Public

Annex A

R. Aitala, *Diritto Internazionale Penale* (Mondadori, 2021), p. 103

no la fattispecie come scusante piuttosto che come causa di giustificazione (Amati *et al.* 2020, p. 252).

Requisiti

L'istituto è costruito intorno ad una minaccia incombente e una reazione necessaria e ragionevole. Il primo elemento richiede la sussistenza di un pericolo imminente di morte o di danno continuativo per la propria o altrui integrità fisica derivante da circostanze al di fuori del controllo dell'agente, umane o naturali. Il requisito ruota sulla pressione psicologica esercitata dal pericolo sull'agente e l'inesigibilità da parte sua di un comportamento diverso da quello proscritto. La reazione deve essere connotata da costrizione, necessità, ragionevolezza: l'agente deve porla in essere nella convinzione soggettiva di esservi costretto di fronte al pericolo incombente; in termini oggettivi deve trattarsi dell'unica possibile alternativa nelle concrete circostanze; e deve determinare il minor danno possibile al terzo incolpevole. Secondo taluni nella ragionevolezza rientra implicitamente un elemento di proporzionalità, mentre sembra corretto interpretare la clausola «purchè la persona non intenda causare un danno più grave di quello che mirava ad evitare» (*provided that the person does not intend to cause a greater harm than the one sought to avoid*) in senso soggettivo, per via dell'ispirazione prevalentemente di *Common law* della norma.

4. Errore di fatto e di diritto

L'art. 32 St.

L'art. 32 St. prevede che l'errore di fatto esclude la responsabilità penale solo quando elide l'elemento mentale richiesto dalla fattispecie (*only if negates the mental element required by the crime*); mentre l'errore di diritto sull'illiceità della condotta non è di norma causa di esclusione della responsabilità, salvo che determini il venir meno dell'elemento mentale o che ricorrano le ipotesi di cui all'art. 33 St.

L'errore di fatto

L'errore di fatto consiste nella mancata o erronea rappresentazione da parte dell'agente di uno o più elementi della fattispecie ed è detto «errore-motivo» in quanto influenza il processo di formazione della volontà, al punto tale da escludere il dolo e dunque la punibilità del fatto. Per esempio, l'agente ordina di bombardare un edificio pensando si tratti di una caserma dell'esercito avversario ignorando invece che è adibito a scuola o ad ospedale. È da notarsi che lo Statuto non prevede l'ipotesi di rimproverabilità dell'errore di percezione per negligenza e d'altronde, anche se così fosse, l'agente sarebbe punibile a titolo di colpa, mentre le fattispecie penali internazionali sono generalmente solo dolose.

L'errore di diritto

L'errore di diritto si verifica quando l'agente ha agito nell'ignoranza o erronea interpretazione di una norma giuridica penale o extrapenale. Secondo lo Statuto, non esclude la responsabilità l'errore sulla illiceità penale della condotta; mentre può avere rilievo l'errore su una norma extrapenale. In queste ipotesi l'errore su un elemento normativo della fattispecie è psicologicamente assimilabile all'errore di fatto e come tale esclude il dolo e la punibilità. È il caso dell'erronea interpretazione della qualificazione quale persona protetta in base al diritto internazionale umanitario della vittima di un attacco armato.

Informal translation

[P. 103]

[…]

The requirement revolves around the psychological pressure of the threat on the person and the fact that it would not be fair to expect [*inesigibilità*] a different behaviour. The reaction must be characterized by compulsion, necessity and reasonableness: the person must put it in place in the subjective conviction of being forced to do so by the incumbent danger: from an objective point of view it must be the only possible alternative given the circumstances; and must cause the minimum possible damage to innocent persons.

[…]

E. Amati, ‘Le Cause di Esclusione della Responsabilità Penale’, in E. Amati et al., *Introduzione al Diritto Penale Internazionale*, 4th Ed. (Giappichelli, 2020), pp. 252-253, 256-258

trebbe trovare applicazione. Infatti, nel confronto tra la vita di un solo soggetto e quelle ben più numerose delle vittime di crimini di guerra o contro l'umanità sembra doversi sistematicamente escludere la sussistenza del requisito della proporzione. Forse anche per tali motivi, le nuove frontiere dell'elaborazione giuridica aperte dallo Statuto di Roma paiono prospettare la riformulazione dello stato di necessità in termini di scusante soggettiva, basata sull'impossibilità morale o materiale di agire altrimenti e di conformarsi all'appello del diritto, così da rendere tale esimente meglio applicabile ai casi in cui la salvezza dell'agente passi attraverso il sacrificio della vita altrui[54]. Di conseguenza, ravvisando il fondamento giuridico della declaratoria di non punibilità nell'inesigibilità soggettiva di un comportamento diverso da quello tenuto dall'agente, la circostanza che il suo sacrificio personale avrebbe evitato l'uccisione di individui innocenti non rappresenterebbe più la condizione che decide dell'applicabilità o meno dell'esimente, poiché è l'alternativa stessa che si configura – "vita contro vita" – a legittimare la rinuncia ad esercitare l'azione penale rispetto a comportamenti che mantengono invariata la loro connotazione criminosa. La scelta che si presenta al soggetto agente è di fatto priva di soluzione: un *aut-aut* bloccato, che, comprimendo la libera volontà dell'agente, rende non necessario il rimprovero da parte dell'ordinamento giuridico.

4. Lo stato di necessità nello Statuto di Roma

L'art. 31(1)(d) StCPI stabilisce che il soggetto non è penalmente responsabile se, nel momento in cui ha commesso il fatto, la condotta che si presume costituire un crimine rientrante nella giurisdizione della Corte è stata causata dalla coercizione derivante dalla minaccia di morte imminente o di gravi e imminenti lesioni all'integrità fisica propria o di un'altra persona, a condizione che il soggetto agisca necessariamente e in modo ragionevole per evitare tale minaccia ed eccetto che non intenda causare un danno più grande di quello che intendeva evitare. Tale minaccia può alternativamente derivare da un'altra persona, oppure essere costituita da circostanze fuori del controllo dell'agente.

Ancora una volta lo Statuto prevede una disposizione complessa, costituita dalla somma di requisiti ben noti alla tradizione italiana e alla cultura giuridica dei paesi di *civil law* e *common law*, ma non priva di spunti ed elementi originali. Da un lato, infatti, si evidenzia il caratteristico restringimento dell'area di applicazione dell'esimente, limitata soltanto alla tutela della vita e dell'integrità fisica, dato già riscontrato anche nella formulazione della difesa legittima. Dall'altro, ciò che connota in maniera vistosa – e certamente problematica – la definizione dello stato di necessità nello Statuto di Roma è la presenza di elementi fortemente soggettivi, che concorrono a delineare una **fattispecie più marcatamente orientata in senso scusante**.

[54] In argomento, v. L.E. CHIESA (2008); I.R. WALL (2006), 724 ss.; A. FICHTELBERG (2008).

La definizione di stato di necessità fornita all'art. 31(1)(d) StCPI contiene, così come per la legittima difesa, una somma di requisiti in massima parte mutuati dalle differenti tradizioni legislative e dai contenuti della giurisprudenza internazionale.

Come per la legittima difesa, l'istituto dello stato di necessità ruota attorno a due poli:

a) la **situazione necessitante**, ovvero l'esistenza di un pericolo imminente di morte o di danno imminente o continuativo per l'integrità fisica propria o altrui, non volontariamente causato dal soggetto;

b) la **reazione necessitata**.

4.1. La situazione necessitante

Muovendo dall'analisi della situazione necessitante – ovvero l'atteggiarsi concreto del pericolo rispetto alle esigenze di tutela dell'agente – l'art. 31(1)(d) StCPI stabilisce che la minaccia debba tradursi nell'esistenza di un **pericolo imminente di morte o di danno imminente o continuativo** per l'integrità fisica propria o altrui, precisando poi che suddetta minaccia possa derivare indifferentemente da un comportamento altrui o da circostanze naturali indipendenti dalla volontà di colui che ne subisca gli effetti. Tale differenziazione – tra pericolo necessariamente imminente, nel caso in cui sia diretto contro il bene vita, o pericolo anche solo continuativo, se ha ad oggetto l'integrità fisica della potenziale vittima – si spiega in relazione alle caratteristiche proprie degli interessi giuridici considerati. Infatti, mentre la lesione del bene vita non può presentare alcuna progressione d'intensità, perché ogni offesa finisce inevitabilmente col tradursi nella totale soppressione dell'interesse tutelato, la violazione dell'integrità fisica può atteggiarsi in maniera differente a seconda del grado e dell'ampiezza che la condotta illecita presenta [55].

L'art. 31(1)(d) StCPI non distingue a seconda della fonte da cui promana il pericolo, mantenendo la disciplina dello stato di necessità all'interno di una sola disposizione. Tale scelta risulta facilmente comprensibile se si tiene conto delle opzioni sistematiche dello Statuto e della *ratio* sottesa alla definizione dello stato di necessità.

La fattispecie delineata all'art. 31(1)(d) StCPI, infatti, ha adottato nella definizione dello stato di necessità un paradigma di carattere soggettivo, basato sulla pressione motivazionale esercitata dalla costrizione e sull'impossibilità di esigere dall'agente, in quelle peculiari circostanze, un comportamento diverso. La prospettiva scusante che domina nella struttura della disposizione rende irrilevante l'elemento della provenienza del pericolo, poiché l'esonero di responsabilità sembra essere fondato esclusivamente sull'elemento della costrizione e sulla sua capacità di alterare il processo motivazionale dell'agente, indipendentemente da quale ne sia la provenienza.

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[55] E. VENAFRO (2005), 125.

Informal translation

[Pp. 252-253]

[…]

Once again, the Statute's provision is complex in that it includes requirements—known to the Italian legal system—derived from civil law and common law legal traditions, as well as innovative and unique elements. On the one hand—like for self-defence—this ground for excluding criminal responsibility is limited to threats to life and to physical integrity. On the other, the problematic focus on the subjective element suggests that under the Rome Statute *necessity* is shaped as a form of *excuse*.

The definition of *necessity* provided under article 31(1)(d) of the Statute includes, like self-defence, a number of requirements largely derived from different legal traditions as well as the jurisprudence of international tribunals.

Like for self-defence, *necessity* turns around two key circumstances:

a) a **situation requiring a reaction** [*situazione necessitante*], which is the threat of imminent death or of continuing or imminent serious bodily harm—not voluntarily caused by the accused;

b) a **necessary reaction** [*reazione necessitate*].

[…]

personalmente conflittuale, motivandolo ad un'azione che si presentava negli stessi termini di una condotta obbligata.

I concetti di **necessità** e **ragionevolezza** costituiscono, invece, il nucleo "obiettivo" dell'esimente.

Ad una attenta lettura dell'art. 31(1)(d) StCPI è possibile rilevare come la duplicazione risultante dalla sovrapposizione di due elementi simili all'interno della stessa fattispecie sia solo apparente. Infatti, il concetto di necessità non vuole tanto denotare un'esigenza di moderazione nella reazione di risposta dell'agente – esigenza che è compiutamente soddisfatta dall'inserimento del parametro della ragionevolezza – quanto indicare che la condotta così posta in essere debba prospettarsi come l'unica possibile ed efficace nelle peculiari circostanze del caso di specie[56]. Pertanto, mentre il riferimento alla ragionevolezza esprime – come già chiarito in relazione all'analisi della legittima difesa – la misura ideale della reazione difensiva, che deve essere la meno lesiva per i diritti del soggetto terzo coinvolto nella dinamica dell'offesa, il concetto di necessità sottolinea l'esigenza che questa sia di fatto l'unica e non diversamente sostituibile soluzione al conflitto di interessi.

L'ultimo aspetto da sottolineare è l'assenza nella definizione statutaria del requisito della **proporzione**[57]. Secondo parte della dottrina, tale elemento potrebbe considerarsi intrinsecamente ricompreso nel generale parametro della ragionevolezza, di cui costituirebbe logico corollario[58]. Tuttavia, non è necessario ricorrere ad una simile opzione interpretativa per spiegare la mancata menzione del requisito della proporzione nella struttura dell'art. 31(1)(d) StCPI, ma è sufficiente porre mente alla *ratio* propria dell'esimente che stiamo analizzando e alle sue caratteristiche sostanziali. Si tratta, infatti, di una causa di esclusione della responsabilità penale che nello Statuto di Roma assume una forte coloritura soggettiva, ispirandosi ad un paradigma orientato in senso scusante.

Se la ragione della non punibilità dell'agente risiede nell'impossibilità di formulare a suo carico un giudizio di rimproverabilità personale, non vi è alcuna motivazione per includere all'interno di una fattispecie modellata in chiave soggettiva l'elemento della proporzione, che ha ragion d'essere soltanto se ricondotto alla logica oggettiva della giustificazione e del bilanciamento dei valori in conflitto. Pertanto, qualora l'istituto dello stato di necessità venga considerato come una scriminante e di conseguenza fondato sul criterio della ponderazione tra i differenti beni giuridici coinvolti nella dinamica dell'offesa, è chiaro che il requisito della proporzione sarà assolutamente indispensabile nell'economia della norma, poiché servirà come "misura" del rapporto di valore che tra essi intercorre. Al contrario – e sembra essere questo il caso della definizione statutaria – se l'esimente viene articolata secondo un paradigma scusante, non vi è motivo alcuno di inserire siffatto elemen-

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[56] Così A. Eser (2016) e M. Scaliotti (2001), 155.

[57] Sul requisito della proporzione si rinvia a G.V. De Francesco (1978).

[58] K. Ambos (2004), 851.

to e la sua assenza risulta pienamente conforme alla logica che domina la fattispecie. D'altronde, in questo senso depongono elementi significativi: da un lato, infatti, nella fattispecie non è presente alcun riferimento espresso al principio di proporzionalità, che è invece chiaramente indicato tra gli elementi costitutivi della difesa legittima. Il legislatore statutario, quindi, ha scelto di non menzionare un requisito di cui aveva ben chiara la portata ed il tenore sostanziale, per averlo utilizzato nella descrizione tipica di altra *defence*. Inoltre, anche la formulazione della clausola limitativa "*provided that the person does not intend to cause a greater harm than the one sought to be avoid*" sembra doversi interpretare, come verrà chiarito nel prosieguo, alla stregua di un elemento di natura soggettiva e non come espressione di un'esigenza di proporzionalità all'interno della struttura della fattispecie.

4.3. *Segue*. La clausola limitativa "*provided that the person does not intend to cause a greater harm than the one sought to be avoid*"

L'art. 31(1)(d) StCPI stabilisce l'impossibilità di invocare lo stato di necessità nel caso in cui il soggetto abbia agito con l'intenzione di arrecare un danno più grave di quello che doveva essere evitato. L'introduzione di una **clausola limitativa incentrata sul requisito dell'intenzionalità** e, pertanto, di carattere dichiaratamente soggettivo, rappresenta una novità nell'ambito del diritto penale internazionale e trova ispirazione nella cultura giuridica dei paesi di *common law*.

Secondo autorevole dottrina, l'inserimento della locuzione "*provided that the person does not intend to cause a greater harm than the one sought to be avoid*" rappresenterebbe soltanto una non felice via di compromesso tra le esigenze della scusa e quelle della giustificazione [59], senza assumere nella struttura della fattispecie un autonomo significato.

Secondo altri autori, invece, tale clausola servirebbe a riferire l'operatività dell'esimente ai soli casi in cui l'agente abbia posto in essere la condotta necessitata in esecuzione di ordini altrui, ma non abbia assunto alcun ruolo decisionale nella realizzazione del disegno criminoso [60].

Una simile interpretazione, tuttavia, sembra essere smentita dalla lettura dei requisiti indicati nel testo della norma, perché, se così fosse, mancherebbe in radice l'elemento della costrizione richiesto dall'art. 31(1)(d) StCPI per l'applicazione dell'esimente. Ciò non significa, tuttavia, che la clausola "*provided that*" sia priva di una specifica funzione nell'economia complessiva dell'esimente. Al contrario, l'introduzione del requisito dell'intenzionalità tra gli elementi costituivi dello stato di necessità ha un preciso ruolo applicativo, che vale a soggettivizzare ancora più marcatamente il rimprovero penale.

Se questa previsione dovesse intendersi come un limite di carattere oggettivo –

[59] A. Eser (2016), 552.

[60] M.C. Bassiouni (2014), 491.

nel senso che l'agente non debba anche *effettivamente causare* il più grave danno che egli intendeva arrecare – essa risulterebbe completamente inutile, poiché la clausola si limiterebbe ad escludere l'applicazione dell'esimente ove la condotta dell'agente risulti indirizzata alla realizzazione di un'offesa più grave di quella strettamente necessaria all'obiettivo di salvezza, che di fatto egli realizza nel resistere alla minaccia. Detta previsione, in sostanza, si limiterebbe a riconoscere l'irrilevanza dell'eccesso doloso, che è tale in qualsiasi ordinamento nazionale o internazionale si voglia prendere in considerazione. Al contrario, la disposizione stabilisce che la punibilità dell'agente non è esclusa se questi *abbia inteso causare* un danno maggiore di quello da evitare, con ciò trasferendo l'eccezione dal piano oggettivo della materialità a quello soggettivo dell'intenzionalità. In altri termini, se anche il soggetto avesse agito perché costretto dalla pressione di una minaccia irresistibile e non altrimenti evitabile, ma pur sempre con l'intenzione di causare un'offesa maggiore rispetto al pericolo paventato, l'esimente non potrebbe trovare applicazione. Alla luce di queste considerazioni, parte della dottrina ha ritenuto che detta clausola introduca una sorta di "proporzionalità soggettiva", quale logico corollario dell'applicazione del criterio del "*lesser evil*" nella ricostruzione teorica dell'istituto. In questa prospettiva, essa rifletterebbe la natura di compromesso della *defence* in esame, che richiederebbe un *quid minus* della rigorosa proporzione oggettiva degli interessi suscettibili di bilanciamento (secondo la logica delle cause di giustificazione) e, contestualmente, un *quid pluris* rispetto all'applicazione del principio di inesigibilità che sostiene la figura della *duress*.

