Chapter 24.4

Other Grounds for Excluding Criminal Responsibility

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I. Introductory Remark

Article 31 recognizes four substantive grounds for excluding criminal responsibility: mental disease or defect, intoxication, self-defence, and duress/necessity. For the purpose of this paper mental disease or defect and intoxication will be discussed jointly. The paper focuses primarily on duress/necessity, since these defences are most important from a practical point of view. They are treated together since Article 31(1)(d)—although referring exclusively to 'duress'—offers a kind of mixed solution containing elements of both defences.

II. Status of Customary Law

Customary law within the meaning of Article 38(1)(b) of the ICJ Statute follows from a generalized State practice which is the expression of an *opinio iuris vel*

necessitatis.[1] By analysing codifications, the international and national jurisprudence, and the comparative law, including doctrine, one may identify custom although comparative law can also be an expression of general principles within the meaning of Article 38(1)(c) of the ICJ Statute.[2]

A. International and National Jurisprudence

As of yet, the jurisprudence has focused primarily on the problem of duress, which is normally analysed in connection with superior orders. Self-defence has only been dealt with in Nuremberg; mental disease or defect and intoxication have been hardly dealt with.

1. Self-defence

In *US v. von Weizsäcker et al.* the defence argued that Germany had a right to self-defence because of Russia's alleged war preparations. The Tribunal rejected this argument since Germany had begun a war of aggression and there was no right to exercise 'self-defence against self-defence': self-defence presupposes an *unlawful* attack.[3] Similarly, in *US v. Ohlendorf et al.*, 'presumed self-defence' or 'presumed necessity' by Germany was rejected,[4] since Germany had itself initiated the aggression. As far as the individual perpetrators were concerned, only duress—as an 'imminent, real and inevitable threat' or 'irresistible, physical duress'[5]—was taken into account. However, in the case of the execution of an unlawful order, duress only excluded criminal responsibility if non-compliance with the order would have caused a greater harm than compliance.[6] Finally, in *Krupp et al.* self-defence was distinguished from necessity as follows: 'Self-defense excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right.'[7] Self-defence was also invoked in other post-war trials documented by the UNWCC. For example, in *Tessmann et al.*[8] the Judge Advocate argued that the law allowed the killing of an aggressor as the 'last resort'. Determination that the killing had in fact been

[1] Cf. R. Bernhardt (ed.), *EPIL* 1 (1992) 898 *et seq.*; I. Brownlie, *Principles of Public International Law* (5th edn., 1998) 4 *et seq.*; A. Verdross and B. Simma, *Universelles Völkerrecht* (4th edn., 1984) §§ 549 *et seq.*

[2] For additional analysis of the sources of the general principles of international criminal law, see the recent study by C. Kreß, 'Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts . . .', 111 *Zeitschrift für die gesamte Strafrechtswissenschaft* (*ZStW*) (1999) 597–623, who—apart from the traditional sources 'custom' and 'general principles' (600 *et seq.*)—invokes a combination of the former and alternative sources.

[3] *US v. von Weizsäcker et al.* (case 11), in Trials of War Criminals CCL No. 10 (hereinafter TWC) XIV, 308–942, at 329.

[4] *US v. Ohlendorf et al.* (case 9), in TWC IV, 411–589, at 462 *et seq.*

[5] Ibid., at 480 ('no court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever').

[6] Ibid., at 471.

[7] *US v. Krupp et al.* (case 10), in TWC IX, 1327–1484, at 1438.

[8] Law Reports TWC XV, 177.

an act of 'last resort' had to be made on a case by case basis, taking into account factors such as whether the aggressor was armed or whether the accused could have retreated. In the trial against *Weiss and Mundo*[9] a US Military Tribunal recognized self-defence as a ground for excluding criminal responsibility with regard to the killing of a US prisoner of war. The defendants had detained a wounded US paratrooper whom they shot believing that he wanted to draw his weapon. Thus, they acted in presumed or erroneous self-defence (*Putativnotwehr*). In another case, a right to self-defence was conceded to the inhabitants of an occupied territory.[10] In contrast, self-defence did not help an accused Japanese officer in a trial before a British Military Tribunal for the killing of a civilian.[11] The defendant had detained the victim attempting to steal some rice; he then killed him with a bayonet, in rage and fear for his life because of threats by a crowd. Although self-defence was clearly excluded since the threat did not emanate from the victim, the defendant could have invoked necessity if he were threatened with death.

2. Duress/Necessity

(a) *Nuremberg Jurisprudence*

The Nuremberg case law did not interpret the defence of necessity as requiring a general balancing of legal interests or goods; instead it considered the defence to be applicable in situations in which the actor's freedom of will and decision were limited to such an extent that the attribution (imputation) of certain criminal results appeared unjust. Further, it did not clearly distinguish necessity from coercion and duress, as the main defences involving freedom of decision.[12] From this it is apparent that the case law conflated the two concepts and that, in fact, the decisions were made on the basis of duress ('compulsion', 'coercion'), not necessity. For reasons of authenticity, however, the Tribunals' terminology will be retained here.

Restriction of freedom of will and decision by external coercion has always been considered as an *objective* requirement of necessity. Defence counsel argued in various cases that the defendants only committed the alleged crimes because of coercion or political pressure by the Nazi leadership or by security organs. Therefore, they claimed the defendants' conduct must have been justified or excused by the defences of superior order, necessity or other related defences. As a result, the tribunals, on the one hand, had to develop general criteria in order to determine

[9] Trial of Erich Weiss and Wilhelm Mundo (Fall 81), Law Reports TWC XIII, 149–150.

[10] Judgment of the Special Court at Arnhem, Law Reports TWC XIV, 129.

[11] Trial of Yamoto Chusaburo (case 20), Law Reports TWC III, 76–80, at 79–80.

[12] See in particular *US v. Krupp et al.*, *supra* note 7, at 1436; also *US v. Ohlendorf et al.*, *supra* note 4, at 462 *et seq.*; *US v. Krauch et al.* (case 6), in TWC VIII, 1081–1210, at 1174 *et seq.* See also the criticism by C. Nill-Theobald, *'Defences' bei Kriegsverbrechen am Beispiel Deutschlands und der USA* (1998) at 179–180, 184 in note 48.

when compulsion or coercion reaches such a degree as to exclude any voluntary decision; on the other hand, they had to analyse on a case by case basis whether and to what extent the defendants were exposed to coercion. Although the criteria developed by the various decisions were far from uniform, a few common standards can be identified. The most concrete definition of duress/necessity was suggested in *US v. von Leeb et al.*:

> To establish the defense of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.[13]

Similarly, in *US v. Krauch et al.*[14] the Tribunal referred to the possibility of another choice in the sense of the 'moral choice' doctrine developed by the IMT with regard to the defence of superior order.[15] Accordingly, the defence of necessity (duress) is only available if an order leaves the subordinate without any choice, i.e. if the order

> is of a character to deprive the one to whom it is directed of a moral choice as to his course of action. It follows that the defense of necessity is not available where the party seeking to invoke it was, himself, responsible for the existence or execution of such order or decree, or where his participation went beyond the requirements thereof, or was the result of his own initiative.[16]

The question of an active participation implying an agreement with an unlawful order and thereby excluding the defence of necessity has been treated differently in the 'Economic Trials':[17] real danger or coercion only exists if the defendant does not act voluntarily and in agreement with the superior who issued the illegal order. Further, the act of necessity must have been committed to prevent a serious and irreparable harm and must be proportional.[18] Thus, for the first time, a pondering of the legal interests involved can be identified. Under these circumstances, necessity may have the effect of providing a complete justification for the commission of the crime.[19]

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[13] *US v. von Leeb et al.* (case 12), in TWC XI, 462–697, at 509.

[14] *US v. Krauch et al.*, *supra* note 12, at 1174 *et seq.*

[15] See also *US v. Ohlendorf et al.*, *supra* note 4, at 471.

[16] *US v. Krauch et al.*, *supra* note 12, at 1179.

[17] *US v. Flick et al.* (case 5), in TWC VI, 1187–1223, at 1200 *et seq.*; *US v. Krupp et al.*, *supra* note 7, at 1436 *et seq.* Unlike in Flick (concerning the defendants Steinbrinck, Burkart, Kaletsch, and Terberger), in Krupp the Tribunal acknowledged an agreement between the defendants and the political leadership with regard to the programmes of slave labour (ibid., at 1439 *et seq.*). On the other hand, Flick's and co-defendant Weiss's active participation in the exploitation of the Russian prisoners of war excluded the defence of necessity (*US v. Flick et al.*, at 1202). Insofar as one could speak of an 'Active steps' doctrine.

[18] *US v. Krupp et al.*, *supra* note 7, at 1443–1444.

[19] *US v. Flick et al.*, *supra* note 17, at 1200 (concerning the defendants Steinbrinck, Burkart, Kaletsch, and Terberger).

There are also certain *absolute limits* of conduct, in particular with regard to the traditional defence of military necessity.[20] Accordingly, this defence does not justify the violation of concrete rules of law and is limited by the principle of proportionality. In *US v. Ohlendorf et al.* it was stated, for example, that mass killings of civilians are never permitted.[21] These limits can also be applied to the ordinary criminal law defences under examination.

On the *subjective* level (*mens rea*), the defendant must not only have acted with 'actual *bona fide* belief in danger',[22] but also may not have acted knowing—because of his position and capacity—that he was excluded from invoking necessity since his conduct was in violation of international law.[23] This reminds us of the *error iuris nocet* rule, according to which a mistake of law does not exclude criminal responsibility.

(b) *Post-Nuremberg Jurisprudence*

In other trials documented by the UNWCC, it was generally required for the defence of duress/necessity that, in objective terms, an immediate, serious, and irreparable threat to body and life existed. Everyone is entitled to bow to the pressure exercised by an order if he or she had no other possibility to avoid the danger; in addition, a balancing of the legal interests involved must result in a finding that the threat to the accused's interests would be disproportionally greater than the threat to the victim. Therefore, under normal circumstances only a life-threatening danger, not mere moral pressure[24] permits the subordinate to invoke the defence of coercion.[25] Finally, based on the famous and, for the common law, decisive British *Mignonette* case,[26] life is considered to constitute an insurmountable obstacle to

[20] See in particular *US v. List et al.* (*Hostages* case, case 7), in TWC XI, 1230–1319, at 1253, 1256 (no killing of innocent civilians); *US v. von Leeb et al.*, *supra* note 13, at 541 (no total war). For a summary, see Law Reports TWC XV, 175–176; see also M. Lippman, 'Conundrums of Armed Conflict: Criminal Defenses to Violations of the Humanitarian Law of War', 15 *Dickinson Journal of International Law* (1996) 1–111, at 59 *et seq.*

[21] *US v. Ohlendorf et al.*, *supra* note 4, at 465.

[22] *US v. Krupp et al.*, *supra* note 7, at 1438.

[23] *US v. Altstoetter et al.* (case 3), in TWC III, 954–1201, at 1076.

[24] Trial of Max Wielen and 17 others (case 62), Law Reports TWC XI, 31–52, at 47.

[25] Cf. Trial of Jepsen and others (Law Reports TWC XV, 172–173); for a summary, see Law Reports TWC XV, 174.

[26] *The Queen v. Dudley and Stephens*, 14 Queens Bench Division (1884–85) 273 *et seq.*, in particular 286 *et seq.* This case referred to 'necessity', while the other classical cases (*Regina v. Tyler*; *Arp v. State*, *US v. Holmes*) explicitly referred to 'duress'. Cf. H.-H. Jescheck and T. Weigend, *Strafrecht, Allgemeiner Teil* (5th edn., 1996) 195, 489; G. P. Fletcher, *Basic Concepts of Criminal Law* (1998) 132; J. Pradel, *Droit pénal comparé* (1995) 288; Nill-Theobald, *supra* note 12, at 212; A. Reed, 'Duress and Provocation as Excuses to Murder: Salutary Lessons from Recent Anglo-American Jurisprudence', 6 *Journal of Transnational Law and Policy* (1996) 52, 59, 66; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn., 1999) 489–490.

invoking necessity or duress: 'You are not entitled, even if you wished to save your own life, to take the life of another.'[27]

The German Supreme Court for the British Zone (*Oberster Gerichtshof für die Britische Zone*—'OGHBrZ') rendered its first decision on the defence of duress in the context of a superior-subordinate relationship. In such a situation the defence of duress may be applicable if the accused was—in objective terms—in serious danger and acted—in subjective terms—with the intention to avert this danger.[28] Further, the extent to which the accused can be expected to resist the danger must be examined.[29] The defence of collision of duties—also known as supra-legal necessity (*übergesetzlicher Notstand),* since it is not codified—comes into play only if the perpetrator was confronted with a true conflict of interests and had to violate the lesser legal interest in order to protect the higher one.[30] This kind of conflict of interests has not been recognized in the case of the 'Euthanasia doctors' who argued that they had to sacrifice the lives of a few of their patients to save many others. According to the OGHBrZ, it was the defendants' duty as citizens and doctors to help all patients equally instead of taking part in the Nazi crimes.[31] A weighing of life against life is not acceptable.[32] Further, an invocation of supra-legal necessity must be excluded *a limine* in those cases where the State itself becomes criminal.[33] In general, the OGHBrZ argued that the gravity of crimes against humanity requires strict conditions for the admission of the defence of necessity or duress and pointed to the danger of an all too generous use of these defences.[34]

In *Eichmann*, the Supreme Court[35] of Israel used the moral choice criterion to decide on the relevance of the defence of 'constraint' and 'necessity'. The Court required, in objective terms, that there be an immediate danger to the life of the

[27] Trial of Valentin Fuerstein et al. (Law Reports TWC XV, S. 173); also Trial of Robert Holzer and 2 others (ibid.).

[28] Cf. OGHSt 1, 310 (313); 2, 393 (394); 3, 121 (129).

[29] OGHSt 3, 121 (129).

[30] OGHSt 1, 49 (52).

[31] OGHSt 1, 321 (331 *et seq.*, in particular 333). For further analysis, see in particular H. Welzel, 'Anmerkung OGH(BrZ) Monatsschrift des Deutschen Rechts (MDR) 1949, 370', in *MDR* 1949, 373–376, at 374–375 (in favour of *supra*-legal necessity); P. Bockelmann, 'Zur Schuldlehre des Obersten Gerichtshofs', 63 *ZStW* (1951) 13–46, at 42 *et seq.*; K.-A. Storz, *Die Rechtsprechung des OGH in Strafsachen* (1969) 29 *et seq.*; C. Roxin, *Strafrecht, Allgemeiner Teil I* (3rd edn., 1997) § 16 mn. 31 *et seq.*; 22 mn. 147 *et seq.*

[32] OGHSt 1, 333; OGHSt 2, 117 (121). Also against necessity as a *justification*, Welzel, *supra* note 31, at 374–375; Eb. Schmidt, 'Anmerkung zu OGHBrZ. Süddeutsche Juristenzeitung (SJZ) 1949, columns 347 et seq.', in *SJZ* 1949, columns 559–570, at 563 *et seq.*

[33] OGHSt 1, 321 (334). This view is shared by K. Peters, 'Zur Lehre von den persönlichen Strafausschließungsgründen', *Juristische Rundschau* (*JR*) (1949) 496–502, at 497.

