake is made: as failed recognition or as an erroneous evaluation. This is clear when considering the following example concerning a mistake with regard to a material element involving 'distinctive emblems':[169]

> If combatant A sees walking towards him B who is a doctor with the Red Cross but held by A to be an enemy soldier as the distinctive emblem is not clearly visible and A shoots at B, it would be a clear mistake of fact. If the emblem is clearly visible to A but A is ignorant on the rules of distinctive emblems and shoots B, his ignorance of protective criteria might qualify as mistake of law.

One could argue in the latter case (mistake of law) that one cannot 'hide behind' ignorance of rules of distinctive emblems, as even a layman knows what the symbol of the Red Cross means.[170] The 'layman's' test is of German origin and is specifically applied in the context of German theory on intent and mistake of law. A layman is contrasted with a lawyer and is, in fact, nothing more than the 'reasonable man' in the world of fact. The 'layman test' basically stipulates that a person does not need to know the specialised interpretation of certain legal terms. In this context, that means that notions such as 'inhumane treatment' and 'persecution' do not need to be understood as to their specific meaning. The perpetrator can be treated as being aware 'if he understands the social significance of the elements concerned in a layman's manner'.[171] Thus, normative ignorance would constitute a mistake of law negativing the mental element only if the perpetrator did not realise the social everyday meaning of the material element of the crime.

In the context of international humanitarian law, however, a higher standard than just the everyday meaning can be required. Military persons, especially those in command, can be required to know more than the average person about certain specific concepts and doctrines applicable in the field of the laws of war. A *Garantenstellung* applies to those in a certain capacity who have a connected duty of extra good care. A commander will have to satisfy more stringent requirements by virtue of his function and will be less easily excused by way of mistake of law. This was acknowledged in the *Hostage* case:

> An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character. Certainly, a field marshal of the German Army with more than 40 years of experience as a professional soldier knew or ought to have known of its criminal nature.[172]

A commanding officer is supposed to know the content of the rules of war. The fact that he might turn to a legal advisor for expert advice does not alter this fact. If he is wrongly advised, in attempting to avert responsibility, he cannot 'hide behind' his legal advisor, who is usually his subordinate. The bad advice might be relevant in sentencing, but not in establishing criminal responsibility.

There is, however, a limit to his knowledge. The Tribunal in the *High Command* admitted this when it determined that a military commander

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[168] See Eser in Cassese *et al.* (2002), p. 938.
[169] Article 8(2)(b)(xxiv) of the ICC Statute.
[170] Eser in Cassese *et al.* (2002), p. 925
[171] Eser in Cassese *et al.* (2002), p. 925.
[172] *Hostages* case in Freidman (1972), Vol. II, p. 1323.

[c]annot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgement as to disputable legal questions.[173]

In the *Peleus* trial in 1945, the Judge Advocate observed that

It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject.[174]

In all this, we should bear in mind that, although military commanders and those effectively acting as such, are presumed to know the laws of armed conflict, this premise should not be maintained at all costs. This is particularly true when bearing in mind that the laws and customs of war can be vague, while war *crimes* law, through which some of the grey areas are interpreted, is not necessarily an area of law mastered by military commanders and their advisors. An example is the crime of persecution, a crime against humanity with a specific, and (even amongst lawyers) a contested and still unclear legal meaning.[175] Here, the social 'everyday' meaning might suffice as a test and a *Garantenstellung* should not be required. The defence of mistake of law should be based upon a lack of knowledge of *wrongdoing*, not of *punishability*. When moral and legal culpability coincide this is not usually a problem. This would be the case with persecution.

As to *culpa in causa*, Article 32 does not provide for a clause referring to the 'avoidability' of the mistake of law. A resort to the defence of mistake of law can be barred when it can be shown that the person could have properly informed himself of the rules. A commander cannot be exempted from liability for having relied on wrong advice from his legal advisor, but the fact that he *asked* for advice keeps the possibility of resort to the defence of mistake of law open. When it can be shown that he tried everything within his power to inform himself on a particular rule or legal position, a defence of mistake of law should be open to him. His ignorance may then be deemed to be excusable.[176] Although a *culpa in causa* clause was provided for in the draft texts, it was left out in the final text.[177] I agree with Triffterer that, though it is not stated explicitly, it is an implicit element of Article 32(2). Moreover, as most national legal systems provide for such a bar in allowing the defence of mistake, it can be applied through Article 21(1)(c) as well.[178]

It remains to be seen if and how the defence of mistake of law will exempt a person from criminal responsibility. As it is impossible under Article 32(2) of the ICC Statute to claim ignorance of a legal provision (first sentence), and only a claim of not having been aware of the social meaning of the (positive) material elements of a crime (second sentence) *may* exempt a person from criminal responsibility, one could conclude that the provision will have little practical value.

A final observation relates to the distinction between mistake of fact and mistake of law; it should not be exaggerated. Rather than grouping the defence of mistake into two distinct categories, the different types of mistake can be marked along a graduated scale with mistake of fact at one end and mistake of law at the other. The longer it takes (in time) to interpret the material elements of a crime, the more normative the element and the more likely that the mistake will be termed a mistake of law.

(b) Text and legal history

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[173] *High Command* case in Freidman (1972), Vol. II, p. 1433.
[174] *Peleus* Case by a British Military Court, Hamburg 1945, 13 *ILR* 248, p. 249.
[175] Article 5(h) of the ICTY Statute, Article 3(h) of the ICTR Statute, Article 7(1)(h) of the ICC Statute. See M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Antwerp/Oxford/New York (2002), pp. 517-526.
[176] Here a parallel can be drawn with Dutch criminal law, see paragraph 2(c) of this Chapter.
[177] Article 24K, Option 1: Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or law may be considered in mitigation of punishment, Zutphen Draft Statute, p. 60. Also proposal 2 of the 1996 PrepCom Report, p. 96.
[178] Triffterer in Triffterer (ed.) (1999), margin No. 38, p. 570. See also Eser in Cassese *et al.* (2002), p. 942.

