

## MENTAL CONDITION DEFENCES IN SUPRANATIONAL CRIMINAL LAW

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### 1. Introduction

With the establishment of the International Criminal Court (ICC) a new supranational criminal code – the Rome Statute of the International Criminal Court (ICC Statute) – has come into effect. This new code contains elements of both civil law and common law jurisdictions, and constitutes a new, unprecedented system of criminal law and procedure. This essay will not examine the procedural rules, the Rules of Procedure and Evidence, but will focus on the grounds for excluding criminal responsibility as laid down in Article 31. More specifically it will consider those sections that deal with the defences of mental incapacity and psychological pressure: Articles 31(1)(a) and 31(1)(d). Both defences will first briefly be compared with their “national” predecessors. Next, this essay will examine the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>1</sup> which deals with roughly the same crimes as the ICC. The interpretation of these defences by the ICTY could be indicative of future interpretations by the ICC.<sup>2</sup> Combining the new ICC Statute, the national angle and the jurisprudence of the ICTY, it should be possible to determine the scope of insanity and duress in contemporary supranational law and, finally, predict their efficacy under the ICC Statute.

### 2. Insanity

#### 2.1 The ICC Statute and national legislation

Article 31(1)(a) of the ICC Statute states:

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

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

Those familiar with the common law concept of insanity might recognise the legacy of the famous M’Naghten Rules in this provision. The House of Lords formulated these rules, which still govern the defence of insanity today, in 1843 following the acquittal of one Daniel M’Naghten:

“[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.”<sup>3</sup>

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<sup>1</sup> The International Criminal Tribunal for Rwanda (ICTR) will not be considered since no mention has been made in its cases of either insanity, diminished responsibility or duress.

<sup>2</sup> For a critical note on comparing the ICC with the ICTY; read *Richard May*, The relationship between the International Criminal Court and the International Criminal Tribunal for the former Yugoslavia, in *Von Hebel, Lammers and Schukking*, Reflections on the International Criminal Court, T.M.C. Asser Press, the Hague 1999.

<sup>3</sup> House of Lords, (1843) 8 ER 718.

However, where the M'Naghten rules seem to focus mainly on the element of understanding, of knowledge, the supranational version of insanity clearly puts more emphasis on a person's capacity to control his actions, besides the element of knowledge. It seems that the influence of the civil law tradition is strongly felt here, as this ICC rule is remarkably similar to, for instance, §20 of the German Penal Code.<sup>4</sup> The civil law version of insanity seems more in touch with the psychiatric / medical angle, like in the Dutch system where a mental defect or mental disease will give rise to *ontoerekeningsvatbaarheid* (impossibility of being held responsible). After being advised by a forensic psychiatrist or psychologist, the judge will decide to what extent the accused can be held responsible for his actions. Obviously, the differences are partly procedural, in this case resulting from trial by jury in the common law tradition as opposed to the exclusive position of the judge in Dutch criminal procedure. Be this as it may, Article 31(1)(a) combines both views and is, as such, an outstanding example of the hybrid nature of the ICC Statute mentioned above.

Compared to national legislation, Article 31(1)(a) seems to apply a more rigorous test as it demands the destruction of the person's capacity to appreciate or control, whereas the M'Naghten Rules for instance merely demand that he be suffering from a certain mental condition, resulting in a lack of insight regarding the criminal nature of his behaviour. Apart from the issue of diminished responsibility, which will be addressed below, this formulation makes one wonder just how insane a person has to be or, more accurately, must have been, in order to raise this defence successfully. It seems he must be one hundred percent insane when he committed the acts, or he will be regarded as mentally sane. This absence of any shade of grey could render it virtually impossible to be acquitted on grounds of insanity. Furthermore, what happens on the rare occasions when a suspect actually does prove to have been completely insane when he committed his crimes? Considering the exordium of Article 31, insanity provides a full defence, so successfully raising it should result in a full acquittal. Part 7 of the ICC Statute, which governs the penalties to be imposed by the ICC, does not provide for any kind of special verdict to have the accused institutionalised in any kind of mental hospital. Does this mean he goes scot-free? This consequence would certainly make any judge confronted with a defence based on insanity hesitant to accept it, to say the least.

