

**Duress as a Defence in International Criminal Law: From Nuremberg to Article 31(1) (d) of the Rome Statute of the International Criminal Court**

**By**

**VIOLA WAKUTHII MUTHONI**

**Student Number: 3368350**



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**Faculty of Law, University of the Western Cape**

**Prepared under the supervision of Prof Dr G Werle**

**Faculty of Law, Humboldt University**

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**DECLARATION**

I, Viola Wakuthii Muthoni declare that **‘Duress as a defence in international criminal law: From Nuremberg to Article 31(1) (d) of the Rome Statute of the International Criminal Court’** is my own work and that it has not been submitted for any degree or examination in any other university or institution. All the sources I have used, referred to or quoted have been duly acknowledged.

**Student**      **Viola W. Muthoni**

Signed: .....

Date: .....



**Supervisor**      **Prof. Gerhard Werle**

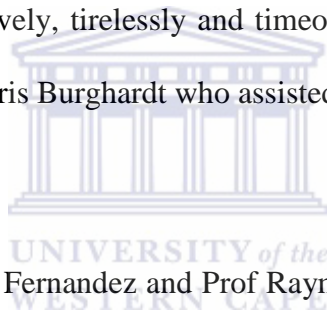
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## **DEDICATION**

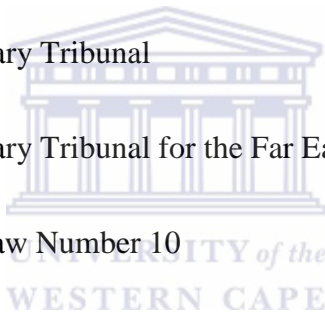
To my mother, Janet Muthoni Gaconde, whose unconditional love, support and provision spurred me on to the journey of achieving my dreams. To my sister, Annbel Wakuthii, whose laughter and love refreshes me constantly and to Alan Mwika, whose support made my one-year study period seem much shorter.





## LIST OF ABBREVIATIONS

ICC	International Criminal Court
PTC	Pre-trial Chamber
AC	Appeals Chamber
TC	Trial Chamber
OTP	Office of the Prosecutor
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
CCL 10	Control Council Law Number 10
MLC	<i>Mouvement de Libération du Congo</i>
LRA	Lord Resistance Army
UPDF	Uganda People's Defence Forces
CAR	Central Africa Republic
DRC	Democratic Republic of the Congo
UNSC	United Nations Security Council
USA	United States of America



## **KEY WORDS**

Defence

Duress

Criminal responsibility

The International Criminal Court (ICC/the Court)

Rome Statute of the International Criminal Court (the Rome Statute/the Statute)

Preconditions

Threat

Erdemović

Successful plea

Defendant



## CHAPTER ONE

### INTRODUCTION TO THE STUDY

#### 1.1 Statement of the Problem

Defences are procedural tools both in domestic and international law.<sup>1</sup> A defence has been defined as ‘...any claim which, if accepted, would necessitate an acquittal or reduction in sentence’;<sup>2</sup> or a denial, justification or confession and avoidance of an action.<sup>3</sup> Defences are therefore grounds raised to deny, justify or excuse criminal action and to avoid the penalty that would otherwise attach to such action. Defences could be procedural or substantive, and this paper is interested only in the substantive defence of duress.<sup>4</sup>

Duress has generally been defined as ‘constraint exercised to force a person to perform some act.’<sup>5</sup> It has also been defined as coercion exercised through a threat to life or limb, which leaves the defendant with no moral choice in the matter.<sup>6</sup> A person under duress has no moral choice not to commit the crime, and he/she cannot therefore be held culpable. Whether such lack of moral choice results in the negation of the actor’s *mens rea*<sup>7</sup> has been subject to debate.

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<sup>1</sup> See discussions on defences in international criminal law by Knoops GA in *Defenses in Contemporary International Criminal Law* 2ed (2008) 63-143. Hereafter Knoops GA 2ed (2008). See also Van Sliedregt E *Individual Criminal Responsibility in International Law* (2012) 224-306. Hereafter Van Sliedregt E (2012); Werle G *Principles of International Criminal Law* 2ed (2009) 553-565. Hereafter Werle G 2ed (2009).

<sup>2</sup> Scallioti M ‘Defences before the International Criminal Court: substantive grounds for excluding criminal responsibility Part 1’ *International Criminal Law Review* (2001) 111. Hereafter Scallioti M Part 1 (2001). This definition however wrongly equates defences with mitigating factors.

<sup>3</sup> *The Law Dictionary* available at <http://thelawdictionary.org/defense/> (accessed 8 April 2013).

<sup>4</sup> The Rome Statute of the ICC only provides for substantive defences and its use of the term ‘grounds for excluding criminal responsibility’ as opposed to ‘defences’ is an attempt to avoid an interpretation that includes procedural defences. See Eser A in ‘Article 31-Grounds for excluding criminal responsibility’ in Triffterer O (Ed) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (1999) 544. Hereafter Eser A in Triffterer O (1999).

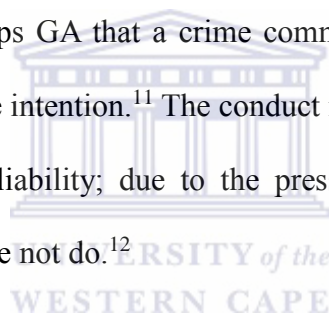
<sup>5</sup> Simpson JA & Weiner ESC *The Oxford English Dictionary* 2ed Vol. IV (1989) 1133.

<sup>6</sup> Schabas WA *The International Criminal Court: A commentary on the Rome Statute* (2010) 490.

<sup>7</sup> *Mens rea* is an essential component of a crime without which criminal liability does not attach to the actor. See Parker JS ‘The Economics of *mens rea*’ *Virginia Law Review* Vol. 79 4 (1993) 724 quoting Hall J *General Principles of Criminal Law* (2ed) (1960) 70, who states that ‘*mens rea* is the ultimate evaluation of criminal conduct’.

According to Knoops GA, the defendant's intention is not negated by duress as he still has a choice to resist the threat, but that choice is an undesirable one, but Epps V argues that duress actually negates intent due to the involuntariness of the action.<sup>8</sup>

Criminal law best expresses the importance of the intent requirement in the Latin phrase, '*actus non facit reum, nisi mens sit rea*', which translates 'an act is not necessarily a guilty act unless the accused has the necessary state of mind required for that offence.'<sup>9</sup> International criminal law also adopts this principle, and the Rome Statute of the International Criminal Court (Rome Statute)<sup>10</sup> specifically provides for an intent requirement for all the core crimes in its Article 30. The discussion of intent is however not explored in this paper, due to the constraint of space, but this paper agrees with Knoops GA that a crime committed under duress fulfills all the elements of a crime, including the intention.<sup>11</sup> The conduct is hence considered unlawful, only that the actor is excused from liability; due to the pressure forcing the defendant to do something he/she would otherwise not do.<sup>12</sup>



The status of duress in international criminal law can be deduced from the practice of international criminal tribunals constituted in history before the coming into force of the Rome

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<sup>8</sup> See Epps V 'The soldier's obligation to die when ordered to shoot civilians or face death himself' 37 *New England Law Review* (2003) 987; and Knoops GA 2ed (2008) 277 referred to in note 1 above.

<sup>9</sup> Law J & Martin EA *A Dictionary of Law* 7ed (2009) Oxford University Press available at <http://www.oxfordreference.com/view/10.1093/acref/9780199551248.001.0001/acref-9780199551248-e-80> (accessed 31 August 2013).

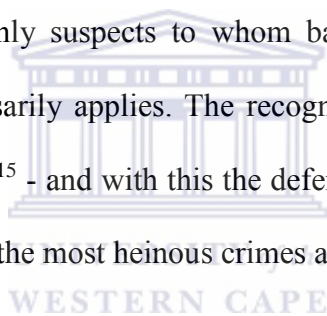
<sup>10</sup> Adopted on 17 July 1998 and entered into force on 1 July 2002.

<sup>11</sup> This opinion is advised by the discussion of duress in Dressler J 'Exegesis of the law of duress: Justifying the excuse and searching for its proper limits' 62 *South California Law Review* (1988-1989) 59, where he distinguishes between an insane actor and a coerced one, stating that the latter understands both the legal and factual implications of his actions. If one considers that duress negates intention, the defence would never be available for the crime of genocide, for which a specific genocidal intent is required. See Article 6 of the Rome Statute. This paper considers such general unavailability of duress for a specific crime would result in an absurdity.

<sup>12</sup> Ambos K 'Defences in international criminal law' in Brown BS (Ed) *Research Handbook on International Criminal Law* (2011) 301.

Statute. An examination of the statutes of the said tribunals - the charter of the International Military Tribunal (Nuremberg Charter), the statute of the International Criminal Tribunal for the Far East (IMTFE Charter), the statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute) and the statute of the International Criminal Tribunal for Rwanda (ICTR Statute) - reveals that the said statutes and their accompanying rules of procedure did not make provision for any of the defences let alone duress.<sup>13</sup>

The rationale for the lack of provision for defences in the above instruments is unclear, but it has led to the opinion that international criminal law tends to show lack of sympathy towards accused persons.<sup>14</sup> This is an unfortunate state of affairs since accused persons under international criminal law are only suspects to whom basic legal guarantees such as the presumption of innocence necessarily applies. The recognition by the Rome Statute of the accused's right to raise a defence<sup>15</sup> - and with this the defence of duress - is testimony to the fact that even persons accused of the most heinous crimes are entitled to a defence.<sup>16</sup>



Despite not being specifically provided for by the statutes of international criminal tribunals preceding the International Criminal Court (ICC), duress was pleaded by several accused persons before the said tribunals.<sup>17</sup> The most notable of these cases was the ICTY case of

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<sup>13</sup> Zahar A & Sluiter G *International Criminal Law* (2008) 428. Also Kittichaisaree K *International Criminal Law* (2001) 263.

<sup>14</sup> According to Cryer R, Friman H & Robinson D et al *An Introduction to International Criminal Law and Procedure* 2ed (2011) 402, these accused persons 'rarely include those with plausible claims of defences recognised by law'. According to Eser A in Triffterer O (1999) 542, crimes under international law are of such magnitude that attempts to justify or excuse them are often met with reservations.

<sup>15</sup> Art 67 (1) (e) of the Rome Statute.

<sup>16</sup> Eser A in Triffterer O (1999) 554 correctly states that even war criminals cannot be denied the right to be tried according to the rule of law.

<sup>17</sup> Examples of these cases in the aftermath of the second world war include *Flick et al* United States Military Tribunal at Nuremberg Judgment of 22 December 1942 14 available at <http://werle.rewi.hu-berlin.de/Flick-Case%20Judgment.pdf> (accessed 8 April 2013); *Attorney General v. Adolf Eichmann* Criminal Case 40/61 40 available at [http://www.trial-ch.org/fileadmin/user\\_upload/documents/trialwatch/eichmann\\_appeal.pdf](http://www.trial-ch.org/fileadmin/user_upload/documents/trialwatch/eichmann_appeal.pdf) (accessed 8 April 2013); *United States v. Wilhelm Von Leeb et al* 12 (1948) LRTWC 1 at 59; *Prosecutor v.*

*Prosecutor v. Drazen Erdemović (the Erdemović case)*, where duress was extensively discussed.<sup>18</sup> The *Erdemović case* served as an important precedent in the development of duress in international criminal law, despite the majority judgment rejecting duress as a complete defence to charges of crime against humanity or charges involving the killing of innocent persons.<sup>19</sup>

Unlike its predecessors, the Rome Statute provides for defences- and with this the defence of duress- but the mere provision for duress does not guarantee seamless practice. Judge Cassese did note in *the Erdemović case* that the preconditions for duress are difficult to prove,<sup>20</sup> and evidence of this can be seen from the fact that there has been little to no practice by the ICC regarding duress. It is only by practice that the letter of the law is given life, and more so the provisions of the Rome Statute, which are a codification of customary international law and a reflection of the consensus of nations concerning crimes under international law.

The lack of practice by the ICC concerning duress is a pointer to the fact that the controversies surrounding duress are far from settled as shall be seen from the literature survey below.<sup>21</sup> This paper shall interrogate whether the said lack of practice could be attributed to the inconsistency of the nature of participation of the persons ‘bearing the greatest responsibility’ with the

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*Miroslav Kvocka et al* IT-98-30/1/A Judgment of 28 February 2005 available at

<http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf> (accessed 10 June 2013).

<sup>18</sup> Appeals Chamber (AC) Judgment of 7 October 1997 in *Prosecutor v. Erdemović* Case No. IT-96-22-A (UNICT)(App)(Yug). Available at <http://www.icty.org/x/cases/Erdemović/acjug/en/erd-aj971007e.pdf> (accessed 29 March 2013).

<sup>19</sup> Para 4 AC judgment referred to in note 18 above. Two judges however wrote dissenting judgments, and these were of the opinion that duress should indeed afford an accused a complete defence once certain circumstances are proved to have existed. See the dissenting opinions of Judge Antonio Cassese available at <http://www.icty.org/x/cases/Erdemović/acjug/en/erd-adojcas971007e.pdf> para 50; and Judge Stephen available at <http://www.icty.org/x/cases/Erdemović/acjug/en/erd-asojste971007e.pdf> para 22 (accessed 29 March 2013).

<sup>20</sup> Dissenting opinion of Judge Cassese in *the Erdemović case* referred to in note 19 above para 43.

<sup>21</sup> According to Scallioti M Part 1 (2001) 157, the provision for duress in the Rome Statute seemingly solved the controversy surrounding the defence, but as shall be seen in the literature survey below, scholars still differ on the defence.

preconditions of a successful plea of duress. In the period subsequent to *the Erdemović case*, duress has been the subject of many literary and scholarly debates, which extend to the period after the coming into force of the Rome Statute.<sup>22</sup> These debates have however not translated into practice.<sup>23</sup>

## 1.2 Research Question

This study shall answer the following question:-

- To what extent the defence of duress can be successfully pleaded by an accused person indicted by the ICC.

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

- Whether duress is a complete defence to charges of crimes under international law.
- Whether the defence of duress has been pleaded by defendants before the ICC.
- What the preconditions for a successful plea of duress in contemporary international criminal law are.
- Whether the said preconditions are consistent with the nature of indictments by the ICC.

## 1.3 Draft Arguments

This paper shall make the following main arguments:-

The element of coercion by another person is the defining factor for the defence of duress in international criminal law. Duress presumes that the person issuing a threat exercises a certain degree of control over the person being threatened and exerts such pressure, as to overpower

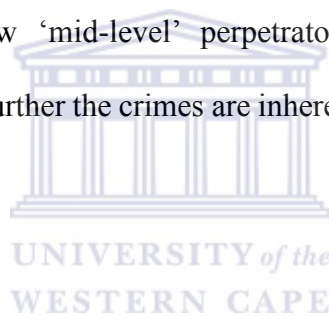
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<sup>22</sup> Refer to the literature survey below for a discussion of some of the debates.

<sup>23</sup> Van Sliedregt E 'Defenses in International Criminal Law' Paper Presented at the Convergence of Criminal Justice Systems: Building Bridges, Bridging the Gap, *The International Society for the Reform of Criminal Law* 25 August 2003 available at <http://www.isrcl.org/Papers/Sliedregt.pdf> (accessed 1 April 2013).

the will of the defendant and to cause him/her to commit the crime against his/her will. This paper shall build on the argument that consequently, the defence would not be available to the persons in the highest levels of power<sup>24</sup> as well as to certain other actors envisaged by Article 25(3) (a)-(f) of the Rome Statute; due to the nature of their participation in the core crimes.<sup>25</sup>

This paper shall also examine the practice of the ICC concerning duress, and it shall argue that one of the possible reasons for the lack of practice regarding duress by the ICC is attributable to the OTP's policy of targeting the 'highest-ranking perpetrators, and branding them the 'persons bearing the greatest responsibility' for the core crimes set out in Articles 6-8 of the Rome Statute. Further, that the nature of the positions of ICC defendants (most being 'high-ranking' perpetrators and a few 'mid-level' perpetrators), coupled with the 'essential contributions' that they make to further the crimes are inherently inconsistent with a successful claim of duress.