Anche a prescindere dalla posizione interpretativa adottata, è innegabile che lo stato di necessità venga a delinearsi, nella ricostruzione dello Statuto di Roma, come una fattispecie fortemente connotata sul piano soggettivo ed anzi, nella ricostruzione qui proposta, come una scusante dai contorni *lato sensu* etici perché legata "alla salvaguardia del valore giuridico già a livello intenzionale"[61].

5. Lo stato di necessità nella definizione dello Statuto di Roma e le ipotesi di omicidio: problemi di applicabilità

Una volta affermata la natura scusante dello stato di necessità nella disciplina dettata dallo Statuto di Roma, rimane da verificare se l'esimente così delineata possa essere riferita anche alle ipotesi di omicidio oppure se, conformemente alla cultura giuridica dei paesi di *common law*, questa sia da escludere laddove il bene leso con la reazione necessitata sia costituito dalla vita di un terzo innocente. In proposito, tuttavia, nonostante la dottrina maggioritaria e la stessa giurisprudenza si mantengano nel solco della tradizionale impostazione interpretativa, alcune significati-

[61] *Ibidem*.

Informal translation

[Pp. 256-258]

[…]

The last important aspect that should be recalled is the absence in the definition provided by the statute of a **proportionality** requirement. […] On the other hand—and this appears to be the case under the Statute—if the ground of excluding criminal responsibility is designed as an *excuse*, there is no reason to include a proportionality requirement and its absence is fully consistent with the logic which typically inspires *excuses*. This is further confirmed by the absence of any expressed reference to the proportionality principle which on the contrary is clearly provided among the constitutive elements of self-defence. Having adopted this requirement for self-defence [under article 31(1)(c)], the drafters clearly knew its importance when they chose not to include it [under article 31(1)(d)]. In addition, the formulation "*provided that the person does not intend to cause a greater harm than the one sought to be avoid*", which appears to be a subjective element, further confirms that no objective proportionality assessment is expressly required.

[…]

The introduction of the intentionality requirement among the constitutive elements of *necessity* serves the purpose of further focusing the [exclusion of] criminal sanction on the subjective element.

The provision would be pleonastic if it was to be interpreted as an objective requirement—in the sense that the subject should not *actually cause* the greater harm he or she intended. If this was the case the provision would merely exclude the defence when the conduct intentionally exceeds what is strictly necessary to avoid the threatened harm. In substance, it would merely reiterate the irrelevance, like in any other domestic or international system, of intentional excess in defence [*eccesso doloso*]. To the contrary, requiring the accused not to *intend to cause* a greater harm than the one sought to be avoided switches the focus from the objective materiality to the subjective intentionality. In other words, even if the accused acted under the pressure of an irresistible and not otherwise avoidable threat, if he or she intended to cause a greater harm than the one threatened, this defence would not be applicable. […] In this sense, the norm reflects the compromising nature of this *defence* in that while it does not require a rigorous application of objective proportionality between harms (typical of *justifications*) it does requires something more [*quid pluris*] in terms of subjective element [*esigibilità*] typical of duress.

[…]

Various excerpts from K. Ambos (ed.), *Rome Statute of the International Criminal Court: Article-by-Article Commentary* 4th Ed. (C.H. Beck/Hart/Nomos, 2022), pp. 141-142, 179-183, 290-293, 1091, 1109-1110, 1347, 1351-1357, 1370-1376, 1949, 1955-1958

(Sijthoff & Noordhoff 2nd edition 1979); Whitaker, B., Report on Slavery, UN. Doc. E/CN.4/Sub.2/1982/20/Rev.l, UN Sales No. E.84.XIV.1.

Note by the editor: the former items 6–9 (Decisions of the ICTY and ICTR, Decisions of national courts, national legislation) have not been continued and can be consulted in the previous edition at pp. 149–151.

Content

A. Introduction/General remarks*

1 The definition of Crimes against Humanity ('CaH') has evolved and become further clarified since this concept first received explicit international legal recognition in the *St.*

* Kai Ambos acknowledges the important research assistance of Jacopo Governa.

Crimes against humanit

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[1] Declaration Renouncir
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(1906) 380. – More likely,
international law, such as
Belli Ac Pacis (On the Law
binding men and nations
Principles of Natural Law
citing Grotius, declared t
Attorney General (1821) 5
CaH (Parker, *The New C*
reform, G.W. Curtis, also
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'CaH' over which any Stat

[2] Hague Convention re
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the protection and empire
between civilised nations,
Martens Clause is named
Lippman (1997) 17 *BCTh*
Macht (2008) 414, 428–9
Henham, *Genocide* (2013)

[3] See, *e.g.*, Hague Conv
para. 8; Article 63 Conver
Forces in the Field (First
Amelioration of the Cond
(Second GC), 12 Aug. 194
of Prisoners of War ('Th
Relative to the Protection
Article 1(2) Add. Prot. I;

[4] Declaration of Franc
178, 181. The date of 28
fn. 129. The history of t
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protests and military hun
See *U.S. v. Altstötter (Just*
4 LRTWC 1 (HMSO 194
191, 191–2.

have to share common characteristics and, perhaps, could simply be groups that existed as such only in the mind of the person responsible, such as all persons believed to be traitors to the State or 'subversives'. Killings of members of protected groups which amount to genocide under Article 6(a) would, if committed on a large scale, constitute extermination within the meaning of Article 7(1)(b), but killings do not need to be on a large scale to constitute genocide and not all cases of extermination would amount to genocide under the Statute. This view has to some extent been confirmed by subsequent jurisprudence of international criminal courts, although that jurisprudence is not entirely consistent, and by the elements of this crime in the Elements (see below mn. 212 ff.).

46 One of the specificities of the ICC Statute is that it contains a synergy to genocide under Article 6(c), through its explicit reference to the infliction of 'conditions of life calculated to bring about the destruction of part of a population'.[275] Ambos even goes so far as to argue that the crime 'essentially consists of the creation of deadly living conditions amounting to widespread "mass" killings, which targets groups of persons'.[276] This view contrasts with the more flexible jurisprudence of the *Ad Hoc* Tribunals which have recognised extermination irrespective of the 'creation of conditions of life' leading to death.[277] It is questionable whether the framing of the Statute is meant to exclude this flexibility. The Elements indicate specifically that the 'conduct could be committed by different methods of killing, either directly or indirectly'.[278] It is thus more convincing to argue that extermination 'may be applied to acts committed with the intention of bringing about the death of a large number of victims either directly, such as by killing the victim with a firearm, *or* less directly, by creating conditions provoking the victim's death'.[279]

47 In the ICC context, extermination has been charged in the Darfur Situation. PTC I, in particular, confirmed with reference to ICTY and ICTR case-law that extermination requires that 'the relevant killings constitute or take place as part of "a mass killing of members of a civilian population"'.[280] Although extermination involves killings on a large scale, individuals may be held criminally responsible under Article 7 for even one death, provided that it was part of large-scale killings.[281] This is made clear by the Elements (for the scope of the crime of extermination under Article 7, see below mn. 212 ff. concerning Article 7(2)(b)).

48 **c) 'Enslavement'.** Slavery and the slave trade were among the earliest violations of human rights to be recognised as crimes under international law, although they were the subject of a comprehensive treaty only when the 1926 Slavery Convention was adopted.[282] Slavery and the slave trade in their traditional forms have all but vanished,

[275] Schabas, *ICC Commentary* (2016) 174; Mettraux, *CaH* (2020) 6.3.2.4.

[276] Ambos, *Treatise ICL II* (2014) 84.

[277] See *Kayishema and Ruzindana*, ICTR-95-1-T, para. 144 ('The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others'); *Krstić*, IT-98-33-T, para. 503 ('there must be evidence that a particular population was targeted and that its members were killed or otherwise subjected to conditions of life calculated to bring about the destruction of a numerically significant part of the population').

[278] See Article (7)(1)(b) Elements, (1), fn. 8.

[279] Emphasis added. See *Krstić*, IT-98-33-T, para. 498; Bassiouni, *Crimes* (2011) 372; Schabas, *ICC Commentary* (2016) 174–175.

[280] *Al Bashir*, ICC-02/05-01/09-3, para. 96.

[281] See also Ambos, *Treatise ICL II* (2014) 85, stressing the need for a 'combined effect of a vast murderous enterprise and the accused's part in it'.

[282] *Slavery Convention*, signed 25 Sep. 1926, entered into force 9 Mar. 1927 (committing States '[t]o bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms' and '[t]o prevent and suppress the slave trade'). For the early efforts to end slavery and the slave trade in one

but other forms of slavery continue to persist, as well as a wide variety of forms of slavery-like practices, including servitude and forced labour and trafficking, particularly involving women and children (see discussion below in mn. 220 ff.).[283] International law has evolved to address these new forms.[284] The prohibition of slavery is also found in provisions of general human rights instruments.[285] Each of the human rights treaties prohibiting slavery and servitude provide that these prohibitions are non-derogable, although not all of these treaties provide that other forms of enslavement are non-derogable. All forms of slavery are now a violation of IHL as well.[286] There was general agreement throughout the drafting process that enslavement should be included in the list of CaH over which the Court would have jurisdiction.[287]

49 The CaH of enslavement has consistently been considered since 1945 to include slavery and most of the subsequent slavery-like practices, as well as related practices of forced labour. Article 6(c) Nuremberg IMT Charter included enslavement as a CaH and deportation to slave labour as a war crime. Several defendants were convicted by the Nuremberg Tribunal of acts of enslavement as CaH and deportation to slave labour as war crimes. In the CC Law No. 10 trials, the nature of enslavement has been aptly described in the *Pohl* case, as follows:

> *'Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived*

part of the world, see Thomas, *Slave Trade* (1997). See also Kaye, *Slavery* (2005); Allain (2009) 52 *HowardLJ* 239; Allain and Hickey (2012) 61 *ICLQ* 915.

[283] For extensive documentation of contemporary forms of slavery, see <http://www.antislavery.org> accessed 14 Mar. 2020.

[284] Among the human rights instruments expressly addressing these evils are the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, adopted 7 Sep. 1956, entered into force 30 Apr. 1957; *Convention concerning Forced or Compulsory Labour* (Convention No. 29), adopted 28 Jun. 1930, entered into force 1 May 1932; *Convention concerning the Abolition of Forced Labour* (Convention No. 105), adopted 25 Jun. 1957, entered into force 17 Jan. 1959.

[285] See Article 4 UDHR (slavery, servitude and the slave trade); Article 4(1) ECHR (slavery, servitude, slave trade and forced or compulsory labour); Article 8 ICCPR (slavery, servitude and forced or compulsory labour); Article 6(1) ACHR (slavery, involuntary servitude, slave trade, traffic in women and forced or compulsory labour); Article 5 AfricanChHPR (slavery and the slave trade).

[286] Article 4(2)(f) Add. Prot. II prohibits 'slavery and the slave trade in all their forms' in NIAC.

[287] Enslavement was proposed in the *Ad Hoc* Committee to be included in the list of CaH, but it was also suggested that this was one of the crimes for which it was necessary to elaborate further its content. *Ad Hoc* Committee Report, 17. Enslavement was included as the third CaH in three separate lists (in two, without further elaborations, and in the other, it was described as '[including slavery-related practices and forced labour]; [establishing or maintaining over persons a status of slavery, servitude or forced labour]', see PrepCom II 1996, 65, 67. An explanatory statement was included in an annex to one of the lists which said: 'Enslavement means intentionally placing or maintaining a person in a condition in which any or all of the powers attaching to the right of ownership are exercised over him'. *id.*, 68. The report further explained:
'Some delegations expressed the view that enslavement required further clarification based on the relevant legal instruments. There were proposals to refer to enslavement, including slavery-related practices and forced labour; or the establishment or maintenance over persons of a status of slavery, servitude or forced labour. The view was expressed that forced labour, if included, should be limited to clearly unacceptable acts'.
PrepCom I 1996, 24. In Feb. 1997, the PrepCom list of crimes simply included enslavement, without any further elaboration. Enslavement, again without further elaboration, was also the third CaH listed in Article 5 [20] Zutphen Draft, and it remained the same in Article 5 of the April 1998 New York Draft. – One participant in the RomConf has stated that the drafters focused on the exercise of the powers attaching to the right of ownership as the main characteristic of enslavement, see McCormack, in: McGoldrick *et al.*, *ICC* (2004) 179, 191, but, as is clear from the drafting history and the nature of the crime, as described below, the crime includes contemporary forms of slavery, which involve a range of other characteristics.

of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.'

Slavery has been recognised as a CaH in subsequent instruments.[288] The ILC in its comment on Article 18(d) ILC Draft Code 1996 listing enslavement as a CaH explained that '[e]nslavement means establishing or maintaining over persons a status of slavery, servitude or forced labour contrary to well-established and widely recognised standards of international law', citing, in an illustrative list, some of the human rights treaties mentioned above.[289] For the history of international legal steps to abolish trafficking, see below mn. 222.

The crime of enslavement has, at least since the end of WW II, encompassed three components: slavery, servitude and forced or compulsory labour. *Slavery* is defined in Article 1(1) of the 1926 Slavery Convention as the 'status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised'. As the ICTY has noted, the concept of slavery, like that of servitude, is broad enough to encompass persons carrying out the slave trade.[290] The concept of *servitude* is much broader than the traditional concept of slavery and has been viewed by one commentator as applying 'to all conceivable forms of dominance and degradation of human beings by human beings', including slavery-like practices such as serfdom, debt bondage, traffic in women and children, compulsory betrothal of women, child labour and prostitution where the victims are not merely economically exploited, but totally dependent on others.[291] *Forced or compulsory labour* has been defined in Article 2(1) of ILO Convention No. 29 as 'all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'.[292] The jurisdiction of the Court over enslavement under Article 7(1) is more limited, not only by the *chapeau* to the Article, but also by para. (2)(c) (see below mn. 220). The first part of the latter provision defines enslavement in a similar way to the 1926 Slavery Convention definition of slavery but describes the act of enslavement – the exercise of powers of ownership over someone – rather than describing the status or condition of the victim. 50

However, despite this language it would be wrong to conclude that the jurisdiction of the Court over the crime of enslavement under para. (1)(c) was necessarily limited to 51

[288] Article II(1)(c) Allied CC Law No. 10; Article 5(c) IMTFE Charter; Principle VI(c) Nuremberg Principles; Article 2(10) ILC Draft Code 1954 (inhuman acts); Article 5(c) ICTY Statute; Article 3(c) ICTR Statute; Article 18(d) ILC Draft Code 1996; Sec. 5(1)(c) and 5(2)(b) UNTAET Reg. 200/15; Article 2(c) SCSL Statute; Article 5 ECCC Law; and it was included as a charge in several indictments issued by the two International Criminal Tribunals before the RomConf. See, for example, ICTY, *Prosecutor v. Gagović (Foča)*, Prosecutor, Indictment, IT-96-23-I, 26 Jun. 1996, para. 4.8 (acts of forcible sexual penetration of a person or forcing a person to penetrate another sexually). See discussion below under Article 7(1)(g) of rape and other sexual violence. For recent jurisprudence concerning enslavement, see mn. 220 ff. (regarding Article 7(2)(c)).

[289] ILC Draft Code 1996, 98.

[290] *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, paras. 520–1.

[291] Nowak, *CCPR Commentary* (2005) 199.

[292] Not all forced or compulsory labour is prohibited in all circumstances. For standards in peacetime, see ILO, *Convention Concerning Forced or Compulsory Labour* (No. 29) (1930); Article 8(3)(c) ICCPR. In addition, under strictly limited conditions civilians can be compelled to perform some forms of labour during an armed conflict. Article 40 IV GC; Article 5(1)(e) Add. Prot. II. See also ICTY, *Krnojelac*, IT-97-25-T, para. 359; *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, para. 542; *Naletilić and Martinović*, IT-98-34-T, paras. 250–335.

the practice of traditional forms of slavery.[293] Given the horrors of enslavement during the WW II and the new forms of enslavement practiced in former Yugoslavia and Rwanda, it is difficult to believe that the drafters intended to restrict the Court's jurisdiction to a merely symbolic one over traditional forms of slavery where legislation provided that one human being had the right to own another human being as a mere chattel. No State has such legislation. Had the Court existed in 1945, under such a restrictive reading it would not have had jurisdiction over the persons who used slave labour in Nazi Germany. Moreover, the inclusion of the slavery-like practice of trafficking in persons as one form of enslavement (see mn. 222), which is not a traditional form of slavery, but normally classified as servitude, is further evidence that the drafters did not wish the Court's jurisdiction to be limited to traditional forms of slavery.[294] The concept of exercising powers of ownership should be understood as broader than simply the exercise of control over another person within a legal framework which enables the person exercising control to go to court to enforce rights under national law over another person as a chattel, given that no State had such a legal system at the time the Rome Statute was adopted. It should also be seen as including the exercise of powers of *de facto* ownership contrary to national law. Indeed, some countries, such as the U.S., have prosecuted private individuals for slavery where national law prohibits slavery.