[34] OGHSt 2, 393 (394 f.).

[35] See 36 ILR (1968), 14–17 (summary), 277–344. For the decision of the District Court, see 36 ILR, 5–14 (summary), 18–276.

subordinate in case of non-compliance with an order and, in subjective terms, that the subordinate see no other possibility to save his life than to obey the order.[36] In fact, this latter requirement was negated with regard to Eichmann because he had, according to the Court, executed his tasks with great ambition and self-interest.[37] In contrast, in a recent decision, the Supreme Court allows for the invokation of the defence of necessity with regard to interrogation methods amounting to torture employed by the General Security Service in the fight against terrorism: 'the investigator may find refuge under the 'necessity' defence's wings (so to speak), provided this defence's conditions are met by the circumstances of the case.'[38] Unfortunately, the Court does not develop these conditions.

In the trial against *Paul Touvier* the defendant argued before the Cour d'Appel of Paris that he only played a minor role in the killing of seven Jews imputed to him. He claimed that he had to bow to the 'unavoidable' and that because of his intervention the number of victims was reduced from 30 to 7 persons.[39] He added to his defence before the Cour d'Appel of Versailles and the Cour de Cassation, that he was exposed to the pressure of the German occupation power. Thus, he invoked the defence of duress.[40] The Cour de Cassation dismissed these arguments for various reasons. First, a balancing of life against life is not possible since all lives are of equal value and no life prevails over another. Second, in general, a member of the militia cannot be justified in invoking necessity since his or her membership in the militia was *voluntary* and it was known that it implied a submission to the wishes of the Nazi occupation power. Finally, the Court argued that Touvier played an *active* role in the commission of the crimes and in fact acted without any external pressure:

> aucun fait justificatif fondé sur la nécessité ou la légitime défense d'autrui ne peut être invoqué par un responsable de la Milice comme Touvier dont les fonctions le mettaient naturellement dans l'obligation de *satisfaire aux exigences des autorités nazies*; qu'ils relèvent, à cet égard, qu'il avait fait le *libre choix* d'appartenir à la Milice, dont un de mots d'ordre était de "lutter contre la lèpre juive', et d'exercer une activité qui impliquait une coopération habituelle avec le Sicherheitsdienst ou la Gestapo;

[36] Supreme Court, *supra* note 35, para. 15 (at 318 referring to *US v. Ohlendorf et al.*).

[37] See District Court, *supra* note 35, para. 216, 228, 231; Supreme Court, *supra* note 35, para. 15, at 313, 318–319.

[38] *Public Committee against Torture in Israel et al. versus the State of Israel et al.*, Judgment of 6 September 1999, <www.court.gov.il/mishpat/html/en/system/index.html>, para. 38, see also para. 35.

[39] Decision of the *Chambre d'Accusation* of the Paris Cour d'Appel of 13 April 1992, in part reprinted in 100 ILR (1995) 339–340, 341–358 (also in F. Bédarida, *Touvier* (1996) 314–321), here at 339, 344, 347. See also the review decision of 27 November 1992 (*Bulletin des Arrêts de la Cour de Cassation, chambre criminel = Bull. crim.* 1992, 1082–1116 = 100 *ILR* (1995) 341, 358–364) and the new decision of the Chambre d'Accusation of the Versailles Cour d'Appel of 2 June 1993 (Bédarida, *op. cit.*, 322–350), which was appealed by Touvier unsuccessfully (Cour de Cassation of 21 October 1993, in *Bull. crim.* (1993) 770–774).

[40] Cour de Cassation, 21 October 1993, *supra* note 39, at 773–774.

qu'ils en concluent que Paul Touvier aurait . . . prêté un *concours actif* à l'exécution des faits criminels . . .; . . . *hors de toute contrainte*.[41]

According to the Canadian Supreme Court in *Finta,* a person can be forced to obey orders either for natural reasons constituting a danger ('necessity') or for external pressure imposed on this person ('coercion'). In both cases we deal with a situation of *compulsion* which, as was stated in the *Einsatzgruppen* case, requires 'imminent, real, and inevitable threats'.[42] Thus, even the execution of a manifestly illegal order may lead to the exclusion of criminal responsibility on the basis of compulsion or duress provided that the accused had no other choice than to obey the order. In such a case, the accused lacks, according to the Supreme Court, the requisite 'culpable intent'. Duress operates as a kind of subsidiary defence. This applies particularly in a military hierarchy which in conceptual terms is always 'coercive' to a certain extent. This reasoning is also supported by the dissenting opinion.[43]

In the case of a former SS member, *Priebke*, a German, the defendant's claim that the existence of a superior order, with which he complied, entitled him to the defence of duress, was dismissed by an Italian Military Court,[44] since non-compliance would not have put Priebke in a life-threatening situation. As he would not have faced the death penalty, but only a transfer to the front or a similar measure, he was obliged to refuse to execute the order. On appeal, the Italian Supreme Court followed this view.[45]

(c) *ICTY: The* Erdemović *case*

The first judgement in the *Erdemović* case, decided on 29 November 1996,[46] was based on a guilty plea of the accused which, however, was not unequivocal.

[41] Ibid., at 774 (emphasis added).

[42] Cf. *Supreme Court*, CCC (3d) 88 (1994) 417–544 (reprinted in 104 ILR (1997) 284 *et seq.*) at 514 *et seq.*

[43] Ibid., at 470.

[44] *Tribunale militare di Roma*, sentence of 1 August 1996, laid down 30 September 1996, at 79–81 (on file with the author).

[45] Corte suprema di cassazione, sentence of 16 November 1998, at 30–31. See also F. Martines, 'The Defences of Reprisals, Superior Orders, and Duress in the Priebke Case before the Italian Military Tribunal', 1 *YIHL* (1998) 355 *et seq.*

[46] ICTY Trial Chamber I, Sentencing Judgment, *Dražen Erdemović*, IT-96-22-T, 29 November 1996. Crit. S. Yee, 'The Erdemović Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia', 26 *Georgia Journal of International and Comparative Law* (1997) 291 *et seq.*; K. Oellers-Frahm and B. Specht, 'Die Erdemović Rechtsprechung des Jugoslawientribunals: Probleme bei der Entwicklung eines internationalen Strafrechts, dargestellt am Beispiel des Notstands', 58 *Zaö RV* (1998) 392 *et seq.*; D. Turns, 'The International Criminal Tribunal for the former Yugoslavia: The Erdemović Case', *ICLQ* (1998) 466–467. See also the interesting solution of the case according to US and German law by J. C. Nemitz and S. Wirth, 'Der aktuelle Fall: Legal Aspects of the Appeals Decision in the Erdemović-case: The Plea of Guilty and Duress in International Humanitarian Law', 11 *Humanitäres Völkerrecht* (1998) 43–53.

Erdemović admitted the charges but, at the same time, invoked the defence of duress, stating:

> Your honour—I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too.' I am not sorry for myself but for my family, my wife and son who then had nine months, and I could not refuse because then they would have killed me.[47]

Thus, the major substantive issue in the decision was whether the guilty plea of Erdemović could be considered unequivocal despite the invocation of duress. While obedience to superior orders is explicitly rejected as a defence by Article 7(4) of the ICTY Statute, the Statute is silent on duress. *Trial Chamber I*—relying heavily on the UNWCC case law—recognized duress as a defence if certain strict requirements are fulfilled.[48] In particular, there must be evidence of a superior order which puts extreme pressure on the accused and leaves him no moral choice other than to obey. On the other hand, it was argued that the lives at stake are never fully equivalent in the case of crimes against humanity, since the victims of the crime are representative of humanity as a whole. In the end, the Chamber held that circumstances which would fully exonerate the accused of responsibility had not been proven. Consequently, the guilty plea was considered valid.

The Trial Chamber's assessment of duress as a defence was rejected, however, by the Appeals Chamber by a 3 to 2 majority.[49] It stated, 'duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings'.[50] The reasoning for this decision can be found in the deliberations of Judges McDonald and Vohrah; the counter-arguments, which in the result follow the Trial Chamber, can be found in the dissenting opinions of Judge Cassese and Judge Stephen.[51] Both the majority and the dissenting opinions agreed that acting on superior order must be distinguished from duress. Although an order can constitute a factual circumstance of

[47] Trial Chamber I, *supra* note 46, para. 10.

[48] Trial Chamber I, *supra* note 46, para. 16–20.

[49] ICTY Appeals Chamber, *Prosecutor v. Dražen Erdemović*, Judgment, IT-96-22-A, 7 October 1997; see O. Swaak-Goldman, 'Prosecutor v. Erdemović, Judgement. Case No. IT-96-22-A', *AJIL* (1998) 282–287. Critically P. Rowe, 'Duress as a Defence to War Crimes after Erdemović: A Laboratory for a Permanent Court?', 1 *YIHL* (1998) 213, 215; Oellers-Frahm and Specht, *supra* note 46, at 399 *et seq.* (408, 412) who agree with the result but criticize the method of the finding, following insofar Cassese; in favour of Cassese also Turns, *supra* note 46, at 470 *et seq.* (472). For a methodical analysis, see Kreß, *supra* note 2, who considers Cassese's argumentation as too formal (at 611) and examines the policy considerations of McDonald and Vorah as alternative sources (615 *et seq.*) agreeing in substance, however, with Cassese (621–22).

[50] Appeals Chamber, *supra* note 49, para. 19 and disposition (4).

[51] See McDonald and Vohrah, *Appeals Chamber*, *supra* note 49, para. 59 *et seq.* (66–67, 72, 75, 78, 88); similar Li, op. cit., paras. 5, 8, 12. For the dissenting opinion, see Cassese, op. cit., para. 11 *et seq.* (12, 16–17, 21 *et seq.*, 41 *et seq.*, 49–50); similar Stephen, op. cit., para. 23 *et seq.* (66).

duress, its absence 'does not mean that duress as a defence must fail'.[52] The majority of the Appeals Chamber, however, did not share the Trial Chamber's conclusion that duress constitutes a complete defence. According to the Appeals Chamber, the UNWCC case law did not specifically address the question of whether duress is a defence in case of the killing of innocent persons.[53] There is no rule on this point in customary international law in this respect, in particular the jurisprudence of the post–World War II Military Tribunals did not establish such a rule.[54] The opposing positions of (traditional) common law on the one hand—against a complete defence—and 'civil law' on the other—in favour of a complete defence under certain conditions—cannot be reconciled.[55] As a general principle it can only be stated that a person acting under duress deserves less punishment since his or her behaviour is less blameworthy.[56]

The central conclusion of the majority opinion that current international criminal law does not contain a rule about duress in the specific case of the killing of innocent persons is shared by the dissenting opinions.[57] However, the consequences drawn from this conclusion are different. The majority seeks a solution looking at the 'broader normative purposes [of the law] in light of its social, political and economic role' and taking into account 'considerations of social and economic policy'.[58] Starting from the premiss that 'international humanitarian law should guide the conduct of combatants and their commanders', the majority opinion argues for 'legal limits as to the conduct of combatants and their commanders' and—in the concrete case—rejects duress as a defence for combatants who have killed innocent persons;[59] otherwise, humanitarian law would be undermined.[60] Judge Cassese considers such reflections 'extraneous to the task of our Tribunal' and—as policy considerations—contrary to the *nullum crimen* rule.[61] In this view, if there is no specific rule for a concrete case the general rule established by the Trial Chamber on the basis of the case law has to be applied. As a result, duress must constitute a defence under four strict conditions:

(1) there must be an immediate threat of severe and irreparable harm to life or limb;
(2) there was no adequate means of averting such evil;
(3) the defence act was not disproportionate to the evil threatened (lesser of two evils);

[52] McDonald and Vohrah, *supra* note 51, para. 35; Cassese, *supra* note 51, para. 15.
[53] McDonald and Vohrah, *supra* note 51, para. 42.
[54] Ibid., para. 55.
[55] Ibid., para. 72.
[56] Ibid., para. 66.
[57] Cf. Cassese, *supra* note 51, para. 11, 15, 41.
[58] McDonald and Vohrah, *supra* note 51, para. 75, 78.
[59] Ibid., para. 80; similar Li, *supra* note 51, para. 8.
[60] McDonald and Vohrah, *supra* note 51, para. 88.
[61] Cassese, *supra* note 51, para. 11, 49.

(4) the duress situation was not voluntarily brought about by the person coerced.[62]

Although it is difficult to meet the requirements of duress in the case of the *individual* killing of innocent human beings, in particular for the lack of proportionality of the defence act,[63] it is possible in a case of participation in a *collective* killing. In such a case, as in the *Erdemović* case, the crime would have been committed *no matter what*. In other words, the harm caused by the accused was not greater than the harm that would have been caused *in any case* by another person, if the accused had not obeyed the order.[64] Cassese's view is based on the idea of the purpose of punishment: he wants to punish only a behaviour that is 'criminal, i.e. morally reprehensible or injurious to society, not . . . behaviour which is "the product of coercion that is truly irresistible" '.[65] If one follows this view, the final decision depends on the impact which the accused's conduct has or does not have on the fate of the victim. Since, in the present case, the accused's conduct did not change the fate of the victims, the defence of duress can be granted if the abovementioned conditions are met. There is no need to punish the behaviour of the accused which was not morally reprehensible or injurious to society and, which was the product of a truly irresistible coercion.

In a similar vein, Judge Stephen questions the common law duress rule with regard to murder on the basis of a thorough analysis of the case law and academic writings.[66] He shows that even the limited exception of duress as a defence in cases where an accused had to choose between his own life and the life of another is itself much criticized.[67] Still more importantly, this was not the situation in the *Erdemović* case since the choice presented to the accused 'was not that of one life or another but that of one life or both lives'.[68] In other words, even if Erdemović had refused to kill the innocent victims, they would have been killed by other soldiers and, in addition, Erdemović himself would also have been killed. Thus, the concept of equivalence which lies at the core of the common law exception and requires from a person acting under duress 'rather to die himself than kill an innocent'[69] is not applicable in the present case. Nor can the principle of proportionality be invoked since the accused had no choice between resisting the duress and saving innocent lives or complying with the order and taking them. Rather,

[62] Cassese, *supra* note 51, paras. 16–17, 41, 44, 50.

[63] Ibid., paras. 12, 43, 50.

[64] Ibid., para. 43. This argumentation, based on the Italian case *Masetti*, was explicitly rejected by McDonald and Vohrah (*supra* note 51, paras. 79–80) as an expression of utilitarian logic.

[65] See Cassese, *supra* note 51, paras. 47–48, citing the American Law Institute's Commentary on the Model Penal Code.

[66] Stephen, *supra* note 51, para. 23 *et seq.*

[67] Ibid., paras. 29 *et seq.*, 36 *et seq.* (36–37, 49), in particular referring to *Lynch v. D.P.P. for Northern Ireland* [1975] AC 653 at 704.

[68] Ibid., para. 33, see also paras. 52, 57, 62, 64.