#### **1.4 Literature Survey**

Numerous Articles and papers have been written concerning duress in international criminal law, and it is notable that opinions on the defence differ greatly. The authors range from those who simply put down and analyse observations from *the Erdemović case*, to those who discuss duress in the Rome Statute. Some of these authors agree with the Rome Statute's stand on duress being a complete defence to crimes under international law, while others maintain that

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<sup>24</sup> Bassiouni MC *Crimes against Humanity in International Criminal Law* 2ed (1999) 491 originates this argument by stating that 'decision-makers, senior and mid-level executors' are excluded from operation of the defence. Ambos K in 'Other grounds of excluding criminal responsibility' in Cassese A, Gaeta P & Jones RWD (Eds) *The Rome Statute of the International Criminal Court: A Commentary* 1 (2002) 1022 however disagrees with this saying that the defence would be available to 'mid-level officials'. Hereafter Ambos K in Cassese A et al (2002).

<sup>25</sup> Two examples of the kinds of participation envisaged here include those who instigate, order, solicit or induce others to commit crimes – See Article 25(3)(1)(b) and those who incite others to commit crimes- See Art 25(3) (1) (e) of the Rome Statute.



duress should not be allowed to exculpate perpetrators of such grave crimes as the core crimes provided for in the Rome Statute.

In line with the provision for duress in Article 31(1)(d), most of the authors surveyed criticise the majority judges' finding in *the Erdemović case*.<sup>26</sup> Wall IL states that the majority judges erred in adopting an absolute moral position and in finding Erdemović guilty, and that by doing so, they added 'to the misery of an already pitiful man.'<sup>27</sup> Epps V favours the finding of the minority judges and adds that duress negates the intent necessary for conviction.<sup>28</sup> Brooks RE discusses the role of the law on duress in conflict situations like the one Erdemović found himself in and states that it is unfair to expect someone to resist duress even in the face of his or her own death,<sup>29</sup> while Weigend T, noting the inadequacy of the law to deal with conflict situations, also agrees that duress should be a complete defence in certain circumstances, one of which is where 'one takes a life to save a life'.<sup>30</sup>

Some of the authors that agree with the dissenting opinions of judges Cassese and Stephen in the *Erdemović case* qualify the applicability of duress to additional factors more than just the preconditions set out by Judge Cassese. Fichtelberg A for instance, states that factors such as the defendant's *mens rea* as well as whether he voluntarily placed himself in the situation causing duress should be considered by the court.<sup>31</sup> Another is Chiesa LE, who discusses

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<sup>26</sup> See note 19 above.

<sup>27</sup> Wall IR 'Duress, international criminal law and literature' *Journal of International Criminal Justice* 4 (2006) 724 & 734. Hereafter Wall IR (2006)

<sup>28</sup> Epps V 'A soldier's obligation to die when ordered to shoot civilians or face death himself' *New England Law Review* 37 4 (2003) 987.

<sup>29</sup> Brooks ER 'Law in the heart of darkness: Atrocity and duress' *Virginia Journal of International Law* 43 (2003) 861-888.

<sup>30</sup> Weigend T 'Kill or be killed: Another look at Erdemović' *Journal of International Criminal Justice* Vol. 10 No. 5 (2012) 1224.

<sup>31</sup> Fichtelberg A 'Liberal values in international criminal law: A critique of Erdemović' *Journal of International Criminal Justice* Vol. 6 No.1 (2008) 15 respectively.

situations where the accused had a duty of care to the victim as denying the applicability of duress.<sup>32</sup> Zahar A and Sluiter G offer a different opinion, stating that that duress should not be subjected to additional requirements other than those set out in the *Erdemović case*.<sup>33</sup>

Knoops GA states that the absence of free will should be the basis of duress in which case an accused person should not be held liable,<sup>34</sup> while Cryer R states that it is not viable to reject the application of duress in all cases.<sup>35</sup> Further, according to Cassese A, an accused person acting under duress can neither be held liable nor punished even if guilty of the offence he is charged with.<sup>36</sup> All these authors therefore agree that duress is a full defence in international criminal law.

Other authors surveyed assess the implication of national laws concerning duress to international criminal law and these include Yeo S, who surveys the Criminal Codes of some African states,<sup>37</sup> and Newman SC, who argues on the implication of domestic military rules and policies on international law provisions for duress.<sup>38</sup> Darcy S notes that the Rome Statute's approach of allowing duress accommodates both civil and criminal law jurisdictions.<sup>39</sup> These three authors show that the allowing of duress in international criminal law is not alien, and is a reflection of domestic law.

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<sup>32</sup> Chiesa LE 'Duress, demanding heroism and proportionality' *Vanderbilt Journal of Transnational Law* 41 (2008) 764-768. In stating that 'arguments in favour of duress weaken as the seriousness of the offence increases', Chiesa attaches importance to gravity of the offence. See p. 741.

<sup>33</sup> Zahar A & Sluiter G *International Criminal Law* (2008) 430.

<sup>34</sup> Knoops GA 2ed (2008) 46-60 & 130-134.

<sup>35</sup> Warbrick C, McGoldrick D & Turns D 'The International Criminal Tribunal for the former Yugoslavia: The Erdemović case' *International & Comparative Law Quarterly* 47 (2) (1998) 461-474.

<sup>36</sup> Cassese A *International Criminal Law* 2ed (2008) 268.

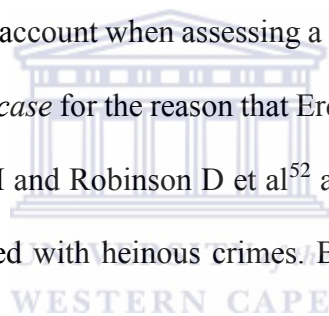
<sup>37</sup> Yeo S 'Compulsion and necessity in African Criminal Law' *Journal of African Law* 53 1 (2009) 90-110.

<sup>38</sup> Newman SC 'Duress as a Defense to war crimes and crimes against humanity-Prosecutor v. Drazen Erdemović' 166 *Military Law Review* (2000) 158-167.

<sup>39</sup> Darcy S 'Defences to international crimes' in Schabas WA & Bernaz N (Eds) *Routledge Handbook of International Criminal Law* (2011) 231.

This paper also relies also on additional authors who discuss duress in Article 31(1)(d) of the Rome Statute, and these include Scallioti M,<sup>40</sup> Van Sliedregt E,<sup>41</sup> Janssen S<sup>42</sup> and Ambos K. Ambos distinguishes the preconditions of duress from those of necessity, despite their joint provision in the Rome Statute.<sup>43</sup> Worthy of note also is the work of Bassiouni MC, whose argument that duress is only available to low-ranking soldiers<sup>44</sup> will be expanded in this research. The discussions of Werle G,<sup>45</sup> Eser A<sup>46</sup> Sadat LN<sup>47</sup> and Schabas WA<sup>48</sup> on duress in the ICC regime are particularly insightful as is Heim SJ's discussion on the application of duress to civilians coerced to kill.<sup>49</sup>

Authors who hold a contrary opinion include Kittichasairee K, who argues that the gravity of the offence needs to be taken into account when assessing a claim of duress. He agrees with the majority judges in the *Erdemović case* for the reason that Erdemović's crime was 'too grave'.<sup>50</sup> Gur-Arye M<sup>51</sup> Cryer R, Friman H and Robinson D et al<sup>52</sup> also observe that duress should not avail a defence to persons charged with heinous crimes. By rejecting duress for the gravest



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<sup>40</sup> Scallioti M 'Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility' *International Criminal Law Review* Parts 1 (2001) 111-172 and Part 2 (2002) 1-46

<sup>41</sup> Van Sliedregt E (2012) 238-245 referred to in note 1 above.

<sup>42</sup> Janssen S 'Mental condition defenses in supranational criminal law' *International Criminal Law Review* (2004) 4 (1) 83-98.

<sup>43</sup> Ambos K in Cassese A et al (2002) 1016-1023 referred to in note 24.

<sup>44</sup> Bassiouni MC *Crimes against Humanity in International Criminal Law* 2ed (1999) 491.

<sup>45</sup> Werle G 2ed (2009) 553-565 referred to in note 1 above.

<sup>46</sup> Eser A in Triffterer O (1999) referred to in note 4 above.

<sup>47</sup> Sadat LN *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002) 212-250.

<sup>48</sup> Schabas WA *The International Criminal Court: A Commentary on the Rome Statute* (2010) 481-492.

<sup>49</sup> Heim SJ 'Applicability of the duress defense to the killing of innocent persons by civilians' 46 *Cornell International Law Journal* (2013) 165-190. Hereafter Heim SJ (2013).

<sup>50</sup> Kittichasairee K in *International Criminal Law* (2001) 263.

<sup>51</sup> Gur-Arye M 'Should duress be treated differently under International Criminal Law?' *Hebrew University of Jerusalem Faculty of Law* 17 March 2012. Available at

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2025368](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025368) (accessed 2 September 2013). Hereafter Gur-Arye M (2012).

<sup>52</sup> Cryer R, Friman H, Robinson D et al *An Introduction to International Criminal Law and Procedure* 2ed (2011) 410-414.

crimes, the foregoing authors disagree with the provision for the defence in the Rome Statute especially considering that the ICC is only concerned with the gravest crimes.<sup>53</sup> The work of Stegmiller I discusses the gravity issue quite comprehensively and has been consulted, as has Jalloh CC's paper on the situation in Kenya.<sup>54</sup>

None of the authors surveyed above has explored the ICC cases to ascertain the practice of the court regarding duress. Despite this being the case, the discussions by all of the authors surveyed offer invaluable guidance on understanding the structure of duress, and this paper borrows insights from both those that discuss duress in the context of the *Erdemović case* as well as those who discuss it in the context of the Rome Statute.

This paper makes a comparison between the preconditions of duress in the *Erdemović case* and the Rome Statute. The paper seeks to add to the existing body of knowledge by discussing the nature of participation of the ICC defendants in the crimes charged and by predicting the implications of such participation on the question of applicability of duress as a defence. The paper further analyses possible reasons for the lack of practice concerning duress before the ICC and examines the likelihood that duress will be applied before the ICC in the future.

## 1.5 Research Methodology

This study will adopt the qualitative research methodology by way of desktop research. Both primary sources and secondary sources will be consulted, and the research will be carried out by reading and analyzing statutes, international treaties, cases, books, journal Articles, papers

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<sup>53</sup> Stating it more succinctly, Fournet C Dr. in 'When the child surpasses the father-Admissible defences in international criminal law' *International Criminal Law Review* 8 (2008) 510 says that 'international criminal law covers the most serious human rights violations [which constitute the core crimes]'

<sup>54</sup> Jalloh CC 'Situation in the Republic of Kenya' *American Journal of International Law* 105 (2011) 540-547.

and e-materials. Reference shall also be made to customary international law.

## **1.6 Structure of the Paper**

This paper comprises five chapters: Chapter 1 contains a general introduction to the study. Chapter 2 contains an analysis of duress in the period before the coming into force of the Rome Statute and makes reference to the statutes and selected case law of international criminal tribunals concerning duress.

Chapter 3 contains an analysis of duress as discussed in the ICTY case of *Prosecutor v. Erdemović* as contrasted with the preconditions for duress in Article 31(1)(d) of the Rome Statute. Chapter 4 contains an analysis of duress in the Rome Statute and an examination of the cases before the ICC. This is with a view to ascertain the nature of participation of selected defendants in the conflicts that led to their indictments, and the implications of such participation on the defence of duress.

Chapter 5 contains observations made in the study, conclusions drawn from those observations and the author's recommendations based on the findings of the study.

## CHAPTER TWO

### THE NATURE OF THE DEFENCE OF DURESS AND ITS STATUS BEFORE THE COMING INTO FORCE OF THE ROME STATUTE

#### 2.1 Introduction

The trial of the major Nazi war criminals at Nuremberg, pursuant to the Charter of the International Military Tribunal at Nuremberg (Nuremberg Charter),<sup>55</sup> was the first successful attempt at prosecuting crimes under international law. It was at this trial that the concept of criminal responsibility for individuals for crimes under international law was given birth,<sup>56</sup> thus shifting the focus of international (criminal) law from states to individuals.<sup>57</sup>

Defences are included in international criminal law in recognition of the principle of fairness and respect for human rights, particularly the right to fair trial which includes the right of an accused person to raise defences.<sup>58</sup> Further and as noted by the ICTY in *Kordic et al*, defences form part of general principles of criminal law which the international tribunal must take into account when deciding the cases before it.<sup>59</sup> In fact, the importance of defences in international

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<sup>55</sup> The Nuremberg Charter was an annexure to the London Agreement of 8 August 1945 among the victorious Allied powers in the aftermath of the 2<sup>nd</sup> World War. The Charter constituted the International Military Tribunal (IMT) for the purpose of prosecuting the major war criminals of the European Axis powers which sat at Nuremberg-Germany. Available at <http://avalon.law.yale.edu/imt/imtconst.asp> (accessed 15 June 2013).

<sup>56</sup> The IMT stated as follows: - 'Crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' Judgment of the IMT of 1 October 1946 447 available at [http://avalon.law.yale.edu/subject\\_menus/judcont.asp](http://avalon.law.yale.edu/subject_menus/judcont.asp) (accessed 15 June 2013). According to Werle G 2ed (2009) the IMT trial was in fact the 'birth certificate of international criminal law'.

<sup>57</sup> At Nuremberg, international law was replaced by international criminal law in which individuals, not states, are liable. This is according to Van Sliedregt E 'Defences in international criminal law' Paper Presented at the Conference, Convergence of Criminal Justice Systems: Building bridges, bridging the gap *The International Society for the Reform of Criminal Law* 25 August 2003 available at <http://www.isrcl.org/Papers/Sliedregt.pdf> (accessed 1 April 2013).

<sup>58</sup> Knoop GA 2ed (2008) 2. Art 67 (1) (e) of the Rome Statute contains the right of an accused to raise a defence.

<sup>59</sup> Case No. IT-95-14/2-T TC Judgment of 26 February 2001 para 449 available at [http://www.icty.org/x/cases/kordic\\_cerkez/tjug/en/kor-tj010226e.pdf](http://www.icty.org/x/cases/kordic_cerkez/tjug/en/kor-tj010226e.pdf) (accessed 24 July 2013). A defence is a general institution of international criminal justice- See Knoop GA 2ed (2008)1.

criminal law cannot be overstated.<sup>60</sup> Of all the available substantive defences in the history of international criminal law, duress is one of the most commonly raised defences<sup>61</sup> and it is arguably also the most controversial.<sup>62</sup>

## 2.2 Nature of Duress

### 2.2.1 Definition and key concepts

Duress is coercion accompanied by a threat of harm to life or limb.<sup>63</sup> Duress is present where a person's will is so overwhelmed that he/she can no longer make a free choice to engage or not to engage in wrongful conduct.<sup>64</sup> It negates the subjective elements of a person's will and therefore that person cannot be held liable for the criminal conduct.<sup>65</sup> In international criminal law, an accused person is only culpable for conduct that he/she not only knowingly engages in, but also does so with the intention of bringing about the consequences prevented by the

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<sup>60</sup> Simpson GJ states as follows in 'War Crimes: A critical introduction' in McCormack TLH & Simpson GJ (Eds) *The law of War Crimes* (1997) 30, discussed by Knoops GA 2ed (2008) xxxv: 'It is clear that in an area of law so thoroughly politicised, culturally freighted and punitive as war crimes, there is a need for even greater protections for the accused.' This quotation was made in reference to war crimes, but it can be said to be true concerning genocide and crimes against humanity as these are as also as 'passionately punitive' crimes.