52 Given the history of the struggle over more than two centuries to abolish slavery, slavery- like practices and forced labour, it is logical to assume that the drafters wished the Court to have jurisdiction over other slavery-like practices such as serfdom and debt bondage, as well as related practices, such as forced or compulsory labour, as CaH. As described below (see mn. 220 ff.), jurisprudence and the Elements have confirmed the view expressed in the first edition of this Commentary that the CaH of enslavement includes contemporary forms of slavery. The reference to 'similar deprivation of liberty' in the Elements makes it clear that the crime must be be understood in a 'functional' sense.[295] A broad reading receives further support from the interpretation of the concept of 'ownership' in the context of sexual slavery (see Article 7(1)(g)) which contains an identical description of ownership in Element (1) of the Elements. In the *Katanga* Judgment, TC I associated the right of ownership over the victim with the creation of a situation of dependence that deprives the victim of all autonomy.[296] It took into account in particular the victim's own subjective perception of the situation.[297] As later confirmed in *Ntaganda*, the exercise of ownership can be shown by a 'combination of factors' such as, 'the detention or captivity in which the victim was held and its

[293] The first five arrest warrants issued by the Court each include counts of enslavement as a CaH. See ICC, *Situation in Uganda*, PTC II, Warrant of Arrest for Joseph Kony Issued on 8 Jul. 2005 as amended on 27 Sep. 2005, ICC-02/04-01/05-53, 27 Sep. 2005 (counts 11, 21 and 28); *Situation in Uganda*, PTC II, Warrant of Arrest for Dominic Ongwen, ICC-02/04-01/05-57, 8 Jul. 2005 (count 28); *Situation in Uganda*, PTC II, Warrant of Arrest for Raska Lukwiya, ICC-02/04-01/05-55, 8 Jul 2005 (count 6); *Situation in Uganda*, PTC II, Warrant of Arrest for Okot Odhiambo, ICC-02/04-01/05-56, 8 Jul. 2005 (count 11); *Situation in Uganda*, PTC II, Warrant of Arrest for Vincent Otti, ICC-02/04-01/05-54, 8 Jul. 2005 (counts 6, 11, 21 and 28). However, the arrest warrants are heavily redacted and the Prosecutor's application for Warrants of Arrest under Article 58, dated 6 May 2005, as amended and supplemented by the Prosecutor on 13 May 2005 and 18 May 2005, as well as the hearing on the application, remain under seal, so it is impossible to determine what the factual and legal basis was for each count. *Situation in Uganda*, PTC II, Decision on the Prosecutor's Application for Warrants of Arrest under Article 58, ICC-02/04-01/05-1-US-Exp, 8 Jul. 2005 (unsealed pursuant to Decision ICC-02/04-01/05-52, 13 Oct. 2005). See also Mettraux, *CaH* (2020) 6.4.1.4.

[294] See also Van der Wilt (2014) 13 *ChineseJIl* 297.

[295] See Werle and Jessberger, *Principles ICL* (2020) 389.

[296] *Katanga*, ICC-01/04-01/07-3436, para. 976. See generally Stahn (2014) 12 *JICJ* 809, 820–1.

[297] *Katanga*, ICC-01/04-01/07-3436, para. 976.

duration, the limitations to the victim's free movement, measures taken to prevent or deter escape, the use of force, threat of force or coercion, and the personal circumstances of the victim, including his/her vulnerability'.[298] In *Katanga*, the TC specifically included in Article 7(1)(g)[299] situations in which women and girls were forced to 'share' their life with a person with whom they had to perform acts of a sexual nature. In addition, many of these practices would amount to other inhumane acts within the Court's jurisdiction under para. (1)(k) when they 'intentionally [cause] great suffering, or serious injury to body or to mental or physical health', which would often occur in such cases. These practices could also amount to persecution where they satisfied the requirements of para. (1)(h) and para. (2)(g) (see below mn. 141 ff. and 252 ff.), or, in the context of certain systems of racial discrimination, 'the crime of apartheid' under para. (1)(j) (see mn. 183 ff.).

One weakness of the ICC definition that has been criticized in recent scholarship is 53
the marginalization of the crime of slave trade.[300] This crime has gained renewed attention in relation to ISIS policies preceding enslavement of Yazidi. Slave trade is listed as a separate crime in the 1926 Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery and Article 4 (2) (f) Add. Prot. II. It captures 'all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery'.[301] It may pre-date actual enslavement.[302] It is more offender than victim-centred, by focusing on the intent of the perpetratror to reduce a person into *de jure* or *de facto* slavery, and does not require the result to occur. Through its emphasis on the exercise of powers attaching to the right of ownership over a person, the ICC definition leaves certain ambiguities in relation to precursory acts of enslavement (*e.g.*, capture, transit, arrangements to buy or sell without ownership).[303]

d) 'Deportation or forcible transfer of population'. Article 7(1)(d) protects 'the 54
right and aspiration of individuals to live in their communities and homes without outside interference'.[304] It includes both, 'deportation' and 'forcible transfer'. Although these terms have not always been used consistently in international law, it is common to distinguish between deportation, meaning 'the forced removal of people from one country to another', and forcible transfer of population, meaning 'compulsory movement of people from one area to another within the same State'.[305] As explained below,

[298] *Ntaganda*, ICC-01/04-02/06-309, fn. 209.
[299] *Katanga*, ICC-01/04-01/07-3436, para. 978.
[300] See Sellers and Kestenbaum (2020) 18 *JICJ* 517; Allain, *Slavery* (2013) 274.
[301] Article 1 Slavery Convention.
[302] Allain, *Slavery Conventions* (2008) 65.
[303] The Elements qualify 'purchasing, seling, lending or bartering' persons as examples of the exercise of powers of ownership.
[304] See *Krnojelac*, IT-97-25-A, para. 218.
[305] The Commentary to Article 18(g) ILC Draft Code 1996 explained: 'Whereas deportation implies expulsion from the national territory, the forcible transfer of population could occur wholly within the frontiers of one and the same State'. Part 2, (1996) 2 *YbILC* 48. See also Bassiouni, *Crimes* (1992) 301; Mettraux (2002) 43 *HarvILJ* 237, 288. Jurisprudence since the RomeConf has confirmed this distinction. The TC in the *Milošević* case reviewed the law and commentaries and concluded that '[t]he jurisprudence of the Tribunal is not uniformly consistent in relation to the element of cross-border movement although … the preponderance of case law favours the distinction based on destination'. ICTY, *Prosecutor v. Milošević*, TC, Decision on Motion for Judgement of Acquittal, IT-02-54-T, 16 Jun. 2004, para. 58. The TC, in *dicta*, citing the first ed. of this Commentary, concluded that the drafters incorporated the same distinction in the Rome Statute. See also *Naletilić and Martinović*, IT-98-34-T, para. 670 (finding no persecution by deportation because there was no movement across a State frontier); *Stakić*, IT-97-24-A, paras 300 (deportation involves forcible transfers across national frontiers, from occupied territory and, 'under certain circumstances, displacement across a *de facto* border') and 302 (rejecting TC's expansion of the definition to include forcible transfers across

241 As noted by the ICTY in *Kunarac et al.*, the characteristic trait of torture lies 'in the **nature of the act** committed', rather than 'in the status of the person who committed it'.[1080] There is no requirement, in contrast to Article 1 CAT, which focuses on State responsibility for the human rights violation of torture, that the pain or suffering be 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[1081] This omission, which follows from the threshold requirement in para. 2 that the attack be pursuant to 'a State or organisational policy', echoes the omission of a similar requirement in the definition of enforced disappearances.[1082] Thus, torture in peacetime or during armed conflict by members of armed political groups not connected to any State could be a CaH under subpara. (2)(f). For requirements as to the organisation of non-State actors, as established in ICC jurisprudence, see above mn. 209.

6. 'Forced pregnancy'

242 This CaH proved to be one of the most difficult and controversial to draft.[1083] It was included partially in response to well-documented reports of widespread instances of forced pregnancy arising in the context of the conflicts in the former Yugoslavia and in Rwanda. The Statute recognizes forced pregnancy as both a CaH (Article 7(1)(f)) and as a war crime (Article 8(2)(b)(xxii) and 8(2)(e)(vi)). The impetus behind its inclusion was influenced by advances made by the women's human rights movement in the years leading up to Rome,[1084] and was driven in large part by the concerted efforts of civil society organisations, in particular the Women's Caucus for Gender Justice.

243 The primary source of difficulty with the provision lay in the concerns of certain States, such as Saudi Arabia, Libya, the United Arab Emirates, Kuwait, Iran, Egypt, and in particular, the Holy See, that the inclusion of the offence could be interpreted as an implicit endorsement of the right of access to abortion; a right they fervently contest.[1085] In addition to their opposition on grounds relating to the potential implications its inclusion would have on further recognition of a range of rights relating to reproductive self-determination, several States suggested that its inclusion was unnecessary as the conduct was already subsumed within the offence of rape.[1086] The Holy See proposed an alternative provision relating to 'forced impregnation', while BiH proposed a definition specifically linked with campaigns of ethnic cleansing.[1087] However, none of these

[1080] *Kunarac et al.*, IT-96-23-T & IT-96-23/1-T, para. 495 (emphasis added).
[1081] *Kunarac et al.*, IT 96–23 & IT-96-23/1-A, para. 148.
[1082] This omission is also consistent with the CIL definitions of torture as a war crime or a CaH according to the jurisprudence of the ICTY and ICTR.
[1083] See Bedont and Hall-Martinez (1999) 6 *BrownJWorldAff* 65, 73–4; Ambos, *Treatise ICL II* (2014) 101–2; Grey (2017) 15 *JICJ* 905.
[1084] Vienna Declaration and Programme of Action, UN Doc A/CONF.157/23, 13 Jul. 1993 , paras. 38; Beijing Declaration and Platform for Action, UN Doc A/CONF.177/20, 15 Sep. 1995, paras. 114, 132 and 135; UN CHR, Res. 1998/52, UN Doc E/CN.4/RES/1998/52, 17 Apr. 1998, para. 4; UN CHR, Res. 1998/76, UN Doc E/CN.4/1998/177, 22 Apr. 1998, para. 13(a); UN CHR Res. 1997/44, UN Doc E/CN.4/1998/54, 11 Apr. 1997, para. 4; UN CHR, Res. 1997/78, UN Doc E/CN.4/RES/1997/78, 18 Apr. 1997, para. 13(a); UN CHR, Res.1996/49, UN Doc E/CN.4/RES/1996/49, 19 Apr. 1997, para. 5; and UN CHR, Res. 1995/85, UN Doc E/CN.4/RES/1995/85, 8 Mar. 1995, para. 5.
[1085] UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC – OR – Vol. II, UN Doc A/Conf.183/13 (Vol. II); statement of the delegate from Saudi Arabia (148 and 163), and the statement of the delegate from Islamic Republic of Iran (166).
[1086] *Ibid.* See statement of the delegate from the Libyan Arab Jamahiriya (160); statement of the delegate from the United Arab Emirates (160); statement of the delegate from Kuwait (162); statement of the delegate from Egypt (164); statement of the delegate from Senegal (167).
[1087] *Ibid.*, 161.

proposals found support as they failed to properly encapsulate the nature and extent of the harms arising from forced pregnancy, in particular the profound consequences such conduct has on the reproductive autonomy of the victim.

The inclusion of the definition of the offence under Article 7(2)(f) was intended to address the concerns of States that restrict or do not recognize women's right to choose. This was achieved through the insertion of an express caveat that the definition 'shall not in any way be interpreted as affecting national laws relating to pregnancy'. As a consequence, forced pregnancy is the only act under Article 7(1)(g) to be specifically defined under Article 7(2), while also being the only act under Article 7 to include an express caveat relating to national legislation; as such it is a prime example of a provision drafted in accordance with an agreed political compromise. In addition, it is worth noting that forced pregnancy is the only offence under the Rome Statute that is gender specific, in that it can only be committed against women. **244**

The offence, and in particular the definition under Article 7(2)(f), continues to be a source of controversy, as has been evident in the discussions relating to its inclusion in the ILC's Draft Articles on CaH. Commenting on the replication of the provision in the Draft Articles, one civil society organisation has argued that its definition under Article 7(2)(f), 'gives undue authority to religious and ideological concerns about control over women's bodies rather than addressing the grave violation that it seeks to remedy'.[1088] The Rome Statute has been justifiably lauded for its progressive inclusion of a broad and non-exhaustive range of acts of sexual and gender-based violence. The inclusion of forced pregnancy and forced sterilization under Article 7(1)(g) are expressive of the desire of States to bring acts of reproductive violence within the prescriptive scope of the Statute.[1089] However, as Grey has argued, while the Rome Statute goes further than any other ICL instrument in addressing reproductive violence it is in no sense comprehensive, with no provision made for related acts such as forced impregnation, forced miscarriage and forced abortion.[1090] In this sense, the inclusion of forced pregnancy and forced sterilization can only be considered a 'qualified success'.[1091] The offence was charged for the first time in the *Ongwen* case (under Article 7(1)(g) and Article 8(2)(e)(vi)) with the Prosecution arguing that '[t]he value protected by the criminalization of forced pregnancy is primarily reproductive autonomy'.[1092] **245**

a) 'unlawful confinement'. The words 'unlawful confinement' are to be interpreted as inclusive of any form of deprivation of physical liberty contrary to international law and standards (see above mn. 65 ff.). In contrast to subpara. (1)(e), this definition does not require the deprivation of liberty be 'severe'. **246**

b) 'forcibly made pregnant'. 'Forcible' means 'done by or involving force'[1093] which does not necessarily require the use of violence, but includes any form of coercion. As established in the *Furundžija* case, any form of 'coercion or force or threat of force against the victim or a third person'[1094] negates consent as does any form of captivity or unlawful confinement.[1095] This principle applies with equal force to the crime of forced pregnancy. The act of forcibly impregnating a woman as such does not necessarily have **247**

[1088] Global Justice Center, *Gender-Perspective* (2018) 6.
[1089] Grey (2017) 15 *JICJ* 905, 906.
[1090] *Ibid.*, 918.
[1091] *Ibid.*, 921, quoting Chappell, in: Abu-Laban, *Gendering* (2008) 139, 154.
[1092] ICC, *Prosecutor v. Ongwen*, OTP, Prosecution Pre-Trial Brief, ICC-02/04-01/15-533, 6 Sep. 2016, para. 512.
[1093] *The Oxford Concise Dictionary of Current English* 522 (8th ed. 1990) 459–60.
[1094] *Furundžija*, IT-95-17/1-T, para. 185.
[1095] *Ibid.*, para. 271.

to be committed by the person confining the woman. Such an act would be subsumed with the crime of rape or could be classified as 'any other form of sexual violence of comparable gravity'. In this regard, the PTC has held that, 'the crime of forced pregnancy does not depend on the perpetrator's involvement in the woman's conception; it is only required that the perpetrator knows that the woman is pregnant and that she has been made pregnant forcibly'.[1096]

248 **c) 'intentional'.** By requiring a form of specific intent, a situation in which a woman, held in 'unlawful confinement', conceives or gives birth to a child as a result of sexual violence as such, does not in itself amount to the crime of forced pregnancy. The perpetrator of forced pregnancy must also have committed the crime of confining a woman, who has been forcibly made pregnant, either 'with the intent of affecting the ethnic composition of any population', or with the intent of 'carrying out other grave violations of international law', which includes the crime of genocide,[1097] CaH, war crimes, torture and enforced disappearances etc. The second aim was added to include many other purposes for which forced pregnancy has been committed.[1098] For example, Ongwen, charged as a direct perpetrator, was alleged to have 'confined women who had been forcibly made pregnant, with the intent to carry out grave violations of international law, including to use them as his forced wives and to rape, sexually enslave, and torture them'.[1099]

249 In confirming the charges against Ongwen, PTC II stated that it is 'the act of confinement which must be carried out with the required special intent', and that, 'the essence of the crime of forced pregnancy is in unlawfully placing the victim in a position which she cannot choose whether to continue the pregnancy'.[1100] Further clarification was provided on the scope of the special intent requirement in the following terms:

> *'[I]t is not necessary to prove that the perpetrator has a special intent with respect to the outcome of the pregnancy, or that the pregnancy of the woman is in any way casually linked to her confinement. While the first alternative of the special intent requirement (intent of "affecting the ethnic composition of any population") would typically include such component, the second alternative (intent of "carrying out other grave violations of international law") does not call for any such restrictive interpretation.'*[1101]

250 The Elements have only one non-contextual element for this crime:

> *'1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law'.*

It simply restates the first sentence of subpara. (2)(f) in the form of a criminal statute.

251 **d) National laws regarding pregnancy.** As has been discussed, the last sentence of subpara. (2)(f) is included to ensure that the definition of forced pregnancy does not affect or impact on national laws regarding pregnancy. It is the only crime under the Rome Statute that includes a caveat linked to national legislation. Evidently, national

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[1096] *Ongwen*, ICC-02/04-01/15-422-Red., para. 99. On this jurisprudence, see also Mettraux, *CaH* (2020) 6.13.4.2.

[1097] Salzman (1998) 20 *HumRtsQ* 348, 365–6.

[1098] Bedont and Hall-Martinez (1993) 6 *Brown JWorldAff* 65, 73–4 ('For example, during the Second World War, Jewish women were forcibly made pregnant so that they and their fetuses could be used for medical experiments'.).

[1099] *Ongwen*, ICC-02/04-01/15-422-Red., para. 101.

[1100] *Ibid.*, para. 99.