Despite the fact that the need to regulate mistake of fact (*error facti*) and mistake of law (*error iuris*) has been debated ever since Nuremberg, it was only in 1980 that a Draft International Criminal Code recognised the defence of mistake for the first time.[179] The International Law Commission referred to 'error of law or of fact' as a possible 'exception to the principle of responsibility' in its 1987 Draft Code.[180] Subsequent ILC Drafts lacked a provision on mistake and left it to the 'competent court' to 'determine the admissibility of defences under the general principles of law'. The drafters of the ICTY and ICTR Statutes of 1993 and 1994 refrained from codifying it. Again, it was left to the discretion of the Judges, who in *Erdemovic* demonstrated a willingness to apply generally accepted legal rules on defences not explicitly provided for in the Statute.[181] In 1995 and 1996, a group of scholars drafted Statutes providing for the defence of mistake.[182] The latter efforts were of influence in the drafting of the provision on mistake in the ICC Statute.[183] There were in reality two approaches in the discussions on mistake: one allowing only mistake of fact as a defence, and one allowing both mistake of fact and mistake of law to exclude criminal responsibility.[184] The latter opinion prevailed, and both defences are now included in the Statute. However, the defence of mistake of law is narrowed down to such an extent that it is doubtful as to whether it may really operate as such.

Article 32 has been called 'repetitious'.[185] As a mistake of fact and law shall only exempt the defendant from criminal responsibility when it negates the mental element, it simply repeats what has already been stated in Article 30(1) of the Statute:

> Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the *material elements* are committed with *intent* and *knowledge* [italics added, EvS].

A link between mistake, the mental element, and the material element of the offence is clearly made in Section 2.04 paragraph 1 of the Model Penal Code, which probably served as an example for Article 32 of the ICC Statute:

> (1) Ignorance or mistake as to a matter of fact or law is a defense if:
> (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense; or
> (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense. (…)

Article 32(1)(a) seems to be nothing more than a negative formulation of Article 30(1).[186] This depends, however, on how we interpret the 'mental element'. Do we regard it as limited to the definitional elements of a given crime (positive mental element), or does it extend to grounds excluding criminal responsibility as well (negative mental element)? [187]

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[179] Article IX(7) in M.C. Bassiouni, *Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Dordrecht (1987), p. 110.
[180] Article 9(d), *YBILC* (1987), Vol. II/1, p. 7 f.
[181] ICTY, *Prosecutor v. Erdemovic*, Judgement, Case No. IT-96-22-T*bis*, T. Ch, 5 March 1998 (*Erdemovic* Sentencing Judgement II), para. 16.
[182] For instance, the Siracusa Drafts I and II, and the Freiburg Draft. See Eser further in Cassese *et al.* (2002), pp. 894-895.
[183] See for a more elaborate drafting history of Article 32 of the ICC Statute: Eser in Cassese *et al. (*2002), pp. 896-898; Triffterer in Triffterer (ed.) (1999), margin Nos. 1-10, pp. 555-560.
[184] 1996 PrepCom Report, Vol. II, (Suppl.), proposal 4: 'Mistake of law may not be cited as a ground for exemption from criminal responsibility'; See for a similar provision Zutphen Draft Statute, Article 24 K, option 3. The latter Report included the following two options as well:'(1) Unavoidable mistake of fact or of law shall be a ground for excluding criminal responsibility provided that the mistake is not inconsistent with the nature of the alleged crime. Avoidable mistake of fact or of law may be considered in mitigation of punishment. (2) A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element required by the crime (…)'.
[185] Eser in Cassese *et al.* (2002), p. 934.
[186] This was already recognised when drafting Article 32. The Zutphen Draft Statute reads in footnote 103, 'Some delegations were of the view that mistake of fact was not necessary because it was covered by mens rea'.
[187] This interpretation of 'material element' can be found in some civil law legal system, such as those of Italy, Germany, and Spain. See Eser in Cassese *et al.* (2002), p. 940.

In the latter case, the mistake could then also be regarded as a defence, for instance, A mistakenly believes that B is attacking him by pointing a loaded gun at him, which as it turns out is a laser-tag pistol. A kills B in presumed self-defence.

Taking a closer look at Article 32(1), which encapsulates the defence of mistake of fact, we see that the word 'only' emphasises the restrictive nature of this defence. This prevents a broad construction of mental element extending to both positive and negative mental elements. Furthermore, the narrow interpretation is in line with Article 30(1), which is concerned with 'material elements committed with intent and knowledge' and as such relates solely to the positive (definitional) elements of a crime. In other words, in the context of the ICC, mistaken self-defence cannot qualify as a mistake of fact pursuant to Article 32(1). In the above example, 'A' cannot rely on mistake of law either, if only because the error is a factual and not a legal one. Article 31(1)(c), which encapsulates the defence of self-defence, will not exempt the defendant in the event of an erroneous act in self-defence either. It can be concluded from the replacement of 'reasonable belief' in the draft text by 'acts reasonably' in the final text, that mistaken self-defence is not explicitly provided for in the ICC Statute.

Can the 'mental element' in Article 32(2) as to mistake of law be construed in broader terms, as to include a mistaken defence? Consider the case where a soldier (*bona fide*) mistakenly believes that he is justified by military necessity in shelling a village. Admittedly, the word 'only' does not appear in Article 32(2), but the exclusionary wording of Article 32(2) warrants the inference that a broad interpretation of mental element, *i.e.* including the negative mental element, would be inappropriate here. Besides, a broad interpretation would result in a discrepancy with Article 30(1) of the Statute. Article 33 on superior orders might cover cases of misperception regarding a justification. Returning to our example, and assuming that the soldier was ordered to shell the village, this means that the soldier, when prosecuted for a war crime, would have a defence under Article 33 of the ICC Statute.

In addition to the above noted difference between mistake of fact and mistake of law, there are two other disparities. Firstly, they differ on the point of legal consequence. Mistake of fact *shall* be a ground for excluding criminal responsibility while a mistake of law *may* be a ground for excluding criminal responsibility. As to mistake of law, it is at the Court's discretion whether it will grant a complete exoneration or a mitigation of punishment pursuant to Article 78(1) of the ICC Statute and Rule 145(2) of the RPE. Secondly, mistake of law is much more narrowly circumscribed than mistake of fact. The first sentence of Article 32(2) precludes mistakes 'as to whether a particular type of conduct is a crime within the jurisdiction of the Court'. This sentence stems from the general rule that ignorance of the law is no excuse (*ignorantia iuris nocet*). With regard to 'the most serious crimes of concern to the international community as a whole',[188] the drafters must have thought it undesirable and impossible that one could claim ignorance of the law. Moreover, Article 32(2) and *error iuris* in general proved contentious amongst the drafters of the ICC Statute because of their lack of familiarity with the defence in some of their own legal systems. It is its controversial nature that makes mistake of law, as it is encapsulated in Article 32(2), look like a contradiction in its own terms. In the first sentence of the provision the defence is excluded unconditionally, while in the second sentence, as allowing under certain conditions. The unfortunate wording of Article 32(2) must be understood, however, as to allow for a defence of mistake of law, albeit a conditional one.

