



From a Mitigating Factor to a Complete Defence: Duress and *Erdemović*'s Haunting Shadow over the Rome Statute

RESEARCH ARTICLE

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ABSTRACT

This paper examines the trajectory of duress within international criminal law, with a particular focus on the role of the International Criminal Tribunal of the former Yugoslavia's (ICTY) *Erdemović* case, having crystallised the international rules governing this issue. The focus is on the practical legal effect of duress: whether it should act as a complete defence, or a mere mitigating factor at the sentencing stage. However, the paper also touches upon theoretical debates on the dual legal nature of excuses and justifications as exculpatory grounds in criminal law, and the underpinning deontological and consequentialist stances on morality intertwined within the decisions and judicial opinions. The first section explores the conflicting conceptual basis of duress as set by the International Military Tribunal (IMT) and post-war jurisprudence. The second section focuses on the *Erdemović* case and analyses the contradictory approaches of both the concurring and dissenting judges. The last section sheds light on the impact of the *Erdemović* debate on the Rome Statute's provision on duress. It concludes that the Rome Statute's approach is implicitly informed by the debate on the *Erdemović* case and adopts the approach of the dissenting judge Cassese; highlighting points of criticism directed at the provision in its current format.

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INTRODUCTION

The defence of duress in international criminal law (ICL) has long stood at the intersection of moral philosophy and legal doctrine. It is invoked when a defendant is coerced into committing an international crime, such to an extent that it puts their moral culpability and personal agency in the criminal deed into question. As such, it raises crucial normative questions with practical consequences, most prominently how to reconcile the accountability for international atrocities and the (non-)existence of a moral choice to commit them, when the perpetrator is subject to significant duress. From a theoretical standpoint, it has been controversial whether duress operates as an excuse, which negates the perpetrator's blameworthiness for the crime while keeping the illegality of the act; or a justification, implying that the coercion has removed the illegality of the *actus reus*. Closely linked to this distinction, is that which qualifies duress as a significant component in the assessment of individual criminal responsibility. It must be considered whether it is solely the limitations of the free will to commit the crime, or if the consequences of that crime act as a factor in considering the defence, thus reflecting the philosophical divide between deontological and consequentialist perspectives on morality. The latter point naturally arises when the issue at hand concerns the murder of innocents: can ICL legitimately impose individual criminal responsibility upon an actor for murders of civilians when those murders are performed under such coercion that the actor's moral culpability is called into question?

Within this doctrinal framework, duress has ignited considerable debate on its proper legal effect in ICL: whether it may operate as a ground for a complete exclusion of individual criminal responsibility (*i.e.* be considered as a complete defence) or a mere condition for mitigating the sentence. In this context, duress has followed an evolutionary path: starting as grounds for mitigation before the IMT and culminating in a potential ground for the complete exclusion of criminal responsibility under the Rome Statute of the International Criminal Court (ICC). In this context, the *Erdemović* case before the ICTY was a pivotal point. By splitting the bench, the conviction of a Bosnian Croat who participated in the mass murder of civilians after being told to either shoot or stand beside those who were to be shot, crystallised the long-standing divide over the scope and legal effect of duress. More importantly, it offered a comprehensive analysis of the associated moral and legal stances, which served as an important guideline for further development of ICL.

The central aim of this paper is to examine the broader impact of *Erdemović* on ICL: from its contribution as the first systematic analysis of duress within an international tribunal, to its impact on shaping Article 31(1)(d) of the Rome Statute. To this end, the first section traces the undefined parameters of duress as a legal concept within ICL, as set by the IMT and post-war jurisprudence, which established the framework for the contemporary analysis. The second section delves into *Erdemović* and dissects the competing judicial rationales advanced in this case. The last section deals with the Rome Statute's provision on duress, assessing the extent to which it reflects *Erdemović's* legacy. Although the focal point of the paper is to consider the legal effects of the defence of duress, engagement with the underlying theoretical debates proves unavoidable. In doing so, the analysis adopts the premise that human beings possess free will as a foundational assumption of criminal law.¹ Ultimately, the paper concludes that the Rome Statute allows duress as a complete defence regardless of the committed crime, recognising the flawed nature of the perpetrator's *mens rea*. However, the proportionality requirement suggests that the Rome Statute envisions duress as a justification, which calls into question the recognition of the role of moral agency within the framing of this legal institution.

1. DEFINING (THE CHALLENGES OF) DURESS

In ICL, the first definition of duress appeared in the Rome Statute. The earlier statutes of the IMT, ICTY and International Criminal

Tribunal for Rwanda (ICTR) unequivocally rejected two defences: obedience to superior orders and official position, excluding both as complete defences and permitting reliance on superior orders only for the mitigation of punishment.² Beyond these provisions, the statutes remained silent, thus leaving the courts to identify and develop other potential defences.

For the purposes of the following analysis, duress may be understood as a situation which arises when a defendant is coerced to commit an international crime, such to an extent that renders their moral blameworthiness and personal agency dubious. This crafty definition intentionally omits the most vital aspects of duress: its elements, the scope of its application (*i.e.* whether it can be invoked for all crimes, no matter the seriousness), and whether it can be considered an exculpatory ground; as all of these aspects are contested within customary international law. On these issues, international jurisprudence has reached different conclusions. The following sections present a brief overview of those aspects.

1.1. Elements of Duress

As mentioned above, there was no codified definition of duress that elucidated what was required to invoke the defence prior to the Rome Statute. However, the UN War Crimes Commission (UNWCC) examined the post-Nuremberg jurisprudence and defined three recurrent requirements for the invocation of duress, which have been reiterated in later jurisprudence:³

- a) the crime should have been committed in order to avoid a threat of immediate, serious and irreparable harm to life or limb;
- b) there should have been no other adequate means of averting the evil; and
- c) the committed crime should not have been disproportionate to the evil it sought to avoid.⁴

The first criterion sets two standards: a temporal restriction on the threatened harm (*immanent*) and a qualitative restriction (*serious, irreparable harm to life or limb*). For this criterion, it is outlined that the threat must be real and about to materialise,⁵ it must not be abstract⁶ nor merely believed to exist.⁷ Additionally, there must exist "actual *bona fides* belief in the danger by the particular individual".⁸ The threat must be directed at life or limb, and thus cannot consist of "mere moral pressure".⁹ From the way in which the criterion is formulated, it clearly emerges that the threat can be directed at other persons rather than just the accused. Some authors go so far as to argue that that third person need not even have a relationship with the accused.¹⁰

The second criterion warrants that the commission of the crime is a last resort to prevent the threat from materialising. These two elements essentially form the basis of the "moral choice test" adopted by the IMT. This test allows for the invocation of duress if no "moral choice was in fact possible" as an alternative for the accused.¹¹ This test is quite consequential when analysing duress in ICL, and was re-invoked in subsequent criminal proceedings which relate to the international crimes committed in the Second World War.¹² The lack of moral choice requires that the individual's capacity to opt out of committing the crime was undermined by the circumstances constraining them.¹³ Such constraining circumstances arise when the accused reasonably believes that the failure to commit the act would result in the death or serious harm inflicted upon themselves or upon a person of close connection to them.¹⁴ Such circumstances render the actions of the perpetrator practically lacking in any agency to disobey the unlawful order, as a method of preventing the harm, which leaves the commission of the crime as the sole moral, *adequate* means of averting the threat.