<sup>61</sup> Knoops GA 2ed (2008) 201 speaks of duress and superior orders as two of the most common defences to war crime indictments. This was mostly the case in the war trials following the 2<sup>nd</sup> World War, where the accused alleged that they had been coerced by Hitler and his tyrannical system to participate in among others war crimes and crimes against humanity.

<sup>62</sup> Knoops GA 2ed (2008) 130. As has been highlighted in the literature survey, one of the controversies is whether duress should excuse persons accused of crimes against international law involving killing of human beings.

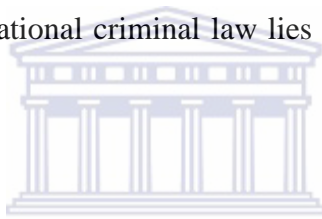
<sup>63</sup> The Blackstone W. Commentaries on the Law of England defines duress as 'threats and menaces which include a fear of death or other bodily harm' quoted by Dressler J in 'Exegesis of the law of duress: Justifying the excuse and searching for its proper limits' 62 *California Law Review* (1988-89) 1335.

<sup>64</sup> In *US v. Von Leeb et al* Case 12 (1948) TWC XI 509, the court stated as follows: - 'To establish the defence of coercion ... in the face of danger, there must be a strong 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.' Available at <http://werle.rewi.hu-berlin.de/High%20Command%20Case.pdf> (accessed 16 June 2013).

<sup>65</sup> Cassese A *International Criminal Law* 2ed (2008) 268. A contrary view is held by Chiesa LE (2008) referred to in note 32 above, that exculpation of an actor under duress is the product of societal determination and lies in the comprehensible nature of the accused's choice as opposed to the involuntariness of the conduct; she calls this is the 'understandable choice theory which triumphs over the 'involuntariness or hard-choice theory as well as over the 'seriousness of the offence' theory. See pp. 756, 758 & 762.

prohibition of such conduct.<sup>66</sup> Such intent is expressed through voluntary action,<sup>67</sup> and duress negates such voluntariness of conduct.<sup>68</sup>

Both the ICTY in *the Erdemović case* and Article 31 (1) (d) of the Rome Statute, recognised that duress is a defence in international law, but subject to certain preconditions. The main precondition is the presence of a threat. The said threat must meet a threshold, and this threshold is what distinguishes duress from the closely similar defence of superior orders-in which levels of coercion are also present.<sup>69</sup> The preconditions will be discussed at length in chapter three of this paper. Where duress is present, the act committed remains unlawful but the actor is not punished as he/she did not have a moral choice to commit or not to commit the crime.<sup>70</sup> The principle of punishment in international criminal law lies in voluntariness of conduct which then justifies punishment.<sup>71</sup>



### 2.2.2 Duress and the purpose of punishment

Punishment in criminal law must serve a certain purpose: whether retributive, deterrent or rehabilitative. It has been argued that apart from the foregoing purposes, punishment in international criminal law should serve additional purposes: ‘norm-stabilisation’, educating the public as to what is acceptable conduct and what is not, truth-seeking and attribution of

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<sup>66</sup> There are various forms of mental elements in international criminal law which include intention, recklessness and negligence. See Cryer R, Friman H, Robinson D & Wilmschurst E *An introduction to International Criminal Law and Procedure* (2008) 318. Also Article 30 of the Rome Statute.

<sup>67</sup> Beilefeldt H ‘Autonomy and Republicanism: Immanuel Kant’s philosophy of freedom’ *Political Theory* 25 4 (1997) 528 available at <http://www.jstor.org/stable/191892> (accessed 16 June 2013).

<sup>68</sup> The question regarding duress and its connection with intention is highly debated. See notes 8 & 11 above.

<sup>69</sup> Epps V ‘The soldier’s obligation to die when ordered to shoot civilians or face death himself’ *New England Law Review* 37 4 (2003) 1012-13 hereinafter Epps V (2003).

<sup>70</sup> Ambos K in Cassese A et al (2002) 1027. In *US v. Krauch et al* Case No. 6 TWC VIII 1174 it was stated that ‘duress is only available if it leaves [the accused] with no choice in the matter.’

<sup>71</sup> Cassese A, Acquaviva G, Fan M & Whiting A *International Criminal Law: Cases & Commentary* (2011) 485. Hereafter Cassese et al (2011).



individual responsibility.<sup>72</sup> It has also been argued that an additional purpose of punishment in international criminal law is catharsis or healing of the community ravaged by the effects of internationally proscribed crimes, in which case punishment of a coerced actor would be unjust and even unnecessary.<sup>73</sup> This paper agrees with Werle G and Wall IR that punishment in international criminal law must serve a purpose greater than in domestic law and the paper opines that none of the above-mentioned purposes are served by punishing a coerced actor.

### 2.2.3 Does duress constitute a full defence to charges of killing?

Duress in the jurisprudence of international criminal tribunals preceding the ICC was largely centred on crimes involving killing, and it mostly involved military situations.<sup>74</sup> Scholars differ greatly on whether duress should afford a complete defence to charges of international crimes involving killing.<sup>75</sup> This was one of the questions for determination in *the Erdemović case*, where it was noted that most common law jurisdictions denied the defence in cases of murder, while civil law jurisdictions allowed it.<sup>76</sup> The judges in that case considered the practice of civilised nations as one of the sources of law concerning duress,<sup>77</sup> and to date, that practice is still considered a source of international law, albeit a subordinate one.<sup>78</sup>

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<sup>72</sup> Werle G 2ed (2009) 33, 35 & 36- quoting Akhavan P 'Beyond impunity: Can international criminal justice prevent future atrocities?' 95 *American Journal of International Law* (2001) 30. He further posits that legitimacy of punishment in international criminal law is assessed in whether it vindicates human rights violations and world peace, both of which are offset by the commission of crimes under international law.

<sup>73</sup> See the discussion by Wall IR referred to in note 27 above 12 & 13 on the importance of catharsis in trials of serious cases (as are crimes under international law).

<sup>74</sup> Heim SJ (2013) referred to in note 49 above generally offers a different perspective in exploring how duress should play out in the case of civilian defendants.

<sup>75</sup> See the literature survey in chapter 1 above.

<sup>76</sup> See para 49 & 71 of the joint opinion of judges Vohrah and McDonald available at <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971007e.pdf> (accessed 29 March 2013).

<sup>77</sup> The Judges noted that no customary rule of practice in international law had emerged concerning duress in the case of killing of innocent persons. See the joint separate opinion of Judges Vohrah and McDonald referred to in note 76 above paras 46 & 57.

<sup>78</sup> Art 21(1) (c) of the Rome Statute.

The position that all perpetrators of crimes under international law should never be excused even in the face of duress has been argued by Gur-Arye M, who cites gravity, the unique nature of crimes under international law, the need to vindicate victims of such crimes and the role of punishment in promoting respect for international humanitarian law.<sup>79</sup> Chiesa LE also argues the question whether heinous crimes, especially those involving multiple murders should be excused on account of duress.<sup>80</sup>

The Rome Statute presupposes that duress is available in all cases of grave crimes, but such a presupposition is myopic and the Court will inevitably have to determine issues of gravity in assessing duress in specific cases.<sup>81</sup> The status of international law is therefore that duress is available regardless of the magnitude of the crime, and including those that involve killing.



#### 2.2.4 Significance of a superior-subordinate relationship

Practice concerning the defence of duress before international criminal tribunals almost always involved a superior-subordinate relationship, with the ‘coercer’ being the ‘superior’ and the ‘coerced’ being the subordinate. As far as the Nuremberg follow-up trials are concerned, the ‘coercers’ were alleged to be the *Führer*<sup>82</sup> and his close associates while the ‘coerced’ were the foot-soldiers and other perpetrators including professionals.<sup>83</sup>

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<sup>79</sup> Gur-Arye (2012) referred to in note 51 above 1, 11& 12. Gur-Arye further argues that granting leeway to subordinates coerced to perpetrate heinous crimes leaves the victims of such crimes un-vindicated.

<sup>80</sup> Chiesa LE (2008) 744.

<sup>81</sup> According to Eser A in Triffterer O (1999) 553, in making such a determination, the court can only make specific as opposed to general pronouncements on the issues before it.

<sup>82</sup> A German word meaning leader or guide. The term was used to refer to Adolf Hitler at the time he was ‘Chancellor of the Reich’ from 1934-1945.

<sup>83</sup> These professionals were for instance the industrialists-prosecuted in the IG Farben & Krupp cases (discussed later on in this chapter), doctors prosecuted in *USA v. Karl Brandt et al* judgment of 20 August 1947 and judges prosecuted in *USA v. Alstötler et al* Case No. 3 TWC 1(1948). The tribunal in the case of *USA v. Otto Ohlendorf and Others* Case No. 9 (1950) Vol. VIII LRTWC 480 available at [http://www.worldcourts.com/ildc/eng/decisions/1948.04.09\\_United\\_States\\_v\\_Ohlendorf.pdf](http://www.worldcourts.com/ildc/eng/decisions/1948.04.09_United_States_v_Ohlendorf.pdf) (accessed 16 June 2013), rejected the claim of coercion raised by the defendants, and stated that the *Führer* could not have committed all the atrocities without the help of collaborators-including industrialists like the defendants in this

In the aftermath of a war, it was only natural that duress cases concerning military men were accompanied by superior orders, in which case a superior-subordinate relationship existed.<sup>84</sup>

Duress was therefore usually pleaded concurrently with superior orders, which was inevitable in the course of a war. Superior orders coupled with duress would present a subordinate soldier with an incredibly difficult choice; on the one hand the soldier would be punished with summary execution if he failed to comply with orders, and on the other hand he would be committing a crime under international law if he complied with the manifestly illegal orders.

Having said that, it is trite to note that not only subordinates can be coerced. There could be situations where a ‘superior’<sup>85</sup> is coerced into perpetrating the core crimes under the Rome Statute. It is also not difficult to imagine a situation in which peers coerce a colleague to commit the crimes. In fact, there is nothing in the nature of the defence of duress that restricts its application to situations of coercion of subordinates by superiors and there is no requirement of any relationship whatsoever between the coercer and the coerced; only the fulfilment of the preconditions of the defence.

Despite the common occurrence of duress being in relation to the military in the aftermath of the Second World War, duress situations are not confined to members of the military or even situations of armed conflict. In fact, in the same period after the Second World War, duress was raised in cases of industrialists, doctors and judges<sup>86</sup>, in which case the defendants could not be said to have been ‘subordinates’ of Hitler and his associates. That notwithstanding,

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case. Here the defendants case had complied voluntarily with orders and had shared the ambition of the *Führer*, all of which were factors inconsistent with a plea of duress. See also Cassese et al (2011) 474.

<sup>84</sup> Duress may be raised independently of superior orders especially where coercion originates from a fellow soldier. See para 15 of Judge Cassese’s opinion.

<sup>85</sup> The word ‘superior’ in this context is used in relation to different structures and organisations including social, economic, religious and political structures and will be used synonymously with the word ‘leader’.

<sup>86</sup> See note 83 above.

Hitler and his Nazi government were able to pressurise some of these into collaboration with the government in war crimes and crimes against humanity. Consequently, the superior-subordinate relationship was a common, but not an essential component of duress.

### **2.2.5 The role of the defendant's position**

So far, ICC indictments have originated from situations of armed conflict, in which the participating persons are more often than not organised to a certain degree as militia groups, government forces and other groups.<sup>87</sup> As shall be seen from chapter four of this paper, the ICC targets the leaders of such groups (and their close associates), be they legitimate political, business and military leaders or illegitimate militia leaders.<sup>88</sup>

The ICC indictments focus on large scale crimes, and it has been stated that only the trial of 'important figures in the public mind, high-ranking officials and notorious participants in gross criminality' can serve the macro effect of catharsis and deterrence intended by ICC intervention.<sup>89</sup> One has to agree that is a sound assertion, insofar as it recognises that 'notorious participants in gross criminality' won't always be the high-ranking officials. The positions of the defendants, however, as shall be discussed in chapter four of this paper is a factor that influences the availability of the defence of duress.

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<sup>87</sup> This assertion is neither to be taken to mean that armed conflict is a requisite factor in the perpetration of crimes against international law nor that only organised groups can perpetrate these crimes. Armed conflict a requisite factor only for war crimes, and an organisation is only required for crimes against humanity.

<sup>88</sup> The ICC only prosecutes a limited number of cases, usually the most serious involving leaders. See Gur-Arye M (2012) 12-13.

<sup>89</sup> Wall IR (2006) 13.

## 2.3 Development of Duress as a Defence for Crimes under International Law

### 2.3.1 Nuremberg and Post-Nuremberg Period

The Nuremberg Charter does not contain any provision for applicable substantive defences, and instead only provides for excluded defences.<sup>90</sup> By virtue of Article 16 (e) of the IMT Charter however, defendants before the IMT were not restricted from raising appropriate defences and presenting evidence to support the same.<sup>91</sup> A similar trend was adopted by the International Military Tribunal for the Far East (IMTFE)<sup>92</sup> which also excluded superior orders and official position defences,<sup>93</sup> and contained provisions on production of evidence for the defence.<sup>94</sup>

The absence of provision for defences including duress in the above-mentioned statutes did not preclude the defendants from raising it. The defence was usually not distinguished from necessity, and the IMT at Nuremberg often referred to ‘necessity’ when it actually meant duress.<sup>95</sup> It was the post-Nuremberg trials pursuant to the CCL 10<sup>96</sup> that made a marked contribution to the development of international criminal law jurisprudence concerning duress.

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<sup>90</sup> Art 7 and 8 of the IMT Charter exclude the defence of official position and superior or government order respectively.

<sup>91</sup> Article 16 provides as follows:

In order to ensure fair trial for the Defendants, the following procedure shall be followed: (...)

(e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross-examine any witness called by the Prosecution.

<sup>92</sup> Established pursuant to the Charter of the International Criminal Tribunal for the Far East enacted on 19 January 1946 available at <http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml> accessed 15 June 2013. Hereafter the IMTFE Charter.

<sup>93</sup> Article 6 of the IMTFE Charter.

<sup>94</sup> Article 9 (d) and (e) of the IMTFE Charter.

<sup>95</sup> Ambos K in Cassese et al (2002) 986.

<sup>96</sup> Control Council Law 10 was enacted pursuant to the Moscow Declaration of 1943 and the London Agreement of 1945 and was a follow-up to the IMT trials at Nuremberg. Since the IMT was only concerned with the major actors in the war, CCL 10 enabled the prosecution of other (lesser) perpetrators of crimes against peace, crimes against humanity and war crimes. Available at <http://avalon.law.yale.edu/imt/imt10.asp> (accessed 16 June 2013).

This was despite that CCL 10 did not provide for applicable defences.<sup>97</sup> The military tribunals acting pursuant to CCL 10 did not rule out the application of duress, and only denied the defence on a factual basis. In some of the cases, even in the face of such denial, duress would be considered a mitigating factor. Some selected cases in which duress was raised are as follows:

*USA v. Carl Krauch et al (IG Farben Trial)*, where the accused were charged with crimes against peace, crimes against humanity, war crimes, membership in a criminal organisation and conspiracy to commit crimes against peace.<sup>98</sup> The accused were members of IG Farben, a large company involved in the production and distribution of poison gas that was used in extermination camps.<sup>99</sup> In rejecting the defendants' plea of duress, the USA military tribunal found that the circumstances of the case refuted the defence of duress, noting that IG Farben undertook its task in the armament of Germany with enthusiasm, and the company 'continued to enjoy much freedom of action and initiative'. This disentitled the defendants from alleging that they were coerced into participating in the crimes.<sup>100</sup>

Another case in which duress was discussed was the *Ohlendorf Case*, in which duress was raised accompanied by superior orders. The defendants in this case were soldiers in different ranks in the SS<sup>101</sup> and they were charged with crimes against humanity, war crimes and membership in a criminal organisation.<sup>102</sup> The tribunal affirmed the fact that no law existed

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<sup>97</sup> Article 2(4)(a) & (b) which exclude official capacity and superior orders as defences but does not provide for any other defences. Superior orders is recognised as a factor in mitigation.