[1101] *Ibid.*, para. 100.

laws which prohibit or limit access to safe and legal abortion do not amount to forced pregnancy as defined under the Statute, unless they are intended to affect the ethnic composition of any population or to carry out grave violations of international law. Consequently, the inclusion of the caveat is entirely superfluous.[1102] That being said, such laws may be contrary to international human rights standards. For example, HRC General Comment 36 on the right to life under Article 6 ICCPR acknowledges the right of States to regulate access to abortion, but states that 'such measures must not result in violation of the right to life of a pregnant woman or girl, or her rights under the Covenant'.[1103] Furthermore, '[S]tates parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or is not viable'.[1104]

7. 'Persecution'

In contrast to previous instruments which included the crime of persecution as a CaH, the Statute provides for a definition of the crime. In the commentary to Article 21 of the ILC Draft Code 1991, the ILC stated that persecution 'relates to human rights violations other than those covered by the previous paragraphs [...] [which] seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied'.[1105] In their commentary to this Code several States argued that there is no agreed definition of persecution in any international instrument and one State in particular said that the crime of 'persecution on social, political, racial, religious or cultural grounds' is so vague that it could mean almost anything.[1106] This objection was reiterated during the *Ad Hoc* Committee sessions[1107] and the meetings of the PrepCom.[1108] However, the drafters in Rome had the benefit of two significant developments. First, the ILC commentary to its 1996 Draft Code, which modified the definition slightly by replacing cultural grounds with ethnic grounds, provided greater precision in stating that the 'common characteristic' of the many forms of persecution was 'the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (Articles 1 and 55) and the International Covenant on Civil and Political Rights (Article 2)'.[1109] Second, as discussed below, the ICTY TC in its 1997 judgment in the *Tadić* case developed a definition based on an analysis of a number of sources, including the ILC Draft Code 1996, national jurisprudence and 252

[1102] This point was made by Estonia in their comments on the offence as included in the ILC's Draft Articles on CaH: 'Taking into account that the first sentence of the definition specifically emphasizes the convention to cover cases of unlawful confinement of a woman forcibly been made pregnant with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law, this supplementary sentence is confusing and should be considered irrelevant and therefore removed from the text'. ILC, CaH: Comments and Observations Received from Governments, International Organizations and Others, UN Doc A/CN.4/726, 21 Jan. 2019, 40.

[1103] HRC, General Comment No. 36 (2018) on Article of the ICCPR, on the Right to Life, UN Doc CCPR/C/GC/36, 30 Oct. 2018, para. 8.

[1104] *Ibid.*

[1105] ILC Draft Code 1991, (1991) 2 *YbILC* 104, 268.

[1106] 'According to several delegations [.], the list of offences should not include persecution which was considered too vague a concept', ILC, 'ad hoc Committee Report' (1995) UN Doc A/50/22, 17.

[1107] 'According to several delegations [.], the list of offences should not include persecution which was considered too vague a concept', ad hoc Committee Report, 17.

[1108] PrepCom Report 1996 I, 19.

[1109] Commentary to Article 18 ILC Draft Code 1996.

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Article 20
Ne bis in idem

1. Except as provided in this Statute, no person shall be tried before the Court with respect to conduct which formed the basis of crimes for which the person has been convicted or acquitted by the Court.

2. No person shall be tried by another court for a crime referred to in Article 5 for which that person has already been convicted or acquitted by the Court.

3. No person who has been tried by another court for conduct also proscribed under Article 6, 7, 8 or 8*bis* shall be tried by the Court with respect to the same conduct unless the proceedings in the other court:

(a) Were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court; or

(b) Otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.

Literature: AI, *ICC V* (1998); AIDP (ed.), 'Resolution of Section IV Concurrent National and International Criminal jurisdiction and the Principle "Ne bis in idem"', adopted by the XVII. International Congress of Penal Law, 12–19 Sep. 2004 in Beijing', (2004) 75 *RIDP* 802; Amar, A.R., 'Double Jeopardy Law Made Simple', (1997) 106 *YaleLJ* 1807; Bartsch, H.-J., 'Ne bis in idem: The European Perspective', (2002) 73 *RIDP* 1163; Bassiouni, M.C., 'Negotiating the Treaty of Rome on the Establishment of the ICC', (1999) 32 CornellILJ 443; Bassiouni and Manikas, *ICTY* (1996); *id.*, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', (1993) 3 *DukeJComp&IL* 235; Baum, L.M., 'Pursuing Justice in a Climate of Moral Outrage: An Evaluation of the Rights of the Accused in the Rome Statute of the ICC', (2001) 19 *WisconsinILJ* 197; Benzing, M. and Bergsmo, M., 'Some Tentative Remarks on the Relationship Between Internationalized Criminal Jurisdictions and the ICC', in: Romano *et al.*, *Internationalized Criminal Courts* (2004) 407; Bernard, D., 'Article 20' in: Fernandez et al., *Commentaire* I (2019) 941; *id.*, *Juger et juger encore les crimes internationaux. Etude du principe ne bis in idem* (Larcier 2014); *id.*, '"Ne Bis in Idem": Protector of Defendants' Rights or Jurisdictional Pointsman?', (2011) 9 *JICJ* 863; Birklbauer, A., 'Der Grundsatz "Ne bis in idem" in der Rechtsprechung europäischer Instanzen und die Auswirkung auf den Tatbegriff der öStPO', in: Moos *et al.* (eds.), *Strafprozessrecht im Wandel, FS für Roland Miklau*, iii (StudienVerlag 2006) 45; Błachnio-Parzych, A., 'Solutions to the Accumulation of Different Penal Responsibilities for the Same Act and Their Assessment from the Perspective of the Ne Bis in Idem Principle', (2018) 9 *NJECL* 366; Black, H.C., *Law Dictionary* (Thomas Reuters 6th ed. 1997); Bogensberger, W., 'Die Anwendung des transnationalen Ne-bis-in-idem-Prinzips in Europa – and the Oscar for the development of standards goes to … the Court', in: Moos *et al.* (eds.), *Strafprozessrecht im Wandel, FS für Roland Miklau*, iii (StudienVerlag 2006) 91; *Bohlander, M.*, 'Possible Conflicts of Jurisdiction with the Ad Hoc International Tribunals', in: Cassese *et al.*, *Rome Statute I* (2002) 607; Böse, M., *The Transnational Dimension of the ne bis in idem Principle and the Notion of res iudicata in the EU Justice Without Borders* (Brill Nijhoff 2018); Brady, H. and Jennings, M., 'Appeal and Revisions, in: Lee, *ICC* (1999) 294; Broomhall, B., International Justice (OUP 2003); *id.*, 'The ICC: A Checklist for National Implementation', (1999) 13*quarter NEP* 113; Burchard, C. and Brodowski, D., 'The Post-Lisbon Principle of Transnational Ne Bis in Idem: On the Relationship Between Article 50 Charter of Fundamental Rights and Article 54 CISA: Case Note on District Court Aachen, Germany, (52 Ks 9/08 – 'Boere'), Decision of 8 Dec.', (2010) 1 *NJECL* 310; Campanella, S., 'Il Ne bis in idem nella giustizia internazionale penale: riflessioni su un principio in itinere', in: Cassese, Chiavario and De Francesco (eds.), *Problemi attuali della giustizia penale internazionale* (G. Giappichelli Editore 2005) 253; Carter, L.E., 'The Principle of Complementarity and the ICC: the Role of Ne Bis in Idem', (2010) 8 *SantaClaraJIL* 165; Cassese, ICL (2003); Conway, G., 'Ne Bis in Idem in International Law', (2003) 3 *ICLRev* 217; *id.*, 'Ne bis in idem and the International Criminal Tribunals', (2003) 14 *CLF* 351; Costa, J.E., 'Double Jeopardy and Non Bis in Idem: Principles of

formulation to describe the scope of *ne bis in idem*.[82] The wording of para. 1, defining *idem* by the same historical facts, leaves room for a broad interpretation of the protection. Accordingly, a subsequent trial for a different qualification based on the same historical facts would be prohibited. If a person was acquitted for genocide, a new trial for crimes against humanity with respect to the same conduct would constitute an *idem*. Certainly, this broad protection is inherently confined to the narrow subject matter jurisdiction of the ICC.[83] In order to avoid acquittals on the ground of wrong legal qualification of the facts, the Prosecutor benefits from the fact that the categories of crimes under the jurisdiction are partly overlapping. It was standard practice of the prosecutors of the *ad hoc* Tribunals to include several types of charges for each alleged incident and leave the classification to the judges. This practice was criticised for complicating the work of the defence and considerably prolonging the trials. In contrast, the ICC OTP follows a policy of targeted investigations/prosecutions that focus on selected incidents and crimes. This considerably reduces the scope of investigations/prosecutions. Potentially wrong legal qualifications may, on the one hand, be adjusted through formal amendment of the document containing the charges. On the other hand, ICC judges have expressed the view that they are bound by the facts underlying the charges against an accused but not by their legal qualification (*iura novit curia*).[84] The downside of the OTP's policy of targeted prosecutions is their territorial focus, which narrows the case specific *idem*. An accused who is acquitted or convicted by the ICC for 'conduct which formed the basis of crimes' in the context of one incident, could, at least in principle, be prosecuted for the same crimes committed within the same situation in the context of separate incidents.

3. 'convicted or acquitted by the Court'

The application of *ne bis in idem* involves determining the point in time and the 24
circumstances in which it can be said that the first 'jeopardy' has been attached. Even proceedings terminated before judgement might raise the question of a *bis in idem* in the same court. The drafters of the ICC Statute, however, did not think that the protection should cover such cases.[85] Para. 1 restricts the scope of the protection to a person 'convicted or acquitted by the Court'. It targets the final decision of the ICC.[86] However, the Rome Statute gives no clear indication of whether a conviction or acquittal rendered by the first instance is regarded a final decision 'as such': or whether only a non-appealable judgment can establish *res iudicata*. The latter would be in conformity with the application of *ne bis in idem* by regional human rights organs, as well as the civil law tradition that consider a judgment as final only after all 'ordinary

[82] Critical Holmes, in: Lee, *ICC* (1999) 58 who comments that '[t]he rationale of this difference was never fully explained'.

[83] 'The broad and the narrow interpretation coincide', Wyngaert and Ongena, in: Cassese *et al.*, *Rome Statute I* (2002) 722.

[84] See Regulation 55(1) RegC and its application e.g. in ICC, *Prosecutor v. Lubanga Dyilo*, AC, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of TC I of 14 Jul. 2009 entitled "Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court", ICC-01/04-01/06, 8 Dec. 2009. For the practice of the ICTY see above mn. 17 and for an in-depth analysis, Olusanya, *Double Jeopardy* (2004) 73 ff.

[85] See also the ICTY TC: 'there can be no violation of *non-bis-in-idem*, under any known formulation of that principle, unless the accused has already been tried', *Prosecutor v. Tadić*, IT-94-1-T, para. 24.

[86] See Preparatory Committee I 1996, p. 39, para. 170.

remedies' have been exhausted.[87] According to this view, only decisions of the AC and those of a TC against which no appeal has been filed within a period of 30 days (extendable) after notification of the appealing party could be considered as final (see Rule 150). But relying on the wording and the discussion during the drafting process, it seems arguable that not only revision but also appeal is an exceptional measure with regard to the prohibition of a retrial after conviction or acquittal by the Court.[88] Hence, a TC's judgement on the merits of the case may suffice to trigger *ne bis in idem*. Appeal and revision before the ICC would still be in conformity with Article 20 due to their exceptional character, but any other proceedings would be already barred through the TC's judgement. The latter interpretation is more favourable to the individual, in particular regarding its application under para. 2 (below mn. 30).

25 Before the final decision is taken, however, para. 1 is not applicable. It covers neither a ruling on inadmissibility nor decisions on amendment, withdrawal, reclassification[89] or non-confirmation of charges, see, *e.g.*, Article 61(7)(c)(ii) and Article 53(4). Furthermore, it was made clear during the negotiations that *res iudicata* should not apply for proceedings discontinued for technical reasons.[90] As there are no provisions on statutory limitations, it seems that new evidence found any time after such proceedings may reactivate investigation and lead to a new surrender and procedure on the confirmation of the charges.[91]

II. Paragraph 2

1. 'by another court'

26 Para. 2 establishes that a decision by the ICC is final with regard to any other proceeding before any other national or international court. This protection is absolute in terms of opening no exceptions.[92] The focus during the negotiations was exclusively on national courts. The wording encompasses all civilian and military courts, be they permanent or *ad hoc*. At the Preparatory Committee 1998, attention was drawn to the fact that 'by another court' could mean courts of States parties only, as the Statute as a whole can in any case address parties only.[93] This can, understandably, lead to unsatisfactory results from the point of view of the individual. There is, however, hardly

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[87] See above mn. 7 ff. This was also the approach adopted by the ILC Draft Code 1996, p. 68–9 'finally convicted or acquitted' applies 'only to a final decision on the merits of the charges against the accused which was not subject to further appeal or review'. See also AIDP (2004) 75 *RIDP* 802, I 5.2.

[88] See also above mn. 22; van den Wyngaert and Ongena, in: Cassese *et al.*, *Rome Statute I* (2002) 722; Klip and van der Wilt (2002) 73 *RIDP* 1121; see also the CCPR and *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, para. 49.

[89] A reclassification may even occur at the latest possible time of the proceedings, ICC, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, TC II, Decision on the implementation of regulation 55 of the Regulations of the Court and severing the charges against the accused persons, ICC-01/04-01/07-3319, 21 Nov. 2012.

[90] See e.g. Preparatory Committee I 1996, Article 42, para 170, p. 39; ILC Draft Code 1996, p. 69.

[91] Critical e.g. Costa (1998) 4 *UCDavisJIL&Policy* 199; Conway (2003) 3 *ICLRev* 382 arguing for a strict construction of the provisions on prosecutorial appeal and revision. See also Pierini (2016) 78 *Università de Catania – Online Working Paper* 3 ff. for a critical account of a possible retrial after a successful 'no case to answer' challenge.

[92] De la Cuesta (2002) 73 *RIDP* 732, van den Wyngaert and Ongena, in: Cassese *et al.*, *Rome Statute I* (2002) 723.

[93] The same is true with regard to States that have accepted the jurisdiction of the Court with respect to a *situation* by declaration (Article 12(3), Rule 44, see thereto e.g. Bassiouni (1999) 32 *CornellILJ* 443, 453–4 and States involved in a situation, which is referred to the ICC by the Security Council under Chapter VII of the Charter of the United Nations (Article 13(b)).

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Article 31
Grounds for excluding criminal responsibility

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

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

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

(c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

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

(i) Made by other persons; or

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

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

3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Literature: Anguiling-Pangalangan, R.L., 'Dominic Ongwen and the Rotten Social Background Defense: The Criminal Culpability of Child Soldiers Turned War Criminals' (2018) 33 *AmUILRev* 605; Ambos, K., 'Other Grounds for Excluding Criminal Responsibility', in: Cassese *et al.*, *Rome Statute I* (2002) 1003; *id.*, 'General Principles of Criminal Law in the Rome Statute' (1999) 10 *CLF* 1; *id.*, 'Zur Rechtsgrundlage des Internationalen Strafgerichtshofs – Eine Analyse des Rom-Statuts' (1999) 111 *ZStW* 175; *id.*, 'May a State Torture Suspects to Save the Life of Innocents?' (2008) 6 *JICJ* 261; *id.*, 'Defences in International Criminal Law', in: Brown, *RH ICL* (2011) 299; *id.*, 'Defences in ICL: Exceptions in International Law?', in: Bartels and Paddeu (eds.), *Exceptions in International Law* (OUP 2020) 347; *id.* and Alkatout, J., 'Has 'Justice been done'? The Legality of Bin Laden's Killing under International Law' (2012) 45 *IsLRev* 341; Babucke, L., *Der Schulddefekt im Völkerstrafrecht. Rechtsvergleichende Analyse und Reformvorschlag für den internationalen Strafgerichts-*

A. General remarks – Genesis and scope of the provision

With regard to the genesis of Article 31, two lines of development are worth mentioning: a more substantive and a more formal one. The first is concerned with the question of whether the Statute should provide for exclusionary grounds at all given the especially serious nature of ICC crimes.[1] However, while defences should certainly not be applied lightly to abhorrent crimes, every (alleged) criminal has a right to be tried according to the rule of law, which includes his/her right to invoke possible defences. Insofar, the drafters' attempt to codify the main exclusionary grounds marks a progress and a welcome step towards a comprehensive codification of ICL.[2] 1

At any rate, the development in recognizing exclusionary grounds leads from almost zero to considerable heights, finally ending on a middle level.[3] If we take the 1994 ILC Draft Statute, neglecting earlier drafts,[4] as starting point we quickly realize that it does not mention exclusionary grounds at all; this may be explained by the fact that this ILC Draft only contains a general rule on 'applicable law' (Article 33), thereby allowing the recourse to 'general international law' or 'any (applicable) rule of national law' in order to identify exclusionary grounds. Given the considerable criticism of this approach, including alternative proposals,[5] all further UN or ILC drafts contained a number of defences. This new openness can be observed as early as 1995 with the *Ad Hoc* Committee Report, where in Annex II a long list of possible defences can be found.[6] Still more proposals arose from the work of the 1996 PrepCom.[7] However, in all further recommendations of the WG on General Principles of Criminal Law, solely mistake of fact or of law were explicitly recognized.[8] The eventually decisive step was then taken by the PrepCom at its December 1997 session, where it accepted the recommendations of the WG on General Principles, which formed the basis of the current Article 31.[9] 2

After these recommendations had basically been upheld by the Inter-Sessional Meeting of January 1998[10] and were finally included in the PrepCom Draft Statute of April 3

[1] See also Stahn, *Introduction ICL* (2019) 147 ('tension' with end of impunity, 'limited role').

[2] To the same end *cf.* van Sliedregt, *Responsibility IHL* (2003) 299; also Ambos, in: Bartels and Paddeu, *Exceptions* (2020) 347–48.

[3] See also Ambos, *Internationales Strafrecht* (2018) 212 ff.; *id.*, *Treatise ICL I* (2013) 301 ff.; Knoops, in: Doria *et al.*, *Legal Regime* (2009) 779, 793 ff.; Schabas, *ICC Commentary* (2016) 638 ff.; van Sliedregt, *Responsibility IHL* (2003) 239 ff. – Further *cf.* on the controversy about an exhaustive or enumerative list of defences, Scaliotti (2001) 1 *ICLRev* 111, 119; van Sliedregt, *Responsibility* (2012) 221 ff.