The last criterion, proportionality, is the most contested element of duress. Debates arise as to whether it should be included at all, and if so, what is required by its balance. Regarding the first question, the

crucial dilemma is whether to approach duress from a deontological or a consequentialist perspective. A deontological approach to duress would mean that the only relevant factor in the assessment should be whether the actor may be considered culpable for their actions, without taking the consequences into account.¹⁵ A consequentialist approach, in turn, entails an assessment of the effects of the act to determine whether duress should constitute a defence for the committed crime.¹⁶ Therefore, the consequentialist approach essentially calls for a proportionality analysis, whereas the deontological stance does not consider the effects of the crime, and as such does not require a weighing on the balance of the crime's consequences. The pre-ICTY jurisprudence adopted divergent views on this point. On the other hand, the IMT did not engage in a proportionality analysis and did not aim to weight the legal interests at hand, instead focusing on the subjective position of the accused.¹⁷ The post-Nuremberg tribunals also adopted varying approaches: whilst some followed the IMT's deontological approach,¹⁸ others took a consequentialist stance: in that the type, and seriousness, of the committed crime ought to play a role in the determination as to whether duress could shield the defendant from imposing liability.¹⁹

The second question centres on: how can proportionality be assessed? While it is less controversial that the life of the perpetrator engaged in war never outweighs the life of the innocent victim,²⁰ the central case of this paper poses a more crucial question: what happens when the actor is of a reasonable belief that the lives of the victims could not be saved, even if the perpetrator were to sacrifice their own? Beyond the proportionality criterion, this issue is pertinent for the moral choice test: what is the moral choice when an actor has to decide whether to sacrifice their own life, even if that sacrifice cannot save the lives of a hundred others? These questions are central to the debate in the *Erdemović* case and are examined below.

Besides these requirements, a fourth element is occasionally set forth in this context: that the individual claiming duress should not have brought the situation upon themselves.²¹ In this context, it is argued that the accused should not have placed themselves within a position or unit that was notorious for the commission of such atrocities.²² In a similar vein, some scholars outline that the nature of the position of the accused should be taken into account when determining whether they are morally culpable for the defence.²³ This calls for a consideration of a soldiers' commitment to obey international humanitarian law (IHL) in the proportionality analysis, specifically, whether they should sacrifice themselves in return for the lives of civilians.²⁴ However, it should be noted that their position does not impose an obligation upon them to "passively accept their certain death or serious bodily harm."²⁵ Although these considerations are relevant, they have not been reiterated by the UNWCC as prevalent in most of the post-war jurisprudence concerning this crime, but are taken into account by some of the ICTY's judges.

1.2. Defence of Superior Orders vs Duress: Two Sides of the Same Coin?

As reflected in Principle IV of the ILC's *Nuremberg Principles*, the IMT Judgment²⁶ and several subsequent post-Nuremberg decisions of military tribunals²⁷, duress is tied to the superior orders' defence (also known as the Nuremberg defence). The practical implication of the fusion of the two concepts is that duress could not be treated as a complete defence since it is prohibited by the IMT Charter as an extension of the Nuremberg defence. Thus, duress is by default reduced to a mitigating circumstance which can only be considered in the sentencing decision.

However, as unanimously recognized by the ICTY, these defences, although related, are not identical.²⁸ Namely, the Nuremberg defence centres on the order itself as a factor that exempts responsibility, whereas duress focusses on the recipient, and their lack of choice to disobey the order as a result of coercion.²⁹ Put more bluntly, the commission of the crime cannot be excused by the fact that an unlawful order was followed, as the defendant must have refused to obey the order.³⁰ Yet, if the refusal is followed by a

threat to life or limb, the issue ceases to be an issue of an illegal order, and becomes a case of coercion.³¹ Through this distinction, duress is divorced from the constraints of the prohibition of superior orders and warrants a separate assessment on whether it can operate as a complete defence, or solely a mitigating factor.

1.3. Scope and Legal Effect of Duress: Conflicting Approaches

Once duress has been established as a separate defence, there has been significant jurisprudential and doctrinal disagreement in the post-Nuremberg tribunals as to whether duress can be invoked for the most serious crimes that threaten the lives of civilians, and whether they can be invoked as a ground for exculpation or mitigation.³² These disparities are reflective of the schism between civil law and common law traditions. Namely, civil law endorses duress as a complete defence, even for the most serious crimes, whereas common law jurisprudence rejects the idea that duress could vindicate the perpetrator from criminal responsibility for the most serious violations, which includes murder.³³

In making this determination, the civil law approach concentrates on the perpetrator and their criminal intent, holding that individuals cannot be held accountable when their free will has been practically eroded by coercion.³⁴ This incapacitation to make a free choice does not depend on the crime the individual is asked to commit, therefore it can be applied even to the gravest of crimes.³⁵ In the same vein, the civil approach concludes that the aim of a sanction would not be served properly if an individual is penalised for a crime they would not have committed, had they not been in fear for their own life, and therefore permits duress to act as a complete defence.³⁶ In this sense, it is most illustrative to underline the *Einsatzgruppen* case, where the US Military Tribunal concluded the following:

*"Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. [...] No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever."*³⁷

In contrast, the common law approach centres on the victim,³⁸ arguing that the protection of human life as a sacred object of the law cannot be completely overridden by coercion, even if the perpetrator is unable to truly make a free choice under a serious and immanent threat.³⁹ This consequentialist stance is best outlined by Sir Lauterpacht:

"no principle of law permits the individual person to avoid suffering or even to save his life at the expense of the life - or, as revealed in many war crimes trials, of a vast multitude of lives - of or sufferings, on a vast scale, of others".⁴⁰

Secondly, when this stream of post-war jurisprudence analyses the fairly limited *mens rea* of the accused, it adds that the moral choice is not completely eradicated by duress as:

*"the decision of the threatened man whose consistency is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and therefore that of a man with, perhaps to some exceptionally limited extent, a 'guilty mind'..."*⁴¹

Therefore, the common law view is that even this minimal level of culpability should be punishable when serious crimes are committed. The diminished nature of that culpability is sufficiently accounted for by duress being considered as a mitigating circumstance for the punishment.⁴² This means that the defendant is still morally reprehensible, just to a lesser extent than an accused who committed the act willingly, without any form of pressure.⁴³

In response to the common law concerns on the potential abuse of duress and how the safeguarding of human life acts as a central tenet of legal systems, civil law poses a set of particularly stringent criteria which must be proven to utilise the defence.⁴⁴ Depending on the degree of fulfilment of those criteria, duress could completely

exculpate the perpetrator, or could mitigate their sentence accordingly.⁴⁵

Together, these opposing conceptions reveal the fundamental dilemma of duress: whether the law should prioritise the moral accountability of the actor, or the inviolability of the victim's life. This national law dilemma was transposed and developed in the international legal arena in ICTY's *Erdemović* case. By way of the separate and dissenting opinions on the matter, the Appeals Chamber (AC) judges have significantly contributed to this discussion in the sphere of ICL and to its further development.

1.4. Duress as a Justification or an Excuse?

Another perplexity on the issue of duress as a defence, especially as a complete defence, is whether it constitutes a justification or an excuse for the committed act. This is not a mere doctrinal distinction, as it discusses the underlying tension on the reasons for which duress should (not) exculpate the perpetrator.

A justification considers that even though an act fits squarely into the definition of a crime (*i.e.* the *actus reus* limb is satisfied), it is not considered illegal due to the existence of a permissive norm which negates the criminality of the act.⁴⁶ In essence, the justification engages in a proportionality analysis (*i.e.* the balancing of the involved legal interests) and opts for the superior interest by making the prohibited conduct legal.⁴⁷ Thus, if an act is considered justified by certain circumstances, it means that society does not reprimand its commission, and might even encourage such behaviour under those particular circumstances.⁴⁸ Justifications are applicable when the individual "intends to attain the result of his action and is aware that by undertaking the conduct he will bring about that result".⁴⁹ A classic example of a justification is self-defence: when an individual murders someone in self-defence, their conduct is not considered to be criminally prohibited, even though it fits the prescribed criteria of the offense of murder.⁵⁰ As Ambos outlines, this is because the individual invoking self-defence defends both themselves and "the legal system as a whole, which is disregarded by the attacker", and therefore "the defender acts rightly, not wrongly; his conduct is not only excused but must be justified."⁵¹ The crucial difference between this legal institute and duress is that the former involves an attack against an individual who behaves illegally, whereas the latter involves the infliction of harm upon innocent individuals. As such, while the former is generally considered justified and desirable, it is doubtful whether the same can be said for the latter.