6. ARTICLE 33 OF THE ICC STATUTE: SUPERIOR ORDERS

(a) Three approaches

[188] Article 5 (1) of the ICC Statute.

This defence is probably the best-known defence in war crimes law. In case law as well as in scholarly debates, it has been at the forefront of the debate on 'defences'. As the United Nations War Crimes Commission observed, 'the plea of superior orders has been raised by the Defence in war crime trials more frequently than any other'.[189] The legal debate on superior orders has produced three main 'schools of thought': 1) the *respondeat superior* doctrine, 2) the absolute liability or full responsibility doctrine, and 3) the conditional liability or limited responsibility doctrine that, which, as will be shown later, exists in different versions. Much has already been written on the defence of superior orders. The debate below will be limited to the main points in the superior orders debate.

According to the *respondeat superior* theory, propounded by Oppenheim and briefly discussed earlier, the subordinate was exempted from criminal responsibility if he committed a war crime. As the subordinate was regarded an instrument in the hands of the superior, it was the superior who could be held accountable for the commission of the crime. The subordinate could thus successfully invoke a defence of superior orders. The Nuremberg Judgement disposed of this doctrine, which had by that time already come under heavy criticism. The Statute of the Nuremberg Tribunal established the absolute liability doctrine, which stipulated that superior orders are no defence but can be considered in mitigation. The British Military Manual and the US Field Manuals, both of which had previously embraced the *respondeat superior* doctrine, changed accordingly.[190] However, in 1956 the American viewpoint changed again. What had already been developed in US national law was now put down in the Field Manual: the limited responsibility doctrine:

> The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, *unless he did not know and could not reasonably have been expected to know that the order was unlawful*. In all cases where the order is held not to constitute a defense to an allegation or war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.[191] (italics added, *EvS*)

This theory has a 'positive formulation' as well leading to the same result. Under the latter approach, the plea of superior orders is, as a general rule, a complete defence unless the subordinate *knew or should have known* that the order was illegal, or the *illegality* of the order was *manifest*. Thus, two criteria, formulated here as *alternatives*, condition the resort to a complete the defence of superior orders.

(b) Nuremberg and beyond

The conditional/limited liability approach was proclaimed for the first time in a decision of the Austro-Hungarian Military Court in 1915.[192] The German military penal code of 1872 comprised a similar formula.[193] It was further reaffirmed in the well known and much cited cases which came before the Leipzig Court after the First World War: the *Llandovery Castle*[194] and *Dover Castle*[195]. In the *Llandovery Castle* case, the Leipzig Court stated,

> However the subordinate obeying an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law (…). It is certainly to be urged, in favour of the military subordinates, that they are under no obligation to question the order of their superior officer and they can count upon its legality. But no such confidence can be held to exist if such an order is universally known to everybody including the accused, to be without any doubt whatever against the law.[196]

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[189] UNWCC, Vol. XV, p. 157.
[190] British Military Manual (1944), para. 443; See UNWCC (1948), p. 282; US Field Manual 27-10, para. 345. See N. Keijzer, *Military Obedience*, Alphen a/d Rijn (1978), pp. 168-169 and pp. 176-178.
[191] US Field Manual 27-10, para. 509
[192] See P. Gaeta, 'The defence of Superior Orders; The Statute of the International Criminal Court versus customary international law', 10 *EJIL* (1999), p. 175.
[193] See further Keijzer (1978), pp. 190-191.
[194] 16 July 1921, 16 *AJIL* 708 (1922), pp. 721-723.
[195] 4 June 1921, 16 *AJIL* 708 (1922), pp. 706-708.
[196] 16 *AJIL* 708 (1922), p. 721-722.

At Nuremberg, the limited/conditional liability approach made room for the absolute liability approach. As was submitted by Garraway, however, the Nuremberg text was 'situation specific rather than a general reflection of the views for all war crimes at that particular time'.[197] At Nuremberg, the crimes alleged were of such a magnitude and nature that the absolute denial of the plea of superior orders was in the end accepted. Moreover, it was thought that such a plea could not avail the *leaders* of the Nazi regime.

The negotiating history of the Nuremberg Statute demonstrates, however, that its 'founding fathers' were neither unanimous nor definite in rejecting the limited/conditional liability rule and in adopting the absolute liability rule instead. Indeed, in 1941, the Sub-Committee on superior orders, after having conducted a survey of national codes and laws on the plea of superior orders, concluded that,

> Generally speaking the codes of law of the respective countries recognise the plea of superior order to be valid if the order is given by the superior to an inferior officer within the course of his duty and within his normal competence, provided the order is not blatantly illegal.[198]

The Committee further submitted that each case must be considered on its own merits and that the plea of superior orders was not an automatic defence. In 1944, the Enforcement Committee that was engaged in drafting a Convention on the Trial and Punishment of War Criminals recommended adopting the limited responsibility approach.[199] This recommendation was, however, not unanimous. It was suggested by the Czech representative that, if this rule would be adopted, it would place individuals such as S.A., SS, and Gestapo members in a better position than that prescribed in the law already in existence in some Allied countries.[200] In that, he seemed to refer to the British Military Manual and the United States Rules of Land Warfare, which by that time had adopted the absolute liability position. After much debate, the United Nations War Crimes Commission, in a statement transmitted to the Governments, decided

> [t]o leave it to the court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that *in principle* this plea does not of itself exonerate the offenders.[201] [italics added, *EvS*]

In spring 1945, however, the issue was re-opened by the Czech and French representatives. The Commission laid down in the Explanatory Memorandum to its Draft Convention for the Establishment of a United Nations War Crimes Court the following statement:

> The commission unanimously maintains the view which it expressed in connection with the United Nations War Crimes Court that the mere fact of having acted in obedience to the orders of a superior does *not of itself* relieve a person who has committed a war crime from responsibility.[202]

In this way the Commission left the court no discretion in deciding what to do with a plea of superior orders. It is of interest, however, that the superior orders plea was not considered a defence *of itself* (*per se*), thus leaving open the possibility that it can be considered a defence in conjunction with other facts to exempt the defendant from responsibility. This clause was,

