

## **A perspective on the Rome Statute's defence of duress: The role of imminence**

### **Abstract:**

The concept of duress encapsulated in Article 31(1)(d) of the Rome Statute of the International Criminal Court is a novel inclusion in a statute created to allow prosecution of serious crimes against the person in international criminal law. Despite being the topic of much debate, the present state of the discourse remains at a fairly superficial level: existing studies focus on a general analysis of the defence and its conditions. This has included the way in which the defences merges necessity and duress, with only a few authors examining the conditions of 'proportionality' and 'necessity.' This study looks at an underexplored part of the defence: the condition of imminence. The purpose of this work is to explore the idea of imminence and to review whether a clearer definition of duress could have been used, replacing the idea of imminence with the concept of the individual selecting the lesser evil.

**Keywords:** International criminal law; International Criminal Court; duress; imminence

## 1 Introduction

The defence of duress<sup>1</sup> in the Rome Statute of the International Criminal Court<sup>2</sup> is one of six defences which have been codified in the Statute, making the Statute the first international criminal law document to openly acknowledge the availability of defences for serious violations of international criminal law.<sup>3</sup> However, the way in which the defences have been drafted can often be seen as the result of compromise among States, rather than the manifestation of legal principle.<sup>4</sup> Duress is a particularly good example of the focus on compromise, rather than principle, because of the way in which it has been drafted. Firstly, the concept of duress has arguably ‘melded’ the separate ideas of duress and necessity into one defence.<sup>5</sup> This reflects a merging, or submerging, of the common law separation of duress and necessity, and the civil law tendency to approach necessity and duress as two versions of the same idea. The wording of the defence also reflects a greater focus on compromise than clarity.

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<sup>1</sup> Articles 31-33, Rome Statute of the International Criminal Court 1998.

<sup>2</sup> Hereafter, ‘Rome Statute.’

<sup>3</sup> Article 8, Charter of the International Military Tribunal at Nuremberg 1945, article 6, Charter of the International Military Tribunal for the Far East 1946, article 7(4), Statute of the International Criminal Tribunal for the former Yugoslavia 2009 and article 6(4), Statute of the International Criminal Tribunal for Rwanda 2010; see Kai Ambos, ‘Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law viewpoint’ 7 *Eur.J.Int’l.L.* (1996) 519-544.

<sup>4</sup> Claus Kress, ‘The Procedural Law of the International Criminal Court in Outline: Anatomy of a Unique Compromise’ 1 *J.Int’l.Crim.Just.* (2003) 603-617; Benjamin Risacher, ‘No excuse: The failure of the ICC’s article 31 “duress” definition’ 89 *Notre Dame L.Rev.* (2014) 1403-1426; Thomas Weigend, ‘Kill or be killed – Another look at *Erdemovic*’ 10 *J.Int’l.Crim.Just.* (2012) 1219-1237.

<sup>5</sup> Jens David Ohlin, ‘The bounds of necessity’ 6 *J.Int’l.Crim.Just.* (2008) 289-308.

To plead duress before the International Criminal Court (ICC), one must prove that he or she committed the crime while under pressure ‘resulting from a threat of imminent death or of continuing or imminent serious bodily harm.’ The act itself must then be ‘necessar(y) and reasonabl(e) to avoid (the) threat,’ and should also be proportional in that the individual must not cause a greater harm than that which is to be avoided.<sup>6</sup> There are thus four strands to this version of duress: the seriousness of the threat, the imminence of the threatened harm, the necessity and reasonableness of the act committed to avoid the harm, and a further test that the act was proportionate, in that it did not cause greater harm than it intended to avoid. The tests of proportionality<sup>7</sup> and a ‘necessary and reasonable act’<sup>8</sup> have been discussed by other authors, but there has been little focus on the requirement of imminence.

The test of imminence is of particular interest because it augments the requirement of a serious threat. The role of

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<sup>6</sup> Article 31(1)(d), Rome Statute.

<sup>7</sup> See, among others, Steve Coughlan, ‘The rise and fall of duress: How duress changed necessity before being excluded by self-defence’ 39 *Queen’s LJ* (2013) 83-125; William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, Oxford, 2010); Risacher *supra* note 2, p.2; Shane Darcy, ‘Defences to international crimes’ in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge, Abington, 2011).

<sup>8</sup> Schabas, *supra* note 7; Geert-Jan Knoops, *Defenses in contemporary international criminal law* (Martinus Nijhoff, Leiden, 2008), and M. Cherif Bassiouni, *A draft international criminal code and draft Statute for an International Criminal Tribunal* (Martinus Nijhoff, Leiden, 1987) where the availability of defences was doubted for serious violations of international criminal law.

imminence in self-defence has been widely documented<sup>9</sup> and is considered a key part of justifying the use of force against another to defend oneself. However, the addition of imminence is questionable, particularly in respect of crimes that may be committed during times of war, civil unrest, or other emergencies. There has been no consistent use of the idea of imminence in duress when it has been plead before international courts. The previous focus has been on the proportionality of the actions committed under duress, which has generally undermined its application.

It is argued here that a better approach to the defence in the Rome Statute, learning from the previous international criminal tribunals, would be to focus on the removal of freedom of choice. Rather than to indicate that the defence ought to be used in situations of imminent harm, it would demonstrate greater pragmatism to focus on the alternatives that the individual had.<sup>10</sup>

In its current form, the inclusion of the defence demonstrates a

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<sup>9</sup> For example, Whitley Kaufman, 'Self-defense, imminence, and the battered woman' 10 *New Crim.L.Rev.* (2007) 342-369; Jeffrey Murdoch, 'Is imminence really necessity? Reconciling the traditional self-defense doctrine with the battered woman syndrome' 20 *N Ill U.L.Rev.* (2000) 191-218; David Gauthier, 'Self-defense and the requirement of imminence: Comments on George Fletcher's domination in the theory of justification and excuse' 57 *U Pitt L Rev* (1996) 615-620; Shana Wallace, 'Beyond imminence: Evolving international law and battered women's right to self-defense' 71 *U Ch L Rev* (2004) 1749-1871, Angelica Guz and Marilyn McMahon, 'Is imminence still necessary? Current approaches to imminence in the laws governing self-defence in Australia' 13 *Flinders LJ* (2011) 79-124.

<sup>10</sup> Luis Chiesa, 'Duress, demanding heroism, and proportionality' 41 *Vand. J. Transnat'l L.* (2008) 741-773.

clear progression from the previous international criminal tribunals, but one which does not properly engage with the problems highlighted by the discussion of defences in previous international criminal tribunals.

This analysis seeks to demonstrate that the drafters ought to have used the test of whether the individual had the freedom to choose another path when acting under duress, rather than when under the threat of imminent harm. The relevance of this is significant for the defence of duress because of it would properly link the importance of the freedom to choose to the defence, which is a key element of criminal liability. Equally, it is consistent with the idea of individual criminal responsibility at the international level that the individuals with the greatest responsibility for the crimes are prosecuted: freedom of choice is a key indicator of those who bear the greatest responsibility in the most serious crimes which are likely to be prosecuted before the International Criminal Court.