A possible explanation for this difference between national legislation on insanity and Article 31(1)(a) of the ICC Statute can be found in the seriousness of the offences to be tried by the ICC, which will consist of genocide, crimes against humanity and war crimes (Articles 6, 7 and 8 of the ICC Statute respectively). To exclude criminal responsibility for such serious crimes on grounds of insanity demands an extreme impairment of the subject's mental capacities, or any supranational court or tribunal might lose its credibility. During the drafting of the ICC Statute these considerations were undoubtedly acknowledged; nevertheless, it seems as if the drafters were so anxious to prevent loss of public sympathy that the practical use of Article 31(1)(a) has become very limited.

## 2.2. The ICTY: the Celebici Case

As mentioned in the introduction, the ICTY has already tried cases that are similar to the sort of indictments the ICC will face. Judgements and decisions made by this tribunal may therefore be regarded as indicative of the interpretation the ICC is likely to give with regard to legal terms and defences, such as insanity. Remarkably though, insanity has not been raised as a defence in any of the cases before the ICTY. In fact, the only time a defence based on the suspect's abnormal mental state was raised was in the Celebici case,<sup>5</sup> in which one of the suspects, Landzo, raised the "special defence of diminished mental responsibility".

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<sup>4</sup> § 20 Strafgesetzbuch; Schuldunfähigkeit wegen Seelischer Störungen: "Ohne Schuld handelt, wer bei Begehung der Tat wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen Schwachsinnns oder einer schweren anderen seelischen Abartigkeit unfähig ist, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln (emphasis added)."

<sup>5</sup> The Prosecutor v. Delalic, Mucic and Landzo (Celebici case), Case No. IT-96-21-T ("Celebici case").

In this case, both defence counsel and the Trial Chamber appear to have assumed the applicability of diminished mental responsibility as a defence under Article 67 of the Rules of Procedure and Evidence of the ICTY. This article deals with the procedural concept of disclosure and speaks of a “special defence” in section A (ii)(b):

“As early as reasonably practicable and in any event prior to the commencement of the trial:

(ii) the defence shall notify the Prosecutor of its intent to offer:

the defence of alibi; (...);

any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.”

Landzo claimed that through this article diminished mental responsibility is a full defence, just as lack of mental responsibility (amounting to insanity) would be, and that it should thus result in an acquittal.

The Appeals Chamber did not agree. In its judgement of 20 January 2001 it ruled that the “rule-making power of judges” is limited by Article 15 of the Statute<sup>6</sup> to rules concerning procedures and evidence, so that the Tribunal is not empowered to adopt rules that constitute new offences or, for that matter, defences. From a perspective of legality this is a questionable point of view. Of course, the assumption that a person cannot be punished unless the act is criminalised in some sort of code of law is nowadays more or less acknowledged the world over, but this principle of *nullem crimen sine lege*<sup>7</sup> does not prohibit the adoption of any rule or circumstance that leaves the suspect *unpunished*. In other words, the premise that the ICTY cannot create new offences does not logically exclude the possibility of the ICTY creating new defences. The ICC Statute has explicitly acknowledged the Court’s rule-adopting competence in Article 31(3).

Be this as it may, the Appeals Chamber reasoned that, as there was no reference to any defence of diminished mental responsibility in the Statute of the ICTY, the Tribunal could not adopt such a new defence. Therefore, for a special defence like diminished responsibility to succeed it would have to be rooted in customary international law. With reference to Article 31(1)(a) of the ICC Statute, the court ruled that diminished mental responsibility does not constitute the defence of insanity, as insanity requires the destruction of the defendant’s capacity, so that there would only be a complete defence when defendant could not be regarded to be responsible *at all* for his actions. Diminished mental responsibility does not have this high threshold: “On the other hand, if the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by a plea of insanity. (...) This is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant’s capacity, and it leads to an acquittal”.<sup>8</sup>

There is therefore no basis in international law for accepting this special defence. Diminished mental responsibility is merely recognised as a special defence in certain national legislation, such as the English Homicide Act 1957, but even there it is not a defence in the true sense, since it can only reduce the crime from murder to manslaughter, thus avoiding the mandatory sentence of life imprisonment should the conviction be based on murder.