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[197] C.H.B. Garraway, 'The defence of superior orders', in P. Duyx, *et al.*, 'War Crimes Law and the Statute of Rome: Some Afterthoughts. Report of the Seminar of Rijswijk', 39 *Revue de Droit Militaire et de Droit de la Guerre* (2000), p. 97.
[198] UNWCC, *History of the United Nations War Crimes Commission and the development of the Laws of War*, London (1948), p. 98.
[199] The recommendation reads, 'The defence of obedience to superior orders shall not constitute a justification for the commission of an offence against the laws and customs of war, if the order was so manifestly contrary to those laws or customs that, taking into account his rank or position and the circumstances surrounding the commission of the offence, and individual of ordinary understanding should have known that such an order was illegal'. UNWCC (1948), p. 279.
[200] UNWCC (1948), p. 279.
[201] Ibidem, p. 280.
[202] Ibidem.

however, left out in the actual provision for superior orders in the Tribunal's Charter, because of the Soviet position at the London Conference.[203] Article 8 of the Nuremberg Statute reads:

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the tribunal determines that justice so requires.

The provision on superior orders in the Charter of the Tokyo Tribunal, on the other hand, maintained the clause in Article 6:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, *of itself*, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

According to Dinstein,

The authors of the Tokyo Charter prescribed a more flexible, and a more logical, rule than that enunciated in London. It is not the doctrine of absolute liability, but rather the principle which permits all the circumstances of the case to play their parts, that prevails here.[204]

The attempts in the post-war period to formulate a generally accepted rule on superior orders, in order to codify it in a valid international instrument, were in vain. Neither at the negotiating table around which the delegates assembled to draft the genocide convention, nor at the diplomatic conferences drawing up the 1949 Geneva Conventions and the 1977 Additional Protocols, could a satisfactory text be adopted.[205]

The debate on the defence of superior orders continued within the framework of the ILC. It is noteworthy that the 'moral choice test' reappeared in the 1951 Draft Code of Offences against the Peace and Security of Mankind:

The fact that a person charged with an offence defined in this code acted pursuant to order of his Government or of a Superior order does not relieve him of criminal responsibility, provided a moral choice was in fact possible to him.[206]

The 'moral choice' clause was replaced in the 1954 Draft Code by the wording "in the circumstances at the time it was possible for him not to comply with that order".[207] The latter formula returned in the 1991 ILC Draft Code. In this way, the ILC did not allow superior orders to be a defence *per se*. It could, however, be a defence in relation to other defences such as those of duress or choice of evils. The initiatives of the Association Internationale de Droit Pénale (AIDP) and the International Law Association (ILA) in drafting an ICC Statute also evidence restraint in allowing superior orders as a defence *per se*.[208]

When the Statutes of the *ad hoc* Tribunals were drawn up there was no generally accepted international rule on superior orders and no example other than the Statute of the Nuremberg Tribunal to draw inspiration from. It is hardly surprising that the ICTY and ICTR Statutes contain in Article 7(4) and Article 6(4), respectively the following wording:

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[203] The Russians wanted the adoption of the absolute liability principle in all its extremes, See Dinstein, (1965), pp. 113-115. General Nikitchenko, the Soviet Union delegate at the London Conference asked himself, "Would it be proper really in speaking of major criminals to speak of them as carrying out some order of the superior? This is not a question of principle really, but I wonder if that is necessary when speaking of major criminals", cited by Garraway in Duyx *et al.* (2000), p. 96.

[204] Dinstein (1965), p. 157.

[205] See W.A. Schabas, *Genocide in International Law*, Cambridge (2000), pp. 326-329; Dinstein (1965), pp. 217-225.

[206] Article IV, UNGAOR, Supp. No. 9, UN Doc. A/CN 4/44, p. 13, in Nill-Theobald (1998), p. 77.

[207] Article IV, UNGAOR, Supp. No. 9, UN Doc. A/2693, p.12 in Nill-Theobald (1998), p. 77

[208] The Siracusa Draft II contained the 'moral choice test' and referred to 'necessity, coercion, duress or mistake of law' as possible defences in connection with a plea of superior orders. See Article 33-16 of the Siracusa Draft II in Nill-Theobald, (1998), Annex B, p. 459.
The ILA Draft Statute did not allow 'obedience to superior orders as a justification per se, but it can be taken into consideration in conjunction with other facts of the case in the context of Excuses (…), Mistake of Fact, Mistake of Law, Duress'. See ILA-Report of 64th Conference (1990), p. 187

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

It is noteworthy that the Secretary General, in his explanatory report to the ICTY Statute, argued - in line with the ILC's views on this point – that

Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime or his criminal responsibility and should not be a defence. Obedience to superior orders may, however, be considered a mitigating factor, should the International Tribunal determine that justice so requires. For example, the International Tribunal may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.[209]

In adopting the Nuremberg rule, the drafters of the ICTY and ICTR Statutes failed to appreciate the 'situation specific' nature of the Nuremberg rule on superior orders. Practice at the ICTY, however, has shown that, as in the subsequent proceedings after the Second World War, resort to a defence of superior orders is possible through another defence such as those of duress and mistake.[210]

The delegates drafting the ICC Statute were divided into two groups: one advocating the absolute liability approach (in particular Germany and the United Kingdom) and another group supporting the conditional/limited liability approach (the United States). After many long and difficult debates, the two opposing positions found a compromise in one rule. Article 33 can be seen to constitute the conditional/limited liability approach. The provision, however, reverses the presumption that the plea of superior orders is a defence. A *positive* version of the conditional/limited liability rule would have formulated conditions that render the defence invalid, the existence of which the *prosecution* would have to prove. Article 33 of the ICC Statute in its current *negative* formulation requires the *defence* to demonstrate that the requirements under paragraph 1 (the person was under a legal obligation to obey orders, *and* he did not know that the order was unlawful, *and* the order was not manifestly unlawful) were present. The absolute liability approach reappears in paragraph 2 of Article 33, where one reads that 'orders to commit genocide or crimes against humanity are manifestly unlawful'.