## 2 Duress in international criminal law

Duress has been recognised as a defence in a number of domestic jurisdictions,<sup>11</sup> and has also been admitted as a defence before international and hybrid tribunals.<sup>12</sup> A comparative analysis of the defence of duress at the national level has been undertaken elsewhere,<sup>13</sup> so the discussion here will open with a brief overview of the significance of the criterion of imminence in duress at the domestic level. This will set the scene for a discussion of the manifestations of the defence at the international level. In the interests of parity, two influential civilian legal systems and two common law systems will be examined. The jurisdictions which have been selected for analysis are England and Wales, United States, France and Germany, all of which are prominent and influential jurisdictions.<sup>14</sup>

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<sup>11</sup> See, for example, *Dixon v. United States*, 548 U.S. 1 (2006), Paul Robinson and Markus Dubber, 'The American Model Penal Code: A brief overview' 10 *New Crim. L. Rev.* (2007) 319-341; Article 122, French Criminal Code; Caroline Elliott, 'A comparative analysis of defences in English and French criminal law' 8 *Eur. J. Crime, Crim. L. and Crim. Just.* (2000) 319-326; s34, German Criminal Code 1998 and Michael Bohlander, *Principles of German criminal law* (Hart, Oxford 2008).

<sup>12</sup> See *US v. Ohlendorf* et al, 8-9 April 1948, U.S. Military Tribunal Nuremberg; *Prosecutor v. Erdemović* International Criminal Tribunal for the former Yugoslavia, T-96-22- T/A 1996; and *Hass and Priebke*, 22 July 1997, Military Tribunal of Rome.

<sup>13</sup> See Khaled Abou El Fadl, 'Law of duress in Islamic law and common law: A comparative study' (1991) 30 *Islamic Study* 305-350 and Clare Frances Moran 'A comparative exploration of the defence of duress' (2017) *GJCL* 6(1) 51-76.

<sup>14</sup> It should be noted that some of this influence stems from colonisation.

In England and Wales, there are three defences which relate to the idea of duress in the Rome Statute: necessity, duress of circumstances and duress by threats.<sup>15</sup> The courts have rejected the availability of all three defences to a charge of murder.<sup>16</sup> The focus of the first two defences is on the idea of compulsion, where the concept of imminence appears to have little relevance.<sup>17</sup> The focus instead, particularly in *R v. Dudley*<sup>18</sup> is on the degree of pressure, rather than the imminence of the threat. Similarly, in the *Re A (Children)*<sup>19</sup> case, the focus was on the doctrine of necessity where an individual acted as a result of pressure. The third type of duress, by threats, equally relies upon the idea of a serious pressure, most likely relating to fear of death,<sup>20</sup> rendering the will of the accused overborne.<sup>21</sup>

The defence of duress by threats is much more distinct and far more contentious than that above. The definition of duress has not been dealt with extensively by the courts and more serious cases tend to focus on its applicability, rather than the extent to which the individual has been threatened. The judgment in *Howe*<sup>22</sup> relies on the definition written in Hale's pleas of the

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<sup>15</sup> Jonathan W. Herring, *Criminal law: text, cases and materials* (Oxford University Press, Oxford, 2012) p.664 and Nicola Padfield, *Criminal law*, (Oxford University Press, Oxford, 2008) p.111.

<sup>16</sup> *R v. Dudley and Stephens* [1884] 14 Q.B.D. 273.

<sup>17</sup> James Stephen, *History of the criminal law of England*, 1883, 108.

<sup>18</sup> *Dudley* *supra* note 16.

<sup>19</sup> *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam. 147.

<sup>20</sup> *R v. Howe* [1987] A.C. 417, 453.

<sup>21</sup> *R v. Hudson* [1971] 2 Q.B. 202, 206.

<sup>22</sup> *Howe* *supra* note 20.

Crown,<sup>23</sup> which holds that there must be a ‘fear of death’ threatened by another individual compelling the accused to act. The case of *Hudson*<sup>24</sup> holds that the question is really one of whether the will of the accused was ‘overborne’, which is an issue of proof to be decided by the jury. There is little focus on the idea of the imminence of the threat in any of the above cases, and the courts appear to focus instead on the nature of the threat. However, the English Law Commission have included a test of imminence in their proposals for the codification of duress.<sup>25</sup> However, as of 2017, there are no legislative plans to codify duress as a defence in English law.<sup>26</sup>

In the United States Model Penal Code,<sup>27</sup> two relevant defences are provided: that of coercion (or duress) and a defence entitled ‘choice-of-evils.’ Duress is characterised as a positive<sup>28</sup> defence in which the individual argues he acted because ‘*he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness would have been unable to resist.*’<sup>29</sup> The choice-of-evils defence relates instead to a situation in which the individual

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<sup>23</sup> *Ibid.*, Opinion of Lord Hailshaw, p.427.

<sup>24</sup> *Supra* note 21, p.7.

<sup>25</sup> *Criminal law report on defences of general application*, Law Com. No. 83, Law Commission of England and Wales, 28 July 1977.

<sup>26</sup> A 2005 Law Commission report on Partial Defences to Murder declined to discuss duress as the last set of recommendations had not been implemented by Parliament.

<sup>27</sup> Drafted in 1962 by the American Law Institute. See Robinson and Dubber, *supra* note 11, p.6.

<sup>28</sup> American Model Penal Code, 2.09 (1).

<sup>29</sup> *Ibid.*



sought to avoid a greater harm than the one which would be created by the otherwise illegal act.<sup>30</sup> Neither defence specifies a temporal element, or notes that the threat must be imminent. The Model Penal Code, to an extent, mirrors the English focus on the nature of the threat and the extent to which the individual could be expected to resist. There is no mention of a temporal element and the criterion of imminence is given little consideration. Both jurisdictions appear to take the approach that the nature of the threat, and the resultant degree of pressure under which the individual acted, is of greater import than the imminence of the threatened harm.

The civilian legal systems examined here both support the idea that imminence is a relevant consideration. In the French Criminal Code of 1994, there are two defences connected with duress: constraint<sup>31</sup> and necessity.<sup>32</sup> Both defences reference the idea of a present or imminent danger as a requirement for the application of the defence. Constraint focuses on the idea that criminal responsibility is removed when the danger is present or imminent and threatens the individual,<sup>33</sup> while necessity focuses on the actual or imminent danger which may face an individual who would need to commit a ‘necessary act.’

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<sup>30</sup> *Ibid.*, 3.02 (1).

<sup>31</sup> Article 122-2, French Criminal Code 1994.

<sup>32</sup> *Ibid.*, Article 122-7.

<sup>33</sup> *Ibid.*, Article 122-2.

Both definitions require there to be an imminent threat as a key criterion for the use of the defence. However, despite this, it should be noted that the defences have never been admitted for any serious charges of crimes against the person.<sup>34</sup> Thus, even where the elements of the defence are satisfied, there is a general discomfort surrounding the application of the defence to very serious crimes.