In contrast, excuses recognise that a certain act is wrongful and socially reprehensible, but they exclude the culpability of the particular defendant (*i.e.* the *mens rea*) as "they did not perform the admittedly wrongful act in a blameworthy manner."⁵² The commission of the crime is not blameworthy and therefore not fit to be subjected to criminal justice when the defendant was "unable to recognise [...] [the] unlawfulness [of the act] or could not be expected to act lawfully".⁵³ A textbook excuse is the defence of insanity: when an individual kills another person while suffering from a severe mental disorder that prevents them from grasping that they are taking a life, or that taking a life is wrong, society still considers that the murder is wrong, just that the individual who conducted the murder is not criminally reproachable.⁵⁴ Therefore, while justifications have an impact on the norm as a whole, excuses "have no meaning beyond the concrete case".⁵⁵

The acceptance of either of these approaches has practical applications for the arguments outlined in the preceding section, particularly on the argument as to whether duress can be a complete defence for murder. More specifically, if it is accepted that duress may be considered as an excuse in a particular case, rather than a justification, that negates the illegality of the act as a whole. The argument that the gravity of the crime should remove that crime from the scope of duress is then left with little merit.⁵⁶ In contrast, if duress was recognised as a justification, it would necessarily be subjected to a strict proportionality requirement.

Within this context, duress has been subject to significant debate. While the doctrinal approaches are rather unified on the

argument that duress should be considered within the framework of excuses,⁵⁷ in practice, the ICTY judges approach it from different angles, with only one of them considering duress an excuse.⁵⁸ However, the judges do not outline these theoretical distinctions directly. Still, their stance on this issue is derived from the threads underlying their reasoning and are examined in more detail below.

Following this overview of the challenges of duress, the analysis proceeds to examine how the ICTY has addressed its elements and legal effects as an exculpatory or mitigating circumstance.

2. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND ITS ERDEMOVIĆ CASE

The legal and moral dilemma on duress gained momentum in the ICTY's trial of Dražen Erdemović. This case highlighted the inconsistencies of the post-Second World War jurisprudence and resulted in the ICTY judges reaching divergent conclusions on the nature of duress under international law. These discussions have sparked huge debate within the legal community, with experts supporting both sides of the decision,⁵⁹ and have, in turn, become pivotal for the development of this area of ICL. The following sections analyse the factual circumstances of the case, the findings of the Trial Chamber (TC), and the findings of the judges of the AC.

2.1. Factual Background

Dražen Erdemović was a Bosnian Croat who had opposed the Bosnian war and had despised the generated ethnic tensions between Serbs, Muslims and Croats in Bosnia. Initially, he refused to enlist in the Army of Bosnia and Herzegovina, but later became a member of the Croatian Defence Council (*Hrvatsko vijeće odbrane* – HVO).⁶⁰ He left the HVO feeling that his position was insecure as he "had been arrested and beaten by HVO soldiers for having helped Serbian women and children return to their territory".⁶¹ Following an unsuccessful attempt to escape the Bosnian wars altogether by migrating to Switzerland, primarily due to financial constraints, he enlisted in the Bosnian Serb Army (*Vojaska Republike Srpske* – VRS), deliberately in a unit that was ethnically diverse.⁶² His position entailed reconnoitering enemy positions and sabotaging artillery equipment.⁶³ However, in July 1995, he was assigned to go to a farm in Pilica where he was ordered to "massacre hundreds of Muslims".⁶⁴ Erdemović refused to obey the command, but eventually conceded after he was told to either shoot or stand beside those who were to be shot.⁶⁵ This threat was brought to life by the fact that Erdemović witnessed the shooting of a fellow soldier who had refused to carry out the same order.⁶⁶ After subsuming to the threat, it is estimated that Erdemović killed between 10 and 100 people.⁶⁷

When he was charged with crimes against humanity for his deeds in Pilica, Erdemović became the first person to plead guilty before the ICTY.⁶⁸ As he expressed in his plea, he felt a moral responsibility to admit to the crime in front of the Court in order to clear his consciousness. He testified in several trials, providing substantial and detailed information about the crimes committed in connection with the Srebrenica genocide. He expressed that he was sorry for all of the victims of the war and that he "wanted to help the International Tribunal understand what happened to ordinary people like [him] in Yugoslavia".⁶⁹

However, while admitting to the charges, Erdemović enunciated he pulled the trigger in fear of the gun pivoting in his direction, thus invoking the defence of duress. This, in turn, prompted the Trial Chamber to consider the question as to whether duress could be invoked as a ground to completely dismantle the criminal responsibility of the individual.

2.2. Findings of the Trial Chamber

The TC set itself apart from the IMT, finding that duress could “eliminate the *mens rea* of the offence and therefore the offence itself”,⁷⁰ and should be determined on a case-by-case basis, subject to a strict set of criteria.⁷¹ This determination meant that the TC separated duress from the defence of superior orders, as discussed above. The remaining element, however, was to determine the conditions for applying duress; *i.e.*, its scope and legal effects.

The TC outlined the UNWCC’s stringent conditions for the invocation of duress, which were examined above: the existence of immediate, serious and irreparable danger, the absence of means to escape and the proportionality of the action in relation to the threatened evil.⁷² The TC also gave specific notice to the moral choice test and its application in subsequent jurisprudence.⁷³ Further, the TC recognised two other factors: the accused’s voluntary participation in an enterprise “that leaves no doubt about its end results” and the rank held by the giver and the receiver of the order.⁷⁴ Yet, the TC did not delve into a discussion on their status as rules of law, as it did not rely on those criteria for rejecting the plea.

Instead, the TC held that duress was inapplicable in the present case as its stringent threshold had not been met.⁷⁵ In making this decision, the TC referred to two considerations: firstly, the question of whether Erdemović had the moral choice to “disobey rather than to obey”⁷⁶ the order and, secondly, an amalgamated criterion of proportionality and gravity of the crime. Regarding the second criterion, the TC stated that:

*“With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.”*⁷⁷

The TC did not elaborate on these criteria, but concluded that they had not been met in the present case, and therefore it could only be considered whether duress could constitute a mitigating factor in the sentencing stage.⁷⁸ The conclusion that can be drawn from this approach is that despite the fact that the trial judgment found that the existence of a moral choice to disobey was to be factored in the decision, in the end the decision as to whether duress amounted to a complete defence depended on the gravity of the committed crime. Although the criterion is initially framed as an analysis of proportionality, from the cited paragraph, it is evident that whenever a crime against humanity is committed, the threshold needed to make duress an exculpatory defence could not be reached. As such, the TC rejected duress as a justification of the committed crime, due to its gravity, thus taking a consequentialist approach. Ultimately, this finding solidified the common law view that the severity of the crime limits the scope and legal effects of duress as a defence.

2.3. Findings of the Appeals Chamber

Following this TC’s judgment, Erdemović lodged an appeal. The Appeal Judgment agreed with the TC that duress does not constitute a complete defence under international law for crimes against humanity.⁷⁹ However, the controversy of the question is reflected in the tight majority of the decision (3:2), whereas its complexity is underscored by the existence of four separate and dissenting opinions. Three of the judges, Judge McDonald, Judge Vohrah and Judge Li voted in favor of the decision, whereas the remaining two of the bench – Judge Cassese and Judge Stephen – voted against. Judges McDonald, Vohrah and Cassese embark upon an extensive analysis of jurisprudence and state practice⁸⁰ and are in agreement on one major point: that due to major divergences in civil law and common law approaches, there exists no positive rule of international law which would exclude duress as a defence for crimes that involve the murder of innocent persons, be it a customary rule or a general principle of law.⁸¹ However, they dramatically differ in their subsequent legal conclusions and the rationales behind them. Their perspectives will be examined in turn.