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<sup>6</sup> Article 15 ICTY Statute: “The judges of the International Tribunal shall adopt rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.”

<sup>7</sup> *Nullum crimen, nulle poena sine lege praevia*: no crime and no punishment without a previous legal provision.

<sup>8</sup> Judgement Appeals Chamber *The Prosecutor v. Delalic, Mucic and Landzo (Celebici case)*, Case No. IT-96-21-T, 20 February 2001, par. 581, 582, 589.

In effect the special defence of diminished mental responsibility operates as a mitigating circumstance in these jurisdictions. Regardless of the fact that the Tribunal does not have any mandatory sentences, the Appeals Chamber concluded that diminished mental responsibility should have the same role under supranational law as it, in effect, has in national jurisdiction: mitigation of punishment.<sup>9</sup>

The Appeal Chamber dismissed some of the counts against Landzo and remitted the case to the Trial Chamber to impose a new sentence with regard to these dismissals. The Trial Chamber passed its sentencing judgement on 9 October 2001; no mention was made of the issue of diminished responsibility and the sentence of 15 years' imprisonment was upheld

### 3. Duress

#### 3.1 The ICC Statute and national legislation

In common law, two forms of duress are traditionally distinguished: duress resulting from a threat made by another person, also known as compulsion, and duress resulting from something other than another person, commonly referred to as necessity. This article will use the same dichotomy, so "duress" will refer to the first definition, acting under threat of death or grievous bodily harm made by a third person. This is contrary to Article 31(1)(d) of the ICC Statute, which speaks of duress in its broadest definition, encompassing both necessity and duress by threat:

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

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

1. Made by other persons; or
2. Constituted by other circumstances beyond that person's control."

As with insanity, the wording of this article suggests that a person acting under duress or necessity has a full defence, leading to acquittal if it were accepted. However, given the nature of the offences to be tried by the ICC, the question arises whether this will also be upheld in practice. In answering this question we shall again focus on national jurisprudence and on the ICTY.

The major problem with establishing a defence of necessity or duress in a case where an innocent life has been taken is the issue of proportionality. Especially where it is a matter of him-or-me, judges are confronted with an almost insurmountable ethical problem, namely who is to decide who should live and who should die? This is precisely why Lord Coleridge CJ decided in the famous case of *Dudley and Stephens* (1884) that in cases like this, the law should "keep the judgement straight and the conduct pure."<sup>10</sup> In this case two sailors, who had drifted on a raft for 17 days after a shipwreck, killed and ate another survivor, a young cabin boy. Lord Coleridge CJ ruled that the defence of necessity could not be available in this case, firstly because there is no real necessity to preserve one's own life, and secondly because of the above mentioned ethical argument. Eventually the sailors were convicted but only sentenced to six months' imprisonment, showing the court's compassion with the convicts who had faced such extreme circumstances.

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<sup>9</sup> Read *Peter Krug*, "The emerging mental incapacity defence in international criminal law; some initial questions of implementation" in the *American Journal of International Law*, vol. 94, 2000, p. 332, where the author prefers this exact solution.

<sup>10</sup> (1884) 14 QBD 273.