<sup>98</sup> Case No. 6 of July 1948 TWC VIII available at <http://werle.rewi.hu-berlin.de/IGFarbenCase.pdf> (accessed 16 June 2013) 1082.

<sup>99</sup> See p. 1168-9 of the judgment in the *IG Farben case* referred to in note 98 above.

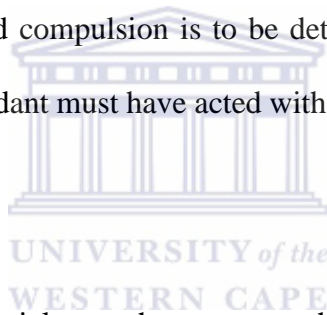
<sup>100</sup> See p. 1298 of *the IG Farben judgment*.

<sup>101</sup> Schutzstaffel- a quasi-military unit that served as Hitler's personal guard.

<sup>102</sup> Case No. 9 referred to in note 83 above 411.

requiring a man under duress to forfeit his life in order to avoid committing a crime. However, such a crime must have been committed in the face of an ‘imminent, real and inevitable’ threat. The tribunal therefore recognised the availability of duress, but found that the defence was inapplicable to the defendants in the case.<sup>103</sup>

In *USA v. Krupp* duress was also rejected and the tribunal stated that the defendants voluntarily participated in the violations of laws of war. The defendants in this case were directors and managers of Krupp AG, a company that manufactured arms, and the tribunal found that compulsion had not operated on their will such that they committed crimes they would not otherwise have committed, as they were already too willing to participate in the crimes. The tribunal further noted that alleged compulsion is to be determined by subjective rather than objective means, in that the defendant must have acted with the *bonafide* belief that the danger existed.<sup>104</sup>



Apart from the post-Nuremberg trials, another case worth noting is the case of *Eichmann*, which was decided by the Supreme Court of Jerusalem. In this case, it was established that duress would not be available where the defendant himself was responsible for the execution of an order; and where the will of the defendant coincided with or surpassed the will of his ‘coercer’.<sup>105</sup> This assertion was in agreement with a statement in the *Einsatzgruppen case* where the tribunal stated as follows: ‘When the will of the doer merges with the will of the

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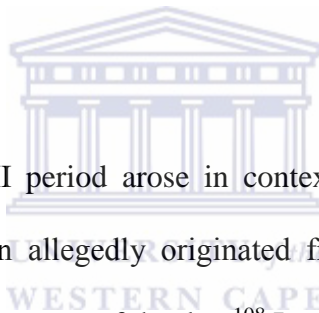
<sup>103</sup> The defendants argued that the massacre of the Jews was justified because they constituted an immediate danger to Germany, and the tribunal found this argument to be inherently inconsistent with a plea of duress as it showed an agreement on the part of the defendants with the policies of the Nazi government. See the judgment referred to in note 98 above at 468-9.

<sup>104</sup> Judgment of 31 July 1948 USA Military Tribunal Cases Vol. IX available at <http://werle.rewi.hu-berlin.de/KRUPP-Case%20Judgment.pdf> (accessed 16 June 2013) at 1353, 1355, 1436 & 1440.

<sup>105</sup> *Attorney-General of the Government of Israel v. Eichmann* Israel Sup. Ct. (1962) Int'l L. Rep. Vol. 36 277 (1968) English translation.

superior in the execution of the illegal act, the doer may not plead duress...'<sup>106</sup> The defendants in the above three cases could be considered 'mid-level' perpetrators, while those tried by the IMT at Nuremberg were the 'high-level' perpetrators.

It can be noted from the post-World War II period that the voluntary nature of participation of defendants in war crimes and crimes against humanity, coupled with their enthusiasm for the crimes, is what caused their pleas of duress to be unsuccessful. Contemporary international criminal law as codified by the Rome Statute does not expressly require proof of involuntariness of conduct for duress to succeed. However, its preconditions, especially the threat requirement, represent a concession that voluntariness is a key factor in determining liability.<sup>107</sup>



Duress in the post-World War II period arose in contexts that included the military and business. In the former, coercion allegedly originated from 'superiors' and in the latter, coercion originated from the government of the day.<sup>108</sup> In none of these cases did the tribunals acquit the defendants in question on account of duress.<sup>109</sup>

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<sup>106</sup> See note 83 at 480.

<sup>107</sup> The requirement in Article 30(2) (b) of the Rome Statute that 'the person means to cause [the] consequence' envisages voluntary action. See Knoops GA 2ed (2008) 5.

<sup>108</sup> See generally the Krupp case referred to in note 104 above.

<sup>109</sup> This research did not come across any case in which duress was successfully pleaded leading to an acquittal. This status quo is indicative of the fact that there is general reluctance in accepting exoneration for persons accused of heinous crimes as are proscribed by the ICC Statute. Here the theory advanced by Chiesa LE (2008) 773 where she argues that 'as the seriousness of the crime increases, the arguments in favor of allowing the defence of duress weaken' is particularly convincing.



### 2.3.2 Post-Cold War Period

The ICTY and ICTR Charters<sup>110</sup> follow in the footsteps of the IMT Charter, only providing for the excluded defences of superior orders and official position.<sup>111</sup> These two charters however differ from the IMFTE and Nuremberg Charters and CCL 10 in as far as they provide for the presumption of innocence, and the accused's rights to conduct his defence and produce evidence.<sup>112</sup> The ICTY case of *Erdemović* was a landmark case which offered invaluable guidance on the status of duress in international criminal law. The case will be discussed at length in chapter three of this paper.

### 2.4 Conclusion

Jurisprudence on duress in international criminal law was largely shaped by case law during the post-cold war period as was the case in the post-World War II period. The international criminal tribunals that were in existence before the ICC did not rule out the application of duress to charges of crimes against international law, but the tribunals merely used it as a factor in mitigation of punishment. The defence was sometimes raised in conjunction with superior orders and was confused with necessity, both of which are distinct from duress. The ICTY is the only tribunal in the pre-ICC period that came close to allowing the defence.

A look at the Rome Statute shows that duress is more than a mere mitigating factor. The ICC is therefore expected to create novel jurisprudence in allowing the defence, in circumstances not involving the military and armed conflict, and where no superior-subordinate relationships

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<sup>110</sup> ICTY Charter adopted on 25 May 1993 available at [http://www.icsl.de/dokumente/icty\\_statut.pdf](http://www.icsl.de/dokumente/icty_statut.pdf) pursuant to United Nations Security Council Resolution 827 of 1993 and ICTR Charter available at <http://www.unicttr.org/Portals/0/English%5CLegal%5CStatute%5C2010.pdf> adopted pursuant to United Nations Security Council Resolution 955 of 1994 (accessed 15 June 2013).

<sup>111</sup> Article 7 of the ICTY Statute and Art 6 of the ICTR Statute.

<sup>112</sup> Art 20 (3) ICTR Statute and Art 21(3) of the ICTY Statute.

exist. In deciding such cases, however, the ICC cannot act in isolation, it must rather learn from the international criminal tribunals that existed before it, as their purposes mirror each other - dealing with effects of large-scale violence.<sup>113</sup>



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<sup>113</sup> The Rome Statute Art 21(2) however only envisages reliance on its own precedents and not the decisions of the preceding international criminal tribunals.

## CHAPTER THREE

### DURESS REQUIREMENTS: *PROSECUTOR V. ERDEMOVIĆ* AND ARTICLE 31(1)(d) OF THE ROME STATUTE

#### 3.1 Introduction

The ICTY<sup>114</sup> was a first in many respects. It was the first ad hoc tribunal to be constituted after the post-world war II trials. It was also the first internationally constituted criminal tribunal to comprehensively discuss duress<sup>115</sup> The *Erdemović case* for its part was the first judgment concluded by an international tribunal concerning a ‘minor’ war criminal,<sup>116</sup> the first judgment of an international war crimes tribunal since Nuremberg and the IMFTE as well as the first sentencing judgment of the ICTY.<sup>117</sup>

Notably, Trial Chamber (TC) of the ICTY in this case, while quoting the United Nations War Crimes Commission, noted that duress was a complete defence to violations of international humanitarian law provided three preconditions were fulfilled.<sup>118</sup> The Appeals Chambers (AC) also recognized the availability of duress, but neither the TC nor the AC in the *Erdemović case* applied these preconditions to the case. It is the dissenting opinion of Judge Antonio Cassese that rendered a comprehensive discussion of the said preconditions.<sup>119</sup>

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<sup>114</sup> The ICTY was constituted by the Security Council Resolution 827 of 27 May 1993. Available at [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf) (accessed 31 August 2013).

<sup>115</sup> *Prosecutor v Erdemović* Case No. IT-96-22-TJ. This case is however limited as it only discusses duress in the case of killing of innocent persons, in the context of the military and concurrently with superior orders.

<sup>116</sup> Warbrick C, McGoldrick D & Turns D ‘The International Criminal Tribunal for the former Yugoslavia: The Erdemović case’ *International & Comparative Law Quarterly* 47 (2) (1998) 461 & 462 where they discuss that the only evidence concerning the rank of Erdemović in the Serb army was his testimony, in which he stated that he was a sergeant at one time and at another time that he was a lieutenant. Hereafter Turns D (1998).

<sup>117</sup> Turns D (1998) referred to in note 116 above 461 referring to the Trial Chamber 1 sentencing judgment of 29 November 1996.

<sup>118</sup> See the Trial Chamber (TC) I sentencing judgment in *the Erdemović case* dated 29 November 1996 para 17 available at <http://www.icty.org/x/cases/Erdemović/tjug/en/erd-ts1980305e.pdf> (accessed 10 June 2013).

<sup>119</sup> See the opinion of Judge Cassese referred to in note 19 above para 16. These preconditions were variously formulated by the TC 1 sentencing judgment of referred to in note 118 above Para 17; and in the separate opinion of consenting judges Vohrah & McDonald paras 42 & 68.

Judge Cassese's opinion seems to have set the stage for the provision for duress in the Rome Statute.<sup>120</sup> As analysed in the previous chapter, before this comprehensive discussion of duress, there was no consensus or indeed a clear cut practice concerning the availability of duress as a complete defence in international criminal law.<sup>121</sup> This chapter makes observations concerning duress from both the TC I and the AC of the ICTY in *the Erdemović case* and compares it with the preconditions in Article 31(1)(d) of the Rome Statute.

### **3.2 Prosecutor v. Erdemović: An Overview**

#### **3.2.1 The facts**

Erdemović was a Croat from Bosnia-Herzegovina. Since April of 1994, he was a sergeant in the 10<sup>th</sup> Sabotage Unit of the Bosnian Serb army. It was during his membership in the said army that Erdemović participated in the massacre of about 1,200 unarmed Bosnian Muslim men at 'Branjevo' farm in Pilica. These men had surrendered to the army after the seizure of Srebrenica where the UN had established a 'safe area'. According to Erdemović, he had personally killed about 10 to 70 people.<sup>122</sup>

Erdemović was initially arrested and charged under the Yugoslav Criminal Code with 'committing a war crime against a civilian population',<sup>123</sup> following his own confession to a journalist, to which charge he pleaded guilty.<sup>124</sup> During the time of proceedings in the national Yugoslav courts against Erdemović, the ICTY requested the Yugoslav government to hand

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<sup>120</sup> Kittichaisaree K *International Criminal Law* (2001) 264.

<sup>121</sup> The majority judges noted that there was no customary rule of international law on the issue. See note 77 above and para 12 of Judge Cassese's dissenting opinion.

<sup>122</sup> See the AC judgment of 7 October 1997 referred to in note 18 above para 3.

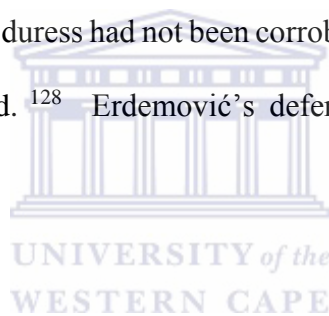
<sup>123</sup> Art 142 of the Criminal Code of the Socialist Federal Republic of Yugoslavia, 1 July 1977 available at <http://www.refworld.org/docid/3ae6b5fe0.html> (accessed 6 August 2013).

<sup>124</sup> An interesting account of the events surrounding the arrest and surrender of Erdemović to the ICTY is given by Turns D (1998) 463.

over Erdemović to the ICTY so he could participate in the cases against Karadžić<sup>125</sup> and Mladić.<sup>126</sup> Erdemović was subsequently surrendered to the ICTY as a witness.<sup>127</sup> While at the ICTY, investigations were opened surrounding the events at ‘Branjevo’ farm in Pilica, and Erdemović was indicted for his participation in the massacre.

### 3.2.2 The Sentencing Judgment

Erdemović was charged with crimes against humanity and the alternative charge of violation of laws or customs of war. He pleaded guilty to the charge of crimes against humanity as a result of which the prosecution dropped the alternative charge. Erdemović qualified his plea by stating that he had been forced to commit the killings. The TC found that the facts raised by Erdemović to support his claim of duress had not been corroborated, and therefore his ‘defence’ had not been specifically proved.<sup>128</sup> Erdemović’s defence of duress was therefore only



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<sup>125</sup> Radovan Karadzic was president of Srpska between 1992 and 1995 was indicted by the ICTY in 1996 for genocide, crimes against humanity and violations of laws or customs of war. He was arrested in 2008 after 13 years on the run. See the ICTY case information sheet available at [http://www.icty.org/x/cases/karadzic/cis/en/cis\\_karadzic\\_en.pdf](http://www.icty.org/x/cases/karadzic/cis/en/cis_karadzic_en.pdf) (accessed 6 August 2013). As at the time of this writing, genocide charges against Karadzic have been reinstated (following an appeal against Karadzic’s acquittal on all initial charges) and are ongoing. See <http://www.icty.org/action/cases/4> on current cases before the ICTY (accessed 6 August 2013).

<sup>126</sup> Rotka Mladić was a chief of staff of the Bosnian Serb Army in the Bosnian war of 1992-1995. He was indicted by the ICTY for genocide, crimes against humanity and war crimes by the ICTY in 1995 and was only arrested in Serbia in May of 2011. His trial is ongoing as at the time of this writing. See [http://www.icty.org/x/cases/mladic/cis/en/cis\\_mladic\\_en.pdf](http://www.icty.org/x/cases/mladic/cis/en/cis_mladic_en.pdf) (accessed 6 August 2013). Erdemović has been a key witness for both the Karadzic and Mladić cases up to the time of this writing. See [http://www.sense-agency.com/icty/drazen-Erdemovic-testifies-for-the-tenth-time.29.html?news\\_id=15127](http://www.sense-agency.com/icty/drazen-Erdemovic-testifies-for-the-tenth-time.29.html?news_id=15127) (accessed 6 August 2013).

<sup>127</sup> Pursuant to Rule 90 bis (A) of the ICTY Rules of Procedure and Evidence that provides for the transfer of a detained witness. Available at [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev44\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf) (accessed 6 August 2013).