[69] See ibid., paras. 31, 33 quoting Lord Hale.

'where resistance to the demand will not avert the evil but will only add to it', the person under duress also suffers that evil and proportionality does not enter into the equation.[70] Consequently, in the present case the principle which supports the exclusion of duress as a defence is absent and 'no violence is done to the fundamental concepts of common law by the recognition in international law of duress as a defence in such cases'.[71] The protection of innocent lives is not achieved 'by the denial of a just defence to one who is in no position to effect by his own will the protection of innocent life'.[72] The question whether duress is a defence in cases involving the taking of innocent lives 'is a matter for another day and another case'.[73] We will return to these important and cogent dissenting opinions when analysing Article 31(1)(d) of the Rome Statute.

It was recognized by all Chambers seized with the case that, in any event, duress must be taken into account in mitigation of punishment. Trial Chamber I considered mitigation possible if the accused acted against his or her will, since in such circumstances his or her degree of responsibility is reduced. This view is shared by the Appeals Chamber.[74] Trial Chamber I, however, did not concede a mitigation of punishment for *this* reason in the facts of the particular case, since evidence was not sufficient to prove a superior order or a situation of duress.[75] However, Trial Chamber II, seized with the case after the successful appeal, finally sentenced Erdemovi_ to five years imprisonment,[76] half the initial sentence handed down by Trial Chamber I (10 years). Unlike Trial Chamber I, it considered his situation as a subordinate receiving orders as a mitigating factor. In fact, it also confirmed the importance of the recognition of duress as a defence when it stated:

> The evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realized that he had no choice in the matter: he had to kill or had to be killed.[77]

[70] Ibid., para. 62.
[71] Ibid., para. 64.
[72] Ibid., para. 65.
[73] Ibid., para. 64.
[74] McDonald and Vohrah, *supra* note 51, paras. 66, 82 *et seq.*; Li, *supra* note 51, para. 12.
[75] McDonald and Vohrah, *supra* note 51, para. 89 *et seq.* A mitigation was granted for other reasons, *inter alia*, because of Erdemović's age at the time of commission (23 years), his inferior rank and his repentance (ibid., after para. 111).
[76] ICTY Trial Chamber II, *Prosecutor v. Dražen Erdemović*, Sentencing Judgment, IT-96-22-T*bis*, 5 March 1998, para. 8, 23, reprinted in 37 *ILM* (1998) 1182 *et seq.*
[77] Trial Chamber II, *supra* note 76, para. 17 (p. 19). It must not be overlooked, however, that the reduction of the penalty was also due to the fact that Erdemovi_ had changed his plea from guilty of crimes against humanity to guilty of war crimes.

B. Efforts of Codification

1. Official Efforts

In general, official codification efforts dealt only with the defences of superior order and—also as a defence in the broad sense—the act of State doctrine; other defences were hardly mentioned. In fact, only the ILC initiated a more profound discussion of other defences. In 1954, for the first time, the ILC in its Draft Code recognized self-defence albeit only indirectly in connection with crimes against peace.[78] In 1991, the ILC's Draft Code of Crimes proposed the following Article 14:

> Defences and extenuating circumstances
> 1. The competent court shall determine the admissibility of defences under the general principles of law, in the light of the character of each crime.
> 2. In passing sentence, the court shall, where appropriate, take into account extenuating circumstances.

The Draft Code 1996 did not alter this provision substantially; in did, however, split it into two parts (Articles 14 and 15). In sum, the ILC's efforts did not produce concrete results for the simple reason that the members of the ILC could not agree on the definition and admissibility of individual defences.[79]

As to *self-defence,* some ILC members argued that it was not admissible at all, given the crimes in question.[80] Others proposed admitting it only in certain circumstances, such as in cases of aggression and war crimes,[81] referring to Article 51 of the UN Charter.[82]

The defences of *coercion*, *necessity*, and *force majeure* should not be admissible in cases of crimes against humanity. Accordingly, these defences have to be distinguished in that coercion and *force majeure* do not leave a free choice to the actor, while necessity does not absolutely exclude the actor's free will. In any case, the

[78] See 1954 Draft Code, Art. 2(1): 'Any act of aggression, including the employment by the authorities of a State of armed force against another State for any purpose other than national or collective *self-defence* . . .' (emphasis added).

[79] *YILC* (1991) Vol. II/2, pp. 100–101. Crit. A. Eser, 'The Need for a General Part', in M. C. Bassiouni (ed.), *Commentaries on the International Law Commission's 1991 Draft Code of Crimes against the Peace and Security of Mankind* (1993) 48 *et seq.*; P.H. Robinson, 'Defences and Extenuating Circumstances', ibid., 199 *et seq.* Defending the ILC's position: C. Tomuschat, 'Die Arbeit der ILC im Bereich des materiellen Völkerstrafrechts', in G. Hankel and G. Stuby (eds.), *Strafgerichte gegen Menschheitsverbrechen: Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (1995) 270–294, at 288.

[80] *YILC* (1987) Vol. I, pp. 9–10, 14, 16, 17, 24, 25, 28, 34.

[81] Cf. the proposal of the Special Rapporteur, Doudou Thiam, Fifth Report (A/CN.4/404), in *YILC* (1987) Vol. II/1 (1989) at 7. See also his Fourth Report (A/CN.4/398), *YILC* (1986) Vol. II/1, at 81; and *YILC* (1986) Vol. II/2, at 52–53 where he stated, however, that self-defence is never applicable in case of war crimes.

[82] *YILC* (1986) Vol. II/2, pp. 52–53; (1987) Vol II/2, p. 11 (para. 45–46); (1991) Vol. II/2, pp. 100–101.

defences require a serious and immediate danger, caused by a third person or natural events, and the proportionality of the actor's reaction.[83] Other ILC members expressed the view that coercion depends on the nature of the compulsion; this must be absolute.[84] Further it was stated that necessity is completely irrelevant[85] and *force majeure* already excludes the *actus reus* because of the lack of a positive act.[86]

In the deliberations preceding the Draft Code 1996, 'self-defence', 'duress or coercion', 'mistake of fact', and—in a limited way—'military necessity' were recognized as possible defences.[87]

Accordingly, *self-defence* must be distinguished from Article 51 of the UN Charter. While this article justifies a *collective* or State reaction, the ILC Draft Code refers to the justification of *individual* acts. The two defences are related in that the justification of an act of aggression by a State always exempts the individuals involved from criminal responsibility since 'aggression by a State is a *sine qua non* for individual responsibility for a crime of Aggression'. In general, individual self-defence is to be admitted if it was necessary to prevent an immediate danger to life or physical integrity.[88]

The defence of *coercion* is of particular importance in connection with military orders. It was controversial, however, whether the killing of another person may be admitted even in the case of extreme coercion. In the view of the Special Rapporteur, coercion entails only an exemption from responsibility, while self-defence negates the wrongfulness of a certain act.[89]

2. Private Efforts

Private proposals have been more concrete. The unofficial (updated) Siracusa Draft[90] provides:

[83] *YILC* (1986) Vol. II/2, p. 51; also (1986) Vol. I/1, pp. 75–76.
[84] *YILC* (1987) Vol. II/2, p. 11. See also *YILC* (1987) Vol. I, pp. 21 (Mr Graefrath), 33 (Mr Shi).
[85] *YILC* (1987) Vol. II/2, p. 11.
[86] *YILC* (1987) Vol. I, p. 10 (Mr Tomuschat). See also Thiam, Fifth Report, *supra* note 81, at 7–8.
[87] Report of the ILC on the work of its forty-eight session, 6 May–26 July 1996. UN GAOR, 51st Sess., Supp. No. 10 (A/51/10) at 75 *et seq.*, para. 7 *et seq.* The commentary refers primarily to the Nuremberg and UNWCC case law (Law Reports TWC).
[88] Report ILC (1996), *supra* note 87, at 75–76. See also *YILC* (1994) Vol. II/2, p. 84 (para. 178); Thiam, Twelfth Report (A/CN.4/460), para. 159.
[89] Report ILC (1996), *supra* note 87, at 76 *et seq.*; see also *YILC* (1994) Vol. I, p. 147 (paras. 21–22); (1994) Vol. II/2, p. 87 (paras. 206–207). See, on the other hand, Thiam, Twelfth Report (A/CN.4/460), para. 159, according to whom coercion and necessity have the same requirements: present and immediate danger, not caused by the actor's behaviour, proportionality between the protected and violated legal interest.
[90] Cf. Association Internationale de Droit Pénal ('AIDP')/International Institute of Higher Studies in Criminal Sciences ('ISISC')/Max Planck Institute for Foreign and International Criminal Law ('MPI') *et al.*, 1994 ILC Draft Statute for an International Criminal Court with suggested modifications, prepared by a committee of experts, Siracusa/Freiburg/Chicago, 15 Mar.

Article 33-4 Insanity and intoxication
1. A person is legally insane when at the time of the conduct which constitutes a crime, he suffers from a mental disease or mental defect, resulting in his lacking substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and such mental disease or mental defect caused the conduct constituting a crime.
2. A person is intoxicated or in a drugged condition when under the effect of alcohol or drugs at the time of the conduct which would otherwise constitute a crime he is unable to formulate the mental element required by said crime. Such a defence shall not apply to a person who engages in voluntary intoxication with the pre-existing intent to commit a crime. With respect to crimes requiring the mental element of recklessness, voluntary intoxication shall not constitute a defence.

Article 33-12 Self Defence, defence of others and defence of property
1. Self defence consists in the use of force against another person which may otherwise constitute a crime when and to the extent that the actor reasonably believes that such force is necessary to defend himself or anyone else against such other person's imminent use of unlawful force, and in a manner which is reasonably proportionate to the threat or use of force.
2. Self defence, in particular defence of property, shall not exclude punishment if it causes damage disproportionate to the degree of the danger involved or the interest to be protected by the defence act.

Article 33-13 Necessity, coercion, duress[91]
1. Necessity excludes punishment when circumstances beyond a person's control are likely to create an unavoidable private or public harm, and that person engages in criminal conduct only to avoid the greater imminent harm likely to be produced by such circumstances. This defence does not include deadly force.
2. A person acts under coercion when he is compelled by another under an imminent threat of force or use of force directed against him or another, to engage in conduct which may otherwise constitute a crime which he would not otherwise engage in, provided that such coerced conduct does not produce a greater harm than the one likely to be suffered and is not likely to produce death.
3. Military necessity may exclude punishment only as provided by the international law of armed conflict.

Further, the efforts of the International Law Association (ILA) led to the adoption of proposals for defences at the 63rd Conference and in a revised version at the 64th Conference.[92] As exemptions from criminal responsibility, the ILA recog-

1996 ('Updated Siracusa Draft'). For the 'General Part Draft' and the earlier Siracusa Draft, see <http://www.iuscrim.mpg.de/de/forsch/straf/referate/sach/sach_index.html>.

[91] It is confusing that the Siracusa Draft lists 'coercion' and 'duress' in the alternative, since these terms are used identically and essentially mean the same. Therefore, the original Draft of Eser, Lagodny, Koenig, and Triffterer *et al.* proposed an Art. 33-1 on 'necessity/coercion *or* duress' (emphasis added).

[92] Protocol II to the Statute for an International Criminal Court and to the Statute for an International Commission of Criminal Inquiry containing defences, in ILA, Report of the Sixty-Third Conference held at Warsaw, August 21st to August 27th, 1988 (1988) 391 *et seq.*; for the revised version, see ILA, Report of the Sixty-Fourth Conference held at Broadbeach, Queensland, Australia, 20 to 25 August 1990 (1991) 185–187.

nized immaturity, mental disorder, and diminished capacity. The proposal on *mental disorder* reads:

> Everyone is exempt from criminal liability for his conduct if as a result of mental disease or defect he lacks substantial capacity either to understand the criminal wrongfulness of his conduct or to act in accordance with this understanding at the time of commission of the offence.

Intoxication—like automatism, irresistible force, mistake of fact or law, and duress—is considered an excuse:[93]

> Everyone is excused from criminal liability for an offence committed by reason of intoxication, by alcohol or drugs, caused against his will.

Self-defence and 'lawful *necessity*' are considered justifications

> (1) Self Defence
> (a) Everyone is justified in using no more force than necessary to prevent a present unlawful attack on himself or on another, provided the force used by him is proportional to the harm apprehended from the unlawful attack.
> (b) Exceeding the bounds of self-defence by the perpetrator may not be punished if caused by consternation, fear or fright.
> (c) No one is justified in using force which he knows is likely to cause death or serious bodily harm in defending himself against acts, including illegal arrest, done in good faith for the enforcement or administration of law. This provision is applicable notwithstanding the foregoing paragraph.
>
> (2) Protection of property
> Everyone is justified in using force necessary to prevent another from attacking unlawfully his or another's possession . . .; however, he is not entitled to use force which he knows is likely to cause death.
>
> (3) Lawful necessity
> Whoever commits an act out of necessity arising from circumstances other than unlawful threat or attack does not act unlawfully provided
> (i) that he acted to avert an imminent and otherwise unavoidable danger of harm to life, health, liberty of a person or property,
> (ii) that such harm substantially outweighed the harm resulting from that offence, and
> (iii) that the act is an appropriate means to avert the danger.

Duress, on the other hand, is considered an excuse:

> Everyone is excused from criminal liability for an offence committed by way of reasonable response to threats or dangers of serious and immediate bodily harm to himself or another person unless his conduct manifestly endangers life or seriously violates bodily integrity. The rule does not apply if the perpetrator was himself the cause of the danger.

[93] On the (necessary) distinction between justification and excuse, see *infra* D.1. notes 188 *et seq.*

C. Comparative Overview

1. Mental Disease or Defect and Intoxication

Mental disease or defect and intoxication may be considered to exclude the responsibility of the individual actor in the sense of excuses. However, a clear distinction between mental disease or defect, on the one hand, and intoxication, on the other, has to be made. While the former are generally explicitly recognized as grounds excluding responsibility, the latter is not. Let us take a look at a few representative provisions. The US Model Penal Code ('MPC'), § 4.01, reads:

> Mental disease or defect excluding responsibility
> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law.
> (2) As used in this Article, the terms 'mental disease or defect' do not include any abnormality manifested only by repeated criminal or otherwise antisocial conduct.[94]

According to § 2.08 para. 1 MPC *intoxication* is only a defence if it negates an element of the offence. This is only the case if an intoxication is not self-induced[95] or if it is pathological and if:

> by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of the law. (§ 2.08 (4)).

Similar to the self-induced exception of the MPC, the British Draft Criminal Code Bill ('DCCB') treats a person who was 'voluntarily' intoxicated—with regard to reckless conduct—'as having been aware of any risk of which he would have been aware had he been sober.'[96] Also, the Australian CCA 1995 distinguishes between involuntary and self-induced intoxication and only excludes criminal responsibility in the former.[97] The Canadian Draft Criminal Law Bill retains liability if the intoxicated person causes the death of another person.[98]

In contrast, Article 122-1 of the French Nouveau Code Penal of 1994 ('NCP') does not explicitly mention intoxication:

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[94] For a similar provision, see § 3(6) of the Canadian Draft Criminal Law Bill (Law Reform Commission of Canada, *Report 31: Recodifying Criminal Law* (1987) at 33). See also the Australian Criminal Code Act 1995 (hereinafter 'CCA 1995'), division 7, para. 3: 'Mental impairment' as a circumstance involving lack of capacity and excluding criminal responsibility (available at <www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/>).