[4] Such as the ILC Draft Code 1991, in which at least some rudimentary general principles and in rather general terms 'defences and extenuating circumstances' had been recognized: *cf.* Eser, in: Bassiouni, *Commentaries* (1993) 58 ff. – As to whether and to what kind and degree defences had already found consideration and recognition in the Nuremburg trials see Heller, *Nuremberg* (2011) 294 ff.

[5] In particular *cf.* the various (private) Siracusa/Freiburg/Chicago-Drafts which, as an alternative to the (official) ILC-Drafts, had been prepared by a WG of the AIDP/ISISC in Siracusa/Italy and the (former) MPI for Foreign and International Criminal Law (now renamed "MPI for the Study of Crime, Security and Law") in Freiburg/Germany (Article 33; published in: Nill-Theobald, *'Defences'* (1998) 454 ff.); as several of these rules had been phrased differently by Eser, Koenig, Lagodny and Triffterer with the assistance of Ambos and Vest (reprinted and compared with the version in the Updated Siracusa Draft in: Ambos, *Völkerstrafrecht* (2002) 942 ff.), these rules were also integrated into 'Proposals to Amend the "Draft Code of Crimes against the Peace and Security of Mankind"', in: Triffterer, *Acts of Violence and ICL*, Annex 2, (1997) 4 *CroatianAnnCrimL&Pract*, 872. On the role of these different drafts see also Eser, in: Cassese *et al.*, *Rome Statute I* (2002) 777.

[6] *Ad Hoc* Committee Report, pp. 18 ff., 48 ff.

[7] PrepCom, UN Doc. A/AC.249/CRP.9 (4 Apr. 1996), Annex: General Principles of Criminal Law. *Cf.*, in addition, PrepCom II 1996, pp. 79 ff.

[8] *Cf.* PrepCom Decisions Feb. 1997, pp. 18 ff.

[9] See Arts. L–O, PrepCom Decisions Dec. 1997, pp. 18 ff.

[10] See Zutphen Draft, pp. 60 ff.

1998[11] – the formal basis of the Rome Conf. –, all further modifications were less substantial. The Final Draft Statute as presented to the Diplomatic Conference was structured basically in the following way: Whereas mistake of fact or mistake of law (Article 30) as well as superior orders and prescription of law (Article 32) were regulated in special provisions and later merely renumbered to Articles 32 and 33 respectively, draft Article 31 was at that stage partly broader, recognizing a sort of necessity (para. 1(d)), but at the same time partly narrower due to its absence of a defence of property in case of war crimes (originally to be regulated in a specific Article 33, now within Article 31(1)(c)); it was also narrower in that it regulated the present para. 3 of Article 31 regarding other exclusionary grounds in a special Article 34. Whereas the chapeau of Article 31 as well as para. 1(a) and paras. 2 and 3 remained almost unchanged in their substance, para. 1(b), (c) and (d) underwent various modifications in the course of the Rome Conf. Why, when and in which way this happened, will be seen in connection with the analysis of the respective grounds for excluding criminal responsibility (see below mn. 17 ff.).

4 In the Post-Rome activities of the PrepCommis in charge of defining certain 'Elements of Crimes' (EoC) and elaborating 'Rules of Procedure and Evidence' (RPE), the subject matter of defences did not play a major role: Whilst the Elements, in abstaining from any further concretization of the Statutory grounds for excluding criminal responsibility, remind the Prosecutor of his/her obligation under Article 54(1)(a) to investigate incriminating and exonerating circumstances equally,[12] the Rules foresee only few procedural regulations of when and how to raise exclusionary grounds.[13] Similarly, exclusionary grounds are mentioned in the Regulations of the Court (RegC) only once.[14]

5 While the current provision, as will be seen, certainly has its merits, it must be made clear from the outset that both its heading is misleading and its contents **incomplete**. When speaking of 'grounds for excluding criminal responsibility' in such a general way, the provision seems to comprise all defences which may entail the exclusion of criminal responsibility. This impression is, however, misleading from two countervailing ends: On the one hand, as follows from para. 1 ('[I]n addition'), Article 31 is not the only place in the Statute where grounds for excluding criminal responsibility may be found (see below mn. 8 ff.); in this respect, the provision has a supplementary function in that it regulates grounds for excluding criminal responsibility not yet regulated in other provisions of the Statute. On the other hand, Article 31 is far from providing a complete list of all possible defences, as may be seen from the missing list (see below mn. 13 ff.). In fact, the provision solely deals with incapacity (mn. 20 ff.), intoxication (mn. 26 ff.), self-defence, including defence of property (mn. 32 ff.), and duress (mn. 46 ff.). It is up to the 'Court' to 'determine' the concrete 'applicability' of the respective exclusionary ground(s) (para. 2, see mn. 61 ff.), including other grounds pursuant to the applicable law (para. 3, see mn. 70 ff.).

6 Beyond being merely supplementary and still incomplete, the manner in which these grounds for excluding criminal responsibility are regulated is ambivalent insofar as it leaves open the question as to whether a specific ground may be considered a '*justification*' of the offence or merely an '*excuse*' of the offender, or whether other –

[11] PrepCom Draft 1998, pp. 66 ff.

[12] General Introduction, para. 5 EoC, fn. 1; *cf.* Kelt and v. Hebel, in: Lee, *ICC* (2001) 19, 38.

[13] *Cf.* Rule 79(1)(b) RPE (the defence shall notify the prosecutor of intent to raise a defence pursuant to Article 31(1)), Rule 80 RPE (procedures for raising a defence pursuant to Article 31(3)), Rule 121(9) RPE (procedures relating to pre-trial hearings). *Cf.* Brady, in: Lee, *ICC* (2001) 403, 414 ff., Friman, in: Lee, *ICC* (2001) 493, 521 ff.

[14] *Cf.* 54(p) RegC: at a status conference, the TC may issue any order on the defences, if any, to be advanced by the accused.

more procedural or political – reasons may lead to a discharge.[15] In this respect, by abstaining from a closer differentiation between various types of exclusionary grounds, as known in most continental-European jurisdictions,[16] Article 31 appears to have been phrased along common law propositions of a rather broad and undifferentiated concept of 'defences', largely ignoring the recognized classifications.[17] Although this common law point of departure has to be kept in mind when interpreting the defences of the Statute, the question remains whether the future development could be more nuanced.

Due to the novel nature of how these exclusionary grounds are regulated in Article 31, some caution with regard to the appropriate methodology of its interpretation appears recommendable. Whereas the interpretation of other parts of the Rome Statute may easily take resort to legal precedents both in international and national criminal law, with regard to the 'General Principles' section particular heed must be paid to the wording of the relevant provisions, thus avoiding both an uncritical adoption of the ambiguous and controversial drafting at the Rome Conf. and an unreflected transplant from national criminal justice systems. 7

B. Additional grounds excluding criminal responsibility

The wording 'in addition to' right at the beginning in para. 1 implies that there are other exclusionary grounds, either in the Statute or outside of it. While these cannot be analysed here in detail, they should at least be listed. 8

The attempt provision of Article 25(3)(f) contains a negative and positive **abandonment** clause which excludes criminal responsibility. The negative one is contained in the last part of sentence 1, the positive one in sentence 2; for an analysis, see Ambos above Article 25 mn. 50 ff. with further references. 9

The ICC's **jurisdiction** for persons under 18 years is *excluded* (Article 26), see for further analysis Triffterer and Clark above.[18] This jurisdictional solution was a necessary compromise since the delegates were unable to find a consensus on the age of responsibility.[19] The jurisdictional exclusion can be considered a procedural defence.[20] 10

Mistake of fact and, to a more limited extent, **mistake of law** also entail the exclusion of criminal responsibility according to Article 32; for an analysis see Triffterer and Ohlin below.[21] Remarkably, Article 32 calls both mistake of fact and of law grounds for excluding criminal responsibility, albeit under different conditions. While both the 11

[15] With regard specifically to the defence of 'duress', Joyce (2015) 28 *LeidenJIL* 623, while considering Article 31(1)(d) to be 'a missed opportunity' with a view to a precise delimitation of the defence, sees an advancement as compared to the unclear status of the defence as a justification or an excuse in *Erdemović*. For a theoretical analysis of the distinction between justifications and excuses in general, but also in favour of the application of the distinction in the ICL context see Haenen (2016) 16 *ICLR* 547 ff., esp. 557–559; Ambos, in Bartels and Paddeu, *Exceptions* (2020) 353–58.

[16] *Cf.* Eser, in: Eser and Fletcher, *Justification and Excuse* (1987) 19 ff.; van Sliedregt, *Responsibility* (2012) 215 ff.; *cf.* also below mn. 17.

[17] *Cf.* Ambos, in Bartels and Paddeu, *Exceptions* (2020) 348 ff. with further references (distinguishing, from a specific ICL perspective, between substantive and procedural defences, full and partial ones, justifications and excuses, failure of proof defences and alibi as well as discussing a possible hierarchy of defences).

[18] See also Ambos, *Treatise ICL I* (2021) 555 ff.; Cassese and Gaeta, *ICL* (2013) 227; Frulli, in: Cassese *et al.*, *Rome Statute I* (2002) 527, 533 ff. This exclusion is neither mentioned by Knoops, *Defenses* (2008), nor van Sliedregt, *Responsibility IHL* (2003).

[19] *Cf.*, in particular, PrepCom Draft 1998, pp. 60 ff.; in addition, Ambos (1999) 10 *CLF* 1, 22 ff.

[20] In principle agreeing van Sliedregt, *Responsibility* (2012) 215 fn. 11.

[21] As to partly divided opinions in the Nuremberg trials see Heller, *Nuremberg* (2011) 306; with regard to sex offenses see Grewal (2012) 10 *JICJ* 373, 389.

structure and contents of these mistakes as defined in Article 32 give rise to criticisms,[22] it was certainly a positive move to include them in the Statute at all.

12 Another highly controversial ground for excluding criminal responsibility is obedience to a **superior order**. While the rejection of this defence has been maintained as a rule, Article 33 provides certain exceptions ('unless') under which a person may be relieved of criminal responsibility if he/she acted pursuant to an order of a government or of a superior. While, again, the structure and scope of the provision may be disputable,[23] it attempts to find a middle way between entirely disregarding and partly recognizing obedience to a superior as a ground for excluding criminal responsibility; for a detailed analysis see Triffterer and Bock below.[24]

C. Missing defences

13 In comparison to national penal codes and case law which usually provide for a wide range of justificatory, exculpatory or other grounds of excluding punishability,[25] the list of possible defences in the Statute is rather limited. This may be partly explained by the fact that crimes penalized and prosecuted by inter- and supranational law are, in principle, of such horrendous dimensions that any attempt to justify or excuse them appears obscene and, therefore, face psychological reservations. Nevertheless, in the same way that a suspected murderer's act may be justified by self-defence, a rapist excused by insanity, or a policeman exempted from personal liability due to 'superior order', in case of international crimes the possibility of an exclusion of responsibility cannot be precluded either from the outset.[26] The fact that the Statute recognizes such grounds entails the normative claim that they can possibly exist.

14 As to possible defences rejected or omitted in the Statute one can for the former group refer to the rejection of **official capacity** according to Article 27; for an analysis see Triffterer and Burchard above.[27] The irrelevance of *official capacity*, particularly that of a Head of State or Government, marks a stark contrast to earlier practice ('The King can do no wrong'), only abolished at and since Nuremberg.[28] This Statute's explicit exclusion of 'official capacity' as a defence will hopefully send a clear (dissuasive) signal towards government-supported crimes.

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[22] For alternative wording *cf.* Article 33–15 of the Updated Siracusa Draft (in Ambos, *Völkerstrafrecht* (2002) 951). For a critical analysis see also Eser, in: Cassese *et al.*, *Rome Statute I* (2002) 889, 934 ff.; Korte (2008) 6 *ZIS* 419, 419 ff.; van Sliedregt, *Responsibility* (2012) 269 ff.; Werle and Jessberger, *Principles ICL* (2020) mn. 746 ff.; Ambos, *Treatise ICL I* (2021) 482 ff.

[23] For an alternative wording see Article 33–16 of the Updated Siracusa Draft (in Ambos, *Völkerstrafrecht* (2002) 951) and Article 11 of 'Proposal to amend the "Draft Code of Crimes against the Peace and Security of Mankind" in: Triffterer, *Acts of Violence and ICL*, Annex 2, (1997) 4 *CroatianAnnCrimL&Prac* 2 872, 879.

[24] See also Bantekas and Nash, *ICL* (2007) 56 ff.; Knoops, *Defenses* (2008) 33, 129 ff.; van Sliedregt, *Responsibility* (2012) 287 ff.; Zimmermann, in: Cassese *et al. Rome Statute I* (2002) 957 ff. As to the partly inconsistent approach in the Nuremberg judgments see Heller, *Nuremberg* (2011) 299 ff.

[25] See in general Eser, in: Eser and Fletcher, *Justification and Excuse* (1987) 17, 46 ff.

[26] See Eser, in: Dinstein and Tabory, *War Crimes in IL* (1996) 251, 252 ff.; agreeing Cryer, in: Cryer *et al.*, *ICL* (2019) 380; v. d. Wilt, in: Swart *et al.*, *Legacy of ICTY* (2011) 275, 276; see also Ambos, in: Bartels and Paddeu, *Exceptions* (2020) 347–48.

[27] See also Cassese and Gaeta, *ICL* (2013) 240 ff.; Gaeta, in: Cassese *et al.*, *Rome Statute I* (2002) 951, 975 ff.; Ambos, *Treatise ICL I* (2021) 528 ff.

[28] *Cf.* Sadat, *ICC and Transformation of IL* (2002) 200 ff.

The same holds true for the non-applicability of **statutory limitations** (Article 29); for more details see Schabas above.[29] With the explicit rejection of this defence, any speculations on playing with the passage of time are made illusionary.

Aside from grounds for excluding criminal responsibility which are either statutorily recognized (see above mn. 8 ff. and below mn. 17 ff.) or explicitly rejected (mn. 14), there is a wide range of further defences which are completely ignored in the Statute. Although certain defences recognized by national criminal law, by their very nature may not be acceptable within the context of international crimes, such as, for instance, educational privileges of parents or teachers, quite a few defences remain, which have indeed been discussed and partly even considered in the negotiations,[30] but which in the end did not make it into the Statute. Here are probably the most important ones: **15**

- consent of the victim,[31]
- conflict of interests/collision of duties,[32]
- reprisals,[33]
- general and/or military necessity,[34]
- *tu quoque*,[35] and
- amnesties and immunities.[36]

As several of these defences are highly controversial, partly as a matter of principle and partly at least with regard to the nature of international crimes,[37] it appears understandable that the Statute followed a cautious approach by not explicitly codifying **16**

[29] See also *ibid.*, 220 ff.; for possible conflicts with national statutes of limitation *cf.* Ambos, *Treatise ICL I* (2021) 552 ff.

[30] *Cf.* the compilation of the PrepCom in Annex to UN Doc. A/AC.249/CRP.9, pp. 19 ff., and, with special regard to war crimes, Eser, in: Dinstein and Tabory, *War Crimes in IL* (1996) 251, 254 ff.; Nill-Theobald, *'Defences'* (1998) 55 ff.

[31] Ambos, in: Brown, *RH ICL* (2011) 299, 328 ff.; *id.*, *Treatise ICL I* (2021) 504 ff.; Cryer, in: Cryer *et al.*, *ICL* (2019) 398. It should be noted, however, that the EoC as well as the Rules, in precluding consent regarding certain crimes (Article 8(2)(b)(x) EoC fn. 48; 8(2)(e)(xi) fn. 68) or by barring the inference of consent from certain facts (Rule 70 RPE), implicitly recognize consent as a possible defence; for details *cf.* Schabas, *ICC Commentary* (2016) 649; Ambos, *Treatise ICL I* (2021) 504 ff.; with particular regard to sexual crimes *cf.* Boon (2001) 32 *Columbia HRLR* 625, 667 ff., and furthermore Viseur Sellers, in: McDonald and Swaak-Goldman, *ICL I* (2000) 263, 328 (who interprets the jurisprudence of the ICTR on cases of sexual violence as constricting the availability of consent as a defence); generally on consent with regard to sexual crimes, *cf.* O'Malley and Hoven, in: Ambos, *Core Concepts I* (2020) 135 ff.

[32] *Cf.* Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 1003, 1008.

[33] *Cf.* Ambos, *Treatise ICL I* (2021) 509 ff.; Cryer, in: Cryer *et al.*, *ICL* (2019) 399; Eser (1995) 24 *IsYbHumRts* 201, 217 ff.; van Sliedregt, *Responsibility IHL* (2003) 291 ff.; de Hemptinne, in: Clapham *et al.*, *GC Commentary* (2015) 575–596; on the controversy about the legality of reprisals against civilians *cf.* ICTY, *Prosecutor v. Kupreškić et al.*, TC, Judgement, IT-95-16-T, 14 Jan. 2000, paras. 527–36 (rejecting a defence) and (in criticizing this holding); Greenwood, in: Fischer *et al.*, *Prosecution* (2001) 539, 549 ff. and van Sliedregt, *Responsibility* (2012) 261 ff.

[34] *Cf.* Ambos, in: Brown, *RH ICL* (2011) 299, 324; *id.*, *Treatise ICL I* (2021) 507 ff.; Eser (1995) 24 *IsYbHumRts* 201, 219; Knoops, *Defenses* (2008) 136 ff.; *id.*, in: Doria *et al.*, *Legal Regime* (2009) 779, 786 ff.; van Sliedregt, *Responsibility IHL* (2003) 295 ff.; v.d. Wilt, in: Swart *et al.*, *Legacy of ICTY* (2011) 275, 285 ff. and, with particular attention to the Nuremberg judgments, see Heller, *Nuremberg* (2011) 308 ff. – As to the ill-guided confusion of 'necessity' and 'duress' see below mn. 46. *cf.* also below fn. 129.