The German approach is similar in both the distinctions made between the defences and its lack of use in practice, although the prescription of the defences makes much clearer their effect on criminal liability. The German Criminal Code has two forms of necessity:<sup>35</sup> necessity as a justification and necessity as an excuse. Both versions of the defence require an ‘imminent danger to life or limb.’<sup>36</sup> However, there is a similar issue with German law, illustrated perfectly by the case of *Wolfgang Daschner*.<sup>37</sup> Despite *Daschner* satisfying all of the requirements of the defence, including that of an imminent threat (most pressing, the presumed imminent harm to a child), it was held he could not access the defence where he had threatened torture of a suspect. The fact that even a threat of torture was considered

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<sup>34</sup> John Bell *et al.*, *Principles of French law* (Oxford University Press, Oxford, 2007), p.210.

<sup>35</sup> s34-35, German Criminal Code 1994.

<sup>36</sup> *Ibid.*, s34 and s35(1); see Bohlander, *supra* note 11, p.6, p.101 and p.108.

<sup>37</sup> Judgment of 20 December 2004, District Court of Frankfurt am Main; see F. Jessberger, *Bad torture – good torture*, J.I.C.J. 3 (2005), 1059-1073, p.1064.

too serious to permit the defence indicates a further restriction on the defence which is not evident from its wording.

The common law approach and the civilian law approach can seem divergent at first glance: civilian systems have a much more developed form of the defence of duress, which has all of the components of the defence used in the Rome Statute. Common law systems, on the other hand, appear to acknowledge the defence in theory, based on the work of the English Law Commission and the Model Penal Code. However, the English cases demonstrate a discomfort with ever using the defence in relation to a serious crime against the person. The idea of imminence, in these legal systems, is not viewed as significant as the nature of the threat. The civilian legal systems in France and Germany do not appear to focus as much on the seriousness of the crime, based on the wording of the defences. However, the application of the defence tells a different story, and the reticence to apply the defence shown by these systems is no less than that demonstrated in England and the United States.

The systems have a common thread connecting them: no system outlined above considers the idea of imminence to be as significant as the seriousness of the crime and the attendant balancing exercise which must be carried out. The continued inclusion of imminence is a distraction from the central concern

of the effect that the criminal act will have, and perhaps an unnecessary addition to the discussion. This analysis highlights the usefulness of the test of whether the individual had the freedom to choose in the situation in question, rather than focusing on the imminence of the threat. The confusion evident at the domestic level could also be remedied by greater emphasis on the freedom to choose than the idea of imminence, which seems to be of little concern to civilian systems in practice. This may address the slight confusion over the defence in national law that this brief overview has highlighted.

Moving to the international plane, the defence of duress was also pleaded a number of times before hybrid and military tribunals. The tribunals engaged with the defence of duress, although none permitted that the defence be admitted in respect of the charges libelled. However, as there was no detail on defences in any of the documents which constituted the tribunals, the courts were required to draw their own conclusions on what duress was, which sources to use, and how it ought to be applied. This involved, variously, the use of domestic law, the use of military manuals, particularly in the hybrid tribunals, and the court's own opinion on what duress ought to be, including the consideration that duress and necessity were synonymous concepts. The cases demonstrate that the definition of duress that the courts and tribunals discussed varied, but that the question of imminence

was overwhelmingly not a central consideration. The analysis below indicates that the courts and tribunals had a greater focus on the freedom to choose that the individual had, rather than the idea of an imminent threat.

In the *Flick*<sup>38</sup> case, the defendants were charged with the use of slave labour, property crimes and financing Nazi bodies, such as the SS. In this case, the tribunal<sup>39</sup> examined the availability of a defence of coercion to these crimes. When applying the law, recourse was made to the London Charter's exclusion of superior orders.<sup>40</sup> However, it was held that the exclusion of superior orders was not an indication that all defences were to be excluded. The Tribunal also held that it would be in line with justice to allow the defendants to argue the applicability of necessity.<sup>41</sup>

It should be noted that the Court in this case focused on the US definition of coercion and necessity, using a US text,<sup>42</sup> and ultimately merged the ideas of duress, necessity and coercion. Other than the reference to the US textbook, there was little further investigation into what the defence of duress entailed.

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<sup>38</sup> *U.S. v. Flick et al.*, 22 December 1947, Judgment of the United States Military Tribunal Nuremberg.

<sup>39</sup> *Ibid.*, para 1188: The court was "a special tribunal constituted pursuant to a four-power agreement administering public international law."

<sup>40</sup> *Ibid.*, para 1199.

<sup>41</sup> *Ibid.*

<sup>42</sup> Francis Wharton, *Wharton's Criminal Law*, vol. I.

The Court accepted that the defence of necessity could be used against a charge of slave labour where the necessary “compulsion and fear”<sup>43</sup> was evident. However, in this case, it was not demonstrated that the defendants were sufficiently fearful for their life and only acted to protect themselves. Instead, it was found that the conceptualisation of necessity by the US text utilised in the judgment was focused on the avoidance of an act which was ‘serious and irreparable, that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.’<sup>44</sup> There is little mention of the idea that the threat or circumstance must be imminent, and rather the focus is the necessity of the act, removing the freedom of the individual to choose an alternative to the criminal act, and whether it was proportionate. The Court then focused on an analysis of whether the defence could be used in this situation, and concluded, without direct reference to proportionality, that the use of slave labour was not carried out in necessity, but rather because of the wishes of the factory owner to maintain productivity.<sup>45</sup> The issue, as with many of the cases below, was the lack of proof that necessity (used interchangeably with duress and coercion) was the reason for acting.

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<sup>43</sup> *Flick supra* note 38, p.13, para 1209.

<sup>44</sup> *Ibid.*, para 1199. See also M. Cherif Bassiouni, *Crimes against humanity: Historical evolution and contemporary application* (Cambridge University Press, Cambridge, 2011).

<sup>45</sup> *Ibid.*, *Flick*, para 1201.

Here, the focus of the Court remained on the seriousness of the threat and the freedom that the individual had to act, rather than the imminence of the threat. Although the prosecution made reference to the idea of a 'clear and present danger',<sup>46</sup> no further reference to the temporal nature of the threat was made by the judges.

In the *Flick*<sup>47</sup> case, the individuals put forward several defences against the charges of murder, extermination, and genocide, specifically self-defence, duress, and necessity. The basic argument underlying the use of each of the defences was the lack of choice that the defendants had in carrying out the attacks, basing their arguments on German legal concepts. The first issue raised by the defence lawyers was the question of which law, in terms of jurisdiction, ought to be applied, with the defence lawyers preferring German or Russian.<sup>48</sup> Their central claim was that the application of US law was viewed as arbitrary, on account of the fact that the trial could have been held by any one of the Allied powers,<sup>49</sup> and that the US law was particularly foreign to the defendants.<sup>50</sup> The judges engaged with the German legal concepts, but ultimately, it relied upon the work of

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<sup>46</sup> *Flick*, *supra* note 38, p.13, para 1200.

<sup>47</sup> *Ohlendorf* *supra* note 12, p.6.

<sup>48</sup> *Ohlendorf* *supra* note 12, p.6, p.57. The Tribunal highlighted the inconsistency of the use of Soviet Union law where the Nazi regime had repeatedly denounced the Soviets, and openly considered them inferior, at 463.