[95] See § 2.08(2) and American Law Institute, MPC commentary (1985) at 357.

[96] The Law Commission, *A Criminal Code for England and Wales,* Vol. 1. *Report and Draft Criminal Code Bill* (1989) § 22, at 52.

[97] See CCA 1995, *supra* note 94, § 4.2(6) and (7) as well as § 8, in particular 8.5.

[98] See § 3(3), *supra* note 94.

> N'est pas pénalement responsable la personne qui était atteinte, au moment des faits, d'un trouble psychique ou neuropsychique ayant aboli son discernement ou le contrôle de ses actes.
>
> La personne qui était atteinte, au moment des faits, d'un trouble psychique ou neuropsychique ayant altéré son discernement ou entravé le contrôle de ses actes demeure punissable; toutefois, la juridiction tient compte de cette circonstance lorsqu'elle détermine la peine et en fixe le régime.

Similarly, § 20 of the German Strafgesetzbuch of 1975 ('StGB')[99] states:

> Lack of criminal capacity because of mental disorder
> A person is not criminally responsible if at the time of the act, because of a psychotic or similar serious mental disorder, or because of a profound interruption of consciousness or because of feeblemindedness or any other type of serious mental abnormality, he is incapable of understanding the wrongfulness of his conduct or of acting in accordance with this understanding.

Although neither the French nor the German provisions explicitly recognize intoxication as an excuse[100] the prevailing opinion holds that a 'trouble psychique ou neuropsychique' or a 'psychotic or similar serious mental disorder' can be caused by intoxication and, on that basis, criminal responsibility may be excluded.[101]

A more radical approach is taken by the criminal law of countries with a strong Arab or Moslem influence. The Turkish Criminal Code, for example, bars criminal acts committed in a state of self-induced intoxication from the general exclusion of criminal responsibility.[102] Similarly, the new Russian Criminal Code of 1996 emphasizes the criminal responsibility of persons who committed crimes in a state of intoxication.[103] These provisions point in the direction of provisions like Article 20(2) of the new Spanish Código Penal of 1995 ('CP') which, although in principle recognizing intoxication as a ground for excluding criminal responsibility, do not extend to the case of self-induced or voluntary intoxication.[104]

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[99] Translation by J. J. Darby, *The American Series of Foreign Penal Codes*, Vol. 28 (1987).

[100] See also the similar Art. 31 of the new Polish Criminal Code of 1 September 1998, in T. Weigend (ed. and translator), *Das polnische Strafgesetzbuch/Kodeks karny* (1998) 48.

[101] Cf. F. Desportes and F. Le Gunehec, *Le Nouveau Droit Penal I* (5th edn., 1998) 506; H. Tröndle and T. Fischer, *Strafgesetzbuch und Nebengesetze* (49th edn., 1999) § 20 mn. 9

[102] See Art. 48(2), in S. Tellenbach (ed. and translator), *Das Türkische Strafgesetzbuch/ Türk Ceza Kanunu* (1998) at 28.

[103] See Art. 23, in F.-C. Schroeder and T. Bednarz (eds. and translators), *Strafgesetzbuch der russischen Föderation* (1998) 51.

[104] Están exentos de responsabilidad criminal:

1. El que al tiempo de cometer la infracción penal, a causa de cualquier anomalía o alteración psíquica, no pueda comprender la ilicitud del hecho o actuar conforme a esa comprensión.

El trastorno mental transitorio no eximirá de pena cuando hubiese sido provocado por el sujeto con el propósito de cometer el delito o hubiera previsto o debido prever su comisión.

2. El que al tiempo de cometer la infracción penal se halle en estado de intoxicación plena por el consumo de bebidas alcohólicas, drogas tóxicas, estupefacientes, sustancias psicotrópicas u otras que produzcan efectos análogos, siempre que no haya sido *buscado con el propósito de cometerla* o no se

The Standard Penal Code for Latin America[105] also recognizes intoxication as 'severe disturbance of conscience' but makes an exception for self-induced intoxication.

In sum, an exemption from responsibility for mental disease or disorder is generally recognized; an exemption from responsibility for intoxication is only possible if the intoxication was not self-induced or, at least, not voluntarily caused with the intention or consciously running the risk of committing a crime while in that state. In this respect, modern legislation and doctrine follow the *actio libera in causa* doctrine.[106] The comparative overview also makes clear that the decision whether or not to grant an exemption from responsibility (excuse) in the case of intoxication depends to a great extent on the socio-cultural context of the society concerned, in particular its attitude to alcohol.

2. Self-defence

The MPC contains various provisions on the justifiable use of force (§§ 3.04 to 3.08). The fundamental provision (§ 3.04 para. 1) reads:

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hubiese previsto o debido prever su comisión, o se halle bajo la influencia de un síndrome de abstinencia, a causa de su dependencia de tales sustancias, que le impida comprender la ilicitud del hecho o actuar conforme a esa comprensión [Emphasis added].

3. El que, por sufrir alteraciones en la percepción desde el nacimiento o desde la infancia, tenga alterada gravemente la conciencia de la realidad.

[105] Translated by Jose M. Canals and Henry Dahl, 17 *Am. J. Crim. L.* (1990) 263 (emphasis added):

Art. 19(1)

No responsibility attaches to whoever, at the time of the act or omission, and due to mental illness, incomplete or retarded mental development, or to a severe disturbance of conscience, lacked the capacity to understand the unlawfulness of his act or to conduct himself in accordance with said understanding.

Article 21 para. 1

When the severe disturbance of conscience referred to in Article l9 was *self-induced* by the actor, his responsibility will depend on the criminal intent, recklessness or negligence present at the time when the severe disturbance of conscience was induced.

Article 22

The severe disturbance of conscience caused by alcoholic beverages is ruled by Articles 19 and 20 if their consumption was accidental or fortuitous. Article 21 applies if their consumption was *intentional* or *careless*, or to *facilitate* the commission of the act or to create an excuse.

Punishment will not be attenuated simply because the person in question was only partially able, at the time of the act or omission, to understand the unlawfulness of the act or to conduct himself in accordance with said understanding, if the disturbance of conscience was caused by the intentional or careless consumption of alcoholic beverages, or in order to facilitate the commission of the act or to devise an excuse.

This Article and the three preceding ones will apply when the severe disturbance of conscience resulted from the use of narcotic, hallucinatory or other similar substances.

[106] See Art. 20(2) *CP* as quoted in the text; also Art. 12 Swiss Penal Code and Art. 92 Italian Penal Code; also K. Ambos, 'Der Anfang vom Ende der actio libera in causa?', 50 *Neue Juristische Wochenschrift* (1997) 2296–2298.

> *Use of force justifiable for the protection of the person.* . . . the 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.'[107]

According to § 3.04 paragraph 2(b) the use of deadly force is only justified if 'the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat'; it is not justifiable if the actor provoked the use of force against himself or knows that he can avoid the use of force with complete safety (paragraph 2(b)(i) and (ii)). The use of force for the protection of other persons is justified under basically the same circumstances (§ 3.05). The use of force for the protection of property is justifiable 'when the actor believes that such force is immediately necessary . . . to prevent or terminate an unlawful entry or other trespass upon land . . . or the unlawful carrying away of . . . property' (§ 3.06 paragraph 1 (a)); or 'to effect an entry or re-entry upon land or to retake . . . property' provided that the actor is entitled to the property and acts 'immediately or on fresh pursuit' (paragraph 1(b)). The British DCCP also recognizes self-defence for the protection of oneself or another from harm or for the protection of property; however, the use of deadly force is not dealt with.[108] Also, the Canadian Draft Bill recognizes 'defence of the person' but uses an objective standard.[109] The Australian CCA 1995 provides for a rule on self-defence using a mixed subjective-objective standard.[110]

The French NCP contains the grounds for the exclusion of criminal responsibility in chapter II ('Des causes d'irresponsabilité ou d'atténuation de la responsabilité'):

> Article 122-5
> N'est pas pénalement responsable la personne qui, devant une atteinte injustifiée envers elle-même ou autrui, accomplit, dans le même temps, un acte commandé par la nécessité de la légitime défense d'elle-même ou d'autrui, sauf s'il y a disproportion entre les moyens de défense employés et la gravité de l'atteinte.
> N'est pas pénalement responsable la personne qui, pour interrompre l'exécution d'un crime ou d'un délit contre un bien accomplit un acte de défense, autre qu'un homicide volontaire, lorsque cet acte est strictement nécessaire au but poursuivi dès lors que les moyens employés sont proportionnés à la gravité de l'infraction.
>
> Article 122-6
> Est présumé avoir agi en état de légitime défense celui qui accomplit l'acte:
> (1) Pour repousser, de nuit, l'entrée par effraction, violence ou ruse dans un lieu habité;

[107] Emphasis in the original.

[108] Law Commission, *supra* note 96, § 44(1)(c), (e), at 61; see also the commentary, *supra* note 96, Vol. II, p. 232.

[109] See § 3(10), *supra* note 94 : 'if he acted . . . by using such force as was reasonably necessary to avoid the harm . . .'

[110] See § 10.4 CCA 1995, *supra* note 94 : on the one hand, the actor must *believe* that the conduct is necessary for the purpose of self-defence, on the other hand, the conduct must be a *reasonable* response.

(2) Pour se défendre contre les auteurs de vols ou de pilotages exécutés avec violence.

Finally, 32 StGB provides

(1) Whoever commits an act in self-defence does not act unlawfully.
(2) Self-defence is that defence which is required in order to prevent a present unlawful attack on oneself or on another.

There are similar provisions in the recent criminal codes of Spain,[111] Russia (Article 37: 'necessary defence'),[112] and Poland (Article 25(1)),[113] as well as in the Standard Penal Code for Latin America.[114]

In sum, the right to self-defence is generally accepted in comparative law. As to its elements, it is beyond doubt that an unlawful attack against a protected interested (life, physical integrity, and property), a proportional reaction and the actor's knowledge of acting in self-defence are required. However, the question of whether the first requirement has to exist objectively (civil law solution) or if the actor only has to believe that it exists (common law), has not yet been answered.

3. Duress and Necessity

In comparative law, generally, a distinction between duress and necessity is made. This is also true for the common law which traditionally distinguished between 'necessity' as a situation caused by natural events and requiring a balancing of interests and 'coercion'/'compulsion'/'duress' caused by threats of a person imposing strong pressure on another person. Currently, as will be seen in more detail below, the source of the danger is less relevant and, at least in US practice and doctrine, the terms 'choice-of-evils'/'lesser evils' and 'duress' are used.[115] The MPC contains the following rules:

[111] Art. 20 of the Spanish CP reads in the pertinent part:
Están exentos de responsabilidad criminal:
4. El que obre en defensa de la persona o derechos propios ajenos, siempre que concurran los requisitos siguientes:
Primero. Agresión ilegítima. En caso de defensa de los bienes se reputará agresión ilegítima el ataque a los mismos que constituya delito o falta y los ponga en grave peligro de deterioro o pérdida inminentes. En caso de defensa de la morada o sus dependencias, se reputará agresión ilegítima la entrada indebida en aquélla o éstas.
Segundo. Necesidad racional del medio empleado para impedirla o repelerla.
Tercero. Falta de provocación suficiente por parte del defensor.

[112] In Schroeder and Bednarz, *supra* note 103, at 58.

[113] In: Weigend, *supra* note 100, at 45.

[114] See *supra* note 105, here Art. 16:
No crime is committed by those who defend persons or rights—their own or someone else's—provided the following circumstances occur:
1. The attack was unlawful
2. The means employed to prevent or repel the attack were reasonable.

[115] See also the most recent study by Nill-Theobald, at 190 *et seq.* (227 *et seq.*) 252 *et seq.* (276 *et seq.*), who examines the German and US law on, *inter alia*, necessity and duress in order to develop international criminal law rules with regard to war crimes. As to the US law on necessity and duress,

§ 3.02 Justification generally: choice of evils
(1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
(b) neither the Code nor other law defining the offense provides exceptions or defense dealing with the specific situation involved; and
(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

§ 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 a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.
(2) The defense . . . is unavailable if the actor recklessly placed himself in a situation in which it was probable 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 . . .

Further, the US military law contains a specific provision on 'coercion or duress':

> It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply.[116]

Similarly, the Canadian Draft Bill admits 'duress' if the actor reasonably responds 'to threats of immediate serious harm to himself or another person' but excludes it if the actor 'purposely causes the death of, or seriously harms, another person'.[117] The defence of 'necessity' operates if a person acts to avoid immediate harm to himself or damage to property and if his reaction 'substantially' outweighs the harm or damage resulting from the crime.[118] The fundamental difference between

she concludes (at 210–211, 225, 266–267) that the strict separation between these defences has been replaced by a general distinction along the lines of justification (necessity) and excuse (duress) (see in particular P. H. Robinson, *Criminal Law Defenses*, Vol. I (1984) § 27(b) and Vol. II (1984) § 177(e)(1) note 17) emphasizing the gravity of the danger rather than its cause. Yet, it is clear from the references presented by Nill-Theobald that US case law and doctrine does not make as clear-cut a distinction as the German and similar systematic doctrines.

[116] Rule for Courts-Martial (RCM) 916 (h); see <http://books.army.mil:80/cgi-bin/bookmgr/BOOKS/MCM98/2.9.16.8>. See also Nill-Theobald, *supra* note 12, at 205 *et seq.*, 210 *et seq.* (211) who examines the highly controversial question whether the defence of necessity is incorporated in RCM 916 and concludes that 'at least . . . this provision does not only rule duress' (translation from German). This quite cautious conclusion is due to the already mentioned conflation of necessity and duress in Anglo-American law.

[117] See § 3(8), *supra* note 94.

[118] See § 3(9), *supra* note 94.

duress and necessity lies in the source of the danger: in the former case human threats, in the latter case non-human forces. Similarly, the Australian CCA 1995 distinguishes between duress with regard to (human) threats and a 'sudden or extraordinary emergency' with regard to (other) circumstances.[119] However, while the former only requires a belief of the actor, in the latter these circumstances must objectively exist. Finally, British law distinguishes between 'duress of circumstances' (necessity) and 'duress by threats' considering the source of the danger as the only substantial difference between the two. Thus, according to the DCCB, 'duress by threats', similar to the duress defence at common law, requires that a person does an act because this person

> (a) . . . knows or believes
> (i) that a threat has been made to cause death or serious personal harm to himself or another if the act is not done; and
> (ii) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain official protection; and
> (iii) that there is no other way of preventing the threat being carried out; and
> (b) the threat is one which in all the circumstances (including any of his personal circumstances that affect its gravity) he cannot reasonably be expected to resist.[120]

'Duress of circumstances' is, apart from the source of the danger, distinguishable from 'duress by threats' only in that the three requirements—(i) to (iii)—are summarized in one phrase: the actor must know or believe that the act 'is immediately necessary to avoid death or serious personal harm to himself or another'.[121] While it is accepted that duress does not apply if the person has 'without reasonable excuse exposed himself' to the risk or danger,[122] it is highly controversial whether duress applies to murder or attempt to murder. The original recommendation of the British Law Commission according to which the defence applied to all offences was rejected by the House of Lords in *Howe*;[123] consequently, the DCCB provides that the duress defence 'applies to any offence other than murder or attempt to murder' but puts that clause in square brackets to indicate that its original recommendation 'has not been abandoned'.[124]

As to the continental or civil law, the French NCP is quite representative:

[119] §§ 10.2 and 10.3 CCA 1995, *supra* note 94.