[35] The ICTY consistently rejected the *tu quoque* defence, *cf.* ICTY, *Prosecutor v. Kupreškić et. al.*, TC, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, IT-95-16, 17 Feb. 1999. *Cf.* also Ambos, in: Brown, *RH ICL* (2011) 299, 328 ff., *id.*, *Treatise ICL I* (2021) 513–4; Eser (1995) 24 *IsYbHumRts* 201, 218; van Sliedregt, *Responsibility IHL* (2003) 294 ff.; Borelli (2019) 32 *LJIL* 315 ff.; Yee (2004) 3 *ChinJIL* 87 ff. As to the denial of this defence as well as of the invocation of 'selective prosecution' in Nuremberg trials see Heller, *Nuremberg* (2011) 296 ff.

[36] *Cf.* Cassese and Gaeta, *ICL* (2013) 309 ff.; Eser (1995) 24 *IsYbHumRts* 201, 219 ff., Peschke, in: Brown, *RH ICL* (2011) 178, 183 ff., 202; Robinson, in: Cassese *et al.*, *Rome Statute II* (2002) 1849, 1855 ff.; Schabas, in: Brown, *RH ICL* (2011) 373 ff. (2011); Safferling, *Internationales Strafrecht* (2011) 123 ff.

[37] *Cf.* Eser, in: Dinstein and Tabory, *War Crimes in IL* (1996) 251, 245 ff.

them but leaving the door open for their application by way of a judicial decision pursuant to para. 3 (see below mn. 70 ff.).

D. Analysis and interpretation of elements

I. Paragraph 1: Chapeau

1. 'Grounds for excluding criminal responsibility'

17 In deliberately avoiding the common law term of 'defences', the drafters wanted to avoid a 'catch word' too closely associated with the common law system.[38] Also, the term only covers *substantive* grounds for excluding criminal responsibility.[39] Against this background it is incorrect or at least imprecise to use 'defence' and 'grounds for excluding criminal responsibility' as interchangeable concepts, as some commentators still do.[40] When speaking of 'excluding criminal responsibility' without further differentiation, however, the Statute leaves open the question as to whether a given ground is *justifying* the wrongful act or merely *excusing* the perpetrator, or even only *negating punishability* for some other substantive reason.[41] In abstaining from such further differentiation, the Statute remains behind jurisprudential developments achieved particularly in the Germanic and, to some degree, in the Romanic jurisdictions as well.[42] While this distinction proves to be helpful to properly differentiate between exclusionary grounds, in particular with regard to necessity and duress,[43] the absence of this distinction does not necessarily exclude its application given that it is generally recognized.[44] For as long as 'criminal responsibility' is understood in a broad sense, *i.e.* in terms of not only referring to the (subjective) capability of the actor but as also comprising the (objective) wrongfulness of the act, its exclusion may not only be procured by *exculpatory* factors, as in the case of incapacity (para. 1(a)),[45] but also

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[38] *Cf.* Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 1003, 1028 with reference to Saland, in: Lee, *ICC* (1999) 189, 206; Ambos, *Treatise ICL I* (2021) 408; *id.*, *Internationales Strafrecht* (2018), § 7 mn. 77–8.

[39] For a different view however Sadat, *ICC and Transformation of IL* (2002) 212 fn. 157; Schabas, *Introduction ICC* (2017) 225 (both referring to alibi as a clearly procedural defence; thereto Ambos, *Treatise ICL I* (2021) 414–6). Incidentally, the narrower substantive understanding of defences seems to gain support among common law scholars; see, *e.g.*, Horder, *Principles* (2019) 217; *cf.* also van Sliedregt, *Responsibility* (2012) 215 ff.

[40] *Cf.* Kittichaisaree, *ICL* (2001) 258; Schabas, *Introduction ICC* (2017) 224.

[41] *Cf.* the comment by Sadat Wexler, *Draft Statute* (1998) 56. Apparently due to this lack of clarity Wise, in: Sadat Wexler, *Observations* (1998) 43, 52, sees in Article 31 a 'miscellaneous lot of exculpatory grounds' whilst, even more confusing, Krug (2000) 94 *AJIL* 317 fn. 2 speaks of 'justification' as providing 'exculpation' for not wrongful acts as to be distinguished from 'excuse' as 'exculpating' a particular defendant from accountability, thereby obviously not recognizing that 'exculpation' (as discharging from 'culpa' in terms of 'culpability') is more synonymous with a mere 'excuse' (of the actor) rather than with a 'justification' of the act.

[42] *Cf.* the contributions to Eser and Fletcher, *Justification and Excuse*, Vol. I and II (1987/88); Eser and Perron, *Rechtfertigung und Entschuldigung* (1991); Watzek, *Rechtfertigung und Entschuldigung* (1997); furthermore Ambos, *Völkerstrafrecht* (2002) 825; Jescheck and Weigend, *Strafrechts* (1996) 332 ff.; Merkel (2002) 114 *ZStW* 437, 448 ff., 454; van Sliedregt, *Responsibility IHL* (2003) 229 ff., 273, 299, *id.*, *Responsibility* (2012) 215 ff.; Ambos, in: Bartels and Paddeu, *Exceptions* (2020) 353–8.

[43] *Cf.* below mn. 46; furthermore Merkel (2002) 114 *ZStW* 437, 441, 448 ff., 454; Sadat, *ICC and Transformation of IL* (2002) 214 ff.; Scaliotti (2002) 2 *ICLRev* 1, 46; van Sliedregt, *Responsibility IHL* (2003) 230, 271 ff., 299; Ambos, *Treatise ICL I* (2021) 477 ff.

[44] *Cf.* Bantekas and Nash, *ICL* (2007) 53 ff.; Cassese, in: Cassese *et al.*, *Rome Statute I* (2002) 951, 955; Cryer, in: Cryer *et al.*, *ICL* (2019) 380 ff.; Scaliotti (2001) 1 *ICLRev* 111, 118.

[45] *Cf.* below mn. 20; Ambos, *Treatise ICL I* (2021) 410 ff.

by genuine *justifications* as in the case of necessary and proportionate self-defence (para. 1(c)).[46]

2. 'In addition to' 'other grounds … provided for in this Statute'

18 As already said above, the reference to 'additional grounds' reveals the supplementary function of this provision. Thus, it could serve as the main instance of reference in such cases where general issues of these or other grounds for excluding criminal responsibility are in question,[47] for example, with regard to the 'person's conduct' as the relevant time for the application of a defence (not mentioned in Article 32 and 33).

While para. 1 refers to additional exclusionary grounds 'provided for *in this Statute*', it is clear from para. 3 that the Statute allows for the invocation of other exclusionary grounds found in the applicable law according to Article 21 (see below mn. 70 ff.).

While the case of *concurrent exclusionary grounds* is not expressly addressed, there is no reason why it should not be possible for a defendant to invoke multiple exclusionary grounds, for example, if s/he was misguided by a mistake of fact or law (Article 32) and additionally acted under duress (Article 31 1(c)).

3. 'At the time of that person's conduct'

19 In referring to the 'person's conduct' as the decisive time of the existence of an exclusionary ground, the Statute, apparently, excludes the time of the result of the respective offence as point of reference. Consequently, for instance, with regard to intoxication (para. 1(b)), a participant in an international crime could only invoke this exclusionary ground if s/he was intoxicated already at the time of the criminal conduct and not only when the criminal result occurred. At any rate, this so-called 'act theory' – as opposed to the 'ubiquity principle', according to which the time of the conduct and result are equally relevant[48] – is convincing since prohibitions as well as substantive defences are linked to the conduct, whereas the criminal result may be accidental or beyond the agent's control.[49]

II. Paragraph 1 (a): Incapacity

20 Differently from the other exclusionary grounds of Article 31 which underwent various modifications in the course of negotiations, the wording of para. 1(a) has remained unchanged since its elaboration by the WG on General Principles and its adoption by the PrepCom at its December 1997 session.[50] The provision adopts the well-established principle of national criminal justice systems that incapacity or legal insanity serves as a categorical exclusion of criminal responsibility.[51] As merely granting

[46] As to consequences with regard to mistakes of fact or law, for example, see Eser, in: Cassese *et al.*, *Rome Statute I* (2002) 889, 934 ff.; *cf.* also Ambos, in: Brown, *RH ICL* (2011) 299, 300 ff.

[47] Conc. van Sliedregt, *Responsibility* (2012) 223 ff.; Werle and Jessberger, *Principles* (2020) mn. 720.

[48] For details to these approaches *cf.* Eser, in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 8 mn. 2 (with regard to the time of commission) at 107, and § 9 mn. 3 ff. (with regard to the place of commission), at 109 ff.

[49] *Cf.* Ambos, *Treatise ICL I* (2021) 420; see also van Sliedregt, *Responsibility* (2012) 242 ff.

[50] *Cf.* PrepCom Decisions Dec. 1997; Article L; Schabas, *ICC Commentary* (2016) 639 ff.

[51] *Cf.* Werle and Jessberger, *Principles* (2020) mn. 772 and 774. For details to national underpinnings and case law on this commonly so-called 'insanity defence' *cf.* Ambos, *Treatise ICL I* (2021) 423 ff.; Knoops, in: Doria *et al.*, *Legal Regime* (2009) 779, 789 ff.; van Sliedregt, *Responsibility* (2012) 224 ff. – Note that a plea of incapacity raises procedural difficulties that are neither covered by the Rome Statute nor by the Rules. For example, Article 77 does not foresee detention as the appropriate reaction to a successful incapacity plea; in

volitional element.[141] As to the relevance of (additional) motives it is submitted that the fact that defensive reactions are accompanied and informed by a series of different motives cannot entail the rejection of the defensive character of the attack by this fact alone; rather it should suffice if the defensive reaction is, albeit not exclusively, at least partially (also) motivated by defensive ends.[142]

V. Paragraph 1 (d): Duress

46 Para. 1(d) is an ill-conceived and ultimately failed attempt to combine two different concepts: (justifying) 'necessity' and (merely excusing) 'duress'.[143] Whereas all pre-Rome-Conf. proposals and drafts had, more or less, clearly distinguished between necessity and duress,[144] it was only in the final stage of the conference that they were mixed up in one provision.[145] This reflects (and somewhat perpetuates) a common terminological confusion: in U.S. American and English text books, necessity is labelled 'duress of circumstances',[146] the Nuremberg jurisprudence used the term 'necessity' to describe cases of duress,[147] ICTY Judge *Cassese* employed 'necessity' to encompass 'duress',[148] and the

[141] This is of course controversial, for the here defended view Ambos, *Treatise ICL I* (2021) 455; contrary third ed. mn. 48 and the authors quoted in the previous fn.

[142] However, even if self-defence may not be available if the alleged victim was predominantly motivated by other than defensive reasons, for example if s/he provoked the attack for the purpose of getting a chance to counteract. In this case, while the attack, though provoked, remains a wrong which, from an objective point of view, must not be tolerated, the victim's provocation must diminish his/her defence right and possibly mitigate the attacker's sentence.

[143] Saland, in: Lee, *ICC* (1999) 189, 208; Werle and Jessberger, *Principles ICL* (2020) mn. 732 ff.; van Sliedregt, *Responsibility* (2012) 243 ff.; also Ambos (1999) 10 *CLF* 1, 27 ff.; *id.*, *Treatise ICL I* (2021) 455 ff. (with a comparative survey of national criminal law and pre- and post-war international developments); Janssen (2004) *ICLRev* 83, 97; Gerson (2015) 10 *ZIS* 67, 68–70 (drawing a comparison between Article 31(1)(d) and the relevant provisions of the German PC and concluding that 'duress' in the context of the Rome Statute belongs to the exculpatory, not the justificatory defences); Stahn, *Introduction ICL* (2019) 154 ('exemptions from personal responsibility'); but see also Jescheck (2004) 2 *JICJ* 38, 48 (qualifying the merger as mirroring a modern development in national criminal law not to distinguish between necessity and duress).

[144] Starting with these distinctions in the Siracusa Draft (at IV.A.1/2 and 9 to Article 34, 39, reprinted in Nill-Theobald, '*Defences*' (1998) 455), then in the *Ad Hoc* Committee Report, Annex II subpara. 5(b), p. 59, the various proposals in the Updated Siracusa Draft Article 33–13.1 and 2 (in Ambos, *Völkerstrafrecht* (2002) 951) and in the PrepCom II 1996, Arts. O and P, pp. 100 ff.; *cf.* also the compilation of various proposals in the Annex of the PrepCom to UN Doc. A/AC.249/CRP.9, pp. 16–8, resulting in the more or less equivalent proposals of the PrepCom Decisions Dec. 1997 (Arts. L.1(d) and (e), at p. 19), the Zutphen Draft (Arts. L.1(d) and (e), pp. 62 ff.) and the PrepCom Draft 1998 (Article 31(1)(d) and (e), p. 68).

[145] Eventually starting with Working Paper on Article 31 of 22 Jun. 1998 (UN Doc. A./CONF.183/C.1/WGGP/L.6), with some modifications in the Report of the WG, UN Doc. A/CONF.183/C.1/WGGP/L.6/Add.1 and finalized by the Draft Report of the Drafting Committee to the Committee of the Whole, UN Doc./A/CONF.183/C.1/L.65/Rev.1, Article 30(1)(d), p. 7).

[146] See *e.g.* Wilson, *Criminal Law* (2017) 253; Ormerod, *Smith and Hogan* (2018) 364; Simester *et al.*, *Criminal Law* (2019) 808; see also Knoops, *Defenses* (2008) 83. – Generally, it is very common in Anglo-American criminal law to distinguish between necessity and duress according to the source of the coercion/threat and to classify non-human coercion as necessity and human coercion as duress, *cf.* Kreicker, in: Eser and Kreicker, *Nationale Strafverfolgung* (2003) 270, 337 ff.; Blomsma and Roef, in: Keiler and Roef, *Concepts* (2019) pp. 226 ff., 234 ff.

[147] For a critical overview *cf.* Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 1003, 1005, 1023 ff., 1035 ff. On further international case law see van Sliedregt, *Responsibility IHL* (2003) 279 ff.; with particular attention to the Nuremberg judgments, Heller, *Nuremberg* (2011) 302 ff., 308 ff.

[148] *Cf.* ICTY, *Prosecutor v. Erdemović*, AC, Judgement, Separate and dissenting opinion of Judge Cassese, IT-96-22-A, 7 Oct. 1997, para. 14; see also Cassese, *ICL* (2008) 289, arguing that para. 1(d) 'rightly lumps necessity and duress together', whereas his revised edition (2013, p. 216) merely states that

German PC distinguishes 'justifying' and 'excusing' necessity.[149] It is suggested that the distinction between duress and necessity lies with the rationale for excluding criminal responsibility: Here, para. 1(d) blends the justifying ***choice of a lesser evil*** (necessity) with excusing situations where the defendant's freedom of will and decision is so severely limited that there is eventually ***no moral choice***[150] available (duress).

In the first ICC case where this defence was invoked – the case against former LRA 47
commander *Dominic Ongwen* – PTC II found that, from the evidence available at the confirmation stage of the proceedings, none of the requirements established in Article 31(1)(d) appeared to be met, and thus confirmed the charges.[151] The Chamber did not see a relevant (imminent) threat to Ongwen and found that duress cannot 'provide blanket amnesty to members of criminal organizations which have brutal systems of ensuring discipline …'.[152] As to the (moral) choice argument the Chamber argued that Ongwen had control of the circumstances and could have tried to escape from the LRA; at any rate, he could have chosen *not* to rise in hierarchy within the LRA and "expose himself to increasingly higher responsibility to implement LRA policies".[153] Finally, the Chamber found it 'unclear' how Ongwen's conduct could be considered necessary and reasonable to avoid the alleged threat and satisfy the required intent of proportionality.[154] TC IX did not discuss the nature of duress under Article 31(1)(d) but adopted a purely evidentiary approach.[155] First, the Chamber noted that in the case at hand duress had not to be considered with regard to 'a single or discrete act' on the part of the accused, 'momentary or of a short duration', but rather with regard to a conduct which was 'complex and spread over the entire period of the charges'.[156] Secondly, following the reasoning of the PTC II, duress was not considered applicable, as there was no evidence to hold that Ongwen was subject to a threat of imminent death or imminent or continuing serious bodily harm to himself or another person at the time of his conduct.[157] The TC noted that the accused was not in a situation of complete subordination; acted independently and even contested orders received from his superior; did not face any prospective punishment by death or serious bodily harm in case of disobedience; had a realistic possibility of leaving the LRA, but decided to remain; rose in rank and position; and committed some of the charged crimes in private, in

this paragraph 'encompasses both duress by threat and duress by circumstances'. For a thorough analysis of the *Erdemović* precedent in this regard see Ambos, *Treatise ICL I* (2021) 477 ff.; van Sliedregt, *Responsibility* (2012) (both with further references) and Weigend (2012) 10 *JICJ* 1219 (with legal policy considerations in favour of even a justification); Risacher (2014) 89 *Notre Dame L. Rev.* 1403, esp. 1417, 1419–21 (critical of the ICTY's approach because Erdemović's conviction does not satisfy any of the legitimate purposes of criminal punishment, *i.e.*, deterrence, rehabilitation, retribution, and incapacitation; while Erdemović's actions could not be *justified* he should have been *excused* as unfit for punishment, since he was under duress and unable to make a moral choice; the authors further propose a revision of Article 31(1)(d) by removing the proportionality requirement which would render the excusing character of duress more obvious).