<sup>49</sup> *Ohlendorf* *supra* note 12, p.6, p.57.

<sup>50</sup> *Ohlendorf* *supra* note 12, p.6, p.56.

an international law expert<sup>51</sup> to determine that extermination could never be considered legal, nor was it a suitable method of self-defence. However, it should be noted that there was something of a presumption of what self-defence meant: no definition of self-defence was supplied and there was no focus on any particular jurisdiction. Thus, the foundational element of its rejection – proportionality – was explained as the consequence of the situation, rather than focus on an analysis of the legal concept.

The judgment explained in great detail, by carrying out a balancing exercise and without direct reference to proportionality, that the murder and genocide carried out by the defendant could not be considered a proportionate means of self-defence.<sup>52</sup> Consequently, that the conditions for self-defence or necessity did not exist, as the vigour with which the attacks were undertaken<sup>53</sup> undermined the argument for both necessity and self-defence, as well as for personal duress.<sup>54</sup> Because of the level of the aggression deployed, the use of self-defence was rejected as ‘untenable as being opposed to all facts, all logic and all law.’<sup>55</sup>

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<sup>51</sup> Who had been instructed by Ohlendorf to support his argument that he acted in self-defence.

<sup>52</sup> *Ohlendorf supra* note 12, p.6, 463-4.

<sup>53</sup> *Ohlendorf supra* note 12, p.6, 464-6.

<sup>54</sup> *Ohlendorf supra* note 12, p.6, 468.

<sup>55</sup> *Ohlendorf supra* note 12, p.6, 470.



The Tribunal then went on to consider superior orders and duress, the latter of which was required to exist in order for the former to be plead successfully. It offered more detail on the reasoning underlying duress and an explanation of the defence, using the German Criminal Code's version of duress. For superior orders, the source of law was various military manuals which were provided as evidenced of the existence of the defence in the German, British and United States legal systems. The German Criminal Code was used extensively<sup>56</sup> in determining that the central focus in the defence of duress was wilful volition to act. In other words, the defence would be available should the individual be compelled to act, based on the circumstances in which he found himself, as well as the behaviour. The Tribunal took a flexible approach to the idea of duress and considered the idea of imminence to be dispensable in cases concerning duress:

No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment ... (t)he test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the

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<sup>56</sup> *Ohlendorf supra* note 12, p.6, 485-8.

order. If the second proposition be true, the plea of superior orders fails.<sup>57</sup>

This brief paragraph encapsulates the Tribunal's understanding of the form of duress, on the basis of superior orders, which it applied in this case. The willingness to go along with the orders, and the freedom to choose were the most important aspects of the judges' reasoning. The idea of the imminence of the threat did not occupy any of their time in the judgment; it was noted as part of duress, albeit an expendable part. Rather than imminence being key, it was used to demonstrate the lack of choice that the individual demonstrates in the matter. The central issue was the element of choice that the individual had, and whether his free choice would have resulted in the same outcome as the coerced behaviour. In this case, it is clear that the defendants had freedom to choose whether to obey or not, and that their freedom was not impaired by the threat of death or serious physical injury. The Tribunal's wisdom in focusing on the degree of seriousness of the threat, and the removal of the defendant's freedom, was particularly important in the context of the Nazi regime, in which the pressure may have been ongoing because of the situation. It should also be noted that the focus on the removal of freedom of choice did not permit the defendants to access the defence when

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<sup>57</sup> *Ohlendorf supra* note 12, p.6, p.480.

they were clearly not entitled to use it: the threshold was not lowered when imminence is no longer a consideration.

The case of *Von Leeb*<sup>58</sup> involved members of the German High Command being tried on charges of a significant number of war crimes and crimes against humanity, including breaches of the Geneva Convention,<sup>59</sup> crimes against civilians,<sup>60</sup> and conducting an aggressive war.<sup>61</sup>

The defendants argued that they were entitled to the defence of superior orders,<sup>62</sup> even though the order under which the Nuremberg Trials had been established had explicitly excluded the defence.<sup>63</sup> Although the Tribunal acknowledged that it was bound by the law excluding the defence, it outlined its reasons for rejecting the application of superior orders, on account of the oft-cited argument that any trial organised by the Allied powers against the Nazis was fundamentally unfair to the individuals, who were all bound by Hitler's orders.<sup>64</sup> After exploring the idea of superior orders, as outlined in the German Military Penal Code, the Tribunal held that superior orders, as a form of duress

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<sup>58</sup> *United States of America v. Wilhelm von Leeb et al.*, 27 October 1948, US Military Tribunal Nuremberg Judgment.

<sup>59</sup> *Ibid.*, p.3.

<sup>60</sup> *Ibid.*, p.4.

<sup>61</sup> *Ibid.*, p.2.

<sup>62</sup> *Ibid.*, p.71. They also cited military necessity, which is beyond the scope of this work.

<sup>63</sup> Control Council Law No. 10.

<sup>64</sup> *von Leeb supra* note 58, p.71-2.

or necessity,<sup>65</sup> could not be a defence where slavish adherence to orders of a clearly criminal nature had occurred.<sup>66</sup>

The Tribunal, unusually considering the judgments noted above, the importance of the immediate or imminent nature of the threat. It went on to highlight that the defence of necessity could be available to an individual who ‘was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong.’<sup>67</sup> The significance of the imminence of the threat was underscored in the same paragraph of the judgment, where the ‘disadvantage or punishment’ had to be ‘immediately threatened’<sup>68</sup> for the defence to be used. The Tribunal in this instance prioritised and highlighted the importance of the requirement of imminence, but used it as a way of indicating that the individual’s free will had truly been overborne. The repeated adherence to the orders, and the lack of evidence indicating a clear objection to the orders, was held to have been sufficient evidence that the accused were not entitled to rely on the defence of superior orders.

In this case, the Tribunal had, unusually in comparison to the other cases analysed here, noted twice the importance of the

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<sup>65</sup> See Hilaire McCoubrey, ‘From Nuremberg to Rome: Restoring the defence of superior orders’ 50 *ICLQ* (2001) 386-394.

<sup>66</sup> *von Leeb supra* note 58, p19, p.72.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

temporal nature of the threat or presumed punishment. It is also worth highlighting that the idea of superior orders was automatically connected with duress and/or necessity, and consequently that the pressure on the individual was a key element in utilising the defence. However, the availability of the defence was strictly circumscribed to exclude the generally pressurised environment of the strict Nazi regime and punishments such as demotion. Interestingly, the Tribunal also noted the importance of a 'physical peril', weighting the requirements of the defence as much higher than a mere 'punishment or disadvantage.' Taking the ordinary meaning of the words used, the imminence of the threat is more significant here than the seriousness of the threat, given that the imminence of the threat is repeated by using the word 'peril', but that the seriousness of the threat is not mentioned outside of that word.