Over a hundred years later the House of Lords unanimously ruled in *Howe* (1987) that the defences of duress and necessity are unavailable in all prosecutions for murder, including the prosecution of accomplices.<sup>11</sup> Their main argument resembled the reasons given in *Dudley and Stephens*: no individual should have the right to decide who is to die and who is not, and the law should not leave the side of the victim. Ergo, from a common law point of view, the law can and must demand some heroism from its subjects, even – or perhaps particularly – in extreme circumstances.<sup>12</sup>

The notion of duress as a defence that is not fully applicable in murder cases distinctly sets the common law apart from the civil law. In most civil law systems, duress provides a full defence for all crimes<sup>13</sup> and more weight is given to the issue of whether or not the accused had a choice. In most of these systems the distinction between compulsion and necessity is made more sharply, leading to an excuse and a justification, respectively, and concentrating more on the accused's perception than on who or what caused the urge to commit the offence.

In the Dutch system, for instance, the principal consideration is whether choosing the other option, thus resisting the outside pressure and not committing the crime, can reasonably be expected of an accused. If this is not the case, the accused goes free, even in murder cases. The combination of duress and murder is rare, though, since the abnormal mental condition of the accused often prevents the fulfilling of an essential element of the offence, namely that it be premeditated (*voorbedachte rade*). Dogmatically however there is no reason to exclude the defence in murder cases, and it is sporadically accepted, for instance in a case before the Court of Rotterdam in 1978.<sup>14</sup> In this case a man killed his girlfriend's ex-partner, who kept threatening them and gave him (the accused) an ultimatum to end the relationship. Given the social and intellectual underdevelopment of the accused, and the anxiety and despair he experienced, the court ruled that it could not reasonably be demanded of him that he resist the pressure to end the highly threatening situation. Thus the focus of attention lies more on how the accused subjectively experiences the circumstances he is in than on what society as a whole should or should not demand from its subjects. This is not to imply that Dutch law does not set a standard; it does, but it does not seem to be as objective as its common law counterpart.

In Germany the dichotomy is made on the issue of proportionality, the distinction between compulsion and necessity depending on whether the choice to break the law was just given the circumstances or not (whether the interest defended essentially exceeded the offence). Again, there is no reason to exclude murder beforehand, but the combination of duress and murder is rare as the German *Mord* also demands a specific intent which is not easily combined with abnormal mental pressure.<sup>15</sup>

However, an important difference between national legislation and cases and supranational law involving duress is that in the former it is mostly a question of him-or-me, whereas in the latter most of the time it will be him-or-the-both-of-us. Read Judge Stephen in his dissenting opinion in the case of *Erdemovic*, where he stated that the case law of common-law countries is "based upon situations in which an accused has had a choice between his own life and the life of another as distinct from cases

where an accused has no such choice, it being a case of either death for one or death for both".<sup>16</sup>

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<sup>11</sup> (1987) AC 417.

<sup>12</sup> For another textbook example of duress/necessity read *Joe Simpson*, "Touching the void", where one climber was forced to cut the rope from which his friend was dangling in order to save himself.

<sup>13</sup> Read Joint and Separate Opinion of Judges McDonald and Vohrah, *The Prosecutor v. Drazen Erdemovic*, 7 October 1997, Case No. IT-96-22-PT ("Joint separate opinion"), par. 59.

<sup>14</sup> *Rechtbank Rotterdam*, 3 January 1978, NJ 1979, 465.

<sup>15</sup> § 211 (2) *Strafgesetzbuch*; "Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebes, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet."

<sup>16</sup> Separate and dissenting opinion of Judge Stephen, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-PT, 7 October 1997, para. 25.

### 3.2 The ICTY: the case of *Erdemovic*

The most recent and elaborated case concerning duress is the case of *Prosecutor v. Erdemovic*, in which judgement was passed by the Trial Chamber on 29 November 1996.<sup>17</sup> The accused was a member of a Sabotage Unit of the Bosnian Serb army, who on 16 July 1995, was called to a collective farm near Pilica, without being notified about the nature of the activities to be deployed on arrival. Shortly after arriving on the farm, buses with Muslim men from 17 to 60 years of age came in, carrying unarmed civilians who had surrendered after the fall of the UN safe area at Srebrenica. All men, approximately 1200 of them, were shot that day by Erdemovic and other members of his unit, as well as by soldiers of other units.