The negative formula and the exclusion of the defence in relation to crimes against humanity and genocide leave a limited scope for the defence of superior orders in the ICC framework. As the defence is limited to the crimes within the Court's jurisdiction, the provision has no direct effect on existing rules in domestic rules on this point. However - and here I agree with Zimmermann - strictly speaking, the principle of complementarity could make the Court seize jurisdiction over domestic proceedings more broadly admitting the defence as the latter proceedings might be not deemed a genuine prosecution under Article 17 of the Statute.[211]

(c) Text Article 33 ICC Statute

The notion of 'order' in Article 33 should be taken to have a broad scope and extend to any written or unwritten communication between a superior and his subordinate within a balance of power, *i.e*. presupposing that the superior has the right to demand obedience should suffice in this context. An order should reach its addressee and clearly state what is expected from the recipient. An order can be directed to an individual or to an entity. In the latter case, it can still be regarded as an order to a person. The order that 'no quarter shall be given' directed to a military force can be regarded as an order to every person belonging to that force, although not individually addressed.

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[209] Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC Doc. S/25704 (1993), reprinted in 32 *ILM* 1163 (1993), para. 57.

[210] The *Erdemovic* case is an example of the simultaneous resort to duress and superior orders. It has been suggested that the defence of superior orders can come up at the ICTY in connection with a mistake of fact. The bombing of the Chinese Embassy during the Kosovo conflict by NATO might be an example of a mistake of fact to which the aircrew might have recourse. Fenrick in his reaction to Garraway in Duyx *et al.* (2000), p. 99.

[211] See A. Zimmermann, 'Superior Orders', in Cassese *et al*. (2002), p. 968.

Orders 'of a Government or of a superior' usually relate to orders emanating from the hierarchy of Government to commanders of military units to be delivered to their subordinates. Such a commander may either simply pass the order on to another commander or address his subordinates directly. 'Government' and 'superior' are normally limited to *de iure* authorities. This raises an important point.

Superior-subordinate relationships should be interpreted more strictly in the context of superior orders than in the context of superior responsibility. It is, therefore, misleading to suggest that Articles 28 and 33 'represent two sides of the same coin'.[212] In the context of superior responsibility (Article 28), *de facto* relationships have been understood to include informal relationships based on effective control.[213] This includes civilian superiors, such as the director of a tea company[214], as long as a civilian superior can be found to have the duty and the 'material ability' to prevent his subordinates from committing crimes, or punish them when they have committed one. It is submitted here that *de facto* relationships and unofficial subordination seem irrelevant in the context of superior orders. The only 'civilian' that counts in the context of superior orders is the political superior or government representative. This is why the word 'civilian' was included in the 'chapeau' of Article 33. It refers to civilian departments and administration within Government. The latter is traditionally divided into civilian and military departments.

An exception to the above statement can be made for a *de facto* superior who qualifies as a person effectively acting as a *de iure* military commander. For instance, the subordinate of a military commander, who is not yet formally designated commander, but already acts as one in anticipation of his official appointment. This was the case with General Krstic, who was found to be a *de facto* commander as he already fulfilled his functions as Drina Corps Commander while awaiting his formal appointment, which was already 'officially on paper'.[215] In the latter type of situation, being so close to a *de iure* command, *de facto* command and the orders emanating from it may suffice to qualify as 'orders of the superior' pursuant to Article 33(1)(a) of the ICC Statute.

The reason for the disparity between Articles 28 and 33 regarding the superior-subordinate relationship lies in the basis of a plea of superior orders: the unique relationship between a military superior and his subordinate, which is based on the military duty to obey and the ensuing presumption of legality of orders. In reality, the defence of superior orders is reserved for the military.

A causal connection between order and conduct needs to be established. Article 33 requires that a crime has been committed 'by a person *pursuant to* an order'. If the person commits the crime independently from the order, he does not have a defence under Article 33. The order must have inspired or initiated the subordinate to act. Moreover, as customary international law on superior orders (in connection with duress) has shown,[216] 'superior orders' is no defence when the crimes are committed *con amore*.[217]

Three conditions

The three cumulative conditions under which a person has recourse to the defence of superior orders follow in subparagraph (a)-(c). These requirements serve to establish that the subordinate was *bona fide* or in good faith when (wrongfully) believing that he was under a legal obligation to obey orders.

The first condition refers to the 'legal obligation to obey orders'. The formula refers to orders in general, which must have existed at the time when the subordinate committed the

[212] Triffterer in Triffterer (ed.) (1999), margin No. 33, p. 588.
[213] ICTY, *Celebici* Judgement, paras 377-378, endorsed by the Appeals Chamber in *Celebici* Appeal Judgement paras. 197-199.
[214] ICTR, *Musema* Judgement, para. 135.
[215] ICTY, *Krstic* Judgement, paras. 328, 300, and 625.
[216] See UNWCC, Vol. XV, p. 174, and ICTY, *Erdemovic* Appeal Judgement, Separate and Dissenting Opinion Judge Cassese, para. 16.
[217] Shakespeare in Hamlet: Rosencrantz and Guildenstern act under orders as well, yet Hamlet punishes them as 'they did make love to their employment'. Hamlet, Act V, scene 2.

crime. In essence, the clause 'legal obligation to obey orders' expresses the presumption that a superior has the right to expect obedience of the subordinate. 'Legal' refers to national law as well as international law. Peacekeepers, for instance, often have obligations under two chains of command; a national and an international one.

At this point, it is opportune to return to the defence of duress in connection with superior orders. With Paphiti I agree that '[i]n the case of an order accompanied by a threat, the legality or otherwise of the order is, to the individual, really quite irrelevant'.[218] In other words, duress can still be a defence when a subordinate carries out an *unlawful* order. Not the nature of the order, but the *threat* accompanying it makes one act under duress. With the defence of superior orders *per se*, however, the nature of the order *is* relevant. The 'legal obligation' clause in essence implies that both the superior and the subordinate operate within the boundaries of their normal/usual competence. Only under such circumstances can a mistaken belief on the part of a subordinate be excused under Article 33. Secondly, because obedience to lawful superior orders is another type of defence.