[149] *Cf.* § 34 and § 35 of the German PC; also distinguishing between justifying and excusing necessity (with special regard to torture) see Ohlin (2008) 6 *JICJ* 289; *cf.* also below fn. 182.

[150] For the latter definition *cf.* the Nuremberg jurisprudence in *US v. Krauch et al.* (case 6), in: US-GPO, *TWC VIII* (1952) 1176; crit. Weigend (2012) 10 *JICJ* 1219, 1234 ff.

[151] ICC, *Prosecutor v. Ongwen*, PTC II, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, 23 Mar. 2016, paras. 151 ff. (arguing, at para. 151, that duress may only lead to non-confirmation 'when the evidence [proving the ground] is so clear that it negates even the low evidentiary standards applicable'); see, also, Kappos (2018) 16*JICJ* 425, 442–3.

[152] *Ongwen*, ICC-02/04-01/15-422-Red, 23 Mar. 2016, para. 153.

[153] *Ibid.*, para. 154.

[154] *Ibid.*, para. 155.

[155] *Ongwen*, ICC-02/04-01/15-1762-Red, para. 2581 ff.

[156] *Ibid.*, para. 2586.

[157] *Ibid.*, para. 2670.

circumstances where any threats otherwise made to him could have no effect.[158] Given the clear rejection of duress by TC IX the question of its application in the case of the killing of innocent civilians, *i.e.*, whether the pattern set by the majority of the ICTY AC in *Erdemovic* will be followed,[159] or a new course pursued and the possibility of an *exculpatory* (not a justificatory) 'duress defence' even in such cases recognized,[160] remains unresolved. To be sure, subpara. (d) does not explicitly exclude this possibility.

48 Para. 1(d) is to be distinguished from the defence of 'superior orders' (Article 33).[161] While an order might exert sufficient compulsion so as to curtail a defendant's freedom of will and, thus, rise to (the level of) duress, the superior order defence is not concerned with the freedom of will of the order's addressee but with the protection of (military) hierarchies.[162]

49 A closer look reveals that para. 1(d) contains at least four constitutive elements to be analysed in turn: the type of conduct to be excluded from criminal responsibility (below 1.), the elements characterizing the duress (2.), the requirements for the (re)action to avoid the threat (3.), and the mental element that accompanies the (re)action (4.).

1. 'Conduct alleged to constitute a crime within the jurisdiction of the Court'

50 It is difficult to understand why this clause speaks of conduct *'alleged'* to constitute a crime. If it is to express no more than the fact that, by excluding criminal responsibility, a crime has not been committed but is merely 'alleged', then the same consequence – a truism, in fact – would equally apply to all other grounds excluding criminal responsi-

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[158] *Ibid.*, para. 2668. – In the literature different positions, more favourable to duress, have been defended, see eg Grant (2016) ICD Brief 21, 1, 3 ff. (abducted as child and subjected to extreme violence); Anguiling-Pangalangan (2018) 33 AmUILRev 605, 607, 618. For a discussion and analysis of the nature of the conflict in Northern Uganda and of the LRA in particular from a sociological/cultural perspective see Vorhölter, Youth (2014) 94 ff., esp. 100–12.

[159] ICTY, *Prosecutor v. Erdemović*, AC, Judgement, IT-96-22-A, 7 Oct. 1997, para. 19 and disposition (4), rejecting the TC's recognition of duress with a 3:2 majority (Judges McDonald, Vohrah and Li, dissenting opinions by Judges Cassese and Stephen); for an extensive discussion see Ambos, *Treatise ICL I* (2021) 466 ff. also Hoven, in: Bublitz *et al.*, *FS Merkel* (2020), pp. 859–62.

[160] Cautiously advocating an excuse, within the context of a normative concept of liability/guilt (*'normativer Schuldbegriff'*), provided, of course, that the conditions of Article 31(1)(d) are met, and bearing in mind the particular characteristics of each case, see Ambos, *Internationales Strafrecht* (2018) 223–4; for a more extensive discussion in light of the *Erdemović* precedent see *id.*, *Treatise ICL I* (2021) 477 ff. Joyce (2015) 28 *LeidenJIL* 623, 641–2 rejects the interpretation of 'duress' as a justificatory defence, but also sees difficulties in recognizing 'duress' as an exculpatory defence in cases of killings of civilians, especially when the person under duress kills more than one individual; in order for 'duress' to properly function as an exculpatory defence he proposes an amendment of Article 31(1)(d) that would structure this defence more along the lines of the Nuremberg Military Tribunals' view by incorporating stricter criteria for proportionality. Carback (2016) 3 *Indon. J. Int'l & Comp. L.* 651, esp. 666–71, 688, 694 ff. concurs with the Erdemović majority. Analysing the theoretical-philosophical underpinnings of each of the different judicial views – the Kantian-deontological approach' and the 'utilitarian-consequentialist approach', respectively – Carback claims that the majority reached the correct decision, in accordance with the 'natural-law/teleological approach', which plays a pivotal role in Western legal thinking in general, and human-rights theory and international law in particular. Carback argues that this approach recognizes an absolute value to human life which means that under no circumstances can the charge of a purposeful taking of an innocent life be met with a defence of duress. Anguiling-Pangalangan (2018) 33 *AmUILRev* 605, 624 ff. chooses a different path arguing that Ongwen should be exculpated not on the basis of 'duress' according to Article 31(1)(d), but on the basis of *incapacitation* (along the lines of an 'insanity defence') according to Article 31(1)(a) since his indoctrination and subjugation to extreme violence as a child by the LRA has rendered him permanently incapable to appreciate the unlawfulness of his conduct.

[161] *Cf.* Rowe (1998) 1 *YbIHL* 210, 216 ff.; Schabas, *ICC Commentary* (2016) 645.

[162] *Cf.* Blakesley (1998) 67 *RIDP* 139, 182 ff.; Eser, in: Dinstein and Tabory, *War Crimes IL* (1996) 251, 254 ff.

bility. A possible explanation could be found in the reference to *crimes 'within the jurisdiction of the Court'*, to the effect that this novel blending of necessity and duress should only be available for the international core crimes, thereby foreclosing any effects with regard to national criminal justice systems or other international criminal tribunals.

2. 'Duress' resulting from a 'threat of imminent death' or of 'continuing or imminent serious bodily harm' against 'that person or another person' whereby the threat is either 'made by other persons' or 'constituted by other circumstances beyond that person's control'

Within this lengthy phrase four components can be distinguished: 51

(a) The basic requirement is a **threat** *of imminent death* or *of continuing or imminent serious bodily harm*. While the threat does not need to be unlawful as in the case of self-defence[163] it is, given the qualifying references to death or personal harm, narrower than 'use of force' under subpara. (c)[164] and requires more than basic, superficial injuries. In the same vein a merely abstract danger or simply an elevated probability that a dangerous situation might occur would not suffice;[165] nevertheless, the imminence of a threat may be present in an overall continuing state of emergency[166] (as in terms of a '*Dauernotstand*'[167]). Like the attack in self-defence, the threat must objectively exist and not merely in the perpetrator's mind.[168]

(b) As to its origin, the threat must either be '***made by other persons***', as in the case 52 of coercion against the victim, or 'constituted by **other circumstances** beyond that person's control', as in the case of danger not resulting from another person's action, but from other endangerments by natural forces and the like. The clause 'beyond that person's control' ('*indépendant de sa volonté*') insinuates that self-induced risks, regardless of whether they concerning man-made or natural dangers, cannot provide an excuse.[169] However, an exact definition of self-exposure was consciously left to the judges.[170]

(c) The person exposed to the threat can be either the defendant **him-/herself or** 53 **another person.** This broad approach allows not only for preservation from own endangerment but also for emergency assistance to third persons. In contrast to certain national criminal codes, however, which would limit this kind of 'altruistic' duress to relatives or persons similarly close to the actor,[171] the Statute does not explicitly require any special relationship between the actor and the third person. Nevertheless, averting threats from strangers may for other reasons fail to fulfil subpara. (d) since, for instance, the threat to a stranger may not be grave enough as to compel a reasonable person to

[163] In that case, the person defending him-/herself against an unlawful threat of death or bodily harm could be justified according to subpara. (c).

[164] *Cf.* Ambos, *Treatise ICL I* (2021) 471–2.

[165] See now *Ongwen*, ICC-02/04-01/15-1762-Red, para. 2582. See also Werle and Jessberger, *Principles ICL* (2020) mn. 738, giving the example of the abstract omnipresence of the Gestapo in the Third Reich.

[166] *Cf.* Bond and Fourgere (2014) 14 *ICLRev* 471, 471 ff.; Werle and Jessberger, *Principles ICL* (2020) mn. 738.

[167] *Cf.* Perron, in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 35 mn. 12, 713 with reference to *id.* in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 34 mn. 17, 691.

[168] Ambos, *Treatise ICL I* (2021) 472; Cryer, in: Cryer *et al.*, *ICL* (2019) 390.

[169] *Cf. ibid.*; also Werle and Jessberger, *Principles ICL* (2020) mn. 743; disagreeing Heller, in: Heller and Dubber, *Comparative Criminal Law* (2011) 593, 613 by restricting this clause to self-procured natural risks.

[170] *Cf.* Scaliotti (2001) 1 *ICLRev* 111, 153.

[171] As, for instance, § 35 German PC.

commit an international crime.[172] Thus, with regard to 'altruistic' action in particular, the following requirements need attention.

54 (d) The threat must **result in 'duress'** which in turn causes the (alleged) criminal reaction. Thus, duress functions as the mediator between the threat and the (allegedly) criminal conduct. In order to be *caused*, however, the duress must be such so as to overpower the defendant's will, *i.e.*, it is contingent on the threat's capacity to overcome that will. As a brief comparative analysis shows, this dimension of duress renders it susceptible to normative and, for that matter, objective limitations: Whether one demands, as the Law Commission for England and Wales, that 'the threat [is] one which in all the circumstances… [the defendant] cannot reasonably be expected to resist',[173] or whether, according to the US MPC, the threat must have been sufficiently great that 'a person of reasonable firmness in the [defendant's] situation would have been unable to resist',[174] all these propositions, ultimately, rest on a concept which in German criminal law theory has been labelled as '*Unzumutbarkeit*',[175] finding adoption in Romanic theory in terms of '*no exigibilidad*'[176] and '*inesigibilità*'[177] respectively. In short, duress operates as an excuse only if the defendant acted upon threats that the 'normal' person cannot be fairly expected to endure.[178] Conversely, threats that are otherwise avertable do not result in 'duress' proper.

55 Accordingly, subpara. (d) only applies if the defendant cannot be fairly expected to withstand or assume the risk. Thus, a threat results in 'duress' only if it is not otherwise avoidable, *i.e.*, if a reasonable person in comparable circumstances would not have bowed to the pressure and thus not been driven to the relevant criminal conduct. It is therefore neither required to show special valour, prowess or heroism, nor does a weak will or a weakness of character exclude criminal responsibility.[179] This is not to say that one may simply follow the most convenient way out, rather, the coerced person has to seek every reasonable, not too distant evasive alternative in order to avoid the commission of a crime.[180] Furthermore, if the yardstick for measuring what threats a person may fairly be expected to resist shall not be left entirely to the subjective sentiments and attitudes of the person concerned, fair expect ability cannot be determined without regard to this person's social status and legal obligations; this means that police officers, firemen or soldiers, due to their official position, can be expected to be more resistant to dangers than normal citizens.[181]

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[172] *Cf.* Ambos, *Treatise ICL I* (2021) 472.

[173] See Law Commission, *A Criminal Code for England and Wales*, Vol. I (1989) § 42. Further, the (then) House of Lords answered affirmative to the question: 'Does the defense of duress fail if the prosecution proves that a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats as did the defendant?', *cf. R v Howe and Others* (1987) *CLRev* 480.

[174] Sec. 2.09 (1) US MPC.

[175] As one of the first to develop this concept see Henkel, in: Engisch, *FS Mezger* (1954) 249. As to the implementation of '*Zumutbarkeit*' in § 35 German PC see Perron, in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 35 mn. 13 , 713.

[176] See Mir Puig, *DP* (2016) 618 ff.

[177] Fiandaca and Musco, *DP* (2019) 425.

[178] *BGH*, 4 StR 140/92, 21.05.1992 (1992) 12 *NStZ* 487. Also *cf.* Perron, in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 35 mn. 14, 714. As to the translation of '*Zumutbarkeit*' as 'fair expectability' *cf.* Fletcher, in: Eser and Fletcher, *Justification and Excuse* (1987) 167, 171.

[179] *Cf.* Perron, in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 35 mn. 14, 714.

[180] *Ibid.*

[181] See, again, § 35 German PC and Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 1003, 1039, *id.*, *Treatise ICL I* (2013) 358; Cryer, in: Cryer *et al.*, *ICL* (2019) 390–1. For further details *cf.* Perron, in: Schönke and Schröder, *Strafgesetzbuch* (2019) § 35 mn. 21–37, 717 ff.; as to reservations regarding soldiers *cf.* Weigend (2012) 10 *JICJ* 1219, 1235.

3. 'The person acts necessarily and reasonably to avoid this threat'

56 In contrast to self-defence where reasonableness and proportionality are required (above mn. 43–4), subpara. (d) calls for a '*necessary*' and '*reasonable*' act. This, undisputedly, means that the act directed at avoiding the threat must be necessary in terms of no other means being available and reasonable for reaching the desired effect.[182]

57 Beyond this primarily factual test, however, the prevailing opinion asks for more by interpreting 'reasonable' as to entail an **objective proportionality or balancing test,**[183] to the effect that the harm sought to be avoided outweighs, from a normative perspective, the caused harm: accordingly, a defendant is said only to act 'reasonably' if his/her (re)action is proportionate.[184] This corresponds to the choice-of-a-lesser-evil approach, as already known from the traditional necessity defence and as summarized by Judge Cassese in his dissent in *Erdemović* by requiring that 'the crime committed was not disproportionate to the evil threatened' (this would, for example, occur if one were to use lethal force in order to avert a mere assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils'.[185]

However, it is at least questionable to infer a (objective) proportionality requirement from the umbrella term 'reasonably' given that subpara. (c) explicitly requires the person invoking self-defence to act not only 'reasonably' but 'in a manner proportionate'. Further, the clear-cut requirement of subpara. (d) that the defendant 'does not *intend* (!) to cause a greater harm than the one sought to be avoided' points to a subjective rather than objective proportionality standard (if proportionality is required at all).[186] The subjective reading is confirmed by – above explained – attempt of the drafters to blend in one norm the traditional necessity and duress defence for only a subjective proportionality test would not eliminate altogether the 'no moral choice'-element as the central criterion of the duress defence and, thus, reduce subpara. (d) to mere necessity. Yet, even when renouncing an objective proportionality standard, if there is an unreasonable disproportion between the threat and the harm – for example: threatening to cut-off the defendant's little finger if s/he does not execute an innocent victim – it is, in principle, not *unzumutbar* to expect the defendant to resist.

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[182] With regard to the question of whether subpara. (d) could serve as a defence to interrogational torture (Article 7(1)(f) and Article 8(2)(a)(ii) respectively), for example of alleged terrorists to gain relevant information of imminent attacks, see *e.g.* Gaeta (2004) 2 *JICJ* 785, 791 ff., arguing – against the Supreme Court of Israel – that torture is always unreasonable, because of the uncertainty to gain reliable and pertinent information. A more nuanced position is taken by Ambos (2008) 6 *JICJ* 261, 206, and Ohlin (2008) 6 *JICJ* 289, 289 ff. who both, while denying justification, grant, in principle, an excuse. In a similar vein, distinguishing between torturing for obtaining a confession of a crime already committed and threatening to harm a suspect in order to rescue a victim from otherwise being doomed to die, see Eser, in: Herzog and Neumann, *FS Hassemer* (2010) 713.

[183] *Cf.* Kittichaisaree, *ICL* (2001) 263 ff.; Knoops, *Defenses* (2008) 86 ff.; Korte, *Handeln* (2003) 193 ff.; Kreß (1999) 12 *HuV-I* 7; Safferling, *Internationales Strafrecht* (2011) 117; Satzger, *Internationales Strafrecht* (2018) § 15 mn. 31 ff.; Werle and Jessberger, *Principles ICL* (2020) mn. 742 and fn. 502; Hoven, in: Bublitz *et al.*, *FS Merkel* (2020), p. 866.

[184] Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 1003, 1040.

[185] *Erdemović*, IT-96-22-A, Separate and dissenting opinion of Judge Cassese, 7 Oct. 1997, 7 Oct. 1997, para. 16. The complete definition of duress, as found in Judge Cassese's separate opinion para. 41, requires: '(1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat; (4) the situation of duress should not have been self-induced'.

[186] In similar terms see Ambos, *Treatise ICL I* (2021) 476; Heller, in: Heller and Dubber, *Comparative Criminal Law* (2011) 593, 613; Weigend (2012) 10 *JICJ* 1219, 1224. Interestingly enough, Merkel (2002) 114 *ZStW* 437, 453 ff., as well seems to have interpreted the aforementioned citation (above fn. 185), in subjective terms, although leaving open whether he finally shares this view.

4. 'Provided that the person does not intend to cause a greater harm than the one sought to be avoided'

58 As just indicated, this subjective conception of the 'lesser evil'-principle is an integral element of subpara. (d): different from classical 'necessity' which justifies actions that save the greater good at the cost of the minor, and different from classical 'duress' which would grant an excuse regardless of the greater or lesser harm, if the person could not be fairly expected to withstand the threat,[187] this wording could well be understood as drawing a line in-between: on the one hand requiring less than justifying 'necessity' and on the other requiring more than excusing 'duress'. Thus, only applying a subjective proportionality test to the defendant's conduct would help to reconcile necessity and duress in one provision.[188]

59 Therefore, the clause introduces the common law 'subjectification' in that it is not objectively required that the defendant did not cause a greater harm but it suffices that s/he did 'not intend' to do so.[189] In fact, this encapsulates the reasoning in the *Eichmann* case:[190] if the defendant, although exposed to a risk not otherwise avoidable, identifies him-/herself with his/her project or even over-accomplishes the extorted tasks, his/her criminal responsibility is not excluded under subpara. (d).