*Von Leeb* resurrects the idea of imminence as key in the context of duress/necessity, but only in the case of superior orders. However, no clear reasoning for doing so is offered and, similarly to the cases above, there is little authority offered to substantiate the position undertaken by the Tribunal. Where the Germany Military Penal Code is adduced as authority for the idea that superior orders cannot be a valid defence to war

crimes,<sup>69</sup> no reference is made to the definition of superior orders. Thus, the defence on which the Tribunal bases its arguments appears to be drawn from a general understanding of the ‘international common law’<sup>70</sup> and the inclusion of imminence appears arbitrary.

The *Priebke*<sup>71</sup> case was heard relatively recently, in 1998, although it concerned events which had occurred towards the end of the Second World War. In a similar manner to the *Von Leeb* case, it raised some points relevant to the discussion of duress. Priebke and Hass both stood trial accused of killing civilians in response to the deaths of German soldiers, and both pleaded the defence of superior orders. Their defences included the argument that they would have been subject to serious harm had they not carried out the killings as directed. The Court considered both the defence of superior orders in respect of the case, as well as the argument that they had acted under duress, and examined the availability of the defences to the charges of war crimes, including murder and extermination.

Both Hass and Priebke argued that they were forced to carry out the killings, and stated that they would have been subject to serious harm if they had not. As the case was heard before a

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<sup>69</sup> Article 47, Germany Military Penal Code 1947 in *von Leeb supra* note 58, p.20.

<sup>70</sup> *von Leeb supra* note 58, p.20, p.61-2.

<sup>71</sup> *Priebke, supra* note 12, p.6.

military tribunal in Italy, the version of duress pled was the version contained within the Italian Criminal Code. This version requires that a person must prove they were ‘threatened with severe and irremediable harm to life or limb.’<sup>72</sup> There was little discussion regarding the idea of the imminence of the threat, and instead the focus was on proportionality.<sup>73</sup> The Court held that the acts carried out by both defendants could never be considered proportionate, without having much regard to the imminence of the threat. Furthermore, in a similar way to the other cases, the Tribunal held that there was a lack of evidence to demonstrate the existence of the threat argued by both parties. Thus, the thread connecting the cases here also runs through the *Priebke* case: the inapplicability of the defence in cases before the post-Second World War tribunals has rested mainly on the fact that the threats argued did not exist, and that they could not justify or excuse the actions undertaken by the accused. Rather, the issue of proportionality is instrumental, and of far greater import than the imminence of the threat. The understanding thus far appears to be that the issue of arguing that a war crime is proportionate in respect of the threat made to the accused is too difficult to ever surmount, making it deeply curious that the criterion of

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<sup>72</sup> *Priebke*, supra note 12, p.6, para 9-10. See Francesca Martines, ‘The defences of reprisals, superior orders and duress in the *Priebke* case before the Italian Military Tribunal’ 1 *YIHL* (1998) 354-361; Bassiouni, supra note 44, p.14; Sergio Marchisio, ‘The *Priebke* case before the Italian Military Tribunals: A reaffirmation of the principle of non-applicability of statutory limitations to war crimes and crimes against humanity’ 1 *YIHL* (1998) 344-353.

<sup>73</sup> Martines, supra note 72.

imminence has been included in the Rome Statute's definition of duress.

The case of *Erdemović*<sup>74</sup>, heard by the International Criminal Tribunal for the former Yugoslavia, involved the most in-depth examination of the defence of duress which has ever been undertaken by an international criminal court or tribunal. The accused stood charged with war crimes and the crime against humanity of murder after admitting to taking part in the massacre in Srebrenica during the Bosnian war. Between the initial indictment and the eventual conviction, there were a variety of issues raised by the defence and the Tribunal, not least of all the validity of Erdemović's guilty plea. However, the focus here is simply on the applicability of the defence of duress.

The Appeals Tribunal, in particular, focused on the availability of the defence for duress for charges of war crimes, and undertook a comparative exploration of the use of duress at the domestic level.<sup>75</sup> The majority opinion of Judges McDonald and Vohrah held that the *Ohlendorf*<sup>76</sup> case was the only international criminal law case to accept that duress could be a defence to

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<sup>74</sup> *Erdemović* *supra* note 12, p.6.

<sup>75</sup> *Prosecutor v. Erdemović* 7 October 1997, International Criminal Tribunal for the former Yugoslavia, IT-96-22- A, Opinion of Judges McDonald and Vohrah, paras 49 and 59-65. The importance of the use of comparative law in international criminal law is noted in Kai Ambos, 'Remarks on the general part of International Criminal Law' 4 *J. Int'l Crim. Just.* (2006) 660-673, 662.

<sup>76</sup> *Ohlendorf* *supra* note 12, p.6.



serious violations of international criminal law, and that it lacked any formal basis in customary international law to draw that conclusion.<sup>77</sup> It also concluded that the concept of duress insofar as it meant ‘imminent threats to the life of an accused if he refuses to commit a crime’<sup>78</sup> does not exist as a general principle in international criminal law.<sup>79</sup> In this case, the comparative study yielded the conclusion that the criterion of imminence ought to be retained as part of the general understanding of what the defence entailed, despite the majority of countries not mentioning the idea of an imminent or immediate threat. Out of the twenty-seven countries studied, nine mentioned the temporal nature of the threat,<sup>80</sup> with India and Malaysia holding that the threat must be instant.<sup>81</sup> Two did not accept the defence at all in respect of a murder charge, and accordingly, no reference was made to their definition of duress.<sup>82</sup> The remaining sixteen did not mention the idea of a temporal threat at all.<sup>83</sup> Instead, the range of countries cited, including France, Sweden, Ethiopia, Japan, Mexico, Somalia, and Chile, noted the importance of the irresistibility or inescapability of the threat. Interestingly, the lean away from the requirement was not mentioned or noted by

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<sup>77</sup> Erdemović *supra* note 75, p.24, para 43.

<sup>78</sup> *Ibid.*, paras 49 and 66.

<sup>79</sup> *Ibid.*, para 72. See also M Cherif Bassiouni, *Crimes against humanity in international criminal law* (Kluwer Law International, The Hague, 1999) 489 *et seq.*

<sup>80</sup> Erdemović *supra* note 75, p.24, paras 59-61.

<sup>81</sup> *Ibid.*, para 60.

<sup>82</sup> *Ibid.*, para 60.

<sup>83</sup> *Ibid.*, paras 59-61.

the Chamber, and the preference to include imminence, without any regard for the outcome of the comparative study, remained.

Judge Cassese's notable dissent in the *Erdemovic* case ends by giving even greater emphasis to the requirement of imminence, but begins without noting imminence as part of the definition of duress.<sup>84</sup> He highlights the criterion of imminence as being part of the 'strict conditions' of the defence, but not one which stands alone outwith the matter of the inevitability of the threat.<sup>85</sup> However, a large part of Cassese's reasoning, to hold that the defence ought to be applied in the case, focuses on the inevitability of the threat and the inescapable nature of the situation.<sup>86</sup> The fact that the crime would have been carried out with or without Erdemovic's cooperation was held to have been a relevant consideration and, consequently, a demonstration of why the defence ought to have been permitted.<sup>87</sup> At this juncture, it is worthwhile highlighting that the fact that the crime would have been carried out anyway is argued to be part of the removal of the individual's freedom to choose; even where certain death or serious harm was preferred by the person, rather than committing the crime, the crime would still occur.