[120] Law Commission, *supra* note 96, § 42(3), at 60; see also the commentary, *supra* note 96, Vol. II, pp. 229–230.

[121] Ibid., § 43(2), at 61; commentary, *supra* note 96, Vol. II, pp. 230–231. See also Reed, *supra* note 26, at 67, stating that 'the test for necessity [duress of circumstances] is essentially identical to that for duress by threats with the exception of the situational source from which the threat emanates.'

[122] Ibid., § 42(5), at 60; § 43(3)(b)(iii), at 61

[123] *R. v. Howe and Others* [1987] 1 All ER 771.

[124] Ibid, § 42(2), at 60; § 43(3)(a), at 61; see also commentary, *supra* note 96, Vol. II, pp. 229, 231.

Article 122-7
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.

Article 122-2
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.

Article 20 of the Spanish CP contains a similar provision.[125] Finally, the German StGB also makes a distinction between necessity as justification (§ 34) and as excuse (§ 35):

§ 34
Whoever commits an act in order to avert an imminent and otherwise unavoidable danger to the life, limb, liberty, honour, 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.

§ 35
(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(1).

German military law provides for a specific provision in § 6 of the Military Criminal Code (Wehrstrafgesetz-WStG) which reads: 'Fear of personal danger is no excuse if the soldier's duty requires to assume the danger'.[126]

[125] 'Están exentos de responsabilidad criminal:
. . .
5. El que, en estado de necesidad, para evitar un mal propio o ajeno lesione un bien jurídico de otra persona o infrinja un deber, siempre que concurran los siguientes requisitos:
Primero. Que el mal causado no sea mayor que el que se trate de evitar.
Segundo. Que la situación de necesidad no haya sido provocada intencionadamente por el sujeto.
Tercero. Que el necesitado no tenga, por su oficio o cargo, obligación de sacrificarse.
6. El que obre impulsado por miedo insuperable.

[126] Translation by the author, the original reads: 'Furcht vor persönlicher Gefahr entschuldigt eine Tat nicht, wenn die soldatische Pflicht verlangt, die Gefahr zu bestehen.' See on the interpretation of this provision Nill-Theobald, *supra* note 12, at 190 *et seq.*, 252 with further references.

Similar provisions can be found in the recently enacted Russian Code (Article 39: 'extreme necessity'; Article 40: 'physical or psychological coercion')[127] and Polish Code (Article 26)[128] as well as the Standard Penal Code for Latin America.[129]

III. Article 31 of the Rome Statute

A. General Remarks

The provision,[130] according to the chairman of the working group on general principles, was 'perhaps the most difficult one to negotiate . . . because of the

[127] In Schroeder and Bednarz, *supra* note 103, at 59–60.

[128] In Weigend, *supra* note 100, at 46.

[129] See Art. 17:

A person whose lawful rights—or those of another—are endangered, commits no crime if he injures other legal values in order to avoid a greater harm, provided all the following circumstances occur:

1. the danger is clear and present or imminent.
2. the danger has not been intentionally provoked by the person in question.
3. the danger cannot be prevented otherwise.

If the person whose lawful rights are endangered is duty bound to assume the risk involved, this Article will not apply.

[130] Article 31 reads:

'Article 31 Grounds for excluding criminal responsibility

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

(a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;

(c) 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, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

(d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

(i) Made by other persons; or

(ii) Constituted by other circumstances beyond that person's control.

2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.

3. 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. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.'

conceptual differences which were found to exist between various legal systems'.[131] It is titled 'grounds' excluding criminal responsibility; the term 'defences' was consciously avoided since it is a common law term and as such implies certain established interpretations strange to the 'civil law' system.[132] The terminology used makes clear that the provision refers to substantive 'defences', thereby following in essence a narrower understanding of criminal law defences excluding mere procedural ones, such as *ne bis in idem* or—in most systems—prescription.[133]

The chapeau also makes clear that the grounds laid down in Article 31 are to be understood 'in addition' to other defences of the Statute, i.e. that Article 31 has a supplementary function.[134] In addition, from paragraphs 2 and 3 it follows that the ICC will have a broad discretion in interpreting the defences laid down in Article 31 and that it will not be limited to the defences of the Statute. The difference between paragraphs 2 and 3 lies in the fact that the former only authorizes the Court to seek a just solution 'to the case before it', while the latter permits it to refer to defences not contained in the Statute on the basis of the applicable law within the meaning of Article 21.[135] It was generally accepted in Rome that such a 'window' is necessary since the Statute cannot possibly foresee all defences which could become relevant in a concrete case.[136] Finally, paragraph 3 made a provision on public international law defences (military necessity, reprisals,[137] self-defence according to Article 51 of the UN Charter) redundant, since the Court will be free to decide on the admissibility and requirements of these defences in accordance with Article 21.[138]

As to the decisive time at which a ground of exclusion must exist, the chapeau refers to the 'time of that person's conduct'. Thus, the Statute follows the 'act theory' instead of the so-called 'ubiquity principle', according to which the place of the result of the conduct and the place of the actual conduct are equally relevant.[139]

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[131] P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.), *The International Criminal Court: the Making of the Rome Statute* (1999) 206.

[132] Cf. K. Ambos, 'The General Principles of the Rome Statute', 10 *Criminal Law Forum* (1999) 1–32, at 2; see also Saland, *supra* note 131, at 207.

[133] Cf. A. Eser, 'Article 31: Ground for Excluding Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999) mn. 15 with further references.

[134] Cf. ibid., mn. 16.

[135] Cf. ibid., mn. 41–47.

[136] Cf. Saland, *supra* note 131, at 209.

[137] On reprisals see the analysis of the case law by Lippman, *supra* note 20, at 99–109.

[138] Cf. Saland, *supra* note 131, at 209.

[139] In German law, for example, the 'act theory' (*Tätigkeitstheorie*) is recognized with regard to the relevant time of commission (§ 8 StGB), while the 'ubiquity principle' (*Ubiquitätsgrundsatz*) rules with regard to the place of commission (§ 9 StGB). See also A. Eser in A. Schönke and H. Schröder, *Strafgesetzbuch: Kommentar* (25th edn., 1997) § 8 mn. 2 and § 9 mn. 3; also *id.*, *supra* note 133, mn. 19.

B. Mental Disease or Defect and Intoxication

Subparagraphs (a) and (b) of paragraph 1 exclude criminal responsibility if the actor is not able to control and assess his or her conduct. As seen above comparative law does not treat these two grounds for excluding criminal responsibility equally. While mental disease or defect is universally recognized as an affirmative defence,[140] intoxication is recognized only in a limited way. This difference is also reflected in Article 31, which is very similar to §§ 2.08 and 4.01 MPC.

In case of a *mental disease or defect* (subparagraph (a)), the actor cannot be blamed for his or her unlawful conduct because normally he or she has not caused the disease or defect, or at least has not caused it in order to commit a crime without culpability. The actor cannot, as stated in subparagraph (a), 'appreciate the unlawfulness or nature of his or her conduct' or lacks capacity to control it in accordance with the law because of a defect or disease which lies beyond his or her responsibility. Thus, the exclusion of responsibility has two requirements: a not only momentary defective mental (not psychological) state[141] and the absence of the capacity to (cognitively) appreciate the unlawfulness of the conduct or to control it (volitionally).[142] In essence, the actor does not know what he or she is doing and, therefore, does not act culpably. Responsibility may be excluded by lack of human conduct or intent according to Article 32(1) if the mental defect is so serious as to exclude the actor's awareness or ability to act at all.[143]

In contrast, in the case of *intoxication* (subparagraph (b)) a person normally[144] takes a free and autonomous decision to drink alcohol or use an exogenic substance with a toxic impact[145] normally knowing that this will affect his or her capacity of self-control and appreciation. Starting from this premiss, it is understandable that the legal consequences of a state of intoxication are 'highly controversial'[146] and depend on the cultural context. This became very clear in Rome where most Arab countries, governed by Islamic Law, considered the (excessive) use of alcohol as an aggravating factor while Western countries, as a consequence

[140] Cf. Pradel, *supra* note 26, at 293–294.

[141] See Eser, *supra* note 133, mn. 21 correctly stating that the wording at the same time is narrow—with regard to the *mental* state—and broad—with regard to the recognition of any 'defect'—and that, therefore, the word 'suffers' should be interpreted in implying 'more than only a momentary disturbance'.

[142] See more detailed Eser, *supra* note 133, mn. 22–23.

[143] Cf. ibid., mn. 23.

[144] Leaving aside the cases of involuntary intoxication, e.g. soldiers are unknowingly dosed with a drug and therefore commit crimes, as apparently happened to US soldiers in Vietnam who were dosed with LSD.

[145] See about the meaning of the term 'intoxication', Eser, *supra* note 133, mn. 25; Law Commission, § 22(5) DCCB, *supra* note 96, at 53.

[146] Eser, *supra* note 133, mn. 24; see also—from the viewpoint of the negotiator—Saland, *supra* note 131, at 207.

of the legalization of alcohol consumption, generally held the view that intoxication has to be treated as a factor in mitigation or even exclusion of punishment. Thus, consensus was only possible at the cost of a footnote stating that 'voluntary intoxication as a ground for excluding criminal responsibility would generally not apply in cases of genocide or crimes against humanity, but might apply to isolated acts constituting war crimes'.[147] Apart from the different cultural approach to the consumption of alcohol it would also sound absurd to defend a person who committed genocide or crimes against humanity with the argument that he or she were drunk.

The field of application of subparagraph (b) is further limited by the adoption of the *actio libera in causa* (*alic*) principle ('unless the person has become voluntarily intoxicated'). The fundamental idea of this principle is to prevent a *mala fide* intoxication; i.e. intoxication with a preconceived intent to commit a crime in a state of non-responsibility and later to invoke this state as a ground for excluding responsibility. As has been shown above, this principle is generally recognized in both continental and common law and codified in many national codes.[148] It is, however, hotly disputed whether a reckless or negligent *alic*, i.e. when the actor does not become intoxicated intentionally in order to avoid responsibility for the commission of a crime, but negligently fails to recognize the risk that he could commit a crime in this state, also entails criminal responsibility. For reasons of space it can only be pointed out that the legal systems compared here offer different solutions to this issue.[149]

The intoxication defence also poses evidentiary problems: it is difficult enough to prove that a defendant voluntarily became drunk in order to commit a isolated crime, such as murder; it is even more difficult to prove that he became drunk to commit 'a crime within the jurisdiction of the Court', i.e. a particularly atrocious crime. In short, the Prosecution has to prove that the defendant became drunk in order to commit a crime against humanity 'as part of a widespread or systematic attack' (Article 7(1)) or a war crime 'as a part of a plan or a policy or . . . a large-scale commission' (Article 8(1)).[150] Given this evidentiary burden it is understandable that the common law generally does not recognize intoxication as a full

[147] UN Doc. A/CONF.183/C.1/WGGP/L.4/Add.1/Rev.1 (1998) p. 4, note 8.

[148] See *supra* note 106 and G. P. Fletcher, *Rethinking Criminal Law* (1978) 846–847; also Pradel, *supra* note 26, at 296.

[149] See Pradel, *supra* note 26, at 296; the negligent *alic* is, for example, recognized in German law (see Jescheck and Weigend, *supra* note 26, at 448).

[150] See also Eser, *supra* note 133, mn. 27 with other examples. As to war crimes it is controversial, however, whether the threshold of Art. 8 ('in particular . . .') has a substantial or only a jurisdictional function (for the latter view, see W. J. Fenrick, 'Article 8. War crimes', in O. Triffterer (ed.), *Commentary of the Rome Statute* (1999), Art. 8 mn. 4; A. Zimmermann, 'Article 5. Crimes within the Jurisdiction of the Court', ibid., Art. 5 mn. 9).

defence, at least when it is self-induced.[151] It is equally understandable that continental legal systems have created specific offences to punish the commission of wrongful acts while in a state of intoxication.[152] These offences, however, are based on negligence (as to the risk of committing a crime while intoxicated) and conflict, therefore, with Article 30 of the Rome Statute which—with the exception of superior responsibility (Article 28)—contemplates only intent and knowledge as the required mental elements.[153]

Be that as it may, the differentiated treatment of intoxication in Western systems shows that the Arab position at Rome was not at all far-fetched, and that the above-mentioned footnote was well founded. In fact, if the scope of subparagraph (b) is, as stated in the footnote, really limited to 'isolated acts constituting war crimes', the practical importance of the provision will be very limited; the fact that the intoxication must 'destroy'—not merely diminish—the person's capacity of control and appreciation will also contribute to its limited role.[154] One may not go so far as to claim that the provision 'borders on the absurd',[155] but it is true that the ICC should focus on the prosecution of sober commanders and civilian superiors (usually responsible for the planning and organization of atrocities) rather than on the prosecution of drunk soldiers committing war crimes.

C. Self-defence

Article 31(1)(c) recognizes *proportionate* self-defence and defence of others against an imminent and unlawful use of force which entails danger for a person or for *property* of particular importance. Thus, the provision has basically two requirements: the existence of a certain danger to a person or property by unlawful force and a proportionate reaction against it.[156] As shown above, although no detailed codification of this defence previously existed—except in connection with crimes against peace;[157] from a comparative law perspective self-defence is a classical ground of justification.[158] Still, its requirements are not uncontroversial.

[151] See already *supra*, II.C.1. and MPC, *supra* note 95, § 2.08, and commentary at 350 *et seq.*, on the one hand, and § 4.01, on the other. See also Fletcher, *supra* note 148, at 847–852.

[152] See e.g. German Penal Code, § 330: 'Whoever intentionally or negligently becomes intoxicated . . . is punishable . . . if while in that intoxicated condition he commits a wrongful act and if by virtue of the intoxication is not responsible . . .' (translation, according to Fletcher, *supra* note 148, at 847).

[153] For a more detailed analysis of Art. 30, see D. K. Piragoff, 'Article 30. Mental Element', in Triffterer (ed.), *supra* note 150; Ambos, *supra* note 132, at 20–22.

[154] See also Eser, *supra* note 133, mn. 26.

[155] W. A. Schabas, 'The General Principles of the Rome Statute', 6 *European Journal of Crime, Criminal Law and Criminal Justice (Eur.J.CrimeCr.L.Cr.J.)* (1998) 400–428, at 423.