2.3.1. Analysis of the Concurring Opinions

The concurring majority consisting of Judges McDonald, Vohrah and Li, argues that the ICTY should reject duress as a complete defence for the most heinous crimes, including crimes against humanity, despite the lack of such a positive rule in international law⁸² due to “policy considerations”.⁸³ They point out the trend among the post-World War II tribunals that find duress is restricted from being applied to grave crimes,⁸⁴ and argue that the AC should give preponderance to the approach that safeguards innocent human lives “bearing in mind the specific context in which the International Tribunal was established, the types of crimes over which it has jurisdiction, and the fact that the International Tribunal’s mandate is expressed in the Statute as being in relation to ‘serious violations of international humanitarian law’”⁸⁵. In this sense, Judges McDonald and Vohrah outline that the guiding principle of IHL – to protect the vulnerable – should prevail and that “the law should not be the ... slave of logic or intellectual hair-splitting”.⁸⁶ Their decision rests on the premise that the fear for one’s own life should never prevail when innocent lives are at stake, whereas the question of the moral responsibility of the defendant should be considered in the context of mitigation, and not exculpation.⁸⁷

The concurring judges disregard the moral choice test posed by the Nuremberg judgment due to the ambiguous definition used by the IMT and its various interpretations in legal theory,⁸⁸ adding that the test made no “significant contribution” to the jurisprudence of the issue.⁸⁹ Furthermore, Judges McDonald and Vohrah do not engage in a proportionality analysis nor do they tackle the consideration of the inevitability of the victims’ deaths, but rather base their decision on the fact that IHL rules should guide the conduct of combatants.⁹⁰ To add to this, Judge Li states that:

*“Admission of duress as a complete defence or justification in the massacre of innocent persons is tantamount to both encouraging the subordinate under duress to kill such persons with impunity instead of deterring him from committing such a horrendous crime, and also helping the superior in his attempt to kill them.”*⁹¹

The Judge rejects the contention that Erdemović’s acts could be justified if the lives of the Bosniak victims would have been taken in any case by other soldiers, had Erdemović refused the order.⁹² By invoking the so-called Pandora Box argument,⁹³ he underlines its “absurdity” as “it would justify every one of the criminal group who participated” in the act and would thus lead to impunity for this massacre of innocent persons.⁹⁴

Essentially, the concurring judges ground their reasoning on normative considerations on the gravity of the crimes, the protective foundations of IHL and concerns about deterrence. In doing so, they admittedly apply a *de lege ferenda* standard for Erdemović, thus disregarding the existence of a meaningful choice for the commission of the crimes. With these two main considerations in mind, it is safe to conclude two things: firstly, that these judges entertain the notion that duress has the potential to offer a complete defence solely as a potential justification, and secondly, that they take a consequentialist approach in making that determination.⁹⁵ It is worth noting however that, if the excuse route had been taken, some of the concerns of the judges, such as Judge Li’s deterrence considerations, would be at least partially addressed. This is due to the fact that excuses do not deal with the illegality of the crime as a whole, but are applied on a case-by-case basis, taking the culpability of the particular perpetrator into consideration, as opposed to justifications which touch upon the legality of the act.⁹⁶

The next section turns to the dissenting opinions of Judge Stephen and Judge Cassese, who both offer an alternative legal assessment of the *Erdemović* case.

2.3.2. Analysis of the Dissenting Opinions

Judges Stephen and Cassese reject the value-driven decision of the majority and are of the opinion that duress could constitute a complete defence under positive ICL, even for the most serious IHL violations.⁹⁷ They begin from the shared premise that the absolute

denial of duress as a defence for murder would be unjust in the rare case that would meet its highly restrictive standards.⁹⁸ From this common viewpoint, they advance different lines of reasoning. While only Judge Cassese offers a strictly legal explanation, both judges offer a normative analysis of whether coercion can negate individual culpability. These arguments will be examined in turn.

Firstly, from a formal point of view, Judge Cassese argues that the majority's policy-centered approach to the exclusion of crimes against innocent victims from the defence of duress violates the *nullum crimen sine lege* principle.⁹⁹ He effectively finds that there exists an established rule of international law that duress can be regarded as complete defence provided that its threshold is met, and therefore, any claim that duress is inapplicable for certain crimes must be grounded in another established rule of international law.¹⁰⁰ As the concurring judges themselves agree that there exists no such exception,¹⁰¹ the general rule which allows duress' application remains in force. Thus, any policy-based exception would be contrary to the positive rules of international law.

Secondly, from a normative perspective, Judge Cassese sets forth an articulated set of cumulative requirements for the application of duress as a complete defence:

- I. *"the act charged was done under an immediate threat of severe and irreparable harm to life or limb;*
- II. *there was no adequate means of averting such evil;*
- III. *the crime committed was not disproportionate to the evil threatened [...]*
- IV. *the situation leading to duress must not have been voluntarily brought about by the person coerced"*¹⁰²

The third requirement is reflective of the divergences present in the two dissenting opinions. Although both judges introduce the novel element of whether the sacrificing of the perpetrator's life would have any prospect of saving the life/lives of the victim(s), they approach this element from different positions: while Judge Cassese places it within the frame of a proportionality analysis, Judge Stephen situates it within the realm of the "moral choice" test.

Judge Cassese argues that the criterion of proportionality is well situated to safeguard the sacred position of the right to life as a "*most fundamental human right*"¹⁰³, as it is rare that any conduct would be able to reach its stringent threshold.¹⁰⁴ However, he argues that this threshold may be reached where the perpetrator has no reasonable outlook of saving the lives of the victims.¹⁰⁵ In support of this, he draws a parallel with the ordinary case of choosing between saving one's own life and the victim's life, which he argues can never be deemed proportionate due to the moral and philosophical concerns illustrated by his rhetorical question: "how can a judge satisfy himself that the death of one person is a lesser evil than the death of another?"¹⁰⁶ Yet, in cases such as the present one, the caused harm – the murder of the innocents – would have occurred anyway, and therefore it would not be proportionate to ask the soldier to lay his life, as the result would be an additional, and indeed vain, loss of life.¹⁰⁷ He poignantly adds that even though such a sacrifice would set "a heroic example for mankind", that is an example "which the law cannot demand him to set".¹⁰⁸

In a similar sense, in his assessment of the view of the majority that duress should be understood as a mitigating circumstance,¹⁰⁹ Judge Cassese strictly underlines that the purpose of criminal law is to punish reprehensible behavior, and mitigation would mean that the Court considers that the individual should have behaved differently.¹¹⁰ In his opinion, such reprehension would be "unjust and unreasonable when the accused can do nothing to save the victims by laying down his own life".¹¹¹

On the other hand, Judge Stephen focuses on the inevitability of the victims' deaths as a factor to be considered when deciding whether a "moral choice" truly existed. He outlines that "where resistance to the demand will not avert the evil but will only add to it",¹¹² no moral choice could be deemed available.¹¹³ He outlines:

*"the choice open to [the accused] was not that of the victims' deaths or his own but, rather, that of their deaths or their deaths together with his own, the whole question of proportionality would necessarily be seen to be meaningless; there would be no question of weighing one life against another or others, the choice, if it can be described as a choice, would be between many lives or many lives plus one, his own. [...] It is surely difficult to suppose that an heroic act of self-sacrifice by the Croatian Appellant would have deflected the Bosnian Serb army from the task of extermination of Muslim civilians on which it was embarked."*¹¹⁴

To support this thesis, he argues that in cases such as the present one, the accused is not guided merely by his survival instinct, but rather by the rational idea that his sacrifice would not make any meaningful contribution to the outcome of the situation.¹¹⁵ The only choice which could be said to have been available to him was to sacrifice his life in pursuit of the highest moral principles, but that is a choice without any practical implication on the outcome.¹¹⁶ Therefore, he concludes, "that is not the sort of choice the making of which criminal laws should enforce with penal sanctions."¹¹⁷

Another point raised by Judge Stephen relates to the special status that the concurring majority attach to the crime of murder. Namely, he considers that the differentiated treatment of murder, as the only crime to exclude duress as a complete defence, as "illogical", regardless of the special heinousness of the intent required to commit this crime.¹¹⁸ This view, that the accused's *mens rea* is not dependent on the nature of the crime,¹¹⁹ complements his previous argument, which positions the psychological attitude of the accused as the focal point of the status of duress as a complete defence or mitigating factor.