<sup>128</sup> Erdemović did not expressly raise a defence, he only added an aside to his plea of guilty, which in essence constituted the defences of superior orders and duress. See paras 76, 77, 87 & 91 of the TC Judgment.

considered as one of the factors mitigating his sentence, which the TC fixed at 10 years' imprisonment.<sup>129</sup> Erdemović appealed this sentence, but did not contest the guilty finding.<sup>130</sup>

### 3.2.3 The Appeals Chamber Judgment

One of the peculiar characteristics of the Erdemović AC judgment is that in addition to having one judgment that presented the findings of the AC, there were four separate dissenting and consenting judgments from the five judges who heard the appeal.<sup>131</sup> Erdemović's plea of duress was rejected by a majority of three to two judges.

In his appeal, Erdemović alleged that the TC had erred in law by rejecting his plea of duress. Erdemović did not, however, raise the issue of validity of duress in international criminal law, and specifically whether duress can afford a complete defence to a charge of crimes against humanity, resulting in an acquittal. This matter was raised by the AC on its own motion,<sup>132</sup> and the resulting discussion became a formidable contribution to the duress discourse in international criminal law.

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<sup>129</sup> Other mitigating factors included Erdemović's subordinate rank in the military, his young age, and his full co-operation with the Office of the Prosecutor among others- paras 29-95, 96-98, 99 and 102-111 of the TC Sentencing Judgment.

<sup>130</sup> See para 11 of the AC judgment. One of Erdemović's grounds of appeal was the fact that the TC had required corroboration of his plea of duress while accepting his admission of having participated in the 'Branjevo' massacre without corroboration. See paras 11 & 12 (b) of the AC judgment referred to in note 18 above.

<sup>131</sup> The separate joint opinion of judges Vohrah and McDonald, the separate opinion of judge Li-available at <http://www.icty.org/x/cases/Erdemovic/acjug/en/erd-asojli971007e.pdf> (accessed 24 July 2013). The separate dissenting opinion of judge Cassese, and the separate dissenting opinion of Judge Stephen referred to in note 19 above.

<sup>132</sup> Para 16 of the AC judgment.

### 3.2.3.1 The majority opinions

There were two majority opinions, of Judge Vohrah jointly with Judge McDonald and of Judge Li.<sup>133</sup> These judges rejected the notion that duress could be a complete defence where the conduct in question involved killing, especially where the defendant is a trained soldier or combatant.<sup>134</sup> As per Judge Li, duress should be rejected as it would go contrary to the role of international (humanitarian) law to protect the lives of ‘innocent persons’.<sup>135</sup> Similarly to the TC judges, the AC majority only allowed duress as a mitigating factor.<sup>136</sup>

### 3.2.3.2 The dissenting opinions

The dissenting Judges Cassese and Stephen, while using different criteria arrived at a similar conclusion. According to them, duress is applicable for crimes under international law under certain conditions. Both judges alluded to the preconditions for a successful plea of duress as had been recognised both by the TC and AC majority judges in the Erdemović case. Neither the TC nor the AC majority had assessed the applicability of the said preconditions, having concluded *ab initio* that duress was not applicable.<sup>137</sup> In contrast, Judge Cassese opted for letting the preconditions be the determinants whether the defence would be successful; as opposed to rejecting the defence on the grounds of policy.<sup>138</sup> Judge Stephen noted that general

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<sup>133</sup> On the question of whether duress can afford a complete defence to charges of crimes against humanity and war crimes involving the killing of innocent persons. The judges were also divided on other matters, but the same are beyond the scope of this paper.

<sup>134</sup> According to Judges McDonald & Vohrah, soldiers and combatants are expected to exercise a higher degree of resistance to a threat as compared to civilians. Para 84 of the joint opinion.

<sup>135</sup> In Para 8 of his opinion, Judge Li stated that allowing duress would equate to encouraging subordinates to kill, which would go counter to the role of the tribunal (ICTY) to protect innocent persons (including civilians, prisoners of war and hors de combat).

<sup>136</sup> See Judge Li's opinion para 12 and judges Vohrah and McDonald's opinion para 90.

<sup>137</sup> The TC opined *inter alia* that Erdemović had a duty to disobey the order given (no matter the circumstances of coercion) and that the crimes in question were too grave to warrant the defence. See the TC Sentencing Judgment para 19.

<sup>138</sup> Judge Cassese noted that the preconditions were in themselves difficult to fulfil, and therefore this option is not necessarily more favourable to the accused. See the dissenting opinion of Judge Cassese para 43.

principles of law did not prohibit duress even for charges of murder, especially where the defendant's action is not disproportionate, and where the victims would be killed anyway.<sup>139</sup>

Subsequent to *the Erdemović case*, there hasn't been another *locus classicus* case on the matter of duress in international criminal law, and therefore both the TC and AC judgments remain a source of practice as far as duress is concerned. The following sections of this chapter will contrast the preconditions of duress as per the ICTY TC and AC judgments while showing the differences with the preconditions now required under the Rome Statute regime.<sup>140</sup>

### **3.3 Preconditions for duress: Erdemović contrasted with Article 31(1)(d) of the Rome Statute**

The TC in *the Erdemović case* formulated the preconditions for duress as follows: that 'the act charged was done to avoid an immediate danger both serious and irreparable,' that 'there was no adequate means of escape' and 'the conduct was not disproportionate to the evil [avoided]'.<sup>141</sup> Four of the AC judges agreed with the TC's preconditions,<sup>142</sup> but Judge Cassese ended up with four requirements instead: an immediate threat of severe or irreparable harm to life or limb, the existence of no other way to avert the harm, the crime committed was not disproportionate to the harm avoided, and the situation leading to duress was not voluntarily brought about by the person coerced.<sup>143</sup>

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<sup>139</sup> See para 46 of Judge Stephen's dissenting opinion. Judge Cassese refers to the latter view as the *Masetti* approach from the *Masetti judgment of the Special Court of Assize of Forli* of 17 November 1947. It is a utilitarian approach. Further, Judge Stephen opined that it was illogical to reject duress as a defence while admitting it as a mitigating factor. See para 67 of Judge Stephen's opinion referred to in note 19 above.

<sup>140</sup> This is done with a view to ascertain the nature of duress preconditions in contemporary international criminal law.

<sup>141</sup> Para 17 of the TC's sentencing judgment.

<sup>142</sup> Para 42 of Judge McDonald & Vohrah's opinion, Para 5 of Judge Li's opinion, paras 14 & 67 of Judge Stephen's opinion.

<sup>143</sup> Opinion of Judge Cassese para 16.



The Rome Statute adopts a stance somewhat of a hybrid between the TC's preconditions and Judge Cassese's preconditions, with slight modifications to both. The preconditions in Article 31(1)(d) of the Statute are: a threat of death or serious bodily harm, the person acted necessarily and reasonably to avoid the harm and the person did not intend to cause a greater harm than the one sought to be avoided. The individual preconditions of the TC, of Judge Cassese and of the Rome Statute are compared in the following discussion.

### 3.3.1 Presence of a threat

#### 3.3.1.1 The Concept

Generally, a threat has been defined as:

'A declaration of one's purpose or intention to work injury to the person, property, or rights of another. ...any menace of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free, voluntary action which alone constitutes consent.'<sup>144</sup>

In *the Erdemović case*, the TC did not mention a threat, and instead spoke of 'danger'.<sup>145</sup> Judge Cassese was more specific, stating that those threats 'only emanating from another person' constitute duress.<sup>146</sup> The Rome Statute also provides for a threat, and distinguishes a threat caused by another person - constituting duress, from one caused by circumstances-constituting necessity.<sup>147</sup> This precondition appreciates that for an actor to unwillingly engage in genocide, crimes against humanity and war crimes, his/her state of mind must have been substantially

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<sup>144</sup> Online law dictionary available at <http://thelawdictionary.org/threat/> (Accessed 17 August 2013).

<sup>145</sup> See para 17 of the sentencing judgment. Danger does not refer only to coercion by another person and can include necessity.

<sup>146</sup> Opinion of Judge Cassese para 14.

<sup>147</sup> Article 31(1)(d)(i) and (ii) respectively.

overborne by the will of the ‘coercer’.<sup>148</sup> The determining test is whether a reasonable person in the defendant’s circumstances would have succumbed to the threat.<sup>149</sup>

The presence of a threat is the foundational requirement for duress in contemporary international criminal law, and coercion originating from another human being is what distinguishes duress from necessity in the Rome Statute. However, the threat must have been the cause of the defendant’s action, and duress will not be available to a defendant who would have acted the same way in the absence of the threat.<sup>150</sup>

### 3.3.1.2 Threshold of the threat

The TC in the *Erdemović case* did recognise a threshold requirement, stating that a threat amounting to duress should be of ‘serious and irreparable danger’.<sup>151</sup> The TC did not define what constitutes a ‘serious or irreparable danger’ and it is, indeed, a vague threshold that can be broadly interpreted to include a threat to property. Judge Cassese was more specific, by requiring that it should be a threat to the life or limb of the defendant, thus ruling out other kinds of (serious) threats, for instance to property or constituting verbal threats such as blackmail.<sup>152</sup> The Rome Statute contains a view similar to Judge Cassese’s but is even more

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<sup>148</sup> Eser A, ‘Art 31: Grounds for excluding criminal responsibility’ in Triffterer O *Commentary on the Rome Statute of the International Criminal Court- Observer’s Notes Article by Article* (2ed) (2008) 885 & 885 (hereafter Eser A, in Triffterer O, 2ed (2008). Kham KAA & Dixon R *Archibold International Criminal Courts: Practice, Procedure and Evidence* 3ed (2009) 1285 render themselves thus, ‘...the threat must be such as a reasonable man apprehends so much physical peril as to deprive him of freedom to choose.’

<sup>149</sup> Eser A in Triffterer O, 2ed (2008) 886. Chiesa LE (2008), 753 states the reason for this is that it would be unfair to punish a person for succumbing to a threat that another person in the same circumstances would be unable to resist.

<sup>150</sup> Cryer R, Friman H, Robinson D et al *An Introduction to International Criminal Law and Procedure* (2008) 340. See also Eser A in Triffterer O (1999) 551.

<sup>151</sup> Judges Vohrah and McDonald took the same view as the TC. See their joint opinion para 42.

<sup>152</sup> Opinion of Judge Cassese para 15. See Cryer R, Friman H, Robinson D et al *An Introduction to International Criminal Law and Procedure* (2008) 340.

specific, requiring that the threat of death or serious bodily harm be either ‘imminent’ or ‘continuing’.<sup>153</sup>

The word ‘imminent’ is synonymous with ‘impending’ and refers to the likelihood of something occurring at any moment.<sup>154</sup> Coercion amounting to duress must therefore involve a real threat of death or a serious bodily harm,<sup>155</sup> and the Defendant must have acted with a *bona fide* belief of the immediate existence of the danger.<sup>156</sup> Consequently, a threat of future harm or mere moral pressure would not suffice.<sup>157</sup> The Rome Statute does not, however, expressly require the use of force.<sup>158</sup>

### 3.3.1.3 Threat to defendant or other person

Both the ICTY’s TC and Judge Cassese in the *Erdemović* case only envisaged a threat to the defendant. However, the same tribunal in *Prosecutor v. Simić, Tadić & Zarić* stated that the preconditions of duress do not rule out action to prevent another person from a threat.<sup>159</sup> Article 31(1)(d) of the Rome Statute extends the reach of duress by expressly providing that a defendant may act to prevent harm to another person. The Statute does not require any relationship between the person threatened and the accused.<sup>160</sup>

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<sup>153</sup> According to Dressler J in ‘Exegesis of the law of duress: Justifying the excuse and searching for its proper limits’ 62 *California Law Review* (1988-89) 1336, the threat need not be actual, and that a bonafide belief in the existence of a threat suffices. The Rome Statute counters this view by the requirement of imminence of the threat.

<sup>154</sup> See the online dictionary available at <http://dictionary.reference.com/browse/imminent> (Accessed 17 August 2013).

<sup>155</sup> Ambos K in Cassese A et al (2002) 1019-20.

<sup>156</sup> *US v. Krupp* Judgment of 31 July 1948 USA Military Tribunal Cases Vol. IX available at <http://werle.rewi.hu-berlin.de/KRUPP-Case%20Judgment.pdf> (accessed 16 June 2013) 1438.

<sup>157</sup> *Trial of Max Wielen & 17 Others* (Case No. 62) LRTWC XI 49 & 47 respectively available at <http://www.ess.uwe.ac.uk/wcc/wielen2.htm> (accessed 1 September 2013).

<sup>158</sup> Ambos K in Cassese et al (2002) 1018.

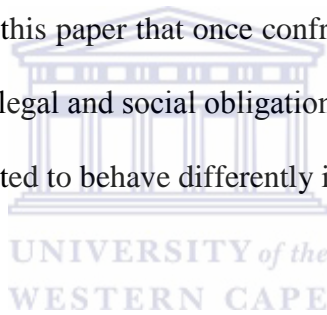
<sup>159</sup> Case No. IT-95-9 Judgment of 17 October 2003 available at <http://www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf> (accessed 2 September 2013) as quoted by Knoops GA 2ed (2008) 133.

<sup>160</sup> Knoops GA 2ed (2008) 132.

#### 3.3.1.4 Requirement for the defendant to assume risk?

Despite the existence of a threat, there are circumstances in which a coerced actor could be reasonably expected to resist a threat to his life, an example of this being where a special legal relationship exists.<sup>161</sup> This was the view held by Judges Vohrah and McDonald in the *Erdemović* case where they stated that soldiers are expected to exercise a greater level of resistance to threats than civilians.<sup>162</sup>

According to Gur-Arye M, no distinction should be made between soldiers and civilians as far as coercion is concerned.<sup>163</sup> The Rome Statute adopts the same view, and accordingly does not require persons with a legal duty to their victims to exercise greater resistance to threats. That notwithstanding, it is the view of this paper that once confronted with duress, the ICC should inevitably consider a defendant's legal and social obligations in assessing whether a particular defendant would have been expected to behave differently in the face of duress, as defendants do not act in a vacuum.<sup>164</sup>



#### 3.3.2 No other means of escape

Both Judge Cassese and the TC in *the Erdemović case* alluded to the precondition that there should be no other means to avert the harm or danger than to fulfil the criminal act in question.

This requirement inevitably means that succumbing to duress must be the only possible means

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<sup>161</sup> See para 16 opinion of Judge Cassese.

<sup>162</sup> See para 84 of their joint opinion. Also *Ambos K* in Cassese et al (2002) 1020. Chiesa LE (2008) 765-6 states that other persons on whom such a duty exists include a firefighter and law-enforcement officer as well as a parent forced to make a choice to save his/her own life or that of his/her child.

<sup>163</sup> Gur-Arye M 'Should duress be treated differently under international criminal law: The ICTY in Prosecutor v. Erdemović as a test case' Hebrew University of Jerusalem Faculty of Law 17 March 2012 15. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2025368](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2025368) (accessed 2 September 2013). Hereafter Gur Arye M (2012).

<sup>164</sup> Persons with legal obligations, for instance soldiers whose work is to protect civilians, are expected to face a higher risk than ordinary civilians. See *Ambos K* in Cassese A et al (2002) 1020; Heim SJ (2013) 175; Chiesa LE (2008) 765. Article 31(2) of the Rome Statute provides that the Court shall determine the applicability of the grounds for excluding criminal responsibility to the case before it.

of action for the defendant. The Rome Statute alludes to this precondition, albeit using different words, by requiring that in yielding to the threat, the accused's conduct should have been both 'necessary and reasonable' to avoid the threat.<sup>165</sup> As was required by the ICTY, the defendant's choice to commit a crime rather than suffer harm should be the only logical course of action under the circumstances.<sup>166</sup>

The Rome Statute neither defines 'necessary' and 'reasonable', nor indicates whether these shall be assessed objectively or subjectively. An objective interpretation would mean that the standard applicable is that of an ordinary person in the accused's circumstances, while a subjective test would mean what is necessary or reasonable as perceived by the accused. According to Knoop GA,<sup>167</sup> the test is subjective, but the Rome Statute does not clarify this. It therefore remains to be seen how the ICC will interpret the two-prong test.