In the Trial Chamber, Erdemovic pleaded guilty to the first count, crimes against humanity, after which the second count, violation of the laws or customs of war, was dismissed. Without disputing the reading of the events presented by the prosecutor, Erdemovic raised the defence of duress, stating that he had no choice but to follow the orders given: "Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: If you're sorry for them, stand up, line up with them and we will kill you too."<sup>18</sup> The Trial Chamber, considering that the Statute provides no guidance on duress, reflected on the post-World War Two Tribunals and concluded that the most essential component for a successful defence of duress is the absence of moral choice, and that for a soldier there is a duty to disobey a manifestly illegal order "which could only recede in the face of the most extreme duress."<sup>19</sup> Furthermore the Trial Chamber considered that the nature of the offences to be tried by the ICTY demands a most restrictive approach: "With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole."<sup>20</sup> The Chamber concluded that not enough proof had been provided to accept the claim of duress as a full defence, and that it would thus be taken into account along with other mitigating circumstances. Erdemovic was sentenced to 10 years' imprisonment.

Erdemovic filed an appeal against this judgement in which, among other things, he claimed that the Trial Chamber had erred in law by not accepting his claim of duress; he felt that in the given circumstances he had no moral choice at all. The Appeals Chamber – by three votes to two – ruled in its judgement of 7 October 1997 "that duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings".<sup>21</sup> To determine which rules concerning duress were applicable in this case the majority of the Chamber based its judgement on an extensive survey of Article 38 of the Statute of the International Court of Justice,<sup>22</sup> which, according to the joint separate opinion of judges McDonald and Vohrah, is generally considered to contain an exhaustive listing of the sources of international law.<sup>23</sup> McDonald and Vohrah try to define a general national principle of law on duress, after establishing that there is no international *communio iuris* on the subject. They point out that there are basically two points of view: the civil law viewpoint that regards duress as a complete defence, relieving the accused of all criminal responsibility, and the common law approach, that also accepts duress in general but does not accept

<sup>17</sup> Sentencing Judgement Trial Chamber, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-PT, 29 November 1996 ("Sentencing Judgement").

<sup>18</sup> Transcript, *The Prosecutor v. Drazen Erdemovic*, 31 May 1996, ("Trial Transcript"), par. 9.

<sup>19</sup> Sentencing Judgement *supra* n. 17, par. 18.

<sup>20</sup> Sentencing Judgement *supra* n. 17, par. 19.

<sup>21</sup> Appeals Chamber decision, *The Prosecutor v. Drazen Erdemovic*, 7 October 1997, Case No. IT-96-22-PT, part IV.

<sup>22</sup> Article 38 of the ICJ Statute:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: international conventions, whether general or particular, establishing rules expressly recognised by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognised by civilised nations; subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereon.

<sup>23</sup> The ICC has its own listing of applicable law in Art. 21 of the ICC Statute, which contains roughly the same sources.

it as a full defence in specified offences, mostly murder and other grave crimes. After examining the case law and underlying principles of both legal systems, they conclude that there is no consistent rule on the matter, before deciding which approach they think would best fit supranational criminal law. With reference to judgements from some famous common law cases, such as *Lynch v. DPP* from Ireland and *Abbott v. the Queen*<sup>24</sup> (words such as “criminal”, “terrorist”, “gang member” etc. consistently seem to be synonyms for “accused” in these cases), and again referring to the gravity of the offences tried by the ICTY, McDonald and Vohrah reject the notion of duress as a complete defence.