[156] See also Eser, *supra* note 133, mn. 28.

[157] See 1954 Draft Code, *supra* note 16 16, Art. 2(1), (3).

[158] Cf. Fletcher, *supra* note 26, at 130 *et seq.*; Pradel, *supra* note 26, at 286–287; see also Eser, *supra* note 133, mn. 28 all with further references.

As to the *first requirement*—'imminent and unlawful use of force' producing a 'danger' to a person or property—the inclusion of the defence of property was hotly disputed. The question of whether this first requirement should exist objectively or whether it would suffice that the actor 'reasonably believed' that it existed was also controversial. As is clear from the wording of the provision, this latter formula, known particularly in common law countries,[159] was not adopted; instead an objective standard was chosen.[160] Thus, if objectively a person did not act in self-defence but subjectively believed him- or herself to be doing so the rules on mistake of fact or law (Article 32) apply. From a systematic and analytical viewpoint this is the correct solution since self-defence and error of fact or law are different concepts with different consequences. In the former case, the actor is justified because he reacted to a real threat in an adequate manner: his reaction is deemed permissible and legitimate by the legal order, it is lawful. In the case of an error (putative self-defence), the conflict between aggressor and defender does not take place in the real word but only in the mind of the defender, who mistakenly believes that he is attacked, his reaction is necessary, etc. Whether this belief can possibly exclude criminal responsibility depends, first of all, on the nature of the error and, secondly, on the legal consequence attached to this error. This is a field too broad to be treated here,[161] but it is clear that the common law's 'subjectification'[162] of self-defence eliminates a difference that ontologically cannot be eliminated, namely the difference between reality and imagination.

The other elements of the first requirement are less complicated:[163] 'force' must be understood broadly, encompassing physical coercion and psychological threats; it must be 'imminent', i.e. immediately antecedent, presently exercised or still enduring, which means that a pre-emptive strike against a feared attack is excluded as is retaliation against a successful attack.[164] The use of force is 'unlawful' if not legally justified. Given this broad definition, only the 'danger' implied by the use of force can restrict the scope of application of self-defence. Certainly, danger must imply a serious risk for the life or physical integrity of a person; as to property, a special qualifier indicates that danger to just *any* property is not sufficient to trigger the defence.

[159] See *supra*, II.C.2.

[160] Cf. Eser, *supra* note 133, mn. 31.

[161] See e.g. the excellent treatment of these questions by Fletcher, *supra* note 26, at 148 *et seq.*; concerning the Rome Statute, see Ambos, *supra* note 132, at 29–30.

[162] Fletcher, *supra* note 26, at 137. This 'subjectification' is explicitly recognized by the Law Commission's proposal on defences, including, see commentary (Vol. II), *supra* note 96, at 228 and *supra*, II.C.3.

[163] Cf. Eser, *supra* note 133, mn. 29.

[164] Fletcher, *supra* note 26, at 133–134: 'Legitimate self-defense must be neither too soon nor too late.'

The *property* defence was promoted by the United States and Israel, the former invoking constitutional provisions and insisting that 'the defence of one's home can be perfectly legitimate'. The US delegation even proposed an equal treatment of defence of life and physical integrity, on the one hand, and property, on the other.[165] This position did not find much sympathy, and the final text of subparagraph (c) shows that protection of property is limited to war crimes situations in which the property is 'essential for the survival of the person or another person' or 'essential for accomplishing a military mission'.[166] Even in this limited form, the protection of property was difficult to accept for many delegations; it became the 'real cliffhanger' in the negotiations of the working group.[167] This is understandable since the difference in value attached to life and physical integrity, on the one hand, and property, on the other, justifies a clear distinction in the protection afforded to these legal interests. However, the proposal to refer to property in a separate phrase was rejected by the United States. Thus, a teleological and systematic interpretation taking into account the second sentence of subparagraph (c) may be necessary to avoid the use of the property clause 'as a readily available 'panacea' in any sort of military confrontation'.[168]

In fact, the second sentence of subparagraph (c) clarifies the difference between *collective* and *individual* self-defence already recognized by the ILC.[169] Participation in a collective defensive operation does not in itself exclude criminal responsibility; rather the actor's conduct must remain within the limits of legitimate individual self-defence, as defined in the first sentence of subparagraph (c). Still another question is whether the invocation of individual self-defence presupposes that the collective self-defence operation itself is lawful. Some delegations were of this opinion.[170] If this approach is taken, the issue of the appropiate law to apply must be addressed. To this extent a footnote states that the use of force by States is governed by the applicable international law.[171] Obviously, this does not answer the question. As the discussion about the Kosovo conflict has made clear, the applicable law is contained, in essence, in Article 51 of the *UN Charter*.[172] However, the premiss of the discussion in Rome, namely the interdependence of individual and collective self-defence, is not convincing. Collective and individ-

[165] UN Doc. A/CONF.183/C.1/WGGP/L.2 (1998).

[166] Comp. UN Doc. A/CONF.183/C.1/WGGP/L.4/Add. 1 (1998) pp. 4–5 and UN Doc. A/CONF.183/C.1/WGGP/L.4/Add. 3 (1998) p. 2.

[167] See Saland, *supra* note 131, at 207–208; see also the critical view of A. Cassese, 'The Statute of the ICC: Some Preliminary Reflections', 10 *EJIL* (1999), 154–155.

[168] Cf. Eser, *supra* note 133, mn. 34.

[169] See *supra*, II.A.

[170] Cf. UN Doc. A/CONF.183/C.1/WGGP/L.4/Add. 3 (1998) p. 2, note 3.

[171] Cf. UN Doc. A/CONF.183/C.1/WGGP/L.4/Add. 3 (1998) p. 2, note 1.

[172] See B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1 *et seq.* See for further codification of self-defence in public international law, Nill-Theobald, *supra* note 12, at 360–361.

ual self-defence, as understood here,[173] must be distinguished. The former relates to inter-State conflicts and is, therefore, State- and sovereignty-oriented in the sense of classical public international law: a right to self-defence by and against collective entities. In contrast, individual self-defence relates to conflicts between two or more individuals and tries to find an adequate solution to this conflict by giving the person attacked an individual right to self-defence against the aggressor; thus, individual self-defence is governed by the emerging rules of international criminal law based on comparative criminal law. Consequently, the legality or illegality of a collective defence operation is independent of the recognition or rejection of self-defence in an individual conflict taking place within the framework of this operation.

As to the *second* requirement—the 'reasonable' and 'proportionate' reaction to avert the danger—these are concepts very well known in national criminal law but impossible to define conclusively in an abstract way. Generally, 'reasonable' means that the defence must be necessary and adequate to prevent or avert the danger. Thus, a reasonable reaction must only create the harm to the aggressor necessary to repel the danger and the means applied must not be inept or inefficient.[174] Even if the defence is 'reasonable', it must still be 'proportionate', i.e., it may not cause disproportionately greater harm than the one sought to be avoided.[175] The proportionality element provides for a balancing of the conflicting interests between the defender and the aggressor[176] and, in this sense, is similar to the necessity defence. Although this cannot be said for those national laws that do not contain the element of proportionality (e.g. § 32 StGB), such provisions do not opt for an unlimited right of self-defence either, but instead contain indirect limits that, in effect, are comparable to the proportionality requirement.[177] In concrete terms, this means that the killing of an aggressor is only admissible as *ultima ratio* to avoid one's own or another's death or serious bodily harm.[178]

[173] I do not use the term 'collective' and 'individual' in the sense of Art. 51 UN Charter, namely as defence of one State against another State or a group of States against one or many States or as defence of a third State, etc. (see A. Randelzhofer, in B. Simma, *Charta der Vereinten Nationen* (1991), Art. 51 mn. 32–33; Nill-Theobald, *supra* note 12, at 358–359), but in a criminal law sense as explained in the text.

[174] See also Fletcher, *supra* note 26, at135.

[175] See also ibid., at 135; Pradel, *supra* note 26, at 286.

[176] Cf. Fletcher, *supra* note 26, at 136.

[177] To take the German case, for example: legitimate self-defence in German law is also limited by the 'abuse of rights' doctrine borrowed from civil law (see Fletcher, *supra* note 26, at 136–137) and based on the requirement of the *Gebotenheit* of the defence (§ 32 para. 1 StGB; see Roxin, *supra* note 31, § 15 mn. 53 *et seq.*).

[178] The concrete decision depends on the circumstances of each case. It is clear, however, that the philosophical nature of self-defence—as a right to defend one's freedom against external aggression—prohibits a formal proportionality requirement. It certainly constitutes justifiable self-defence if the victim kills the aggressor who was about to mutilate him or her.

A further requirement, not contained in subparagraph (c) but derived from general principles of comparative law according to Article 31(3) in connection with Article 21(1)(c) of the Rome Statute, is the *subjective* element of self-defence. It is generally recognized that the defender must at least know about the attack; it is controversial whether he or she must also be motivated by this knowledge.[179] In any case, this does not mean that self-defence is 'subjectified' as discussed above.[180] We are not concerned with the situation of an error about a norm or factual requirements of justification (*Erlaubnis-* or *Erlaubnistatbestandsirrtum*), in which the actor mistakenly believes he or she is entitled to act in self-defence because of the legal situation or certain factual circumstances. Instead we deal with the opposite situation in which the objective requirements of self-defence do in fact exist, but the defender does not act with this knowledge. Thus, the subjective element is an *additional* requirement, which lends stronger legitimacy to the defender's claim that his or her conduct was justified and lawful. If this knowledge does not exist, the defence act is only half-lawful: the wrongful result (*Erfolgsunwert*) is negated by the objective situation of self-defence, the wrongful act or conduct (*Handlungs-* or *Verhaltensunwert*) continues to exist since the actor did not act because of the knowledge of an attack within the meaning of self-defence.[181] In sum, the use of force cannot be justified by a mere objective standard; it also requires that the defender acted in good faith, believing that he or she was entitled to self-defence.

D. Duress and Necessity

1. General

While necessity and duress are recognized in comparative criminal law, albeit less clearly in traditional common law, as two separate defences,[182] international criminal law, in particular the *official* codifications, did not consider it necessary to distinguish between them.[183] It may be recalled that the ILC and its Special Rapporteur in his Twelfth Report held the view that coercion and necessity have the same requirements.[184] The Nuremberg jurisprudence—due to the common law background of the judges and the confusing US case law on the matter—often

[179] This broader view takes Fletcher, *supra* note 26, at 137; but see Roxin, *supra* note 31, § 14 mn. 91 *et seq.*; 15 mn. 111–112.

[180] See *supra* note 162 and accompanying text.

[181] Cf. Roxin, *supra* note 31, § 14 mn. 93; general on *Erfolgs-* and *Handlungsunwert*, see id., § 10 mn. 88 *et seq.*

[182] See Fletcher, *supra* note 26, at 138 *et seq.*, 164; Pradel, *supra* note 26, at 287–288, 298–299 and *supra*, II.C. See for the *travaux préparatoires* of the Rome Conference, Schabas, *supra* note 155, at 425–426.

[183] See e.g. the straightforward statement by Bassiouni, *supra* note 26, at 484: 'necessity can be viewed together with coercion and duress for purposes of this analysis.' In fact, however, Bassiouni, at 485–486, draws a line along the traditional distinction outlined in the text.

[184] See *supra*, II.A.1. notes 83 and 89.

spoke of 'necessity' when it really meant duress.[185] In contrast, the Siracusa and ILA Drafts provided for a clear distinction between these two defences.[186] The little sophisticated official view may partly explain why the Rome Statute has reverted to a position that conflates duress and necessity.[187] In fact, the wording goes back to a proposal of the Canadian delegation apparently based on the *Finta* case in which both defences were characterized primarily by the 'imminent, real, and inevitable threats' required.[188]

As already stated elsewhere, however, well-established and reasonable distinctions should not be blurred: while duress refers to lack of freedom of will or choice in the face of an immediate threat,[189] necessity is based on a choice of evils with the decision taken in favour of the lesser evil.[190] In the case of *necessity*, the unlawfulness of the incriminating act is eliminated by the higher legal good protected; it is only controversial how much higher or greater the protected good must be.[191] In any case, if the higher legal good is protected, necessity justifies a *per se* unlawful act, i.e. it is a *justification*.[192] In the case of *duress*, on the other hand, such a justification cannot be invoked; it can only be argued that the accused cannot *fairly be expected* to resist the threat. In other words, the underlying rationale of duress is not the balancing of competing legal interests but the criterion of *Zumutbarkeit* (could it fairly be expected that the person concerned resisted the threat?).[193] Thus, § 35 StGB excludes this defence 'if under the prevailing circumstances the perpetrator could be expected to have assumed the risk'. § 2.09(1) MPC refers to

[185] See *supra*, II.B.2(a). See also the recent study of Nill Theobald, *supra* note 12, at 179–80, 184, 187, 205 *et seq*., who correctly criticizes the terminological inconsistencies of both the Nuremberg and US case law. See also the statement of W. R. LaFave and A. W. Scott, *Criminal Law* (2nd edn., 1986) 441–442: ' modern cases have tended to blur the distinction between duress and necessity.' See also Reed, *supra* note 26, at 52: 'Anglo-American tradition, vis a vis these defenses, is replete with vagaries, inconsistencies, and anomalies.' Further, as has been shown above (II.C.3), the current British law still does not distinguish clearly between duress and necessity.

[186] See *supra* notes 90, at 92 and accompanying text.

[187] See E. Wise, 'General Principles of Criminal Law', in L. Sadat-Wexler (ed.), *Model Draft Statute for the International Criminal Court based on the preparatory Committee's Text to the Diplomatic Conference*, 13*ter* Nouvelles Études pénales (1998) at 57; also Eser, *supra* note 133, mn. 35; also Ambos, *supra* note 132, at 27–28.

[188] See *supra*, II.B.2(b) note 42 and accompanying text.

[189] Cf. Robinson, *supra* note 115, Vol. II § 177(b)(1): 'relative impairment of the psychological control mechanisms'. See also J. Etzel, *Notstand und Pflichtenkollision im amerikanischen Strafrecht* (1993) 170 with further references; Pradel, *supra* note 26, at 299; Bassiouni, *supra* note 26, at 484. See also the Nuremberg case law, which invoked the moral choice doctrine (*supra*, II.B.2(a) note 16 and accompanying text).

[190] Compare MPC, *supra* note 95, § 2.09 and § 3.02 (II.C.3).

[191] See *supra*, II.C.3: on the one hand, § 34 StGB: 'interest protected by him *significantly* outweighs the interest which he harms'; and on the other, 122–127 NCP: '*disproportion* entre les moyens employés et la gravité de la menace' (emphasis added). See also Pradel, *supra* note 26, at 288.

[192] See MPC, *supra* note 95, § 3.02, comment, at 9: 'a principle of necessity . . . affords a general justification for conduct, that would otherwise constitute an offense.' See also Etzel, *supra* note 189, at 119 *et seq*.; Nill-Theobald, *supra* note 12, at 213–215; Reed, *supra* note 26, at 67–68.