The second condition constitutes the *subjective* requirement of the superior orders defence and refers to the subordinate's knowledge of the legality of the order. To be relieved of criminal responsibility, the subordinate-defendant must have to argue that he did not know that the order was unlawful. Moreover, he needs to *demonstrate* (burden of coming forward) that the order was not manifestly unlawful, while the prosecutor then has to *prove* the contrary (burden of proof). This brings us to the next condition

The third condition contains the manifest unlawfulness test, which constitutes the *objective* requirement circumscribing the scope of application of the plea of superior orders. The manifest unlawfulness test is subject to a *Garantenstellung*. What is manifestly unlawful for specialised military personnel is not necessarily manifestly unlawful for the average soldier. The *Garantenstellung* thus effectively narrows the scope of the superior orders defence for specially trained military personnel who 'should know better'. The second paragraph of Article 33 contains the exclusion of the defence of superior orders for genocide and crimes against humanity. Orders to commit the latter crimes are considered manifestly unlawful *per se*. The inclusion of this clause in Rome was plainly to appease the delegates supporting the absolute liability rule. It marks Article 33 as the ultimate compromise. Strictly speaking, the condition is superfluous. After all, an order to commit either crimes against humanity or acts of genocide can be considered 'manifestly unlawful' under subparagraph 1(c) bearing in mind the special intent and grave nature of the crimes. Furthermore, the clause results in a distinction between war crimes on the one hand and crimes against humanity and acts of genocide on the other hand. This same distinction appeared with regard to self-defence in connection with 'property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission' in Article 31(1)(c). It seems that the delegates in Rome considered war crimes a less apparent and less serious breach of international humanitarian law than crimes against humanity and genocide.[219] These stand lower on the ladder of moral repudiation than crimes against humanity and genocide, the latter being the most serious crime or 'the crime(s) of crimes'.[220] A similar distinction can be found in the jurisprudence of the Tribunals of Rwanda and the Former Yugoslavia.[221]

One needs to be aware of this classification when prosecuting acts that can qualify either as crimes against humanity or as war crimes. As Zimmermann observes, even in situations in which the defendant can rely on a defence of superior orders with regard to war crimes, he can still be punished for the same acts as crimes against humanity.[222] To my mind, this is unacceptable and would violate the principles of equity and fairness. After all, a successful plea of superior orders implies a non-manifestly unlawful order. The Court should,

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[218] A.S. Paphiti, 'Duress as a Defence to War Crimes Charges', 38 *Revue de Droit Militaire et de Droit de la Guerre* (1999), p. 255.
[219] For a different view see Zimmermann in Cassese *et al.* (2002), p. 972.
[220] Referred to as such by Schabas in the subtitle of his book on Genocide (2000).
[221] See ICTY, *Erdemovic* Appeal Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 19 *et seq.*
[222] Zimmermann in Cassese *et al.* (2002), p. 972.

therefore, reason *a contrario* with regard to Article 33(2) and adopt the premise that if it deems an order non-manifestly unlawful, the subsequent crime is *not* a crime against humanity or (an act of) genocide.

(d) Jurisprudence

The *Llandovery Castle* and *Dover Castle* cases constitute the first international precedents in which the conditional liability approach was recognised. The absolute liability approach was born in Nuremberg. The International Military Tribunal did not question this rule, which it thought was in conformity with the law of all nations. When a senior commander raised the defence for what the IMT deemed 'shocking crimes', it did not even grant mitigation of punishment. In the case against Keitel, it held,

> There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes so shocking and extensive have been committed consciously, ruthlessly, and without military excuse or justification.[223]

Thus, there are two different approaches on the international level, a conditional liability and an absolute liability approach. Both have encountered resistance and confirmation in jurisprudence. Without venturing into an elaborate survey of international case a few comments can be made on the plea of superior orders in international adjudication.

First of all, despite the absolute denial of the defence by the International Military Tribunal, the military tribunals and courts pronouncing judgement under CCL 10 displayed a lenient attitude towards the defence of superior orders in the subsequent proceedings. They dealt with soldiers and officers from the middle and lower ranks of the chain of command and occasionally allowed a plea of superior orders, which was raised in almost every trial. Article II(4)(b) of the Law No. 10 of the Allied Control Council for Germany, however, stipulated the absolute denial of such a defence:

> The fact that the person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.[224]

The provision differs slightly from Article 8 of the Nuremberg Statute in that it does not contain the clause 'if the Tribunal determines that justice so requires' relating to the mitigation of punishment, and 'for a crime' was inserted into Article II(4)(b) while absent in article 8 of the Nuremberg Statute. I agree with Dinstein that not much weight should be given to these differences and that in substance both provisions are similar.[225] CCL 10 also excludes the possibility of a superior orders plea to exempt from liability. Nevertheless, the military tribunals, although they did not allow the defence of superior orders in the cases before them, submitted that under certain circumstances a plea of superior orders *could* exempt the defendant from liability. In *Einsatzgruppen*, *High Command*, and *Hostages*, several observations were made in relation to allowing a defence of superior orders in connection with the defences of duress,[226] mistake of fact, and mistake of law.[227]

As to mistake of law, the US Military Tribunal in the *High Command* case retained the possibility that under certain circumstances a defendant, because of excusable ignorance of the unlawful order, could rely on superior orders as a defence *per se*.

> Within certain limitations, a soldier in a subordinate position has the right to assume that the orders of his superiors and the state which he serves and which are issued to him are in conformity with international law.[228]

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[223] Nuremberg Judgement in Friedman (1972), Vol. II, p. 977.
[224] Cited in UNWCC (1948), p. 283.
[225] Dinstein (1965), pp. 162-164.
[226] With regard to duress the Tribunal in the *Einsatzgruppen* case held that: 'No court will punish a man, who, with a loaded pistol at his head is compelled to pull a lethal lever'. TWC, Vol. IV, pp. 411-589.
[227] See Dinstein (1965), pp. 165-174, 214; Garraway in Duykx *et al.* (2000), pp. 94-95.
[228] Friedman (1972), Vol. II, p. 1433.

In other words, a superior's orders may be presumed to be legal by the subordinate. When they turn out not be legal, the subordinate has a defence of superior orders/mistake of law. However, there is a limit to this presumption, especially when the subordinate occupies a certain position or rank. In the *Hostages* case, the US Military Tribunal ruled that,

> An officer is duty bound to carry out only the lawful orders that he receives. One who distributes, issues, or carries out a criminal order becomes a criminal if he knew or should have known of its criminal character.[229]

The Tribunals in *High Command* and *Hostages* seem to have recognised that the presumption of legality, within certain limits, is the basis for accepting a plea of superior orders when the order turns out to be illegal. The defence of superior orders is considered an *excuse* (thus not justifying the subordinate's conduct,) and is based on the subordinate's (reasonable) reliance on his superior.