Eventually they arrive at cases where the victims would die whether the accused participates in the killings or not, as was the case in the Italian case of *Masetti*.<sup>25</sup> According to McDonald and Vohrah, the Masetti approach – where the Court of Assize acquitted the accused since sacrificing his own life would not have made any difference as far as the victims were concerned – departs from a utilitarian logic that does not morally stand in case of the killing of innocent persons. In the tradition of *Dudley and Stephens*, they wish to keep the law pure even in cases where a different course of action could hardly be demanded of any reasonable person: “Thus, our rejection of duress as a defence to the killing of innocent human beings does not depend upon what the reasonable person is expected to do. We would assert an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law”.<sup>26</sup> Strangely enough, they subsequently remark that the relevant question should be framed in terms of what could be expected of the ordinary soldier instead of from the ordinary person; so the moral postulate is not that absolute. After setting this rather artificial standard McDonald and Vohrah reject the position that the law sets too high a standard or expects heroism from its subjects: the defence of duress could, after all, still lead to mitigation of punishment.

Cassese, presiding judge of the Appeal Chamber in the *Erdemovic* case, strongly disagreed. He felt that, since there is no special rule of customary international law on the matter, the general rule on duress should be applied “on a case-by-case basis” to all crimes in order to allow an international rule on the matter to evolve.<sup>27</sup> He severely condemned the (policy-directed) reasoning of the majority which he felt was limited and exceeded the Tribunal’s task delineation and competence: “It (the Tribunal, SJ) should therefore refrain from engaging in meta-legal analyses. In addition, it should refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common-law countries, while disregarding those of civil-law countries or other systems of law.”<sup>28</sup> Searching for a general rule, Cassese then listed four conditions which relevant case law “almost unanimously” requires to be met for the defence of duress to succeed:

1. “the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
2. there was no adequate means of averting such evil;
3. the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;
4. the situation leading to duress must not have been voluntarily brought about by the person coerced”.<sup>29</sup>

Obviously, Cassese acknowledges that in the context of supranational criminal law the issue of proportionality (iii) will be the most problematic of the four. But contrary to the majority opinion, he finds

<sup>24</sup> *Lynch v. DPP for Northern Ireland* [1975] AC 653 and *Abbott v. The Queen* [1977] AC 755.

<sup>25</sup> Decision of the Court of Assize of L’Aquila, 15 June 1948, unpublished, Joint separate opinion, supra n.14, para. 78.

<sup>26</sup> Joint separate opinion, supra n.14, para. 84.

<sup>27</sup> Separate and dissenting opinion of Judge Cassese, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-PT, 7 October 1997, (“Cassese”), para 41.

<sup>28</sup> Cassese, supra n. 27, para. 11.

<sup>29</sup> Cassese, supra n. 27, para. 16.

that the killing of innocent humans beings in order to save one's own life is not disproportionate per se. He concurs with the point of view taken in the Masetti case (above) that it should be possible for the accused to be excused when the refusal to obey an order to execute civilians (the refusal imminently resulting in the accused's own death) would not help the intended victims at all. Sacrificing one's own life, he reasons, would in those situations be to no avail and thus a greater evil than complying with the order given. Cassese does agree that given the special nature of the offences at hand the requirements for duress should be applied strictly, but he rejects on principle the notion of the law setting a standard of behaviour that is above what can be reasonably expected of man: "Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards".<sup>30</sup>

On a more formal level Cassese means that international law is *not* ambiguous on the issue of duress, and that even if it were, the last recourse would have to be the national legislation of the accused (civil-law-oriented former Yugoslavia) and not philosophical or political considerations.

He concludes that, were the case of Erdemovic remitted, the Trial Chamber would first have to determine whether Erdemovic brought the situation of duress upon himself by joining the Bosnian-Serb army (condition iv). Should they conclude that he knew or should have known that his unit would engage in actions violating international humanitarian law, or that he failed to leave his unit when he gained such knowledge, then the plea of duress would not be open to the accused. If however the chamber should conclude the opposite, it should accept the plea and should examine whether the first three conditions for duress were met, specifically taking into account whether the accused had the choice between his own life and that of the intended victims, or whether the civilians would have died regardless of the accused's participation in the execution.