[193] See Fletcher, *supra* note 148, at 833.

a 'person of reasonable firmness'. §§ 42(3)(b) and 44(2)(b) DCCB refer to a threat or danger that is such that 'in all the circumstances' the actor 'cannot reasonably be expected' to resist or act otherwise. In any case, the personal or actor-oriented nature of duress makes clear that it is merely an *excuse*.[194] It is worthwile pointing out in this context that the distinction between justification and excuse has even been recognized by the ILC Special Rapporteur with regard to self-defence and coercion.[195] The legal consequences of the distinction will be illustrated below if we consider the possibility of the duress defence in the case of killing of innocent civilians.

Subparagraph (d) contains the following elements:

- a threat of imminent death or continuing or imminent serious bodily harm against the person concerned or a third person made by other persons or by circumstances beyond that person's control
- a necessary and reasonable reaction to avoid this threat
- on the subjective level, the corresponding *dolus* (not intending to cause a greater harm than the one sought to be avoided).

The provision contains *objective* elements of both necessity and duress. The 'threat' element applies to necessity and duress, while the 'necessary and reasonable reaction' element applies only to necessity, introducing a new *subjective* requirement which relates to the 'choice of evils' criterion. Further, as already mentioned, in traditional common law, the distinction was made between a threat made by persons ('duress by threats') and a threat constituted by other circumstances ('duress of circumstances', i.e. necessity).[196] This distinction is reintroduced by the provision, although it seems to have been abandoned in modern common law, at least as it is interpreted in the United States. Accordingly, not the cause but the gravity of the danger is of particular importance.[197] Let us now take a closer look at the requirements of subparagraph (d).

[194] See Robinson, *supra* note 115, vol. I § 27(h), Vol. II 124(e); Etzel, *supra* note 189, at 40 *et seq*., 96 et seq.; Nill-Theobald, *supra* note 12, at 268–270, 274, 279; also Yee, *supra* note 46, at 297–98; Reed, *supra* note 26, at 52; Y. Dinstein, 'Defences', in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law*, Vol. I. *Commentary* (2000) 373 ('excused').

[195] See *supra* note 89 and accompanying text. See generally for the (necessary) distinction between justification and excuse: A. Eser, 'Justification and Excuse: A Key Issue in the Concept of Crime', in A. Eser and G. P. Fletcher (eds.), *Rechtfertigung und Entschuldigung,* Vol. I. *Justification and Excuse* (1987) 17; Fletcher, *supra* note 148, at 759–774; Robinson, *supra* note 115, Vol. I §§ 24, 25; rather sceptical regarding the feasibility of the distinction: K. Greenawalt, 'The Perplexing Borders of Justification and Excuse', in Eser and Fletcher (eds.), *op. cit.*, at 265; also sceptical: D. N. Husak, 'The Serial View of Criminal Law Defenses', 3 *Criminal Law Forum* (1992) 369.

[196] Cf. A. Eser, ' "Defences" in War Crimes', 24 *IYHR* (1995) 213; Nill-Theobald, *supra* note 12, at 174, 208, 265. See also the Law Commission's DCCB, *supra* II.C.3, note 120 and accompanying text. See most recently Dinstein, *supra* note 194, S. 373.

[197] See *supra* note 115 and accompanying text.

2. Threat of Death or Serious Bodily Harm

Prima facie it appears that a threat may exist even if there has been no use of force within the meaning of subparagraph (c); yet, the qualifier referring to death of or harm to a person makes clear that a threat in the sense of subparagraph (c) is to be understood more narrowly than the use of force in the case of self-defence. While the latter encompasses psychological threats, subparagraph (d) only recognizes psychological threats which imply physical acts and/or consequences, i.e. 'imminent'[198] death or bodily harm. In a similar vein, Judge Cassese, in his dissenting opinion in *Erdemović*, argues that duress requires an immediate threat of severe and irreparable harm to life or limb.[199] The inclusion of property as a protected interested was discussed by the delegates but ultimately rejected.[200] In conclusion, only overwhelming pressure can trigger the defence of duress within the meaning of subparagraph (d).

The pressure itself must be directed against the person concerned or against *any* third person, i.e. the provision does not require a special relationship between the person threatened and the actor. Thus, it follows the broader common law approach as codified by § 2.09 MPC and § 42 (3) DCCB.[201] However, not even the existence of overwhelming pressure constitutes duress if the actor him- or herself *caused* the danger. This requirement was discussed in Rome[202] and is implicitly contained in Article 31(1)(d)(ii) in the reference to 'circumstances beyond that person's control' (clearer in the French version: 'circonstances indépendantes de sa volonté'). In other words, circumstances within the person's control or even caused by her do not fulfil this requirement. It has, however, a solid basis in comparative law[203] and was recognized by Judge Cassese in *Erdemović*, albeit with a slightly different formulation, according to which the accused cannot avail himself of the defence of duress if the situation was voluntarily brought about by himself.[204] Similarly, in *Eichmann*, duress was rejected because of Eichmann's great ambition and self-interest in the crimes committed.[205]

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[198] For the meaning of 'imminent', see *supra* note 164 and accompanying text. One may, however, distinguish between the imminence of an attack in the case of self-defence and of a threat in the case of necessity/duress by including in the latter a permanent threat that may at any moment bring about a violation of a protected legal interest (for this view of the German doctrine, see Roxin, *supra* note 31, § 16 mn. 17–18, § 22 mn. 15).

[199] See *supra*, II.B.2(c).

[200] See Saland, *supra* note4 at 131, 208.

[201] See *supra*, II.C.3 and compare with § 35 StGB. See also Nill-Theobald, *supra* note 12, at 277.

[202] See also Kreß, *supra* note 2, at 623.

[203] e.g. §§ 42(5), 43(3)(b)(iii) DCCB or § 35 StGB (*supra*, II.C.3). See also Pradel, *supra* note 26, at 300; Yee, *supra* note 46, at 298; Nemitz and Wirth, *suprai* note 46, at 51; Nill-Theobald, *supra* note 12, at 254.

[204] *Supra* note 62 and text. See also Dinstein, *supra* note 194, at 374.

[205] See *supra* note 37 and text.

Another limitation to the invokation of this defence can follow from the actor's *status*. Again, § 35 para. 1 sentence 2 StGB can serve as an example. It does not recognize the defence of necessity as an excuse—which includes duress[206]—if the perpetrator 'found himself in a special legal relationship'.[207] As to soldiers, § 6 WStG, quoted above,[208] imposes on them a special duty to assume the danger. However, this special duty does not mean that—because of the fact that they belong to a particular army[209]—soldiers can never qualify for the defence of duress. It only means that a soldier must face a higher risk than does the ordinary person with regard to tasks typically related to the soldier's functions. This higher expectation does not apply, however, to the case of a soldier who is compelled to comply with the illegal order to commit an international crime: the commission of such crimes does not belong to the tasks typically related to the soldier's functions.[210] Also, this special duty does not, as will be argued in detail below, create a blanket preclusion for soldiers from invoking duress as a defence in the case of the killing of innocent persons.[211]

In any case, the issue of status makes clear that the kind of threat required relates to the criterion of *Zumutbarkeit,* i.e. to the question of what can reasonably be expected from a person acting under duress. This question cannot be decided in abstract terms by means of a standard of reasonable firmness as in § 2.09 MPC, but only in light of the circumstances of the concrete case and above all the personal characteristics of the actor. The British Law Commission correctly states that 'threats directed against a weak, immature or disabled person may well be much more compelling than the same threats directed against a normal healthy person.'[212] Thus, the personal circumstances that affect the perceived gravity of the threat must be taken into account as in §§ 42(3)(b), 43(2)(b) DCCB.

3. Necessary and Reasonable Reaction

The reaction has to be 'necessary' and 'reasonable'. The difference from subparagraph (c) is that a 'proportionate' reaction is not explicitly required. Yet, this difference seems to be only of terminological nature since the term 'reasonable' can be considered an umbrella term encompassing 'necessary', 'proportionate', etc. In

[206] For the German doctrine which interprets § 35 StGB as containing duress (*Nötigungsnotstand*) as one possible case of excusing necessity, see Nill-Theobald, *supra* note 12, at 253–254, 255–256, with further references.

[207] Soldiers, policemen, firemen and other professionals with a special duty belong to this group of persons (see Roxin, *supra* note 31, § 22 mn. 39; also Nemitz and Wirth, *supra* note 46, at 51; Yee, *supra* note 46, at 299).

[208] See *supra*, II.C.3.

[209] A different view take Nemitz and Wirth, *supra* note 46, at 51: 'he [Erdemović] caused this danger by entering the Bosnian Serb army.'

[210] See Nill-Theobald, *supra* note 12, at 260–261.

[211] Cf. ibid., at 191, 201, 222–223, 260.

[212] Law Commission, commentary (Vol. II), *supra* note 96, at 230.

this sense, it is clear that the means used have to be apt and efficient, that the harm should be limited to that absolutely necessary to avoid the threat and that, most importantly, the reaction should not cause greater harm than the one sought to be avoided.[213] Despite this substantive similarity, it is unfortunate that terms used in subparagraphs (c) and (d) were not harmonized.

In fact, the similarities between subparagraphs (c) and (d) blur the line between self-defence and duress/necessity. This situation is aggravated by the fact that subparagraph (d) mixes up duress and necessity. From a structural point of view, self-defence and necessity differ in that self-defence gives the attacked person a much stronger right to strike back than is admissible under the rather strict balancing of interests in the case of necessity. This is due to the different philosophical foundations of these defences, i.e. libertarian versus collective, utilitarian thinking,[214] which normally entail a clear-cut distinction in the wording of the corresponding provisions. The fact that subparagraph (d) attempts, in fact, to codify both duress and necessity makes it almost impossible to reach a workable delimitation between subparagraphs (c) and (d). Conceptually, the difference between self-defence and duress/necessity is twofold. First, self-defence requires an attack ('use of force') while duress/necessity require a 'threat'. Secondly, as to the admissible reaction, self-defence generally allows any reaction to defend the invaded good, while necessity—but not duress—only permits a reaction, based on the balancing of interests, which protects the greater legal interest involved. Yet, the wording of subparagraph (d) does not allow an interpretation according to which the protected interest must be 'significantly' greater.[215] Instead, the balancing of interests is 'subjectified' as will be seen in the next section.

4. Subjective Requirements

The general subjective requirement, i.e. the actor's knowledge that he or she is acting under duress, has a solid basis in comparative law[216] and can be deduced from the wording of the second requirement of subparagraph (d).[217] If the person has to act 'to avoid this threat' the act is linked to and determined by the threat, i.e. the actor has to know that he or she acts because of a threat. One could even go further and require that the actor's reaction be motivated by the will to avert the danger. This stricter requirement is found in German law[218] and can be justified on the grounds of comparative law and the conceptual difference between

[213] See also Eser, *supra* note 133, mn. 39; on the reasonable standard see also Reed, *supra* note 26, at 62.
[214] Fletcher, *supra* note 26, at 138, 143, 145.
[215] See § 35 StGB (excusing necessity/duress), *supra*, II.C(3).
[216] See *supra*, II.C.3 and note 179 and text (about self-defence). See also Nill-Theobald, *supra* note 12, at 229, 230, 259, 277, 280.
[217] See *supra*, 2.
[218] See Nill-Theobald, *supra* note 12, at 229, 277: 'Gefahrabwendungswille'.

self-defence and duress/necessity, just mentioned: as the person acting in self-defence has a stronger right than the one acting under duress/necessity, the mental requirement for the former must be less demanding than for the latter; thus, if the requirement of a specific motivation in the case of self-defence is controversial,[219] it may be acceptable in the case of duress/necessity. Also, to require from the actor the motivation to avert the danger would make duress/necessity inapplicable in all cases in which the actor voluntarily, ambitiously, and with self-interest participates in certain crimes.[220] Thus, this kind of active behaviour could be taken into account not only at the objective[221] but at the subjective level as well.

In contrast, the specific subjective requirement of the 'provided that' formula[222] is a compromise formula unprecedented in comparative law, which can hardly be understood without taking into consideration the 'spirit of compromise' and time pressure characterizing the Rome negotiations. In fact, this formula introduces the common law 'subjectification'[223] of the defences by the back door in that it is not objectively, at least not explicitly, required that the actor avoid a greater harm; rather, he must only intend to do so.[224] In other words, duress is excluded—on the subjective level—if the actor intended to cause a greater harm, a fact that would have to be proved by the prosecution. This formula, Bassiouni argues, 'excludes decision-makers, senior executors and even mid-level ones leaving it open only to low level executors'.[225] This view does not seem to be entirely correct. Although decision-makers and senior executors cannot invoke duress, this is due, not to the 'provided that' formula, but to the general structure of the defence which implies, on a factual level, pressure or coercion from 'top to bottom'. This, in turn, means that 'mid-level' officials can certainly be coerced by their superiors to an extent that would, in principle, entitle them to invoke duress. The *Eichmann* case is the most obvious example of a 'mid-level' official seeking to invoke duress, although there duress was rejected for *factual* reasons. Finally, Bassiouni is certainly right if he believes that the provision will be applied primarily to 'low level executors'; but, again, this is due to the general structure of the defence, not to the 'provided that' formula.

There is, finally, another view according to which duress is given a different effect depending on the mental element of the crime in question.[226] According to this view, duress does not exclude the 'general intent' of war crimes but only the

[219] See *supra* note 179 and text.
[220] See Nill-Theobald, *supra* note 12, at 259.
[221] See *supra*, 2 on the interpretation of the 'threat' required.
[222] 'provided that the person does not intend to cause a greater harm than the one sought to be avoided.'
[223] See *supra* notes 162, at 180 and accompanying text.
[224] See also Eser, *supra* note 133, mn. 40.
[225] Bassiouni, *supra* note 26, at 491.
[226] Yee, *supra* note 46, at 298 *et seq.*; Oellers-Frahm and Specht, *supra* note 46, at 411.

'specific intent' of crimes against humanity, including genocide. Apart from disregarding the rule on mistake of law in the Rome Statute (Article 32),[227] this view overlooks the fact that the *mens rea* (intent, *Vorsatz*) of an offence is different from the actor's culpability or consciousness of the legal wrong (*Unrechtsbewußtsein*). Duress does not normally negate the mental element since the perpetrator knows and intends what he does, such as to kill innocent civilians. The mental element—and also the objective elements of the offence (*actus reus*)—can only be excluded if the use of force amounts to *vis absoluta*. Another question is whether duress can exclude specific subjective requirements, such as the specific intent to destroy a certain group or to act with certain discriminatory motives. Be that as it may, criminal law may abstain from punishing a person acting under duress not amounting to *vis absoluta* if this person could not be expected to have acted in accordance with the law since the threat to life and body did not leave him or her a real choice. In this case the person cannot be blamed for the act committed under duress. This consideration is of particular relevance with regard to the 'Erdemović-situation', i.e. the killing of innocent persons in a situation of extreme duress.