When these arguments are taken into consideration, one arrives at a rather interesting conclusion: while the Judges have employed the same factors in deciding that duress should constitute a complete defence, they have threaded different theories within them. Namely, Judge Cassese's focus on proportionality indicates that he envisions duress as a consequentialist justification under international law.¹²⁰ In contrast, as can be derived from Judge Stephen's line of reasoning, he approaches duress from a deontological perspective by focusing on the guilty mind as the sole factor in the determination of the existence of a complete defence.¹²¹ While it is true that he examines the quantity of the victims, he only does so with the intent to derive a broader conclusion as to the mental state of the accused and delimit whether that mental state is worthy of criminal punishment. Additionally, his stance centres on the argument that the defence does not depend on the severity of the act, thereby confirming that he considers duress as an excuse that has no broader impact on the prohibition of crimes against humanity.¹²² As such, his position is in stark philosophical and legal contrast from the rest of the bench.

The analysis of the divergent arguments in the judges' rationales highlights two things: that the *Erdemović* case was the first systematic attempt at defining the legal and moral limits of this defence in ICL; and that a normative and legal consolidation is required for the bench's ability to give a sustained answer to the plea of duress. In this context, the Rome Statute is the first legal instrument aimed at resolving the contested elements.

3. DURESS IN THE ROME STATUTE

In respect of duress, the Rome Statute is significant for two reasons: it is the first international instrument to lay down a definition of this defence and it is the first to recognise it as a potential ground for the complete exclusion of criminal responsibility, regardless of the severity of the crime committed. The following sections go on to examine the preparatory works of Article 31(1)(d) which governs duress, and subsequently analyse its constituent elements in light of the *Erdemović* case.

3.1. *Travaux Préparatoires* of Article 31(1)(d)

The drafting of the Rome Statute commenced before the *Erdemović* AC decision was adopted. Initially in 1991, in line with the IMT and the ICTY statutes, the ILC proposed that no defence, other than superior orders and official position, should be codified within the official provisions as such, by stating that: “*The competent court shall determine the admissibility of defences under the general principles of law, in light of the character of each crime.*”¹²³ The ILC clarified that this formulation resulted from the lack of consensus among the negotiating delegations,¹²⁴ with some delegations arguing that duress should not constitute a defence for crimes against humanity.¹²⁵

In 1994, the UNGA established the *Ad Hoc* Committee for the Establishment of an International Criminal Court, which continued the work of the ILC. The Committee essentially confronted the same dilemmas: whether the Statute should enumerate available defences, and whether there should exist any defence for crimes against humanity.¹²⁶ The 1996-1997 draft of the Committee included duress as a defence.¹²⁷ Although it offered different versions of the provision, providing for a variety of conditions for the invocation of duress, one remained unclear: whether duress could be invoked for crimes against humanity.¹²⁸

In the meantime, the ICTY AC delivered its judgment in the *Erdemović* case on 7 October 1997. The subsequent Rome Conference of June and July of 1998 led to the adoption of the current text of Article 31(1)(d) without much time being spent discussing the matter.¹²⁹ As can be elucidated in the following section, the criteria adopted by Article 31(1)(d) are largely reflective of those outlined by Judge Cassese in his dissent. This text, as evident in the citation below, does not make any explicit reference to the gravity of the committed crime, and therefore resolves the persisting dilemma of duress.

3.2. Definition of Duress and its Elements

Article 31(1)(d) of the Rome Statute establishes duress as a complete defence for all crimes enumerated within the Statute, notwithstanding their gravity, as such rejecting the findings of the majority of the *Erdemović* AC. It provides that a person is not criminally liable in the event that:

“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.”*¹³⁰

Although most national legal systems maintain duress and necessity as separate defences,¹³¹ the Rome Statute does not distinguish between compulsion brought about by natural events (necessity) and coercion caused by threats addressed from one person to another (duress).¹³² Critics have outlined that these defences should be separated since they serve a different purpose, and as such require different treatment.¹³³ More specifically, in the case of necessity, when the need to choose between two harms is triggered by *vis major*, the actor consciously balances legal interests and opts for the lesser evil.¹³⁴ In doing so, the perpetrator “does entertain the criminal intent required by the criminal rule” in the sense that they intend to cause the crime that they deem to be a lesser evil.¹³⁵ Yet, society considers this permissible since the defendant deliberately opts to serve a higher value, which excludes the illegality of the caused harm, and as such aligns with the rationale behind justifications.¹³⁶ On the other hand, duress “to a large extent negatives the subjective element of the person under coercion” as the culpable intent to cause the harmful result *belongs* to the individual causing the duress.¹³⁷ Consequently, treating duress as an

excuse acknowledges the lack of moral guilt of the coerced individual while their actions remain criminal and reproachable,¹³⁸ as excuses have no broader impact on the norm as a whole. Despite these differences, Article 31(1)(d) applies an identical set of criteria for both duress and necessity, most notably the proportionality requirement, and as a result, treats both of these defences as justifications. As such, the conditions laid down in Article 31(1)(d) suggest a consequentialist stance and largely conform to those outlined by Judge Cassese in his dissenting opinion to the *Erdemović* case.

The first requirement, for nature of the threatened harm to reach the threshold of sufficiently serious and immanent, is identical to the first criterion outlined by Judge Cassese and is the only element thoroughly analysed in the ICC’s practice.¹³⁹ The second criterion which refers to the available alternatives for avoiding the threat has been subject to changes to accommodate the joint prescription of duress and necessity. For these purposes, Judge Cassese’s ‘lack of adequate means to avoid the threat’ was replaced by a ‘need for a necessary and reasonable reaction to avoid the threat’. Yet, when subject to interpretation, it ultimately leads to the same threshold as posed by Judge Cassese.¹⁴⁰ Effectively, when employing the defence of duress, the reaction runs parallel to the absence of any other adequate means to avert the threat in the sense that “the means used have to be apt and efficient, [and] the harm should be limited to that which is absolutely necessary to avoid the threat”.¹⁴¹ Furthermore, as has been accepted in state practice and international legal theory as a “prevailing opinion”,¹⁴² the reasonableness of the reaction entails a proportionality assessment, meaning that a reasonable reaction does not cause greater harm than the one it intends to avoid.¹⁴³ The inclusion of proportionality in this requirement is confirmed briefly and implicitly in the *obiter dictum* of the *Ongwen* case, where the ICC outlined that a person acting necessarily and reasonably “is not required to take all conceivable action to avoid the threat, irrespective of considerations of proportionality or feasibility”.¹⁴⁴ *A contrario*, a reasonable accused person would be required to take actions which are proportionate and feasible. When determining whether the person acted in such a manner, the Court will consider “the totality of the circumstances in which the person found themselves” and whether “others in comparable circumstances were able to necessarily and reasonably avoid the same threat”.¹⁴⁵ Accordingly, this requirement demands an objective proportionality assessment and, as such, subsumes the criteria put forward by Judge Cassese.

At first glance, the third criterion seems to depart from Judge Cassese’s interpretation. Namely, Article 31(1)(d) introduces the subjective requirement of intent: that the actor did not *intend* to cause greater harm than the one they sought to avoid. When briefly interpreting this element, the ICC has outlined that it evaluates the subjective state of the accused and their perception of the balance between the sought and avoided harms, and not whether a greater harm was avoided in reality.¹⁴⁶ On the other hand, Judge Cassese framed the requirement in objective terms, inquiring whether the act simply caused greater evil than the threatened one. However, upon closer scrutiny, it can be deduced that the introduction of intent is reflective of Judge Cassese’s broader reasoning as laid out in his dissenting opinion.

The inclusion of the lack of intent to cause harm is in contravention with the IMT’s moral choice test which questions whether there exists any intent in the first place to cause evil when a defendant is coerced.¹⁴⁷ As examined above, Judge Cassese only examines the existence of a moral choice within the framework of proportionality: he concludes that a situation satisfies the duress requirement of proportionality *only* when the actor could not have reasonably saved the victims’ lives by sacrificing their own, and not when the perpetrator only acted to save their own life. Put another way, he deems it would not be proportionate, and thus permissible, to invoke duress when the actor premeditated that they should trade the civilian’s life to save their own, thus intending to cause greater harm than the one sought to be avoided. In contrast, he concludes that it would be permissible to take innocent lives, when the actor realises that there would be no prospect of saving them. Therefore,

the judge likewise took into consideration the *intent* to cause a certain degree of harm.