A possible explanation, besides the seriousness of the crimes, for the Appeals Chamber's reluctance to accept the defence of duress might be more dogmatic, and once again based on a dissimilarity between common law and civil law: the distinction between justifications and excuses. Justifications, with self-defence as the most archetypal example, apply when a person faces circumstances in which he has the right to act in a way he normally could not, because it would normally constitute an offence. It could be said that the defendant's behaviour was not unlawful; nevertheless, the demands of proportionality must be met. Excuses are a little harder to define, mainly because two different rationales are given in common law: the first regarding the excuse (e.g. duress) as a reasonable response in extreme circumstances, the other focusing on the much lower degree of choice the defendant had as a result of a threat of death or grievous bodily harm. It is obvious that the first approach, in a similar manner to justifications, demands a certain degree of proportionality, where the second is more subjective: the excusable conduct cannot be said to have been involuntary, but may be described as non-voluntary. In general the courts in common law jurisdictions tend to mix elements of justifiable and excusable conduct when dealing with defences.<sup>31</sup>

In civil law the distinction between justifications and excuses is drawn more sharply. In the Netherlands, for instance, a justification (*rechtvaardigingsgrond*) is thought to legitimise the defendant's behaviour, whereas an excuse (*schulduitsluitingsgrond*) does not focus on the act but is thought to remove the actor's culpability. Hence the issue of proportionality is tested far more rigorously with regard to justifications than to excuses; in fact, an excuse is almost disproportionate per se, since the defendant's behaviour stems from his (subjective) abnormal mental condition as a result of the extreme external circumstances.

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<sup>30</sup> Cassese, *supra* n. 27, para. 47.

<sup>31</sup> Andrew Ashworth, *Principles of Criminal Law*, Oxford University Press, New York 1999, p 230.



In *Erdemovic* the majority of the Appeals Chamber clearly adopted the first approach, the proportionality issue being the pith of the judgement as a result. Had they focused more on the voluntariness of Erdemovic's behaviour there would have been more room to take his subjective perception of the events into account, which might have led to a different result. But of course, the first approach is closely connected with the above views on duress in murder cases and the setting of an "absolute moral postulate", so in that respect neither the approach chosen nor the outcome of the case is very surprising.

As stated above, the issue of duress as a full defence was one of the grounds of appeal that Erdemovic filed. This appeal presented the Appeals Chamber with a problem concerning Erdemovic's guilty plea, which now seemed equivocal: if Erdemovic felt that in the circumstances faced at Pilica he had no option but to comply with the order to execute the civilians, then he could not have pleaded guilty to crimes against humanity. This would violate Article 62bis of the Rules of Procedure and Evidence, which demands a guilty plea to be voluntary, informed and not equivocal.<sup>32</sup> Cassese concluded that a violation had taken place; the majority, rejecting duress in the supranational context, ruled that the plea was not equivocal but was not informed since Erdemovic had been wrongly advised by his counsel and apparently understood neither the nature of the charges nor the distinction between them. The case was therefore remitted to a second Trial Chamber to give Erdemovic the opportunity to replead with full knowledge of the Court's point of view concerning duress.

The second Trial Chamber passed its judgement on 5 March 1998. It took into account a plea bargain agreement between the accused and the prosecutor which in short meant that the accused pleaded guilty to the second count (war crimes), that both parties agreed that there has been duress, and that the prosecutor agreed not to proceed with the first count (crimes against humanity) and would recommend a sentence of seven years. The Chamber adopted the proposition that there was an imminent threat to the accused's life had he disobeyed the order, and ruled, perfectly in line with the Appeals Chamber's decision, that this in fact was a situation that constituted duress, but that it would be taken into account only by way of mitigation.<sup>33</sup> Other mitigating circumstances were the accused's age, background and character, his admission of guilt and genuine remorse, and his co-operation with the Office of the Prosecution. Erdemovic was sentenced to five years' imprisonment.

#### 4. Conclusion

To return to the introduction of this paper and the question: what role can the mental condition defences play before the ICC? As stated in the introduction, the ICTY case law might provide a blueprint as to how the ICC will deal with mental condition defences.