### 3.3.3 The possible proportionality requirement

Both the TC and Judge Cassese in *the Erdemović case* alluded to the precondition of proportionality; that the defendant's conduct should not cause a greater harm than the one avoided. According to Judge Cassese, this precondition is the most difficult to satisfy especially where charges of killing are concerned, because the life of the victim(s) cannot be considered less valuable than that of the perpetrator.<sup>168</sup> He stated that for the defendant's act to be proportionate, it should be the lesser of two evils.<sup>169</sup>

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<sup>165</sup> Ambos K in Cassese A et al 1018 states that this precondition only applies to necessity and not duress, but the Statute does not make such a distinction.

<sup>166</sup> According to Eser A in Triffterer O (1999) 552, 'necessary' means the unavailability of alternative means of escape, while 'reasonable' means the propensity of the said conduct to reach the desired effect.

<sup>167</sup> Knoop GA 2ed (2008) 53.

<sup>168</sup> See para 42 of the dissenting opinion of Judge Cassese. See also Chiesa LE (2008) 751 where she states that the core crimes-genocide, crimes against humanity and war crimes would never meet the proportionality requirement if the test is the balance of the lesser evil.

<sup>169</sup> Opinion of Judge Cassese para 16.

This requirement of proportionality is objective and has been described as harsh,<sup>170</sup> although it has been advocated for by some authors. Chiesa LE for instance advocates for a proportionality requirement for soldiers, but not for civilians.<sup>171</sup> She gives examples where application of the proportionality requirement (for civilians) would cause absurd results, allowing duress for some defendants and denying it to others, chiefly on the basis of the gravity of the crimes committed.<sup>172</sup> On the other hand, Heim SJ advocates for an objective requirement for proportionality as a precondition for duress even for civilians.<sup>173</sup>

The Rome Statute does not contain an objective requirement for proportionality,<sup>174</sup> and instead contains a subjective requirement pegged on the mental status of the perpetrator.<sup>175</sup> The Statute does not require that the perpetrator actually avoids the greater harm, but only that he intended to do so.<sup>176</sup> Proportionality therefore depends on the defendant's perception and assessment of the balance between the harm that might befall him/her if he/she fails to yield to the threat, and the crime that he/she is forced to commit. The Statute does not provide a way to prove such intention, and this paper suggests that it could be inferred from the objective factual circumstances surrounding the crime, and the defendant's conduct.

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<sup>170</sup> Eser A in Triffterer O (1999) 552.

<sup>171</sup> That civilians would be excused from actions committed under duress regardless of proportionality, but a soldier who yields to a threat to his life in violation of his legal duty can only be allowed to plead duress if his actions were proportionate to the harm avoided. See Chiesa LE (2008) 765.

<sup>172</sup> An example is a nuclear scientist who is threatened with death if he/she does not create a nuclear bomb to liquidate thousands of people. While acknowledging that the highly specialised nature of the perpetrator's conduct coupled with the magnitude of the harm likely to be caused by the nuclear bomb would make it difficult to justify succumbing to the threat, Chiesa LE (2008) 757 concludes that this is inconsistent with the entrenched principle that the law cannot demand heroism from its citizens.

<sup>173</sup> Heim SJ (2013) 181.

<sup>174</sup> Eser A in Triffterer O 2ed (2008) 887.

<sup>175</sup> The relevant section of Art 31 reads as follows:

'... 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 ...' (Emphasis added).

<sup>176</sup> Eser A in Triffterer O (1999) 552.

It has been stated that the subjective intention requirement is the most problematic part of Article 31(1)(d) of the Rome Statute, due to the fact that it is likely to be interpreted differently.<sup>177</sup> The opinion of this paper, however, is that the subjective requirement is easier to satisfy and is a more realistic requirement than an objective one.

### **3.3.4 Involuntariness of conduct**

The precondition that the accused should not have voluntarily brought about the duress situation is unique to Judge Cassese's opinion in *the Erdemović case*.<sup>178</sup> In discussing this requirement, Judge Cassese found that the voluntary conscription of the defendant to a group which he knows or ought to have known purposefully engages in violation of international law, would disentitle him from claiming duress.<sup>179</sup> The Rome Statute is a departure from this stance as it does not require voluntariness in order to prove duress.<sup>180</sup> However, this is a factor that could assist the court in assessing applicability of duress in a particular case.<sup>181</sup>

### **3.3.5 The importance of rank**

Although he did not recognise this as a distinct precondition to duress, Judge Cassese noted that rank is important in assessing coercive circumstances. The fact that Erdemović was a low-ranking soldier<sup>182</sup> was a crucial factor in determining whether he was justified in yielding to coercion.<sup>183</sup> The Rome Statute does not seem to give the same kind of attention to questions of

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<sup>177</sup> See Scallioti M 'Defences before the International Criminal Court: Substantive grounds for excluding criminal responsibility' Part 2 *International Criminal Law Review* (2002) 156 & 157. Hereafter Scallioti M Part 2 (2002).

<sup>178</sup> Opinion of Judge Cassese para 16.

<sup>179</sup> Opinion of Judge Cassese para 50. See Scallioti M Part 2 (2002) 151.

<sup>180</sup> According to Eser A in Triffterer O 2ed (2008) 885, the Rome Statute avoided delving into the self-exposure concept. The Statute instead gives a wide discretion to the ICC to determine applicability of grounds to exclude criminal liability to cases before it as per Article 31(2).

<sup>181</sup> See Heim SJ (2013) 168 and Knoops GA 2ed (2008) 58.

<sup>182</sup> See p 7, 8 of the AC Judgment of 7 October 1997 referred to in note 18 above.

<sup>183</sup> Opinion of Judge Cassese para 45.

rank as far as duress is concerned, but as shall be discussed in Chapter four of this paper, rank is in practice important to the ICC especially in the selection of defendants. Hence, the rank of defendants is an important factor when it comes to the availability and proof of duress.<sup>184</sup>

### 3.4 Conclusion

As can be seen from the foregoing discussion, the preconditions of duress in Article 31(1)(d) of the Rome Statute are a substantial development from the ones formulated by the TC and discussed by Judge Cassese in *the Erdemović case*. The preconditions in the Rome Statute seem to be less stringent insofar as they did away with an objective proportionality requirement, as well the involuntariness requirement by Judge Cassese. Article 31(1)(d) of the Rome Statute is also more specific as regards the threshold of a threat amounting to duress.

The ICC enjoys wide discretion by virtue of Article 31(2) to determine such questions as what amounts to reasonable and necessary action; and to take into account matters such as the defendant's rank, legal and social obligations and whether he/she voluntarily placed him or herself in the duress situation. These factors, though not requirements for duress, could be used to gauge whether the defendant acted 'necessarily' and 'reasonably'.<sup>185</sup> The Court is also tasked with ascertaining whether, in yielding to the threat, the defendant intended to cause disproportionate harm or not. All these are largely questions of fact which can only be decided on a case-by-case basis, and no general determinations can be made on them.<sup>186</sup>

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<sup>184</sup> Knoops GA 2ed (2008) 58.

<sup>185</sup> Eser A in Triffterer O (2008) 886.

<sup>186</sup> Kittichaisaree K *International Criminal law* (2001) 264 and Eser A in Triffterer O (1999) 553.



## CHAPTER FOUR

### ICC SITUATIONS AND CASES – THE NATURE OF THE DEFENDANTS’ PARTICIPATION AND ITS IMPLICATIONS ON THE DEFENCE OF DURESS

#### 4.1 Introduction

This chapter explores some of the situations before the ICC and examines the role of the defendants in the conflicts leading to their indictments. The chapter seeks to ascertain the implications of the defendants’ participation on the question of duress as a defence in international criminal law.

#### 4.2 The ICC situations and defendants

The ICC is interested in the ‘persons who bear the greatest responsibility’ for crimes against international law.<sup>187</sup> Despite the fact that the Rome Statute does provide for all levels of participation in the core crimes,<sup>188</sup> the practice of the court thus far has focused on commanders and deputy commanders both of militia groups<sup>189</sup> and of national armies,<sup>190</sup> heads of states and former heads of states,<sup>191</sup> other influential personalities including family members of powerful individuals,<sup>192</sup> cabinet ministers and former cabinet ministers<sup>193</sup> as well as journalists.<sup>194</sup>

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<sup>187</sup> See the Policy Paper on some issues before the Office of the Prosecutor September 2003 available at [http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905\\_policy\\_paper.pdf](http://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf) (accessed 31 August 2013). The court has however also prosecuted some defendants not considered ‘most responsible’ for instance Bosco Ntaganda. See Stegmiller I ‘The gravity threshold under the ICC statute: Gravity back and forth in Lubanga and Ntaganda’ *International Criminal Law Review* Vol. 9 (2009) 552. Hereafter Stegmiller I (2009).

<sup>188</sup> Art 25(3) on individual criminal responsibility and modes of participation.

<sup>189</sup> *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* (ICC-02/04-01/05); *The Prosecutor v. Thomas Lubanga Dyilo* (ICC-01/04-01/06); *The Prosecutor v. Germain Katanga* (ICC-01/04-01/07); *The Prosecutor v. Mathieu Ngudjolo Chui* ICC-01/04-02/12.

<sup>190</sup> *The Prosecutor v. Abdullah Al-Senussi* (ICC-01/11-01/11).

<sup>191</sup> *The Prosecutor v. Laurent Gbagbo* (ICC-02/11-01/11); *the Prosecutor v. Omar Hassan Ahmad Al Bashir* (ICC-02/05-01/09).

<sup>192</sup> *The Prosecutor v. Simone Gbagbo* (ICC-02/11-01/12).

<sup>193</sup> *The Prosecutor v. Saif Al-Islam Gaddafi* (ICC-01/11-01/11).

<sup>194</sup> *The Prosecutor v. Joshua Arap Sang* (ICC-01/09-01/11).

Article 17(1)(d) of the Rome Statute provides for gravity as one of the factors to determine admissibility of a case before the court but the Statute links such gravity to the seriousness of the crimes as opposed to the position and participation of the defendants. However, apart from stressing the fact that the ICC is concerned with the ‘most serious crimes of concern to the international community’,<sup>195</sup> the Statute does not define gravity. The Prosecutor of the ICC enjoys the discretion to determine which cases to take on for investigation and prosecution, while taking into account the gravity of the case.<sup>196</sup>

The OTP has therefore developed a policy of focusing on the ‘highest-ranking’ perpetrators, as a filter to enable the court zero in on defendants, who would otherwise be numerous, as is the case with mass crimes.<sup>197</sup> The parameters used by the OTP to measure gravity include the scale of crimes, the nature of the crimes, the manner of commission and the impact of the crimes,<sup>198</sup> and it can be observed that the OTP also attaches some importance to the position, power and influence of the defendant concerned. In fact, the OTP seems to interpret ‘persons most responsible’ to mean military and political leaders<sup>199</sup>, and persons with other kinds of influence, including journalists.<sup>200</sup> The jurisdiction of the ICC is, however, not limited as were the ICTY

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<sup>195</sup> Para 4 of the Preamble to the Rome Statute.

<sup>196</sup> Article 53(1)(c) of the Rome Statute. An insightful discussion on gravity and admissibility is done by Stegmiller I (2009) referred to in note 187 above p. 555-6. The gravity threshold has been described as a safeguard to prevent the ICC from trying ‘peripheral cases’. See Decision pursuant to Article 15 of the Rome Statute on the authorisation of an investigation into the situation in the Republic of Kenya dated 31 March 2010 available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed 10 October 2013).

<sup>197</sup> See note 187 above.

<sup>198</sup> See Regulation 29(2) of the OTP Regulations which came into force on 23 April 2009. Available at <http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBD050109ENG.pdf> (accessed 9 October 2013).

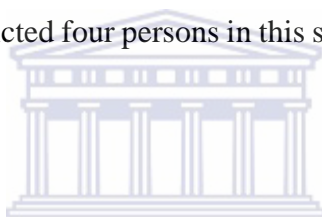
<sup>199</sup> Carter LE ‘The International Criminal Court in 2021’ *South Western Journal of International Law* Vol. 18 (2011) 211.

<sup>200</sup> Influence is defined as ‘...the exercise of formal authority ... or moral power over a person...or authority not formally expressed’. Simpson JA & Weiner ESC *The Oxford English Dictionary* 2ed Vol. VII (1989) 940.

and ICTR- which had policies to try only the most senior leaders.<sup>201</sup> Some of the cases before the ICC are discussed below, and these have been deliberately chosen to represent the various forms of defendants before the ICC- the militia, politicians, journalists, government officials and presidents. Despite the express provision for duress in the Rome Statute, none of these defendants has raised duress.

#### **4.2.1 The Uganda Situation**

This situation resulted from a civil war in Northern Uganda waged by the Lord Resistance Army (LRA)<sup>202</sup> against the Ugandan People's Defence Forces (UPDF). The LRA has been accused of heinous crimes against civilians including murders, rapes, mutilations, abductions and displacement.<sup>203</sup> The ICC indicted four persons in this situation, all of whom constitute the militia leaders of the LRA.



##### **4.2.1.1 The Defendants**

###### **a. Joseph Kony**

Kony is founder and commander-in-chief of the LRA and he was instrumental in devising strategies of the LRA that included attacks against civilians- amounting to war crimes and crimes against humanity.<sup>204</sup> Kony is allegedly responsible under Article 25(3)(a) of the Rome Statute for direct perpetration as well as under Article 25(3)(b) for ordering and inducing the

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<sup>201</sup> This was due to their limited temporal jurisdictions. He further states that the OTP's policy of linking leadership with a higher degree of criminal responsibility is based on defective legal reasoning. See Stegmiller I (2009) 555 & 556.

<sup>202</sup> A rebel group formed in 1986 allegedly as a voice of the Acholi people of Northern Uganda.

<sup>203</sup> A comprehensive account of the armed conflict is contained in Branch A 'Uganda's civil war and the politics of ICC intervention' *Ethics and International Affairs* Vol. 21 Issue 2 180-1.

<sup>204</sup> See Kony's amended arrest warrant dated 27 September 2005 paras 7, 9, 10 & 12. Available at <http://www.icc-cpi.int/iccdocs/doc/doc97185.pdf> (accessed 14 September 2013). Hereafter Kony's arrest warrant.

commission of crimes. As a result, Kony is considered one of the ‘most responsible persons’<sup>205</sup> for the LRA atrocities. As at the time of this writing, Kony is still at large.

#### **b. Vincent Otti**

Otti is considered the ‘vice-chairman’ and 2<sup>nd</sup> in command in the LRA, and is alleged to have participated in the devising and implementation of strategies of the LRA.<sup>206</sup> Otti is allegedly criminally liable under Article 25(3)(b) of the Rome Statute for ordering, inducing or soliciting for the commission of war crimes and crimes against humanity.<sup>207</sup> As at the time of this writing, Otti has not been apprehended.<sup>208</sup>

#### **c. Dominic Ongwen**

Ongwen is a member of the leadership group of the LRA, (the so-called Control Altar), and he is also believed to be the brigade commander of the Sinia Brigade of the LRA.<sup>209</sup> Otti is also the director of operations and the third most powerful man in the LRA.<sup>210</sup> He is allegedly responsible under Article 25(3)(b) of the Rome Statute for leading and ordering attacks on civilians pursuant to the LRA strategies and objectives. He faces three counts of crimes against humanity and four counts of war crimes<sup>211</sup> and is still at large at the time of this writing.

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<sup>205</sup> See Kony’s arrest warrant referred to in note 204 above para 37.