Lastly, the Rome Statute approaches duress from a consequentialist point of view.¹⁴⁸ Although the third criterion refers to the intent of the actor, it does so only insofar as it relates to the result produced, and not the degree of meaningful moral agency present on the actor's part, or their capacity to make a free choice. Even if the requirement (that the accused did not intend to cause greater harm) could be read as engaging with the deontological concerns of moral culpability, that engagement is still judged by way of the consequences produced, and not the ability to make a truly free choice. When the degree of culpability is not the sole subject of discussion, a deontological understanding of duress cannot be inferred.

In sum, it can be concluded that the Rome Statute seems to adopt Judge Cassese's stance on duress, thus departing from the value-driven approach of the *Erdemović* majority. Given the circumstances discussed above, Article 31(1)(d) envisions duress as a complete defence which could be invoked even in the most serious international crimes.

CONCLUSION

The foregoing analysis has traced the evolution of duress in ICL from a mitigating factor at the sentencing stage before the IMT, to its codification as a complete defence within the Rome Statute. On that transformative path, the case of *Erdemović* served as a doctrinal rupture that directly confronted the two contradictory imperatives: the demand for accountability for heinous crimes prohibited by humanitarian law and the need to detect the boundaries of individual moral culpability for their commission under extreme coercion.

The deep division within the *Erdemović* bench highlighted the pressing need to resolve the issue of duress within an international context. In this sense, *Erdemović* cast a lasting shadow over Article 31(1)(d) of the Rome Statute. Although not explicitly discussed during the *travaux préparatoires* of the provision, the Statute's implicit endorsement of Judge Cassese's stance echoes ICTY's debates and shows recognition for the pursuit of the overarching goals of international humanitarian and ICL should not come at the cost of individual justice. Punishing actors who lack a significant moral commitment to the crimes they are compelled to commit could have a counterproductive effect to both individual justice and transitional justice processes.

Article 31(1)(d)'s recognition of duress as a complete defence affirms that the imposition of criminal punishment must be grounded in moral blameworthiness. This approach allows the court to evaluate the accused's mental state on a case-by-case basis and assess whether the particular coercive circumstances completely exonerate the perpetrator, or if the perpetrator is still culpable to a limited extent, in which case the threat can only play a mitigating role in the punishment as prescribed by the Rules of the Court.¹⁴⁹ Yet, it is still debated whether the provision is conceptually complete when it entails the consequentialist balancing of the harms produced, despite the defect of the *mens rea*. This remains the central critique among scholars who envision duress as an excuse, and not a justification. Specifically, although this approach recognises duress as a complete defence in the most extreme of circumstances where the perpetrator's sacrifice could not have spared the victims' lives, this recognition would still be rooted in a utilitarian balancing of harms, as perceived by the perpetrator, and not their own ethical role in the crime. Evaluating the individual's intent when deciding to commit the crime is an approach which assesses moral agency when its existence in coercive circumstances is initially doubtful. Although the ICC has not yet directly confronted the criteria that render duress a consequentialist justification under its Statute, their future interpretation could expose the provision's doctrinal problems and their practical implications.

Nevertheless, while duress must remain an exceptional defence subject to a very stringent threshold, its application when this threshold is reached is not a concession to impunity. In contrast, it exposes ICL's inherently moral character and commitment to individualised responsibility. Instead of blindly punishing the hand that pulled the trigger, allowing duress as a complete defence recognises that the true moral reprehension should be directed at the voice that imposed the threat.

NOTES

1. See Matthew Jones, 'Overcoming the Myth of Free Will in Criminal Law: The True Impact of the Genetic Revolution' (2003) 52 *Duke Law Journal*, 1031, 1034-1037.
2. Charter of the IMT (Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis) ('London Agreement') (8 August 1945), art. 7 and art. 8; UNSC, Statute of the International Criminal Tribunal for the Former Yugoslavia (25 May 1993), as amended 17 May 2002, art. 7; UNSC, Statute of the International Criminal Tribunal for Rwanda (8 November 1994), as last amended 13 October 2006, art. 6.
3. *Prosecutor v. Erdemović* (Sentencing Judgment) IT-96-22-T (ICTY, 29 November 1996) [17]; *Prosecutor v. Erdemović* (Appeal Judgment) IT-96-22-A (ICTY, 7 October 1997) Separate and Dissenting Opinion of Judge Cassese [16].
4. U.N. War Crimes Commission, *Law Reports of Trials of War Criminals*, (vol.XV, 1949) 174.
5. Although the length of time between the threat being made and the action materialising is to be determined on a case-by-case basis.
6. Kai Ambos, 'Defences in International Criminal Law', in Bertram S. Brown (ed) *Research Handbook on International Criminal Law* (Edward Elgar 2011) 311.
7. Gerhard Werle, *Principles of International Criminal Law* (2nd edition, TMC Asser Press 2009) 206. Similarly, the ICC has interpreted the Rome Statute's provision on duress to require the existence of a concrete and objective threat that is about to materialise. See *Prosecutor v. Dominic Ongwen* (Judgment on the Appeal against the Trial Judgment) ICC-02/04-01/15 A (ICC Appeals Chamber, 15 December 2022) [1419]-[1424] and *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud* (Trial Judgment) ICC-01/12-01/18 (ICC Trial Chamber X, 26 June 2024) [1743]-[1748]. For the debate in contemporary national law see Emma Charlene Lubaale, 'The Defence of Duress: Inconsistent International Criminal Court Rulings and National Law Guidance' (2025) 36 *Criminal Law Forum*, 419, 435-441.
8. 'Trial of Alfred Felix Alwyn Krupp von Bohlen und Halbach and Eleven Others' [1947-1948], US Military Tribunal, Nuremberg Case No 58 in UN War Crimes Commission *LRTWC* (vol. XV, 1949) 148. Similarly, Lubaale outlines the importance of the subjective stance of the accused towards the threat, see Lubaale (n 7) 441-442.
9. Kai Ambos, *Treatise on International Criminal Law, Volume 1: Foundations and General Part* (OUP 2013) 349.
10. Ambos (n 6) 312.
11. Judgment of 1 October 1946, [1946] International Military Tribunal, 447; *United States v. Ohlendorf*, ('The Einsatzgruppen case') [1948] US Military Tribunal, Case No