First, insanity. The ICC Statute clearly regards insanity as a full defence, which could lead to acquittal, but the conditions for and consequences of a successful insanity plea are such that acceptance is highly unlikely. Not only must it be established that the accused was completely insane when he committed the acts, but moreover no provision has been made for the unlikely event of such an admittance actually happening. The issue of diminished responsibility has been tackled by the ICTY, ruling it out as a complete defence but recognising that it might mitigate the punishment. It must be concluded that the options left open for a mentally impaired accused seem fairly limited.

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<sup>32</sup> Article 62 bis: If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:

(i) the guilty plea has been made voluntarily;  
(ii) the guilty plea is informed;  
(iii) the guilty plea is not equivocal; and

(iv) there is a sufficient factual basis for the crime and the accused's participation in it (...)

<sup>33</sup> Sentencing Judgement Second Trial Chamber, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-PT, 5 March 1998, para. 17.

In order for the ICC to have a functioning defence of insanity one of the issues that has to be resolved is the establishment of a psychiatric institution capable of dealing with highly traumatised and disturbed perpetrators who have been qualified insane by the ICC, accompanied by a legal framework. This might facilitate the judge in acquitting an accused on grounds of insanity, and lead to a perception of insanity in line with the medical reality of people being neither completely sane nor completely insane, but somewhere in between.

As for duress, in my view, things do not look too bright either. Similarly to diminished responsibility, it has only been acknowledged as a mitigating circumstance by the majority of the ICTY and will probably have the same role before the ICC. I agree with Cassese that duress should not be ruled out completely as a full defence, that it should be possible to be acquitted on grounds of duress provided certain strict conditions are met, and that the law should not set its subjects an unattainable standard. In their joint opinion, judges McDonald and Vohrah state that they “do not believe that the issue should be reduced to a contest between common law and civil law”.<sup>34</sup> Sadly, however, this is exactly what happened in the end: the judges deriving from a common law jurisdiction, McDonald (USA) and Vohrah (Malaysia) stood by their approach, and Cassese as the one true civil law lawyer stuck to his. Judge Stephen (Australia) was the only one who seemed willing to abandon his own common law dogma, but seemed hesitant to take a formal stand; Judge Li (China) experienced no such hesitation and stated that “the absurdity of this argument [the Masetti approach, SJ] is apparent” and that “the futility of remittal to a Trial Chamber will be as plain as a pikestaff”.<sup>35</sup> Of course, were there to be a new trial before a new chamber with a different proportion of civil law judges to common law judges, the outcome might be different, but for the time being the role of duress as a full defence in supranational law seems finished.

Unfortunately for continental jurists, the civil-law-oriented drafting of Article 31 of the ICC Statute has not averted, and probably will not, an ongoing common law interpretation of the elements of this article. The defences of insanity and duress have been undermined and put into perspective to a point that their only function seems to be to serve as a ground for mitigation. The other defences, self defence (Art. 31(1)(c)) and intoxication (Art. 31(1)(b)), are in my view very likely to face the same fate in due course. Self defence is formulated in such a way that it will be very hard to comply with its demands, and intoxication has a role similar to diminished responsibility in most national jurisdictions, so it stands to reason that the supranational judge will rule accordingly should this matter arise. As for the ICC’s competence to exclude criminal responsibility on grounds other than the ones mentioned in Article 31(1), as laid down in Article 31(3), considering the ICTY’s refusal to adopt new rules in the *Landzo* case, and its reluctance to accept defences in supranational cases in general, I do not expect any spectacular additions in the near future. Article 31, “grounds for excluding criminal responsibility”, could then be renamed “grounds for mitigating punishment”, and an accused appearing before the ICC would not have any defences in the true sense of the word left at his disposal. Highly efficient, probably in line with public demand, but very dubious from a legal point of view.

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<sup>34</sup> Joint separate opinion, *supra* n. 14, para. 72.

<sup>35</sup> Separate and dissenting opinion of Judge Li, *The Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22-PT, 7 October 1997, par. 11 and 27 respectively.