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<sup>84</sup> *Erdemović supra* note 75, p.24, Dissenting opinion of Judge Cassese, para 14.

<sup>85</sup> *Ibid.*, para 16.

<sup>86</sup> *Ibid.*, para 43.

<sup>87</sup> See Robert Cryer, Hakan Friman, Darryl Robinson, and Elizabeth Wilmschurst, *An introduction to ICL and procedure* (2<sup>nd</sup> edn, Cambridge University Press, Cambridge, 2010).

Cassese's conclusions in the matter highlight the nature of the threat as being of great import, as well as the likelihood of a similar outcome in the case whether or not the individual participates, or capitulates to the threat. Although Cassese's opinion was not that of the majority, both his and the opinion of Judges McDonald and Vohrah demonstrate striking similarity as regards the nature of the threat. Both acknowledge, in the research conducted rather than conclusions drawn, the importance of the nature of the threat being inescapable and serious. The requirement of imminence in both cases functions to underscore the nature of the threat, without really adding anything to the understanding of duress. Finally, both note the existence of duress as a defence, and the comparative study highlights the importance of the nature of the threat, rather than the criterion of imminence. Cassese's focus, in his concluding paragraphs, of the seriousness of the threat and the inevitability of the outcome, demonstrates clearly the importance of the fact that the individual has no other choice.

Based on these findings from the above cases, it is clear that the role of imminence in duress is questionable, and so the next part to the work examines the place of imminence in the defences which have been used as part of the above discussion. Acknowledging duress, necessity, and self-defence as being part

of the same ‘species’ of a generalised defence of being compelled to act for different reasons, the next section explores the idea of imminence in each and questions whether imminence plays the same role in each of the defences, noting the problems that arise as a consequence of making imminence a condition in self-defence.

### **3 Imminence in the ‘necessity’ defences**

The idea that necessity and duress and self-defence are species of the same basic concept is not new,<sup>88</sup> as demonstrated above by the way in which the courts and tribunals approached the issues of necessity, self-defence, and duress, whether through threats or by superior orders. The requirements for each are similar, in that there should be a threat of serious harm or death to the individual who then must react to avert that threat, by using violence against the aggressor (self-defence), using violence to avert the threat or consequences (necessity) or committing a crime to protect themselves (duress). Because of the similarities between the defences, there has even been some discussion of

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<sup>88</sup> See Edward B. Arnolds and Norman F. Garland, ‘The defense of necessity in criminal law: The right to choose the lesser evil’ 65 *J Crim L and Criminology* (1975) 289-301, George P. Fletcher, ‘From rethinking to internationalizing criminal law’ 39 *Tulsa LR* (2004) 979-994 and Fiona Leverick, *Killing in self-defence* (Oxford University Press, Oxford, 2006).

uniting all the defences under one of ‘necessary action’<sup>89</sup> in English law. For self-defence in particular, the requirement that the threat to one’s life is imminent has been applied with relative consistency,<sup>90</sup> as will be discussed below. However, there has been a lack of discussion of the condition of imminence in the literature on duress.<sup>91</sup> This section will examine the role of imminence in the necessity defences, focusing on the defence of self-defence, and questioning whether imminence has been ‘imported’ from self-defence to duress. The reasoning underlying this shall also be examined, and the problems of uniting the defences shall also be discussed.

Scaliotti considers that the idea of imminence is of greater relevance to self-defence than duress,<sup>92</sup> and his view is reflected

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<sup>89</sup> Chris Clarkson, ‘Necessary action: A new defence’ Feb *Crim. L.R.* (2004) 81-95.

<sup>90</sup> Darcy in Schabas and Nadia Bernaz, *supra* note 7, p.3; Massimo Scaliotti, ‘Defences before the international criminal court: Substantive grounds for excluding criminal responsibility - Part 1’ 1 *Int’l Crim. L. Rev.* (2001) 111-172; Kai Ambos, ‘Other grounds for excluding criminal responsibility’ in Antonio Cassese, Paola Gaeta and Roy Jones, *The Rome Statute of the International Criminal Court: A commentary* (Vol I, Oxford University Press, Oxford, 2002); Ian Johnstone, ‘The plea of necessity in international legal discourse: Humanitarian intervention and counter-terrorism’ 43 *Colum. J. Transnat’l L.* (2005) 337-388; Murdoch, *supra* note 9, p.4; Guz and McMahon, *supra* note 9, p.4; Amir Pichhadze, ‘Proposals for reforming the law of self-defence’ 72 *J. Crim. L.* (2008) 409-440.

<sup>91</sup> Sarah Heim, ‘The applicability of the duress defense to the killing of innocent persons by civilians’ (2013) 46 *Cornell Int’l L J* 165-190; Marcus Joyce, ‘Duress: From Nuremberg to the International Criminal Court, finding the balance between justification and excuse’ 28 *L.J.I.L.* (2015) 623-642; Clarkson, *supra* note 89; D.W. Elliott, ‘Necessity, duress and self-defence’ Sep *Crim. L.R.* (1989) 611-621; Florian Jessberger and Gerhard Werle, *Principles of international criminal law* (3<sup>rd</sup> edn, Oxford University Press, Oxford, 2014).

<sup>92</sup> Scaliotti, *supra* note 90.

accurately in the literature<sup>93</sup> on the condition of imminence for the applicability of self-defence. Among others, Clarkson notes the idea of imminence relates to that which is ‘impending threateningly, hanging over one’s head.’<sup>94</sup> He is of the view that the function of imminence is to prove that the act of self-defence was necessary. Kaufman in particular notes the importance of the necessity of the reaction to the threat<sup>95</sup> in self-defence, and arguably the use of the concept of imminence is a means of proving this. In this way, imminence can be seen as way of quantifying the necessity of the act.<sup>96</sup> Other authors refer to imminence specifically as a ‘translator for necessity,’<sup>97</sup> in that the necessity of an act is contingent on the imminence of the threat.<sup>98</sup> Rosen describes imminence as being a requirement to affirm the necessity of the action; Murdoch clarifies imminence as being a ‘condition precedent’<sup>99</sup> for the necessary action.

This approach thus looks at the necessity of acting in the context of imminence, justifying the conduct: the individual was required to act at that particular moment because of the harm

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<sup>93</sup> Johnstone, *supra* note 90, p.29; Murdoch, *supra* note 9, p.4; Guz and McMahon, *supra* note 9, p.4; Pichhadze, *supra* note 90, p.29; Paul Robinson, ‘Criminal law defenses: A systematic analysis’ 82 *Colum L. R.* (1982) 199-291.

<sup>94</sup> Clarkson, *supra* note 89, p.29, p.90.

<sup>95</sup> Kaufman, *supra* note 9, p.4, p.348.

<sup>96</sup> Jeremy Horder, ‘Re-drawing the boundaries of self-defence’ 58 *Mod. L. Rev.* (1995) 431-442.

<sup>97</sup> Richard Rosen, ‘On self-defense, imminence and women who kill their batterers’ 71 *N C L Rev* (1993) 371-412, 380; Elliott, *supra* note 91, p.29.