The ICTY and ICTR Statutes confirm the absolute liability approach. The only trial in which the defence played some role was *Erdemovic*. However, the plea of superior orders raised by the accused was in reality a resort to the defence of duress and treated as such. The Trial Chamber in *Erdemovic* acknowledged that the strict absolute liability rule was applied in a less rigid way in the subsequent Nuremberg proceedings. The defence was admitted as a mitigating factor, especially with regard to lower-ranked accused.[230] Relying on this precedent and the fact that Erdemovic occupied a very low rank in the Bosnian Serb army, the Trial Chamber deliberated that,

> In practice, the Trial Chamber therefore accepts that tribunals have considered orders from superiors as valid grounds for a reduction of penalty. This general assertion must be qualified, however, to the extent that tribunals have tended to show more leniency in cases where the accused arguing a defence of superior orders held a low rank in the military or civilian hierarchy.[231]

The Trial Chamber, however, would not accept a plea of superior orders to mitigate punishment where the accused had carried out the order *con amore, i.e.* with the requisite *mens rea*

> If the order had no influence on the unlawful behaviour because the accused was already prepared to carry it out, no such mitigating circumstances can be said to exist.[232]

While the Trial Chamber in *Erdemovic* was of the view that superior orders and duress were necessarily connected,[233] the Appeals Chamber ruled that the concepts of superior orders and duress should be distinguished.[234] Superior orders were deemed to serve merely as a factual circumstance confirming (or not) the existence of duress. The following statement of Judge McDonald and Judge Vohrah (the majority) makes clear that superior orders is not considered a defence *per se* at the ICTY:

> We subscribe to the view that obedience to superior orders does not amount to a defence per se but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.[235]

Whatever the exact meaning of the preceding case law, it is clear that the absolute liability approach in international case law is not as absolute as one might think. The decisions of the US military Tribunals and some of the deliberations in the *Erdemovic* case leave us with a

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[229] Friedman (1972), Vol. II, p. 1323.
[230] ICTY, *Erdemovic* Sentencing Judgement I, paras. 51-52.
[231] Ibidem, para. 53.
[232] Ibidem.
[233] Ibidem, para. 19.
[234] ICTY, *Erdemovic* Appeal Judgement, paras. 34-36.
[235] Ibidem, para. 34.

more nuanced picture. The fact that the ICC Statute has adopted the conditional liability approach in reality marks the end of the absolute liability approach altogether.

According to Gaeta, Article 33 must be faulted as it deviates from customary international law. To her mind, international customary law adopts the absolute liability approach: the plea of superior orders can never exempt a person from criminal responsibility in case of war crimes. Below, I will argue that the conditional liability approach in Article 33 is the right approach. I will first discuss the legal reasons, and then point out the 'social reasons' that support my argument.

Legal reasons for adopting conditional liability approach

I disagree with Gaeta for four reasons. Firstly, because her argument that there is a *communis opinio* among States confirming the absolute liability approach under customary international law is still very much based on the Nuremberg precedent. However, as set out above, I would agree with Garraway that Nuremberg was 'situation-specific' and, therefore, not a reliable source of customary international law.[236] Secondly, beyond Nuremberg there have been attempts to codify the conditional liability approach on the international level in the framework of the 1949 Geneva Conventions and the 1977 Additional Protocols to the Geneva Conventions. This weakens the alleged existence of general agreement among States on the absolute liability rule. Thirdly, various examples above have shown that a number of national war crimes trials have recognised and applied the conditional liability approach, also when it concerned a non-national. State practice after Nuremberg does not warrant the conclusion that superior orders can never amount to a defence in cases of war crimes. Lastly, what exactly is meant by war crimes? The concept, with its rigid requirements as to context and capacity, has changed radically under the influence of the jurisprudence of the Tribunals for the Former Yugoslavia and Rwanda and has been partly replaced by crimes against humanity. The latter notion proved much more useful and flexible in dealing with mass crime. This resulted in a 'devaluation' of war crimes, evidenced in some of the findings in *Erdemovic* and also in the ICC Statute itself in Article 31(1)(c) and Article 33. Thus, when Gaeta refers to the absolute liability approach and 'war crimes', she might well mean the most serious international crimes, *i.e.* 'manifestly unlawful' acts that in the past were all grouped under the term 'war crimes' but nowadays qualify as crimes against humanity and genocide. If that is the case, we are less in disagreement than might appear at first sight.

The absolute and the conditional liability approaches lead to the same result in the ambit of crimes against humanity and genocide.[237] The latter crimes almost always qualify as 'manifestly illegal/unlawful' and generate an exclusion of the plea of superior orders. Therefore, Article 33(2) has no added value and to my mind it would have been better if it was left out. The absolute liability approach is now subsumed in the conditional liability approach. That both approaches now form one rule becomes even clearer when we put the wording into a negative formula, like in Article 33 of the ICC Statute ,:

> Execution of an unlawful superior order is no defence unless the order was not manifestly unlawful and the subordinate did not know the order was unlawful.

The absolute liability approach has influenced the 'traditional' conditional liability approach by reversing the presumption that the plea of superior orders is a defence.

The survey of national and international criminal law has shown that national legal systems by and large adopt the conditional liability rule while adjudication on the international level shows a resort to the absolute liability approach. It seems that the

[236] See also T. Vogler, 'The Defence of 'Superior Orders' in International Criminal Law', in M. Ch. Bassiouni and V.P. Nanda, *A Treatise on International Criminal Law*, Vol. I (Crimes and Punishment), Springfield (Ill.) (1973), p. 621; J.W. Grayson, 'The Defence of Superior Orders in the International Criminal Court', 64 *Nordic JIL* (1995), pp. 247--248.
[237] See also Gaeta (1999), p. 185.

principle of absolute liability was *specifically* suited to the international arena where *major war criminals* stood trial who, in addition, were *non-nationals* of the states that established the tribunals. As to the latter, political reasons may be considered 'responsible' for this inequality.

The two-track development has now been fused into one rule in Article 33 of the ICC Statute. Bearing in mind the national and international backgrounds of each of the two approaches, this seems appropriate. The institutional framework and the substantive law of the ICC - more than its predecessors - accommodates a rapprochement between national and international criminal law. As a result of the complementarity principle underlying the ICC Statute, State Parties will prosecute nationals and non-nationals for the crimes listed in the ICC Statute. Bearing in mind that the conditional liability approach has been favoured by a majority of States (applying it predominantly but not exclusively to nationals), the conditional liability approach in Article 33 is the satisfactory result of a very difficult negotiating process.[238]

The 'battlefield reality' and social reasons for adopting conditional liability approach

Apart from its established legal status in international and national criminal law, the conditional or limited liability approach is the correct approach to the defence of superior orders for 'social reality reasons'.[239] A soldier is trained (and conditioned) to obey his superior. He may, therefore, presume that an order given by his superior is lawful. The laws and customs of war are not always clear and, although the war crimes provision of the ICC Statute is an improvement in that it lists the numerous violations of the law of war, the provision still leaves room for multiple interpretation, and grey areas undecided.