<sup>206</sup> See para 13 of Otti’s arrest warrant dated 8 July 2005 available at <http://www.icc-cpi.int/iccdocs/doc/doc97189.pdf> (accessed 14 September 2013).

<sup>207</sup> Information sourced from the ICC website available at [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx) accessed 15 September 2013).

<sup>208</sup> In fact, Otti is said to have died in October of 2007, but the ICC still considers him to be at large since no proof of his death has been availed to the court. Information sourced from the Hague Justice Portal website available at <http://www.haguejusticeportal.net/index.php?id=8194> (accessed 5 October 2013).

<sup>209</sup> The LRA is allegedly divided into 4 brigades, being *Stockree*, *Sinia*, *Trinkle* and *Gilva*. See paras 9 & 11 of Ongwen’s arrest warrant dated 8 July 2005 available at <http://www.icc-cpi.int/iccdocs/doc/doc97201.pdf>.

<sup>210</sup> Enough! ‘Wanted by the ICC; The LRA leaders: Who they are and what they’ve done’ p. 4. Available at [http://www.enoughproject.org/files/pdf/lra\\_leaders.pdf](http://www.enoughproject.org/files/pdf/lra_leaders.pdf) (accessed 15 September 2013) 4. Hereafter Enough!

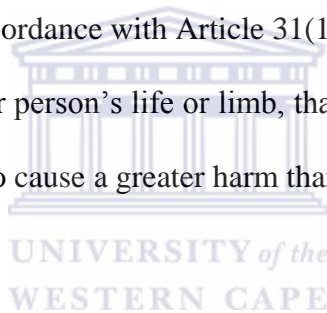
<sup>211</sup> Information sourced from the ICC website referred to in note 207 above.

#### **d. Okot Odhiambo**

Odhiambo is believed to be the LRA's army commander and a member of the 'Control Altar',<sup>212</sup> who has been described as a 'ruthless killer'.<sup>213</sup> He faces two counts of crimes against humanity and eight counts of war crimes for responsibility under Article 25(3)(b) of the Rome Statute.

##### **4.2.1.2 How duress would play out for these defendants**

Kony, Odhiambo, Otti and Ongwen could be termed 'military' leaders as far as the LRA is concerned. The four constitute 'high-level' perpetrators of the LRA atrocities, as they comprise the central ultimate leadership of the LRA.<sup>214</sup> Any of these persons claiming that he acted under duress would have to prove in accordance with Article 31(1)(d) of the Rome Statute that there was a threat against his or another person's life or limb, that he acted necessarily to avoid the threat and that he did not intend to cause a greater harm than the one he avoided in yielding to the threat.



As much as it is possible for Odhiambo, Ongwen and Otti to claim that they were threatened by Kony and coerced to commit the crimes they are accused of, it could be successfully argued in response that the three had identified themselves so much with Kony's strategies that a claim of duress is unlikely to be sustainable. The three are alleged to have been involved in atrocities for the last 26 years, during which time they must have had chances to escape, but they did not.

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<sup>212</sup> This refers to an inner circle of top leaders of the LRA who devise strategies and objectives of the group. See Odhiambo's arrest warrant para 9 & 12 dated 8 July 2005 available at <http://www.icc-cpi.int/iccdocs/doc/doc97197.PDF> (accessed 14 September 2013). Hereafter Odhiambo's arrest warrant.

<sup>213</sup> Para 9 of Odhiambo's arrest warrant referred to in note 212 above.

<sup>214</sup> The terms 'high-level', 'mid-level' and 'low-level' as are used in this chapter are borrowed from Bassiouni MC in *Crimes against Humanity in International Criminal Law* 2ed (1999) 491.

The alleged conduct of the three shows their enthusiasm for the LRA's cause, which is inconsistent with a claim of duress.

Further, Kony could not have succeeded to run the rebel group and implement its strategies without the cooperation of Otti, Odhiambo and Ongwen, and therefore a complete absolving of responsibility for the three, even in the face of coercion, would result in absurdity. Even if they were initially coerced to join the LRA, their continued participation in the strategies of the LRA for over two decades are unlikely to be excused. Besides, it would be difficult in light of the LRA atrocities to prove that their acts were reasonable and necessary and that there was no intention to cause a greater harm than the one avoided.<sup>215</sup>

As was the case in the post-World War II case of *Ohlendorf* where the USA Military tribunal stated that Hitler would not have succeeded in his plans were it not for the cooperation of the defendants,<sup>216</sup> Kony would not have single-handedly committed war crimes and crimes against humanity without the cooperation of Otti, Odhiambo and Ongwen. Therefore claims of duress by all four would be bound to fail. Though the case of *Ohlendorf* does not have binding force as far as the ICC is concerned, its argument is very convincing and could provide a basis for a rejection of claims of duress by the ICC.<sup>217</sup>

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<sup>215</sup> The Rome Statute does not require that such greater harm be actually avoided, but from the magnitude of crimes committed by the LRA- resulting in the deaths of thousands, abductions of over 30,000 children and the displacement of over 1.7 million civilians, one can infer that the LRA perpetrators had no intention of avoiding a greater harm. Information sourced from the Village of Hope-Uganda website. Available at <http://villageofhopeuganda.com/about/uganda-and-the-lra/> (accessed 9 October 2013).

<sup>216</sup> Also referred to as the *Einsatzgruppen case* See note 83 above p. 480.

<sup>217</sup> Article 21 of the Rome Statute does not list case law as a source of law for the ICC, and the court is not bound to even apply its own previous decisions.

## 4.2.2 The Kenya Situation

This situation arose from violence that followed the disputed 2007 presidential elections in Kenya, as a result of which the Prosecutor of the ICC decided to begin investigations.<sup>218</sup> The Kenya situation is interesting since it involves two politicians and two journalists.

### 4.2.2.1 The defendants

#### a. William Ruto

Ruto was the Member of Parliament for Eldoret North Constituency in Rift Valley Province of Kenya in the period relevant to his ICC indictment (December 2007 to February 2008). He allegedly created and co-ordinated a ‘network’ responsible for devising strategies of attacking civilians perceived to be supporters of a rival political party. In fact, the PTC II stated that Ruto’s mental element in relation to the crimes in question was a sufficient indication of the ‘network’s’ intention.<sup>219</sup> Ruto is allegedly responsible under Art 25(3)(a) of the Rome Statute as an indirect perpetrator.

#### b. Uhuru Kenyatta

At the time of the alleged perpetration of crimes against humanity, Kenyatta was the Member of Parliament for Gatundu South Constituency in the Central Province in Kenya. He was also the leader of the official opposition. Kenyatta allegedly organised and co-ordinated meetings between political party officials and the Mungiki militant group to carry out retaliatory attacks on behalf of the Kikuyu.<sup>220</sup> Kenyatta is charged with criminal responsibility under Art 25(3)(a)

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<sup>218</sup> In exercise of powers provided for in Article 15(1) of the Rome Statute. See decision to grant the Prosecutor’s application to open a *proprio motu* investigation into the situation in Kenya dated 31 March 2010. Available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed 24 September 2013).

<sup>219</sup> See the confirmation of charges decision in *Prosecutor v. William Samoei Ruto and Joshua Arap Sang* Case No. ICC-01/09-01/11 dated 23 January 2012 paras 187, 190, 192, 193, 196, 302, 307 and 352 available at <http://www.icc-cpi.int/iccdocs/doc/doc1314535.pdf> (accessed 1 October 2013).

<sup>220</sup> See the confirmation of charges decision in *Prosecutor v. Uhuru Muigai Kenyatta* Case No. ICC-01/09-02/11 dated 23 January 2012 paras 288, 289, 290, 291, 292 and 294 available at <http://www.icc-cpi.int/iccdocs/doc/doc1314543.pdf> (accessed 1 October 2013).

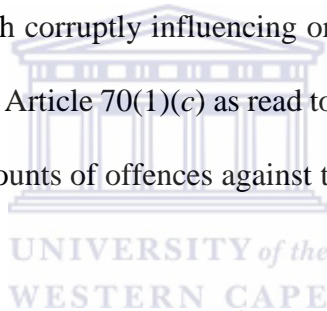
of the Rome Statute as an indirect perpetrator of retaliatory attacks planned and executed against civilians.<sup>221</sup>

### **c. Joshua Arap Sang**

Sang is the head of operations at Kass FM, which is a radio station that broadcasts using the vernacular Kalenjin Language.<sup>222</sup> He faces three counts of crimes against humanity and is charged under Article 25(3)(d) of the Rome Statute for liability for any contribution made to a crime. Sang allegedly broadcasted hate messages and disseminated plans of the above-mentioned 'network'<sup>223</sup> in addition to participating in the said 'network's preparatory meetings.<sup>224</sup>

### **d. Walter Osapiri Barasa**

Barasa is a journalist charged with corruptly influencing or attempting to corruptly influence three prosecution witnesses under Article 70(1)(c) as read together with Article 25(3)(a) of the Rome Statute.<sup>225</sup> He faces three counts of offences against the administration of justice.



#### **4.2.2.2 How would duress play out for these defendants?**

It is possible to imagine that Kenyatta and Ruto could claim duress as a defence to the charges facing them. Though the two were powerful politicians at the time of their alleged participation in the crimes alleged, it is not unfathomable that they could have been coerced to participate for instance by other politicians more powerful than them, by their peers or by vigilante groups.<sup>226</sup> However, both Kenyatta and Ruto were allegedly responsible not only for organising

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<sup>221</sup> See paras 287 & 288 of the confirmation of charges decision referred to in note 220 above.

<sup>222</sup> Para 355 of the confirmation of charges decision referred to in note 219 above.

<sup>223</sup> See note 219 above.

<sup>224</sup> Para 364 of the confirmation of charges decision referred to in note 219 above.

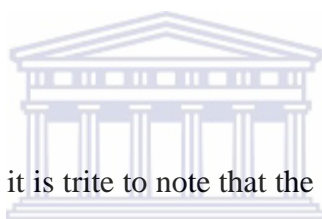
<sup>225</sup> See Barasa's arrest warrant was issued on 2 August 2013 and unsealed on 2 October 2013. The redacted warrant is available at <http://www.icc-cpi.int/iccdocs/doc/doc1650592.pdf> (accessed 2 October 2013).

<sup>226</sup> As noted by Knoops GA 2ed (2008) 199, '...superior authority is not the only [possible] source of duress'.



and coordinating attacks but also for financing the said attacks,<sup>227</sup> and it remains to be seen whether such substantial contributions can be made as a result of coercion.

The foregoing notwithstanding, this paper notes the difficulty in sustaining a duress claim as regards Kenyatta and Ruto. Even if they were initially coerced to participate in crimes against humanity, the defendants' alleged conduct would most likely rule out the defence. The statement of the Supreme Court of Jerusalem in the *Eichmann's case* succinctly states that duress is not available where the will of the defendant coincided with or surpassed the will of his coercer.<sup>228</sup> Similarly to Eichmann, Kenyatta and Ruto carried out their alleged 'essential contributions' to the attacks in question with zeal, possibly due to their political ambition and ethnic loyalties.



As concerns the Sang and Barasa, it is trite to note that the history of indictment of journalists for international crimes goes back to the Nuremberg case of Julius Streicher, the chief editor of the anti-Semitic publication '*Der Stürmer*', who was convicted of crimes against humanity for his role in inciting Germans against the Jews.<sup>229</sup> Another case worthy of note is the ICTR case of Georges Ruggiu, a broadcast journalist, who pleaded guilty to charges of incitement to genocide and was sentenced to 12 years imprisonment.<sup>230</sup> None of these journalists raised the defence of duress, and if faced by a claim of duress by a journalist, the ICC would be creating maiden jurisprudence in international criminal law on the issue.

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<sup>227</sup> Para 303 of the confirmation of charges decision referred to in note 219 and para 292 of the Confirmation of charges decision referred to in note 220 above.

<sup>228</sup> *Attorney General of the government of Israel v. Eichmann Israel Sup. Ct.* (1962) Int'l L. Rep. Vol. 36 (1968) 277.

<sup>229</sup> IMT Judgment of 1 October 1946 in the *Trial of German Major War Criminals*, Proceedings of the Military Tribunal sitting at Nuremberg, Germany p. 502-3.

<sup>230</sup> Judgment of 1 June 2000 in *Prosecutor v. Georges Ruggiu* ICTR-97-32-1 available at <http://www.unictr.org/Portals/0/Case%5CEnglish%5CRuggiu%5Cdecisions%5C080213.pdf> (accessed 9 October 2013).

It is submitted, however, that such form of perpetration as disseminating hate messages (as is the case with the allegations against Sang) or the corrupt influencing of witnesses (as is the case with the allegations against Barasa) indicate such an intention to further the commission of crimes which can only be done under duress in very rare and unusual circumstances. This paper opines that the circumstances of their alleged participation make it difficult for Sang and Barasa to prove both the necessary and reasonable as well as the subjective intention requirements.

#### **4.2.3 Situation in the Central African Republic (CAR)**

This situation arose from a conflict between the CAR government and rebels who attempted to topple the regime of the then President Ange-Félix Patassé. President Patassé allegedly solicited help from the Jean-Pierre Bemba Gombo, who was then the leader of the *Mouvement de Libération du Congo* (MLC)- a political party with a military wing- to assist him quell an attempted coup by the above-mentioned rebels. Bemba is alleged to have ordered the MLC troops to go into the CAR, and while there, the MLC allegedly committed crimes against civilians including murders, rapes and pillaging-constituting crimes against humanity and war crimes.<sup>231</sup>

##### **4.2.3.1 The Defendant**

Jean Pierre Bemba-Gombo was the president and commander-in-chief of the MLC during the period when the MLC allegedly committed war crimes and crimes against humanity in the CAR.<sup>232</sup> He was in control of the military wing of the MLC, and he is charged with command

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<sup>231</sup> These crimes were allegedly committed a bid to instil fear and maintain President Patassé's regime. Information sourced from the Open Society Justice Initiative website available at <http://www.bembatrial.org/trial-background/who-is-jean-pierre-bemba-gombo/> (accessed 4 October 2013).

<sup>232</sup> Arrest warrant of Jean Pierre Bemba-Gombo dated 23 May 2008 para 6, 12, 16 & 20. Available at <http://www.icc-cpi.int/iccdocs/doc/doc504390.PDF> (accessed 25 September 2013).

responsibility under Article 28 of the Rome Statute for the crimes of the MLC's military wing.<sup>233</sup> In addition to being a military leader, Bemba was a politician, being one of the vice-presidents of the DRC's transitional government from July 2003 to December 2006.<sup>234</sup>

#### 4.2.3.2 How duress would play out in Bemba's case

The circumstances of Bemba's case make it unlikely that he might successfully claim duress, as he was the highest-ranking leader of the MLC and he allegedly gave the troops a *carte blanche* to do as they pleased.<sup>235</sup> Bemba's level of control and influence over the MLC's activities is so evident in that once the MLC was recalled from the CAR the atrocities against civilians allegedly ceased, and so did the rule of President Ange-Felix Patassé.<sup>236</sup> As noted by Ambos K, 'decision-makers' and 'senior executors' (such as Bemba) cannot invoke duress, due to the general structure of the defence which implies coercion from 'top to bottom'.<sup>237</sup> The 'reasonable' and 'necessary' requirement would be particularly hard to prove in Bemba's case, especially due to the *carte blanche* he allegedly gave to the MLC troops.