- 9 in UN War Crimes Commission, *LRTWC* (vol.VII, 1949) 471.
12. The Einsatzgruppen case (n 11) 174; *The German High Command Trial: Trial of Wilhem von Leeb and thirteen others* [1947-1948], US Military Tribunal, Nuremberg Case No 72 in UN War Crimes Commission, *LRTWC* (vol. XII, 1949), 72; *Krauch et al.*, ('Farben case') [1997] US GPO, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law no 10 (vol. VIII, 1952) 1179.
 13. Yoram Dinstein, 'International Criminal Courts and Tribunals, Defences' in *Max Planck Encyclopedias of International Law* (Oxford Public International Law 2015), [6]; Farben case (n 12) 1179.
 14. Dinstein (n 13) [7]; High Command case (n 12) 509.
 15. Noam Wiener, 'Excuses, Justifications, and Duress at the International Criminal Tribunals' (2014) 26(2) *Pace International Law Review*, 88, 91-94.
 16. Ibid.
 17. Ambos (n 9) 348.
 18. For example, the Einsatzgruppen Case (n 11) 480.
 19. For example, see *Lynch v. DPP for Northern Ireland* [1975] AC 653, 680.
 20. Opinion of Judge Cassese (n 3) [42]; For an explanation of this view, see Ambos (n 9) 365.
 21. Opinion of Judge Cassese (n 3) [16]; Farben case (n 12) 1179.
 22. Einsatzgruppen case (n 11) 91; *Trial of Field Erhard Milch*, [1947] U.S. Military Tribunal, Nuremberg, Case No 39 in UN War Crimes Commission, *LRTWC* (vol.VII, 1949) 40.
 23. Luis E. Chiesa, 'Duress, Demanding Heroism and Proportionality' (2008) 41(3) *Vanderbilt Journal of Transnational Law*, 741, 764-766.
 24. Ibid.
 25. Ambos (n 9) 358.
 26. IMT Judgment [447].
 27. For example, see High Command case (n 12) 509 and Farben case (n 12) 1179.
 28. Sentencing Judgment [15]-[19]; *Prosecutor v. Erdemović* (Appeal Judgment) IT-96-22-A (ICTY, 7 October 1997) Separate and Dissenting Opinion of Judge Stephen [13]; *Prosecutor v. Erdemović* (Appeal Judgment) IT-96-22-A (ICTY, 7 October 1997), Separate and Dissenting Opinion of Judge McDonald and Judge Vohrah [34]-[36]; Opinion of Judge Cassese (n 3) [15].
 29. Marcus Joyce, 'Duress: From Nuremberg to the International Criminal Court, Finding the Balance Between Justification and Excuse' (2015) 28 *Leiden Journal of International Law*, 623, 625.
 30. Ibid.
 31. Antonio Cassese, *International Criminal Law*, (2nd edition Oxford University Press 2003) 246.
 32. For a complete examination of the various approaches to duress offered by the post Second World War tribunals, see Mahmoud Cherif Bassiouni, *Crimes against Humanity: Historical Evolution and Contemporary Application* (CUP 2011) 620-621.
 33. Jonathan Witmer-Rich, 'The Defence of Duress to Killing Innocents: Assessing the Mixed Legacy of the ICTY and the ICTR' in Milena Sterio and Michael Scharf (eds) *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments* (Cambridge University Press, 2019) 225-226; Opinion of Judge McDonald and Judge Vohrah, (n 28) [49]-[72]; Benjamin J. Risacher, 'No Excuse: The Failure of the ICC's Article 31 "Duress" Definition' (2014) 89(3) *Notre Dame Law Review*, 1403, 1406.
 34. Risacher (n 33) 1408.
 35. Ibid.
 36. Ibid 1419-1421; Ambos (n 9) 363-364.
 37. The Einsatzgruppen Case (n 11) 480. For a list of all cases of post-war tribunals that apply this approach, see Opinion of Judge McDonald and Judge Vohrah (n 28) [47].
 38. Risacher (n 33) 1408.
 39. See for example: *R v Tyler* [1838] 8 C & P 616; *Arp v State* [1893] 97 Alabama Supreme Court 5, 12 So. 301; *US v Holmes* [1842] 26 Fed Case 360; '*Trial of Fuerstein and others*', [1948] British Military Court, Nuremberg in UN War Crimes Commission, *LRTWC*, (vol. XV, 1949) 173; '*Trial of Holzer and Others*' [1946] Canadian Military Court in UN War Crimes Commission in UN War Crimes Commission, *LRTWC*, (vol. XV, 1949) 193.
 40. Sir Hersch Lauterpacht (ed) *Oppenheim's International Law: A Treatise, vol.II*, (7th edition, Longmans 1952) 571-572.
 41. Lynch case (n 19) 680. Similarly, see Chiesa (n 23) 760-761.
 42. Opinion of Judge McDonald and Judge Vohrah (n 28) [82]-[87].
 43. Opinion of Judge Cassese (n 3) [48].
 44. Cassese (n 31) 250.
 45. Opinion of Judge Cassese (n 3) [42].
 46. Ambos (n 9) 304; Cassese (n 31) 255.
 47. George P. Fletcher, *Rethinking Criminal Law*, (repr. OUP, 2000, Little Brown, 1978) 769; Ambos (n 9) 305; Cassese (n 31) 219.
 48. Johnatan Herring, *Criminal Law—Text, Cases, and Materials* (4th edition, Oxford University Press 2010) 703; Geert-Jan Knoops, *Defenses in Contemporary International Criminal Law* (2nd edition, Martinus Nijhoff Publishers 2008) 22; Joyce (n 29), 636-637; Cassese (n 31) 219.
 49. Cassese (n 31) 220.
 50. Ambos (n 9) 305; Albin Eser, 'Grounds for Excluding Criminal Responsibility (Article 31 of the Rome Statute)' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (2nd Edition, C.H. Beck/Munchen, HartiVolkach, Nomos/Baden-Baden 2008) 878.
 51. Ibid 333-334.
 52. Chiesa (n 23) 747, 748, 751; Ambos (n 9) 304; Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) 216; Joyce (n 29), 636-637.
 53. Ambos (n 9) 305; Ilias Bantekas and Susan Nash, *International Criminal Law* (3rd edition, Routledge 2007) 53.
 54. Ambos (n 9) 305.
 55. Ambos (n 9) 306; Fletcher (n 47) 810.
 56. Cassese (n 31) 242; Chiesa (n 23) 753.

57. For example, Chiesa (n 23), Wiener (n 15), and Risacher (n 33). For an opposite view see Peter Westen and James Mangiafico, 'The Criminal Defense of Duress: A Justification, Not an Excuse – And Why it Matters' (2003) 6 Buffalo Criminal Law Review, 833.
58. Risacher (n 33) 1412-1414.
59. Some of the authors that support the concurring majority include: Dinstein (n 13), [7],[25]-[26]; Rosa Ehrenreich Brooks, 'Law in the Heart of Darkness: Atrocity & Duress' [2003] Virginia Journal of International Law, 861, 880; Some of the authors that support the dissenting minority include: Chiesa (n 23) 773; Illan Rua Wall, 'Duress, International Criminal Law and Literature' (2006) 4(4) Journal of International Criminal Justice, 724, 724-744.
60. Sentencing Judgment [79].
61. Ibid.
62. Ibid.
63. Ibid.
64. Ibid [80].
65. Ibid.
66. Ibid.
67. Ibid [87].
68. Dražen Erdemović (ICTY), available at <<https://www.icty.org/en/content/dra%C5%BEen-erdemovi%C4%87>> accessed 10 May 2026.
69. Guilty plea of Dražen Erdemović available at ibid.
70. Sentencing Judgment [14].
71. Sentencing Judgment [15]-[19].
72. Sentencing Judgment [17].
73. Ibid [18].
74. Ibid.
75. Ibid [20].
76. Ibid [19].
77. Ibid.
78. Ibid [20]. It was determined there was insufficient evidence in the present case that would warrant the application of duress as a mitigating factor. See [89]-[91].
79. *Prosecutor v. Erdemović* (Appeal Judgment) IT-96-22-A (ICTY, 7 October 1997) [19].
80. See Opinion of Judge Cassese (n 3) [20]-[46]; Opinion of Judge McDonald and Judge Vohrah (n 28) [48]-[72]. Although the judges reach different conclusions regarding the "force and precedential value" of the previous, post-Nuremberg jurisprudence, these differences are mainly theoretical and irrelevant to the core of the issue, as all of the judges agree that the previous jurisprudence is divergent and does not amount to a crystalized customary rule. For this, see Witmer-Rich (n 33) 235-236.
81. Opinion of Judge McDonald and Judge Vohrah (n 28) [48]-[72]; Opinion of Judge Stephen (n 28) [24]; Opinion of Judge Cassese (n 3) [12]; *Prosecutor v. Erdemović* (Appeal Judgment) IT-96-22-A (ICTY, 7 October 1997) Separate and Dissenting Opinion of Judge Li [8].
82. Opinion of Judge Li (n 81) [5]-[8]; Opinion of Judge McDonald and Judge Vohrah (n 28) [75],[76]-[81], [88]-[89].
83. Opinion of Judge McDonald and Judge Vohrah (n 28) [88]. In the same vein, Opinion of Judge Li (n 81) [8].
84. Opinion of Judge McDonald and Judge Vohrah (n 28) [42],[44].
85. Ibid [72]; Opinion of Judge Li (n 81) [8].
86. Opinion of Judge McDonald and Judge Vohrah (n 28) [75]-[81], [88]-[89]. More broadly, judge Higgins has argued that whenever the rules of ICL are unclear, the humanitarian and social aspects of IHL should prevail. See Rosalyn Higgins, *Problems and Process: International Law and How We Use it*, (Clarendon Press, Oxford 1994) 5-7.
87. Opinion of Judge McDonald and Judge Vohrah (n 28) [82]-[87]; Opinion of Judge Li (n 81) [12].
88. Opinion of Judge Li (n 81) [4].
89. Opinion of Judge McDonald and Judge Vohrah (n 28) [45].
90. Ibid [80].
91. Opinion of Judge Li (n 81) [8]. A similar assertion is made by Lord Simon in *Lynch v DPP for Northern Ireland* who follows the rationale that if duress were allowed to be invoked as a complete defence, it would allow commanders to exculpate those they command by purposely putting them under duress. See Lynch case (n 19) 687-88.
92. Opinion of Judge Li (n 81) [8].
93. Payam Akhavan, 'Should Duress Apply to All Crimes?: A Comparative Appraisal of Moral Involuntariness and the Twenty Crimes Exception Under Section 17 of the Criminal Code' (2009) 13 Canadian Criminal Law Review, 271, 277-78.
94. Opinion of Judge Li (n 81) [11]. Similarly, Opinion of Judges McDonald and Vohrah (n 28) [80]. While the main arguments are discussed in the dissenting opinions of the judgment and analysed below, this particular element of Judge Li's rationale warrants closer attention. This view seeks to apply a hypothetical and idealistic scenario – that all the soldiers recognised the immorality of the murders and, more importantly, all of them could prove their unwillingness to obey the immoral order subject to the stringent requirements of duress – to a real, heterogeneous situation with diverse motivations for committing the crimes. To amplify this, the preponderant of those motivations during the Srebrenica genocide specifically seemed to be the sincere desire to exterminate the civilians. This is reflected by the fact that Judge Li fails to give due consideration to the fact that there was a rather large group of Bosnian Serb soldiers who would have willingly committed the murders of the innocent civilians, and would have gladly taken over for Erdemović. Therefore, although his theoretical point is significant, it remains tenuous to conclude that any real-world situation would bring his hypothesis to life, since a collective disobedience towards the order would have left the commander without the manpower to conduct the massacre.
95. Chiesa (n 23) 746-748; Wiener (n 15) 121-122.
96. See the previous section.
97. Opinion of Judge Stephen (n 28) [24]; Opinion of Judge Cassese (n 3) [12],[49].
98. Opinion of Judge Stephen (n 28) [61]; Opinion of Judge Cassese (n 3) [42]-[44].
99. Opinion of Judge Cassese (n 3) [49].
100. Ibid.