A soldier cannot always be expected to know the legal rule. Moreover, he often lacks information: he should be able to rely on his superior for this. In this, it should be borne in mind that the 'battlefield reality' is one of extreme chaos. An armed conflict confronts those participating in it with a capricious reality in which orders emanating from commanding officers are welcomed by subordinates as beacons of light in a situation of dark disorder. It is thus unlikely and undesirable that a subordinate will question the legality of every order he is required to obey. Against this background, the conditional liability approach is the best way to maintain the balance between a subordinate's duty to obey and his duty to respect the law. On the other hand, the conditional liability approach serves the more modern approach of 'self-thinking soldiers'. The military in most western (NATO) countries rely more and more on delegation of powers down the chain of command to the actual battlefield. Soldiers are required to think and decide for themselves, within certain limits.

As was said earlier when discussing the text of Article 33, the defence of superior orders is available solely to *military* subordinates, not civilian subordinates. Admittedly, the latter can also find themselves in situations where they are forced to obey an order from a superior. In those circumstances, they can resort to the defence of duress pursuant to Article 31(1)(d) of the ICC Statute. The reason for being more lenient towards a soldier than an ordinary citizen in allowing the defence of superior orders lies in the special relationship between a subordinate and a superior. Superiors are *authorised* to give orders and they are *responsible* for giving lawful orders. Superiors may be relied upon and their orders are presumed lawful. The military duty to obey is unique in that it is based upon the legal presumption of legality, which is expressed in national military codes and manuals.[240] As the United States Court of Military Appeals held in the case of an order to

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[238] See further C.H.B. Garraway, 'Superior orders and the International Criminal Court: justice delivered or justice denied', 81 *IRRC* (1999), pp. 785-794.

[239] See also Keijzer (1965), pp. 1-65; N. Keijzer, 'A plea for the Defence of Superior Orders', 8 *Israel YBHR* (1978), pp. 78-103; M.J. Osiel, *Obeying Orders: atrocity, military discipline & the law of war*, New Brunswick/London (1999); M. J. Osiel, 'Obeying Orders: atrocity, military discipline and the law of war', 86 *Calif. LR* (1998), pp. 939-1129.

[240] See Keijzer (1978), pp. 282-285, where he points to the 1969 U.S. Manual for Courts-Martial, the British Manual of Military Law (1958), the explanatory note to the Netherlands Military Criminal Code, German writings on military law, and French law.

perform close under drill, given as punishment, which was not authorised in accordance with Article 15 of the Uniform Code of Military Justice (1950),

> It is a familiar and long-standing principle of military law that the command of a superior officer is clothed with a presumption of legality, and that the burden of establishing the converse devolves upon the defence (…) Certainly the presumption of legality of orders emanating from a superior officer is, and of necessity must be, a strong one, requiring for an adverse determination a clear showing of unlawfulness.[241]

This presumption of lawfulness should be reflected in a defence of superior orders.[242] As far as a superior order may be trusted to be legal, compliance with the order must be excused if the order appears to have led to an illegal act.

A problem remains, however, in the category of large-scale criminality. Hanna Ahrendt refers to this.[243] When a system has rendered a person 'immune' to unlawful orders, even manifestly unlawful ones, because such orders are lawful in the system and the person is numbed by being exposed to them on an everyday basis, the question arises as to how, and if, that person should be held accountable for the crimes committed by him in obedience to orders. As already mentioned earlier, German courts dealt with such cases. The defence of superior orders was not available to Nazi criminals. The German judiciary in post-war Germany ruled that there was a higher order that had been violated by nazi crimes: natural law. Every rule or law violating natural law was considered void and invalid *ab initio*. This seems to be a correct and philosophically coherent way of dealing with mass criminality and a correspondingly distorted 'norm-consciousness'. The soldier of such a criminal system does not have a defence under Article 33 exempting him from criminal responsibility. This is a case that goes to sentencing, *i.e.* mitigation of punishment.

7. CONCLUSION

The catalogue of defences listed in Article 31-33 of the ICC Statute is in comparison to previous international criminal law drafts and provisions an improvement and sets the ICC Statute apart from its predecessors. The inclusion of defences such as self-defence, duress and superior orders seems to bring us closer to our goal: developing a mature system and sophisticated system of international criminal law. However, we should not stop here. Taking a closer look it appears that some of the defences, in particular mistake of fact and law, have a very narrow scope.

To achieve our goal rather sooner than later and to make the ICC system of defences an effective system of defences, the author submits that the ICC make three distinctions. First, the Court should have an open eye for the underlying 'cultural differences' and take as point of departure the distinction between justifications and excuses. Secondly, in considering pleas put forward by an accused, the Court should distinguish between a person's public and private capacity. Thirdly, and this relates to the second point, the distinction between international and criminal law defences should be clearly maintained, this to prevent an irrational limitation of the resort to a defence. This is particularly true with regard to the defence of self-defence as an autonomous criminal law defence and inherent right of every human being. By making these distinctions the Court will be able to maintain a clear vision of the matter before it. This is essential, as it is especially in the field of defences that the two legal systems – international law and criminal law – come together, and where cultural differences between the two main legal cultures – Anglo-American law and civil law – most evidently surface.

The inclusion of the superior orders defence in the ICC Statute might have been a struggle , it may be regarded as the crown on top of the drafters' work. Although one can

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[241] *U.S. v. Trani* (1952), 1 USCMA 293, 3 CMR 27 (1952), cited in Keijzer (1978), p. 114.

[242] British law, however, denies the defence of superior orders while at the same time its Manual of Military law (1971) provides for the presumption of legality in the context of military disobedience (para. 3(a)). This leads to an inconsistency and the fact that a subordinate's trust in his superior's judgement can be – to put it in Keijzer's words- 'ill rewarded'. Keijzer (1978), p.180.

[243] H. Arendt, *Eichmann in Jerusalem. A report on the Banality of Evil*, New York-London (1994).

criticise its contrived wording, its acceptance is a definite break from the result-oriented approach of the Nuremberg and Tokyo Tribunals, and to a certain extent, that of the *ad hoc* Tribunals. The ICC Statute allows for the development of a more comprehensive and general system of criminal law. And as the ICC claims to be a *criminal court* and not a (military) *tribunal*, it is only logical that its list of defences contains that of superior orders.

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