<sup>98</sup> Murdoch, *supra* note 9, p.4, p.193.

<sup>99</sup> *Ibid.*

which would otherwise be visited upon them. This approach rejects the significance of a temporal idea of imminence and values instead the necessity of acting, highlighting that imminence functions only as a means of determining the necessity of the threat. Viewed in this way, the criterion of imminence is simply a ‘translator for necessity.’ As Bakircioglu holds, imminence can be used to determine whether there was a reasonable alternative to committing the crime.<sup>100</sup> Despite appearances, the question is not when the threat would happen, but whether the act was necessary given that there was no alternative in the circumstances. The requirement that the threat be made in a timeframe relevant to the act has a deeper relationship with self-defence than duress precisely because it proves that the act was necessary in the circumstances.

However, there have been problems cited with the idea that imminence creates the necessity for action in self-defence. Murdoch states that an ‘imminence based necessity analysis...focuses on the immediacy of the threat rather than the immediacy of the action necessary to avert the threat. If the harm cannot be avoided or the risk that the harm will occur will increase, one should be able to act without punishment.<sup>101</sup> He continues that the defendant’s action should be examined ‘in

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<sup>100</sup> Onder Bakircioglu, ‘The contours of the right to self-defence: Is the requirement of imminence merely a translator for the concept of necessity?’ (2008) 72 *JCL* 131-169.

<sup>101</sup> Murdoch, *supra* note 9, p.4, p.211.

terms of necessity rather than imminence (to) allow (the jury) to acquit on a legal theory that is both consistent with morality and intuition.’

Murdoch’s point is that the threat must be imminent for the defence to be available, rather than examining whether the act was necessary. This points further to the problems with imminence in self-defence, let alone necessity or duress. If the question of whether the criminal act was necessary is not the central consideration, particularly in the context of war crimes and crimes against humanity, the criterion of imminence becomes an arbitrary characteristic of an unthinking system,<sup>102</sup> robotically applying standards which may not consistently achieve the standards of fairness required of such situations. This issue arises typically in cases of self-defence concerning individuals who have suffered domestic abuse. The requirement of imminence in self-defence has meant that the defence has been unavailable to many individuals who did not kill immediately in response to an attack, regardless of the intensity or duration of the abuse they had suffered. Focusing on the freedom to choose that such individuals would have may yield a fairer outcome than including a temporal condition in the defence.

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<sup>102</sup> Roy S. Lee contradicts this point in Roy S Lee, ‘An assessment of the ICC Statute’ 25 *Fordham Int’l L.J.* (2002) 750-766, 757, while acknowledging that the thinking behind the system lacks proper detail.



The continuation of the requirement of imminence in self-defence has created problems and has restricted the availability of the defence to individuals who have proved that the threat to their lives or limbs was imminent, yielding on occasion an unfair outcome. For this reason, it is worth entertaining the conceptualisation of necessity, self-defence, and duress, which Clarkson perceives would lead to greater focus on the necessity and proportionality of the criminal act defended. He posits that the defences of necessity, duress, and self-defence are all forms of the same basic principle,<sup>103</sup> and that each defence simply represents a different reason for acting that the person relies upon to relive themselves of criminal responsibility.<sup>104</sup> He argues that the investigation of the person's state of mind in order to ascribe a justification or excuse to their behaviour is not really relevant, and that the most important consideration should be the reasonableness and proportionality of their actions.<sup>105</sup> Indeed, the focus he has on the outcome demonstrates greater consideration for the victims, and a more nuanced manner of approaching the problem.<sup>106</sup>

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<sup>103</sup> See Arnolds and Garland, *supra* note 88, p.28, Fletcher, *supra* note 88, p.28 and Leverick, *supra* note 88, p.28

<sup>104</sup> Clarkson, *supra* note 89, p.29.

<sup>105</sup> *Ibid.*, p.92.

<sup>106</sup> *Ibid.*, p.87.

The discussion he undertakes shows little regard for the idea of imminence, and focuses instead of the necessity of the action. However, this approach pays little heed to the idea of imminence, and focuses instead on the significance of the necessity and proportionality of the act. This approach is of value because it addresses the above problem of the availability of such defences for victims of domestic violence, as well as confirming that the key element in each of the defences is the necessity and proportionality of the act. Requiring that the focus of the court remains on the necessity and proportionality of the act, rather than the imminence of the threat, excludes the unfairness of denying the defence to an individual who acted under the significant pressure.

Another reason for including imminence in the defences generally is put forward by Kotecha, who focuses on the Canadian judgment of *Perka*.<sup>107</sup> In *Perka*, the court held that people cannot be expected to behave the same way in ‘emergency’ situations.<sup>108</sup> His analysis of the judgment reveals that the function of imminence is to restrict the availability of the defence in ordinary life, on account of the fact that it is easier to accept that the individual acted if they had little time to think.<sup>109</sup> Kotecha concludes that the requirement of imminence is not a

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<sup>107</sup> *R v. Perka* [1984] 2 S.C.R. 232.

<sup>108</sup> Birju Kotecha, ‘Necessity as a defence to murder: An Anglo-Canadian perspective’ 78 *JCL* (2014) 341-362, 353-4

<sup>109</sup> *Ibid.*, p.357.

definitive part to necessity, but a public policy criterion.<sup>110</sup> This analysis underscores the arbitrariness of the idea of imminence: focusing on the temporal nature of the threat and the restriction of the defence to those who can prove that the threat to their life was imminent creates an unnecessary barrier. It deflects from the more important questions: was it necessary for the individual to act in that way? Was their response proportionate? The flexible and evolving nature of policy, and particularly its relationship with politics, disregards the grave impact that the availability of defences can have on the lives of individuals.

In the South African context, Yeo goes further and fully rejects the inclusion of imminence as part of the definition of necessity or compulsion,<sup>111</sup> focusing the limits of the defence on the proportionality of the action and the necessity of carrying it out rather than as a response to an imminent threat. However, he does not countenance the idea that imminence may function as an assisting criterion to determine if the action was necessary, or the consequences of removing the test of imminence from duress, when harm is caused to an innocent victim. The resulting conclusion from this analysis is that Kotecha's idea of the 'public policy' or 'moral' function of imminence may be correct.

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<sup>110</sup> *Ibid.*, p.358

<sup>111</sup> Stanley Yeo, 'Compulsion and necessity in African criminal law' (2009) 53 *J Afr L* 90-110, p100.

The issue thus appears to be one of morality, rather than doctrine.<sup>112</sup> In international criminal law, this is reflected well by the approach in *Erdemovic*: there is a degree of reticence to apply duress where the crimes are serious and where the victims were innocent.<sup>113</sup> This indicates a conflation of morality and law, which is particularly problematic in international criminal law. What may be condemned socially, religiously or culturally does not necessarily mirror what the law ought to condemn, as a generalised standard of behaviour. The author Wall undertakes an interesting analysis of this very point, reviewing both the *Dudley* decision and comparing it to the Ridley expedition to the South Pole.<sup>114</sup> In doing so, he clearly articulates the problems with a moral approach to defences, indicating that the court in *Dudley* enforced the mores of the period, rather than legal rules.