5. Special Consideration: Killing of Innocent Civilians

The *Erdemović* case shows that a situation of extreme duress, where the accused's life is at stake, implies a difficult balancing of legal interests that calls for a differentiated solution. Even if the accused's resistance to an order to kill would save innocent lives, the defence of duress cannot be completely excluded in such cases. Rather, recognizing duress in such cases is convincing since it focuses on the individual guilt of the accused (*nullum crimen sine culpa*) and does not invoke abstract, non-legal policy considerations. Certainly, this seems to imply that the humanitarian ideal of international criminal law does not correspond to the realities on the battlefield. Recognition of duress derives from the assumption that the ordinary person is too weak to refuse an order if there is a risk that he or she will be killed; exceptions confirm the rule but a few extraordinary individuals do not change human nature. The underlying philosophical rationale of the recognition of (extreme) duress as a defence is that we cannot expect others to live up to a standard that is so high that we cannot guarantee that we ourselves would uphold it under similar circumstances. To require such a standard would make the law hypocritical as was forcefully stated by the American Law Institute:

> This is to say that law is ineffective in the deepest sense, indeed that it is *hypocritical*, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case

[227] See Ambos, *supra* note 132, at 29–30. Obviously, neither Yee nor Oellers-Frahm and Specht could take into account the Rome Statute since their articles were written before it was adopted.

> is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is *unjust*. Where it would be both personally and socially debilitating to accept the actor's cowardice as a defense, it would be equally debilitating to demand that heroism be the standard of legality. The proper treatment of the hero is not merely to withhold a social censure; it is to give him praise and just reward.[228]

In fact, this view is based on a profoundly human and in this sense honest and realistic concept of criminal law, which takes into account the human weakness of each individual[229] and rejects an abstract call for heroism to be regulated by criminal law.[230] This human view can also be defended from the perspective of the case law and comparative law, *including* the common law.[231] As to the case law, the famous *Mignonette* case,[232] which is invariably quoted in support of a strict view excluding necessity or duress in cases of murder, does not really, at least in the result, serve this purpose, since the Crown ultimately commuted the mandatory death sentence for murder to six months' imprisonment.[233] Also, the sentencing judgment in *Erdemović* pointed in the direction of a more tolerant view, conceding a considerable mitigation of punishment with a statement which demonstrates the importance of the recognition of the defence of duress.[234] It appears indeed 'illogical', as Judge Stephen correctly pointed out, 'to admit duress generally as a matter of mitigation but wholly exclude it as a defence in the case of murder.'[235] Finally, the rejection of duress as a defence in war crimes cases has normally been due to the defence's failure to prove the corresponding factual circumstances, in particular a credible serious threat against the defendant, rather than to the non-recognition of this defence as a matter of law.[236] As to comparative law, the

[228] MPC, *supra* note 95, at 374–375 (emphasis added, footnotes omitted).

[229] On the 'human claim' as the basis of this position, see Nill-Theobald, *supra* note 12, at 269 with further references. For a similar position—as to ordinary crimes—see Reed, *supra* note 26, at 51, 53: 'concession to human frailty'; A. L. Dienstag, 'Comment: Fedorenko v. United States. War Crimes, the Defense of Duress, and American Nationality Law', 82 *Columbia Law Review* (1982) 142–45.

[230] See M. Kremnitzer, 'The World Community as an International Legislator in Competition with National Legislators', in A. Eser and O. Lagodny (eds.), *Principles and Procedure for a New Transnational Criminal Law* (1992) 337–349, at 345, note 33: 'Criminal law is not the law regulating decoration of heroism'; see also Reed, *supra* note 26, at 55: 'the standard is that of the reasonable man, not the reasonable hero.'

[231] See for the traditional view with various references Dienstag, *supra* note 229, at 137 *et seq.*; also Bassiouni, *supra* note 26, at 486–487; Dinstein, *supra* note 194, at 375–376; for a very critical view Reed, *supra* note 26, at 52 *et seq.*; see also Judge Stephen's account in *supra* note 51, para. 29 *et seq.*, 36 *et seq.* (36–37, 49).

[232] See *supra* note 26.

[233] Cf. Fletcher, *supra* note 26, at 132.

[234] See *supra* note 77 and text.

[235] Stephen, *supra* note 51, para. 46.

[236] See the similar conclusion of Dienstag, *supra* note 229, at 141–142, 146–147 with regard to the US American and the Nuremberg case law.

only provision[237] which explicitly excludes duress, the US Rules for Court Martial (RCM) 2.9.16.8 (h) ('except killing an innocent person'), not only stands alone among the other provisions mentioned above, but also, and more importantly, has to be interpreted systematically, taking into account the general law of necessity and duress, especially § 2.09 MPC. For reasons of space, such an interpretation cannot be carried out here *in extenso,* but it can be said—on the basis of Nill-Theobald's study[238]—that modern common law, in particular the doctrine,[239] no longer absolutely excludes duress in the case of the killing of innocent persons. Consequently, the traditional irreconcilable positions of civil and common law on this issue have approached each other, have merged, one could even say, as far as the general criminal law is concerned (cf. e.g. §§ 3.04 and 2.09 MPC and §§ 34, 35 StGB).[240] Thus, the remaining question is no longer whether duress can be invoked in the case of a killing of innocent persons, but what the requirements of such a defence are and how, from a theoretical point of view, it is to be classified.

The first part of this question—concerning the requirements—has, in fact, already been answered by Judge Cassese's dissenting opinion in *Erdemović*, and his answer has been confirmed and complemented by Article 31(1)(d) of the Rome Statute, as analysed and interpreted above. As to the theoretical foundation of this provision, it may be worthwhile briefly to consider the purposes of punishment.[241] It seems obvious that punishment in such cases can hardly find a convincing justification in traditional theories. There is no need for *special prevention* or *deterrence* with regard to a person committing a killing under extreme duress.[242] As the actor has not shown a hostile attitude towards the law but only acted according to his or her vital—'human'—interests, his or her attitude need not be corrected.[243]

[237] The corresponding provision of the DCCB is put in square brackets (see *supra* note 124 and accompanying text). The Siracusa Draft and the even stricter ILA proposal are based on traditional common law, see II.A.2.

[238] Nill-Theobald, *supra* note 12, at 212–213, 267–268 with further references.

[239] See in particular the recent article by Reed, *supra* note 26, esp. at 61–63 calling the traditional position 'ludicrous'.

[240] See also Nill-Theobald, *supra* note 12, at 224 *et seq*., 274 *et seq*., pointing out similarities and differences in US and German law. However, it should not be overlooked that the modern MPC proposal has by no means been implemented in all US states. Further, the traditional opposing positions of common and 'civil' law are difficult to overcome, even in the academic literature, see e.g. Bassiouni, *supra* note 26, at 486 *et seq.* who, relying on traditional authors, presents the traditional view.

[241] For general considerations on the purpose of punishment in international criminal law, see K. Ambos and C. Steiner, 'Vom Sinn des Strafens auf innerstaatlicher und supranationaler Ebene', 41 *Juristische Schulung* (2001) 9–13.

[242] See also Nemitz and Wirth, *supra* note 46, at 53; Reed, *supra* note 26, at 62; Dienstag, *supra* note 229, at 144, who, however, takes another view with regard to war crimes (see *infra* note 253 and text).

[243] Cf. Roxin, *supra* note 31, § 22 mn. 6, 10 *et seq.* This view is based on a new interpretation of guilt which replaces the traditional category of culpability (*Schuld*) with a new concept of responsibility (*Verantwortlichkeit*), see in the text and the next note.

Nor can it be expected that this person—should he or she ever come again in such a situation—would act differently and—in a demonstration of heroism—sacrifice his or her life. Also, in each concrete case the question must be raised whether a different conduct, e.g. non-compliance with an order, would really have saved the lives of innocent persons. If this is not the case, as it apparently was in *Erdemović*, punishment cannot be justified with preventive, but only with retributive considerations. These considerations would, however, go against modern criminal law theory, based on an integral concept of responsibility, which not only requires individual guilt for punishment, but also behaviour that is morally reprehensible or injurious to society.[244] In addition, it is doubtful whether punishment in such cases has an effect of *general prevention* in its *negative* sense (as pure deterrence), i.e. whether it would make a difference to the actual conduct of combatants on the battlefield. It could even have the opposite outcome, as Rowe points out.[245] Finally, the political or ethical demand that the law express its disapproval of atrocious crimes, based on considerations of *general prevention* in its *positive* sense, as the only possible theory of punishment applicable in these cases, must and need not sacrifice the principle of individual guilt. The de-individualization of the particular criminal case would go too far if punishment were based exclusively on considerations of general prevention, neglecting the defendant's individual contribution to the crime concerned.[246] The law's disapproval may be sufficiently expressed by the verdict of wrongfulness of an act committed under duress, exempting the actor—on a personal level—from culpability. This also answers the question about the theoretical classification of duress in general and subparagraph (d) in particular: it is an excuse, since the commission of the atrocious crimes 'within the jurisdiction of the Court' can never be justified on the basis of a balancing of interests but can only be excused on the basis of compassion for and understanding of the actor's human weakness.[247]

Another interesting proposal was put forward by Nemitz and Wirth. They have argued for a 'guilty but not punishable verdict'[248] in these cases, i.e. a person acting under duress should be convicted ('found culpable'), but 'freed of punishment'.[249] This view is interesting in that it seems to offer a workable compromise

[244] Cf. Roxin, *supra* note 31, § 19 mn. 3 *et seq*., 36 *et seq*. This was exactly the reasoning of Judge Cassese, *supra* note 65 and text.

[245] Rowe, *supra* note 49, at 220: 'Knowing that there is no defence of duress, would Erdemović, or someone in his position, then draw the conclusion that "I might as well kill as many innocent civilians as I like since the law treats me as guilty even when I acted under the greatest compulsion imaginable to take innocent life." ' Similar doubts are expressed by Kreß, *supra* note 2, at 621.

[246] A similar view takes Kreß, ibid., at 621.

[247] See also the same view defended by Nill-Theobald, *supra* note 12, esp. at 222–223, 226, 228–230, 274, 279, with regard to war crimes. See also *supra* note 194 with further references to US law.

[248] P. H. Robinson, *Structure and Function in Criminal Law* (1997) 73.

[249] Nemitz and Wirth, *supra* note 46, at 52–53. Similarly McDonald and Vohrah, *Appeals Chamber*, *supra* note 49, para. 85: 'In appropriate cases, the offender may receive no punishment at all.'

between the traditionally irreconcilable positions of common and civil law. However, apart from the fact pointed out above that these positions have recently approached each other, there are two further objections to this view. First, it starts from the premiss that general deterrence operates in such cases, a premiss which has been questioned above. Secondly and more important, a special ground for excluding punishment would—apart from its theoretical deficit—leave the verdict of blameworthy and culpable conduct intact. In other words, the perpetrator would have committed not only a wrongful, but also a culpable act and, therefore, his or her extraordinary situation of overwhelming pressure would not find an expression at the level of the structure of the offence.

The view that extreme duress in such cases can only operate as an excuse is not incompatible with the general objection against justifying necessity for war crimes, crimes against humanity and genocide.[250] While necessity as a *justification* implies a balancing of conflicting interests and presupposes a—hardly conceivable—prevalence of the protected interest over the interest violated by the commission of an international crime,[251] duress as an *excuse* does not imply such a balancing exercise. On the contrary, duress recognizes that the act committed by the person concerned is unlawful and in this sense does not weaken the *general* validity of the law; it only exempts the *specific* actor from personal responsibility, excusing his or her behaviour on a purely *personal* level on the presumption that he or she cannot be blamed for the act since any ordinary person would have behaved in the same way. The codifications and the case law that exclude duress categorically in the case of international crimes[252] overlook this structural difference between necessity and duress and, in fact, mix up the two defences, inventing a rule for duress that can only govern in the case of necessity. Since both duress understood in this sense and subparagraph (d) only offer a *personal* excuse, and since the personal conflict in question can arise both in the case of ordinary crimes and international crimes, I do not see why duress should be excluded in a general and absolute way for the latter.[253] There are no compelling reasons which would—on the basis of the structural difference between national and international

[250] See the discussion reproduced in Nill-Theobald, *supra* note 12, at 197–198; also Bassiouni, *supra* note 26, at 484, 490.

[251] Indeed, a balancing of life against life has been correctly rejected by the OGHBrZ and the French jurisprudence in *Touvier* (see *supra* II.B.2(b)).

[252] See the ILC's position (*supra*, II.A.1) and the following case law: *US v. Ohlendorf* (*supra* note 21 and accompanying text), OGHBrZ (*supra* notes 33–34 and accompanying text) and *Erdemović* (*supra* note 48 and accompanying text).

[253] Dienstag, *supra* note 229, however, takes this position, at 148 *et seq.*—despite his opposite position in the case of ordinary crimes (see *supra* notes 229, 234, 241). Similarly opposed to duress (or necessity) as a defence to murder or genocide: Y. Dinstein, 'International Criminal Law', 20 *Israel L. Rev.* 206, 235 (1985); followed by E. Mezzetti, 'Grounds for Excluding Criminal Responsibility', in F. Lattanzi (ed.), *The International Criminal Court: Comments on the Draft Statute* (1998) 147–157, 152–153.

criminal law—once and for all exclude the application of duress in the latter.[254] Also, as Judge Stephen convincingly argued,[255] at least in cases where resistance of the subordinate would not save a life, 'no violence is done to the fundamental concepts of common law' by the general recognition of duress as a defence. From the individual's point of view, the situations regulated by international criminal law are not so different from the ones regulated by national criminal law as to deny him or her, categorically, the right to invoke the excuse of duress. While the risks to life and physical integrity are greater during any armed conflict, so too the individual combatant runs a higher risk of becoming entangled in life-threatening situations. Thus, the factual and legal circumstances of the concrete case always determine whether duress as an excuse is applicable and whether its requirements are fulfilled.

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[254] See the similar view of Kreß, *supra* note 2, at 618; also Nill-Theobald, *supra* note 12, at 278–79.

[255] See *supra* note 71.

Erdemović Case', *ICLQ* (1998) 461–474; E. Wise, 'General Principles of Criminal Law', in L. Sadat Wexler (ed.), *Model Draft Statute for the International Criminal Court based on the Preparatory Committee's Text to the Diplomatic Conference*, 13ter Nouvelles Études pénales (1998) 39–64; M. C. Bassiouni, *Crimes against Humanity in International Criminal Law* (2nd edn., 1999) 484–491; A. Eser, 'Article 31. Ground for Excluding Criminal Responsibility', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999); C. Kreß, 'Zur Methode der Rechtsfindung im Allgemeinen Teil des Völkerstrafrechts: Die Bewertung von Tötungen im Nötigungsnotstand durch die Rechtsmittelkammer des Internationalen Straftribunals für das ehemalige Jugoslawien im Fall Erdemovic', 111 *Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW)* (1999) 597–623; P. Saland, 'International Criminal Law Principles', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results* (1999) 189–216; Y. Dinstein, 'Defences', in G. K. McDonald and O. Swaak-Goldman (eds.), *Substantive and Procedural Aspects of International Criminal Law: The Experience of International and National Courts*, Vol. I. *Commentary* (2000) 369–388.