101. Appeal Judgment (n 79) [19].
102. Opinion of Judge Cassese (n 3) [16].
103. Ibid [43].
104. Ibid [42]; See also Cassese (n 31) 250.
105. Opinion of Judge Cassese (n 3) [42].
106. Ibid. For an explanation of this view, see Ambos (n 9) 365.
107. Opinion of Judge Cassese (n 3) [43].
108. Ibid [44]. See also [47].
109. Opinion of Judge McDonald and Judge Vohrah (n 28) [82]-[87]; Opinion of Judge Li (n 81) [3].
110. Opinion of Judge Cassese (n 3) [48].
111. Ibid [48].
112. Opinion of Judge Stephen (n 28) [62].
113. Ibid [54].
114. Ibid [19].
115. Ibid [54].
116. Ibid [54].
117. Ibid.
118. Ibid [46].
119. Ibid [46].
120. Wiener (n 15) 122-126.
121. Ibid 126-128.
122. Ibid.
123. ILC, *Draft Code of Crimes against the Peace and Security of Mankind*, (UN Doc. A/CN.4/SER.A/1001/Add.1 (Part 2) 1991) 95, William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press 2010) 482.
124. Ibid 100.
125. Ibid 101; Schabas (n 123) 481-482.
126. Schabas (n 123) 482; Witmer-Rich, (n 33) 227.
127. UN, *Report of the Preparatory Commission on the Establishment of an International Criminal Court*, (UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome, 15 June - 17 July 1998, Official Records, Volume III, 2002) art. 31, 34-35.
128. Witmer-Rich (n 33) 228.
129. Schabas (n 123) 481-490.
130. UN General Assembly, *Rome Statute of the International Criminal Court* (17 July 1998) as last amended 2010, ISBN No. 92-9227-227-6, art 31(1)(d).
131. Ambos (n 9) 342-347; Risacher (n 33) 1417; Eser (n 50) 883.
132. Ambos, (n 9) 342. For an examination of duress and necessity in national criminal law, see 343-347.
133. Risacher (n 33) 1404-1405; Ambos (n 9) 347,365; Eser (n 50) 884.
134. Ambos (n 9) 347,356 and Eser (n 50) 884.
135. Cassese (n 31) 242.
136. Ambos (n 9) 347,356 and Eser (n 50) 884.
137. Cassese (n 31) 242.
138. Ambos (n 9) 347,356 and Eser (n 50) 884.
139. See *Prosecutor v. Dominic Ongwen* (Trial Judgment) ICC-02/04-01/15 (ICC Trial Chamber IX, 4 February 2021) [2582]; *Prosecutor v. Dominic Ongwen* (Appeal Judgment) [1419]-[1427]; *Prosecutor v Ag Mahmoud* (Trial Judgment) [1743]-[1748]. For an analysis of these findings, see Lubaale (n 7) 423-442.
140. For a detailed explanation of this interpretation see Ambos (n 9) 359.
141. Ambos (n 9) 359. Similarly, Eser (n 50) 886.
142. Eser (n 50) 886.
143. Lubaale (n 7) 442-443; Ambos (n 9) 359. It is worth noting that Eser holds an opposing view: that reasonableness does not “automatically connote proportionality”, especially in the case of the Rome Statute since its Article 31(1)(c), which prescribes self-defence and defence of others, prescribes “reasonable” and “proportionate” as two separate standards. Furthermore, he contends that the subjective standard posed in the third criterion of Article 31(1)(d) indicates that the proportionality should only be assessed subjectively, rather than objectively (see Eser (n 50) 886-887). However, beginning with his first argument and following an analogous interpretation, one might reach the conclusion that an action done in self-defence need not be necessary. Namely, the term “necessary” is not included in Article 31(1)(c) *per se* and is included in Article 31(1)(d), alongside the reasonableness standard. Yet, not only is this view contrary to the essence of self-defence, but when defining the reasonable reaction under Article 31(1)(c), Eser himself states that “The defensive reaction must be reasonable in terms of being necessary” (Eser (n 50) 882). This illustrates that a reasonable reaction can encompass different meanings in the different contexts of self-defence and duress, especially given the numerous and last-minute compromises made during the drafting of the Rome Statute, which, in Ambos’ opinion, has resulted in non-harmonized standards (Ambos (n 9) 359). Therefore, a combined textual and systematic interpretation of its articles does not always lead to an interpretation that is in line with the general state practice and the rationale behind the provisions. Regarding Eser’s second point, the subjective prescription of proportionality in the third criterion does not eliminate the possibility for a need of a double objective and subjective assessment of proportionality, if that is, somewhat paradoxically, required by the text, as is submitted by Lubaale (n 7) 447-449. Therefore, although these concerns do bear certain merit, still, it is more likely that in a future case, the ICC would adopt a standard of reasonableness that is widely accepted in national practice and international legal scholarship.
144. *Prosecutor v. Dominic Ongwen* (Trial Judgment) [2583].
145. Ibid.
146. Ibid [2584]; *Prosecutor v Ag Mahmoud* (Trial Judgment) [1750].
147. Risacher (n 33) 1417.
148. Ibid.
149. Assembly of States Parties, *Rules of Procedure and Evidence of the International Criminal Court* (9 September 2002) ICC-ASP/1/3 and Corr. 1, Part II-A, Rule 145(2)(a)(i). According to the ICC, duress can only mitigate, but not justify the crime when the second or the third condition for its application are not met. See *Prosecutor v. Dominic*

Ongwen (Sentencing Judgment) ICC-02/04-01/15 (ICC Trial Chamber IX, 6 May 2021),[108]-[109].

COMPETING INTERESTS

The author has no competing interests to declare.

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