His further conclusion is that morality played too great a role in the *Erdemovic* decision: that the Tribunal based its conclusion on the morality of permitting the defence where innocent individuals had lost their lives.<sup>115</sup> Wall also argues cogently that the purpose of criminal law is not to set the seal of approval on certain acts, but to provide a baseline for behaviour below which individuals should not descend. The rules exist to condemn and

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<sup>112</sup> See Aaron Fichtelberg, 'Liberal values in international criminal law: A critique of *Erdemovic*' 6 *J. Int'l Crim. Just.* (2008) 3-19.

<sup>113</sup> Bassiouni, *supra* note 79, p.25, p.489 *et seq.*

<sup>114</sup> Illan rua Wall, 'Duress, international criminal law, and literature' 4 *J. Int'l Crim. Just.* (2006) 724-744, 729.

<sup>115</sup> *Ibid.*, p.727.

punish conduct, rather than identify how individuals ought to behave in society.<sup>116</sup> The difficulty he does not note, however, is the fact that it is very difficult, more so than in domestic law, to draw the line between morality and law in the international sphere. The post-Second World War environment in which international criminal law flourished was one where morality and politics directly overlapped: indeed, the entire reason for the genesis of the discipline of international criminal law was the immorality of abusing and exterminating citizens. Because of the moral foundation of the law in this area, in particular, it can be difficult to avoid a recourse to morality where gaps in the law exist.

The failure to focus on the individual's freedom to choose, which has a closer relationship with criminal liability than the idea of the defence being constrained to situations of an imminent threat, can lead to the unfairness outlined above. The importance of the freedom to choose in these situations is discussed in the following section, highlighting the prevailing importance of the freedom to act in relation to the defences.

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<sup>116</sup> *Ibid.*, p.739.

#### 4 Imminence versus the freedom to choose

In international criminal law, the question of whether the defence of imminence in the Rome Statute presents a barrier rather than a threshold of tests is raised by the fact that there are several tests in its conception of duress. The international criminal law cases discussed above demonstrate that the issue of the criteria has not often been central to the failure of the defence, but instead the problem typically falls into one of two categories: the defence either fails because the individual cannot prove that they are entitled to use it or, in cases concerning war crimes or crimes against humanity, the requirement of proportionality is not met. In *Priebke*, there was both too much evidence against the fact that he had acted unwillingly in carrying out the attacks, and the attacks he had carried out were held not to have been proportionate, in any case.

Proof, and the lack of proportionality, equally affected *Flick* and the *Ohlendorf*<sup>117</sup> case, in which neither could prove that they had acted proportionately to avoid the threat. The vigour with which the orders had been complied with in both cases equally demonstrated the unavailability of the defences, and the choice the individuals exercised in their actions. In *Von Leeb*,<sup>118</sup> the

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<sup>117</sup> *Ohlendorf*, *supra* note 12, p.6.

<sup>118</sup> *United States of America v. Wilhelm von Leeb et al* US Military Tribunal Nuremberg Judgment, 27 October 1948

requirement of imminence was key, but its instrumental use was to demonstrate the lack of freedom to choose that the individual had. Similarly, in *Erdemovic*, the question of proportionality was more important than the imminence of the threat. In each case of the post-WW2 tribunals, the court could apply the criteria in a relatively straightforward manner and the defence invariably failed on the criterion of proportionality. However, in the case which stood the greatest chance of proving the application of duress, the court struggled with the perceived morality<sup>119</sup> of applying the defence of duress to war crimes and crimes against humanity.

The difficulty of applying duress is evident, and the criterion of imminence makes it even more so in cases concerning war crimes and crimes against humanity. However, arguably the question is one of wording: when imminence is mentioned in duress, the question dealt with by the court or tribunal is really whether the individual had any freedom to choose. By constraining the availability of the defence to situations where imminent harm was threatened, as opposed to when the individual had no choice, the defence is restricted in a way that does not appear consistent with the majority comparative view, and without good reason.

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<sup>119</sup> Wall, *supra* note 114, p.36.

An imminent threat demonstrates the lack of choice well, which Dinstein holds as the main reason for the removal of criminal responsibility.<sup>120</sup> However, the removal of the ability to choose has been obscured, as demonstrated above, by the focus on the idea of an imminent threat. It has been demonstrated above that self-defence has limited applicability in situations of domestic violence, particularly where the individual did not react immediately to the threatened harm. This gives little regard to the situation in which many victims of domestic violence find themselves, and has yielded an unfair conclusion: that those who have attacked or killed their abusers have not done so in self-defence because they have not had an immediate reaction to the violence.

In the case of duress, the continued use of imminence appears to be on the basis that a removal of the idea of imminence would lead to an unwarranted, broader application of the defence. However, it is disputed that this is the case. Imminence, as demonstrated above, appears to be a byword for the removal of the freedom to choose. A failure to focus on this removal of freedom to choose one's actions could lead to a general inconsistency in the application of the defence, and a technical

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<sup>120</sup> See Yoram Dinstein, 'International criminal law' 20 *Isr L. Rev.* (1985) 206-242.



focus on the immediacy of the threat, rather than the requirement of acting in the way the accused is attempting to defend.

A reformulation of the defence of duress in the Rome Statute, focusing on the removal of freedom of choice in situations of duress, would remedy this issue. It would also make clearer the understanding of the defence, developing<sup>121</sup> its application from the international criminal tribunals and making it fit for purpose in a Statute which has been created to prosecute serious violations of international criminal law.

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<sup>121</sup> Mark Osiel, The banality of good: Aligning incentives against mass atrocity 105 *Colum. L. Rev.* (2005) 1751-1862.

## **5 Conclusion**

This work has sought to demonstrate that the progressive approach espoused by the drafters of the Rome Statute has done little to enhance the availability of the defence of duress for those accused before the International Criminal Court. The inclusion of the idea of imminence has made the defence too cumbersome and impossible to ever be applied, without having regard to what really matters as part of the defence. The seriousness of the threat, and the likelihood that serious injury would be caused to the person, is of far greater importance to the use of the defence than whether the individual was threatened with imminent harm. Coupled with the requirements of reasonable and necessary action, the defence demonstrates a veil of progression concealing a lack of proper reasoning. The drafters of the Rome Statute could have elected to be clearer and more consistent with the existing international criminal law approach by acknowledging that the defence has a very poor chance of ever being applied by the International Criminal Court. They could also remedy the issue by reforming the defence, and Article 31 in general, to make duress clearer and to identify the conditions that really matter in the defence of duress. The idea of imminence has been shown above to have greater relevance to self-defence, rather than duress. The issue of freedom of choice is of far greater import to the defence of duress than the criterion of imminence, and the drafters of the Rome Statute missed a golden opportunity

to draft a fair, reasonable version of the defence. The retention of the condition imminence obscures the relevance of the freedom to choose one's actions, and ignores the relationship between freedom of choice and criminal liability. Criminal liability, after all, should only be ascribed where the individual possessed a degree of intention: compulsion does not demonstrate intention.