#### 4.2.4 Situation in Darfur, Sudan

The Darfur conflict saw a clash between the Sudanese government forces backed by the Janjaweed militia on the one hand, and armed rebel groups on the other. The rebel groups staged an insurgency against the government in response to which the latter rallied its security forces against the rebel groups. During the counter-insurgency attacks, numerous crimes were allegedly committed against civilians both by the Sudanese government forces and the

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<sup>233</sup> See the decision confirming the charges in *Prosecutor v. Jean Pierre Bemba-Gombo* Case No. Case No. ICC-01/05-01/08 paras 341, 343 & 402 available at <http://www.icc-cpi.int/iccdocs/doc/doc699541.pdf> (accessed 5 October 2013).

<sup>234</sup> Information available at the Open Society Justice Initiative website referred to in note 231 above.

<sup>235</sup> Para 373 of the decision confirming the charges referred to in note 233 above.

<sup>236</sup> Information sourced from the Open Society Justice Initiative website referred to in note 231 above.

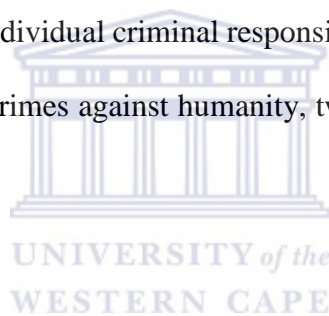
<sup>237</sup> Ambos K in Cassese A et al (2002) 1022.

Janjaweed militia.<sup>238</sup> The following discussion only explores two defendants, Al Bashir and Abdel Raheem,<sup>239</sup> since situations of cases involving rebels and politicians<sup>240</sup> and their implication on duress have already been discussed.<sup>241</sup>

#### 4.2.4.1 The defendants

##### a. Omar Hassan Ahmad Al Bashir

Between March 2003 and July 2008- the time of the counter-insurgency attacks against civilians, Al Bashir was the ‘ruler and highest sovereign authority of the country, responsible for the command of the armed forces and other organised forces.’<sup>242</sup> He is alleged to have coordinated attacks carried out by the different security forces of the Sudan government as a result of which he is accused of individual criminal responsibility under Article 25(3)(a) of the Rome Statute for five counts of crimes against humanity, two counts of war crimes and three counts of genocide.<sup>243</sup>



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<sup>238</sup> Information sourced from the arrest warrant of Ahmad Harun dated 27 April 2007 available at [http://www.iclklamberg.com/Caselaw/Sudan/HarunandKushayb/PTCI/ICC-02-05-01-07-2-Corr\\_English.pdf](http://www.iclklamberg.com/Caselaw/Sudan/HarunandKushayb/PTCI/ICC-02-05-01-07-2-Corr_English.pdf) (accessed 30 September 2013).

<sup>239</sup> At the time of the commission of the crimes in question, the two were President and the Minister of Interior in the Republic of Sudan respectively.

<sup>240</sup> There are four additional defendants in this situation: Ahmad Muhammad Harun, a former Minister of State for Internal Government of Sudan, Ali Muhammad Ali Abd-Al-Rahman, the leader of the Janjaweed militia and Abdallah Banda Nourain and Saleh Mohammed Jerbo, both leaders of rebel groups. Information sourced from the ICC website.

<sup>241</sup> See the discussions above on the Uganda and Kenya situations respectively.

<sup>242</sup> Powers of the President as per Article 42 of the Constitution of the Republic of Sudan which entered into force on 1 July 1998. Available at [http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/d728f18be88d9482c1256dc600507f33/\\$FILE/Constitution%20Sudan%20-%20EN.pdf](http://www.icrc.org/ihl-nat.nsf/162d151af444ded44125673e00508141/d728f18be88d9482c1256dc600507f33/$FILE/Constitution%20Sudan%20-%20EN.pdf) (accessed 9 October 2013).

<sup>243</sup> Al Bashir's arrest warrant dated 4 March 2009 p. 5, 6 & 7 available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>. The genocide charges are by virtue of a second arrest warrant issued against Al Bashir on 12 July 2010. Available at <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (both accessed 1 October 2013).

## **b. Abdel Raheem Muhammad Hussein**

Abdel is allegedly the former Minister for interior and the former President's special representative in Darfur. By virtue of his position, Abdel allegedly made an essential contribution in the formulation and implementation of the Sudan government's counter-insurgency policy.<sup>244</sup>

### **4.2.4.2 How duress would play out for these defendants**

In the case of Bashir, it is submitted that his position of ultimate authority and power in the government of the Republic of Sudan at the time of the attacks is inconsistent with a plea of duress. Bashir would ordinarily have been the source as opposed to a victim of coercion. As noted by Bassiouni MC, the subjective intention precondition, results in the exclusion of both senior and mid-level perpetrators from invoking duress.<sup>245</sup> Hence both Al Bashir and Abdel Raheem would be precluded from raising duress.

Ambos K, however counters this view, stating that duress would 'certainly' be available to mid-level perpetrators.<sup>246</sup> Ambos underscores the importance of a factual distinction in each case, but his view can also be criticised as it is not always certain that duress will be available to mid-level perpetrators.<sup>247</sup> This paper submits that Abdel Raheem could be considered a mid-level actor for whom coercion cannot be ruled out. However, the argument of unavailability of duress where the actor's will merges with that of his coercer would apply to him, therefore rendering it unlikely that he would fulfil the subjective intention requirement.<sup>248</sup>

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<sup>244</sup> P. 6 & 7 of Abdel Raheem's arrest warrant dated 1 March 2012 available at <http://www.icc-cpi.int/iccdocs/doc/doc1344965.pdf> (accessed 1 October 2013).

<sup>245</sup> Bassiouni MC *Crimes against Humanity in International Criminal Law* (2ed) 1999 491.

<sup>246</sup> Ambos K in Cassese A et al (2002) 1022.

<sup>247</sup> See the discussion of the *Einsatzgruppen and Eichmann* cases in notes 83 & 105 above.

<sup>248</sup> See the discussion on *Eichmann's* case in note 105 above.

### 4.3 Conclusion

The modes of participation of the defendants before the ICC are varied, but a common factor among them is that they all made ‘essential contributions’ in the commission or planning of war crimes, crimes against humanity and genocide. Most of the defendants held (or still hold) positions, by virtue of which they are more likely to be originators as opposed to victims of coercion amounting to duress. This is especially so for those defendants who were the highest authority in their respective entities.

This paper appreciates that a number of the ICC defendants were ‘mid-level’<sup>249</sup> perpetrators, but these more often than not share the intention of their ‘seniors’, and are so zealous to fulfil the strategies of the latter, that allowing them the defence of duress would be absurd. Further, the paper notes that the ‘senior’ or ‘highest-ranking’ perpetrators could not succeed in perpetrating crimes of the magnitude envisaged by the Rome Statute without the co-operation of the ‘mid-level’ perpetrators, and the latter should also not be ‘let off the hook’ by being allowed to plead coercion. Having said that, it is trite to note that the availability of duress is a matter to be decided on a case-by-case basis. Many of the cases before the ICC are pending arrest of the defendant, trial or appeal, and it remains to be seen whether any of the defendants will raise the defence of duress and how the ICC will apply itself in the circumstances of each unique case.

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<sup>249</sup> See note 214 above.

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 Observations

In the post-World War II period, international criminal tribunals tried both ‘senior’ and ‘subordinate’ perpetrators<sup>250</sup> of war crimes and crimes against humanity.<sup>251</sup> Duress was mostly raised by the defendants tried in the CCL 10 trials subsequent to the trial of the ‘major war criminals’ at Nuremberg. The tribunals in which duress was raised neither ruled out the defence nor did they acquit defendants on the basis of it. Instead they considered duress to be a factor mitigating punishment, and the same trend is seen by the post-Cold War ICTY’s case of *Prosecutor v. Erdemović*, where the majority judges rejected duress as a full defence.

The dissenting opinions of Judges Cassese and Stephen in the *Erdemović case* marked the beginning of a shift in the thinking of players in international criminal law concerning duress; from merely failing to rule it out, to expressly providing for it. This shift is evidenced by the provision for duress in the Rome Statute, which is the first international legal instrument to provide for applicable defences, and which it christens ‘grounds for excluding criminal responsibility.’ Hence, the period before the coming into force of the Rome Statute saw the lack of codification of duress as a defence in international criminal law, while the period after the Rome Statute has seen the lack of practice concerning the defence, despite its codification.

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<sup>250</sup> The ‘senior’ perpetrators were tried by the IMT at Nuremberg while the ‘subordinate’ perpetrators were tried in the subsequent trials by military tribunals of the allied powers, pursuant to CCL 10.

<sup>251</sup> There were no convictions of genocide by international criminal tribunals up until the ICTR case of *Prosecutor v. Akayesu* Case No. ICTR-96-4-T available at <http://www.unict.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf> (accessed 14 October 2013).

In contemporary international criminal law, duress is available subject to three preconditions,<sup>252</sup> proof of which should ideally lead to the acquittal of the defendant. Duress is a complete defence regardless of the gravity of the crime in question, whether the accused is a civilian or combatant, and whether the crime occurred during armed conflict or not (except for war crimes for which armed conflict is a constituent element).<sup>253</sup> Technically therefore, duress can be raised by any defendant charged by the ICC regardless of the crime he/she has been accused of.

The Rome Statute anticipates the indictment of all levels of defendants, from the highest-ranking to the lowest-ranking perpetrators, as long as their crimes meet the gravity threshold required by Article 17(1) (*d*) as read together with Article 19(1) of the Rome Statute. The ICC has previously noted that deterrence for international crimes can only be achieved if ‘no category of perpetrators is excluded from potentially being brought before the court’.<sup>254</sup> The Court therefore anticipates that ‘low-level’ perpetrators who wield no power or influence could commit crimes of such magnitude as to warrant prosecution. In fact, the criteria for selection of cases for investigation contained in Regulation 29(2) of the OTP Regulations does not bar ‘low-level’ perpetrators.<sup>255</sup> The Statute focuses on the seriousness of the crimes and not the position of the defendants.

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<sup>252</sup> Threat of imminent death or imminent serious bodily harm, the person acts reasonably and necessarily to avoid the harm and the person does not intend to cause greater harm than that sought to be avoided-Article 31(1)(*d*) of the Rome Statute.

<sup>253</sup> See Article 8 of the Rome Statute.

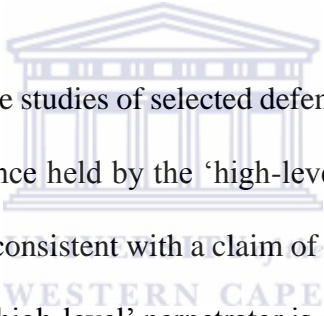
<sup>254</sup> Appeals Chamber Judgment in the DRC situation on the Prosecutor’s appeal against the decision of the Pre-Trial Chamber I dated 13 July 2006 entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” para 73 available at <http://www.icc-cpi.int/iccdocs/doc/doc183559.pdf> (accessed 15 October 2013).

<sup>255</sup> See note 198 above. The words ‘low-level and low-ranking’ as used in this paper refer to rank in particular social, political, military or business orders.



## 5.2 Conclusions and recommendations

This paper appreciates that the position of the defendants could be an indicative factor to the contribution that a particular defendant is able to make in the commission of the crimes. It argues however that the OTP's use of such position as the factor determining gravity results in defendants who cannot successfully plead and prove duress. The choice of defendants by the OTP shows that it has equated gravity with either power (political or military) or influence, thus ending up mostly with the highest-ranking perpetrators and only a few 'mid-level' perpetrators. Its interpretation of the 'persons bearing the greatest responsibility' seems to have more to do with responsibility in terms of the defendants' duties in their respective positions as opposed to responsibility in the context of the actual commission of the crimes.



As has been observed from the case studies of selected defendants in chapter four of this paper, the positions of power and influence held by the 'high-level' perpetrators-mostly militia and political leaders- are inherently inconsistent with a claim of duress. This paper appreciates that there could be situations where a 'high-level' perpetrator is coerced to commit the core crimes, for instance a president coerced by the military, but it submits that such would be unusual circumstances, which would be exceptions rather than the norm.

As for the 'mid-level' perpetrators, it is observed that their indictments allege such zeal and enthusiasm to carry out the offences, that if such participation is true, these defendants would not be able to successfully plead duress. For both the 'high-level' 'mid-level' defendants who constitute the 'most responsible persons, the three preconditions of duress would indeed be very difficult to fulfil, especially the requirements for necessary and reasonable action, as well as the subjective intention requirement. Hence, the fact that one is 'most responsible' for crimes

is not in itself inconsistent with a plea of duress, unless higher responsibility is pegged to the highest-ranks in the political, military, social and business orders.

The ICC has seldom indicted the ‘low-level’ perpetrators, for whom scholars seem to agree that duress is available.<sup>256</sup> It is not difficult to imagine situations where the ‘most serious crimes of concern to the international community’ can be committed by ‘low-level’ perpetrators- for instance by the commission of multiple grave crimes. In fact, the OTP’s policy acknowledges that there are times when the investigation and prosecution of ‘low-ranking’ perpetrators may be necessary.<sup>257</sup> However, the OTP does not seem to have adopted this in practice.

This paper appreciates that the resources of the Court are limited, and are grossly inadequate to try the numerous defendants that result from conflict situations; hence the Rome Statute’s gravity requirement is an important tool in the selection of defendants and cases. However, the paper posits that the said requirement does not justify completely ignoring the ‘low-level’ perpetrators. The OTP can still achieve its goal by periodically choosing defendants from the ‘low-level’ perpetrator-bracket. Having said that, it is trite to note at this point that at the time of this writing, only two ICC cases have been completed.<sup>258</sup> The ICC is therefore still in its infancy stages. Nevertheless, the paper makes its observations based on the Court’s first eleven years of existence.

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<sup>256</sup> See notes 24 & 44 above.

<sup>257</sup> See p. 7 of the OTP’s Policy Paper referred to in note 187 above.

<sup>258</sup> Thomas Lubanga Dyilo was sentenced by the Court to 14 years’ imprisonment on 10 July 2012 and Mathieu Ngudjolo Chui was acquitted on 18 December 2012.

The focus on perpetrators other than ‘low-level’ perpetrators explains the lack of practice concerning duress in contemporary international criminal law. Unless the Court begins to try the ‘low-level’ actors,<sup>259</sup> it is unlikely that we shall see increased practice by the ICC concerning duress. As it stands now, there would have to be rather unusual circumstances for current ICC defendants to allege and in fact be able to successfully prove that they acted under duress. The focus of the OTP’s therefore needs to be more balanced.

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<sup>259</sup> This is also suggested by Gur Arye M (2012) 13 who refers advocates the prosecution of both ‘senior’ and ‘subordinate actors’.

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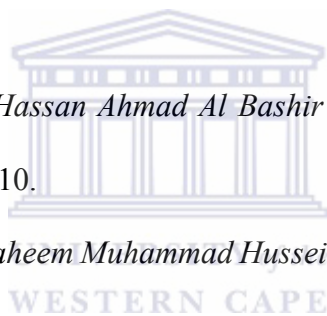
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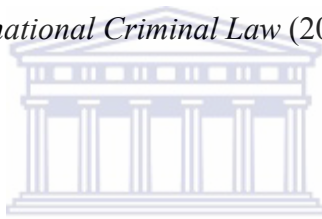
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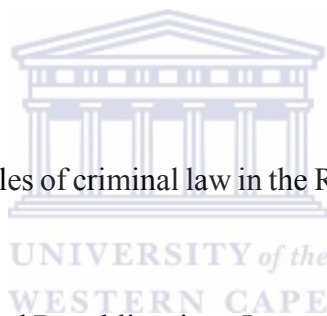
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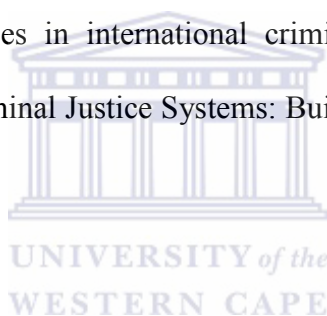
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