60 It remains to be seen whether a nuanced approach that combines a subjective proportionality test and an objective understanding of the threat causing this reaction ('*Zumutbarkeit*') is superior to the prevailing opinion which either applies only an objective proportionality standard or even goes as far as requiring subjective proportionality additionally.[191]

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[187] *Cf.* Eser, in: Eser and Fletcher, *Justification and Excuse* (1987) 19, 54 ff.; *id.*, in: Dinstein and Tabory, *War Crimes in IL* (1996) 251, 261 ff.

[188] Instead of interpreting the proportionality requirement in view of the defendant's subjective intention, Korte, *Handeln* (2003) 198 ff. rather treats the lack of objective proportionality, whilst the defendant had subjectively intended to act proportionally, as a case of mistake.

[189] Cf. Ambos, *Treatise ICL I* (2021) 476.

[190] Attorney General of the *Government of Israel v. Adolf Eichmann* (1968) 36 ILR 5 (summary).

[191] *Cf.* Ambos, in: Cassese *et al.*, *Rome Statute I* (2002) 1003, 1041. The teleological advantage of discarding objective proportionality and of rather focusing on the threat's '*Zumutbarkeit*' might be justified with regard to the *Erdemović* situation (above fn. 148), *i.e.* the coerced killing of innocents: After controversial discussions at the Rome Conf., it was finally agreed that subpara. (d) is also available to killing civilians (Kittichaisaree, *ICL* (2001) 264; Scaliotti (2001) 1 *ICLRev* 111, 154; Werle and Jessberger, *Principles ICL* (2020) mn. 740; *cf.* also Cassese and Gaeta, *ICL* (2013) 217 ff.; in the same vein, Grant (2016) *ICD* Brief 21, 20–1). To explain this conclusion by an appeal to the purported (objective) proportionality of the defendant's action is highly dangerous and appears bluntly utilitarian: since one has to argue that the harm avoided outweighs the harm caused (in terms of choice of the lesser evil), the innocent's life has to be degraded vis-à-vis the defendant's integrity. Yet, the phrase 'duress resulting from a [further specified] threat' reveals an almost humanistic rationale for excluding criminal responsibility even in the case of killing innocents: a defendant cannot be fairly expected to withstand a threat which we would deem irresistible for a reasonable person in comparable circumstances (this seems to be misunderstood by Dinstein, in: McDonald and Swaak-Goldman, *ICL I* (2000) 373, 375, apparently due to his confusing duress as absence of moral choice with the proportionality requirement of the choice of a lesser evil). With regard to the exclusion of responsibility in the case of killing innocents by way of an excuse, the victims are not degraded to a lesser value, but the defendant's human (and fallible) nature has become the focal point of legal reasoning. By not requiring, as a matter of law, that a person defies an overpowering compulsion, criminal justice does not project any expectations of heroism and is thus firmly grounded in humanistic ideals.

ractice before the ICTY
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Article 66
Presumption of innocence

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.

2. The onus is on the Prosecutor to prove the guilt of the accused.

3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Literature: Bassiouni, M.C., 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', (1993) 3 *DukeJComp&IL* 235; Blakesley, C.L., 'Commentary on Parts 5 and 6 of the Zutphen Inter-Sessional Draft: Investigation, Prosecution & Trial' (1998) 13*bis NEP* 69; May, R. and Wierda, M., 'Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha' (1999) 37 *ColJTransnatL* 754; McDermott, Y., 'Inferential Reasoning and Proof in International Criminal Trials' (2015) 13 *JICJ* 507; Noor Muhammad, H.H., 'Due Process of Law for Persons Accused of Crime', in: L. Henkin (ed.), *The International Bill of Rights: The CCPR* (Columbia UP 1981) 138; Pruitt, R.C., 'Guilt by Majority in the International Criminal Tribunal for the former Yugoslavia: Does this Meet the Standard of Proof 'Beyond Reasonable Doubt'?' (1997) 10 *LeidenJIL* 557; Stavros, S., *The Guarantees for Accused Persons under Article 6 of the European Convention on Human Rights* (Brill 1993); Triffterer, O., 'Sind § 42 und seine Ausformung im Prozeßrecht mit Artikel 6 EMRK vereinbar?', (1982) 8 *ÖJZ* 617 and Part 2, 647; *id.*, 'Zur Einschränkbarkeit der Menschenrechte und zur Anwendbarkeit von Verfahrensgrundsätzen bei freiheitsbeschränkenden Disziplinarmaßnahmen in 'besonderen Gewaltverhältnissen'', (1976) 4 *EuGRZ* 363 and Part 2, (1977) 5 *EuGRZ* 136.

Content

A. Introduction/General remarks

The French *Déclaration des droits de l'homme et du citoyen* of 1789 recognizes, at Article 9, '[t]out homme étant présumé innocent jusqu'à ce qu'il ait été déclaré coupable'.[1] The same principle was recognized by common law courts. A famous English judgment states that 'where intent is an ingredient of a crime there is no onus 1

[1] 'Every man being presumed innocent until he has been declared guilty'.

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avros, *Guarantees* (1993)
1983, para. 40. See also,

Ms Le Fraper du Hellen,
I, Decision on Defence
4-01/10-51, 31 Jan. 2011;
utor's statement in *Jeune*

or Disqualification of the
6.

3. 'in accordance with the applicable law'

Although some writers have suggested a degree of ambiguity associated with the terms 'in accordance',[44] it would seem clear enough that the reference is to the application of the law of the Statute to trials before the court. The term 'applicable law' is defined in Article 21 of the *Statute*.[45] It consists of a hierarchy, beginning with the Statute, EoC and the RPE. These sources are followed, where appropriate, by applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict. Failing that, the applicable law comprises general principles of law derived by the Court from national laws of legal systems of the world. The reference to applicable law provides the Court with the possibility of developing a form of exclusionary rule, by which evidence could be refused if obtained illegally, either by those acting under the authority of the Statute or those completely independent of it. This would enlarge its more limited power to exclude evidence pursuant to Article 69(7). Thus, evidence obtained illegally would not be evidence obtained 'in accordance with the applicable law' and therefore could not form the basis for a finding of guilt. **16**

The presumption of innocence clearly interplays with the rights of the accused, and Article 67(1)(i) confirms that no onus shall be placed on the accused to prove his or her innocence. The presumption also intersects with such issues as the right to provisional release and the right to silence. In the *Ruto* case, it was noted that the accused's request to be continually absent from trial had to be assessed in light of the presumption of innocence: **17**

> *'In the circumstances of the present litigation, to have 'full respect for the rights of the accused' will necessarily begin with giving the minimum of a reasonable accommodation to the presumption of innocence that the accused enjoys under Article 66(1) of the Statute — also accepted as a 'right' under international human rights law, as noted earlier. To give it full effect in the circumstances now under consideration will require the Chamber to take the path of construction that will accommodate the natural incidence of that right, in a manner that is not unduly inconvenient to the overall purpose'.*[46]

II. Paragraph 2: Onus of proof

Evidentiary issues are central to the presumption of innocence.[47] That the prosecutor has the burden of proof would seem to be a general principle of law.[48] It is a burden that never shifts.[49] That being said, the Court has noted its own 'truth-finding' role, meaning **18**

[44] Blakesley (1998) 13*bis NEP* 69, 87.

[45] A possible argument that the term as used in Article 66 should not be confined to the technical meaning given in Article 21, but rather receive some broader construction, could rely on the fact that Article 31(3), which contains the only other reference in the Statute to 'applicable law', reads 'applicable law as set forth in Article 21'. *A contrario*, where there is no reference to Article 21, the term is not subject to the statutory definition.

[46] ICC, *Prosecutor v. Ruto*, TC V, Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial, ICC-01/09-01/11-777, 18 Jun. 2013, para. 48.

[47] Preparatory Committee I 1996, see fn. 8, para. 286, 60.

[48] ICTY, *Prosecutor* v. *Delalić et al.*, TC, Judgment, IT-96-21-T, 16 Nov. 1998, para. 599. See also the remarks of Judge Claude Jorda, presiding over PTC I, in ICC, *Prosecutor* v. *Lubanga*, Transcript, ICC-01/04-01/06-T-30, 9 Nov. 2006, p. 11.

[49] ICC, *Prosecutor v. Gbagbo et al.*, TC I, Reasons for Oral Decision of 15 Jan. 2019 on the Requête de la Défense de Laurent Gbagbo afin qu'un jugement d'acquittement portant sur toutes les charges soit

that it is not solely reliant on the consent of the parties to request all of the evidence necessary to reach its findings. Pursuant to Article 69(3) of the Statute, 'the Court has the authority to request the submission of all evidence that it considers necessary for the determination of the truth'.[50] According to the AC, 'The fact that the onus lies on the Prosecutor cannot be read to exclude the statutory powers of the court, as it is the court that must be convinced of the guilt of the accused beyond reasonable doubt.'[51] Although the onus is on the prosecution to prove the guilt of the accused, participating victims have been granted permission to introduce incriminating evidence.[52] There may be issues with this approach, in so far as victims do not share the same disclosure obligations as the Prosecutor has under Article 67(2) of the Statute and Rules 76 to 84. However, it has been stressed that a Chamber will only authorise the introduction of such evidence if it will not prejudice the fairness and impartiality of the trial and the rights of the accused.[53]

19 The presumption of innocence may be breached where an accused person is required to produce evidence to counter the charge even in the absence of any direct evidence of guilt. Although an exceptional measure, most legal systems, even those that purport to adhere scrupulously to the presumption of innocence, allow for some exceptions of this sort. The least offensive of such provisions are so-called factual presumptions, where proof of one fact is deemed by the court to constitute proof of another, incriminating fact. An example would be the presumption that a person who is in possession of recently stolen goods is in fact the thief. The prosecution need only establish two facts, that the object was stolen, and that it was in the possession of the accused. In order to avoid conviction for theft (and not just possession of stolen goods), the accused must then rebut the prosecution's case by leading evidence. While ostensibly a violation of the presumption of innocence, this approach is defended by judges as nothing more than a common sense rule, a logical deduction from the facts. More extreme forms of reversal of the burden of proof are effected by specific legislation. A frequent example is the presumption that a person in possession of a substantial quantity of narcotic drugs is more than a simple possessor, but is actually a trafficker, or at least is in possession for the purposes of trafficking. Despite any direct evidence of trafficking, the accused is required to rebut such a presumption. This form of reversal of burden of proof is somewhat academic, as far as the Statute is concerned, because there are no such 'reverse onus' provisions within the crimes defined by the Statute.

20 Nevertheless, the drafters of the Statute were alive to the issue because they introduced, in Article 67(1)(i) a provision that specifically contemplates the problem of reversal of onus of proof: the right of an accused '[n]ot to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal'. Although Article 67 is based essentially on existing models, principally Article 14(3) of the ICCPR, the reverse onus prohibition in Article 67(1)(i) is quite original. Again, its application is problematic, because there are no typical reverse onus provisions in the Statute. Thus, its application to judge-made reverse onus provisions would seem to be the real purpose of the provision. Depending on the scope this is given by the Court, these norms may create

prononcé en faveur de Laurent Gbagbo et que sa mise en liberté immédiate soit ordonnée, Reasons of Judge Geoffrey Henderson, ICC-02/11-01/15-1263-AnxB, 16 Jul. 2019, para. 15.

[50] See generally, Heinze, *Disclosure* (2014), 218–223, 243–250, 499–505.

[51] ICC, *Prosecutor v. Lubanga,* AC, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 Jan. 2008, ICC-01/04-01/06-1432, 11 Jul. 2008, para. 95.

[52] *Ibid.*, para. 112; ICC, *Prosecutor v Katanga and Ngudjolo Chui*, TC II, Decision on the Modalities of Victim Participation at Trial, ICC-01/04-01/07-1788, 22 Jan. 2010, para. 82.

[53] ICC, *Katanga and Chui*, Decision on the Modalities of Victim Participation at Trial, *ibid.*, para. 84.

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troublesome hurdles for the prosecution and provide the defence with a wealth of arguments.

For example, during the so-called *Čelebići* trial before the ICTY, one of the accused raised a plea of lack of mental capacity, or insanity. The TC considered that the accused was presumed to be sane, despite an absence of prosecution evidence, and that it was for the accused to establish the contrary. Not only was the accused required to lead evidence of insanity, the TC also held that the accused had a burden to prove this according to the preponderance of evidence standard.[54] As the TC explained, '[t]his is in accord and consistent with the general principle that the burden of proof of facts relating to a particular peculiar knowledge is on the person with such knowledge or one who raises the defence'.[55] Given the combined effect of Article 66(2) and 67(1)(i), would the ICC not conclude otherwise? At the very least, it would seem appropriate for the Court to rule that the accused is only required to raise a reasonable doubt as to mental condition, an approach that many legal systems have been able to live with.[56] But under a more extreme hypothesis, the Court might apply these rules so as to impose a burden on the prosecution to establish sanity, a result that was surely unintended by the drafters of the Statute and one that could wreak havoc with the work of the Prosecutor. 21

The provisions of the Statute dealing with command responsibility may also, although more indirectly, lead to problems concerning the burden of proof. According to Article 28, when individuals under the control of a superior commit crimes within the subject matter jurisdiction of the Court, the superior is deemed responsible for such crimes if he or she 'should have known that the forces were committing or about to commit such crimes'. It will be argued that the superior is not being charged with the crime itself, but only with negligent supervision of troops or other subordinates. Yet negligence is not a crime within the subject matter jurisdiction of the Court; indeed, the core crimes require proof of the highest level of *mens rea*. The practical effect of Article 28, once proof of commission of crimes by subordinates has been made, is to force the accused to testify in order to rebut the presumption of negligence, and to establish that the superior took 'all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution' (Article 28(1)(b)). Consequently, there is an effective reversal of the onus of proof. 22

The ICC Statute provides for no exceptions to the general principle of the presumption of innocence. By analogy, the ECHR, which also recognizes the presumption of innocence and without, in the text at least, any possibility of its limitation or restriction, has admitted that reverse onus provisions are included in all domestic systems of criminal law. They are not contrary to the presumption of innocence, according to the Court, unless they go beyond 'reasonable limits', taking into account what is at stake and the rights of the defence.[57] The problem with transposing the European jurispru- 23

[54] ICTY, *Prosecutor* v. *Delalić et al.*, TC, Judgment, IT-96-21-T, 16 Nov. 1998, paras. 602–603, 1157–1160. The Trial Chamber cites two English cases in support of its conclusion: *R.* v. *Dunbar*, [1958] 1 Q.B. 1; *R.* v. *Grant*, [1960] *CLR* 424.

[55] *Delalić et al.*, TC, IT-96-21-T, 16 Nov. 1998, para. 1172.

[56] SCOTUS, *Davis* v. *United* States, 160 U.S. 469, 16 Dec. 1895; SCOTUS, *Re* Winship, 397 U.S. 358 31 Mar. 1970; SCOTUS, *Mullaney v. Wilbur*, 421 U.S. 684, 9 Jun. 1975; SCOTUS, *Jackson* v. *Virginia*, 443 U.S. 307 28 Jun. 1979. But see: Supreme Court of Canada, *R.* v. *Chaulk*, [1990] 3 SCR. 1303, 62 C.C.C. (3d) 193, 20 Dec. 1990.

[57] ECtHR, *Salabiaku* v. *France*, 10519/83, 7 Oct. 1988, para. 28. Also ECtHR, *Willcox and Hurford v. the United Kingdom* , 43759/10 and 43771/12, 8 Jan. 2013, para. 96; ECtHR, *Nicoleta Gheorghe v. Romania*, 23470/05, 3 Apr. 2012, para. 30.

dence is that the Convention contains no clause similar to Article 67(1)(i), that explicitly rules out such exceptions to the presumption of innocence.

III. Paragraph 3: Reasonable doubt

24 Human rights law has left the issue of the standard of proof in criminal law in an uncertain state. The ECtHR has no clear pronouncement on the subject.[58] An amendment specifying the 'reasonable doubt' standard of proof was defeated during the drafting of Article 14 of the ICCPR.[59] However, the HRC has been less circumspect, clarifying that the prosecution must establish proof of guilt beyond reasonable doubt.[60] Citing authority from the post WWII tribunals, May and Wierda have said that if 'from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken'. Proof beyond a reasonable doubt means that the accused's guilt must be proven to a moral certainty.[61] In *Pohl*, the U.S. Military Tribunal said: 'It is such a doubt as, after full consideration of all the evidence, would leave an unbiased, reflective person charged with the responsibility of decision, in such a state of mind that he could not say that he felt an abiding conviction amounting to a moral certainty of the truth of the charge'.[62] The IMT at Nuremberg applied the standard of reasonable doubt, stating explicitly in its judgment that Schacht and von Papen were to be acquitted because of failure to meet that burden of proof.[63]

As for the *ad hoc* Tribunals, they seem to have had no difficulty with the issue, and there are frequent statements in their initial judgments to the effect that the reasonable doubt standard applies.[64] In the *Čelebići* case, the TC said that 'the Prosecution is bound in law to prove the case alleged against the accused beyond a reasonable doubt. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved'.[65] An ICTY TC was found to have misapplied the test of 'reasonable doubt' when it entertained the remote possibility that five men killed in Jaskici might have been victims of a large force of Serb soldiers rather than the smaller group with which Tadić was associated. But the AC resisted the invitation, from the Prosecutor, to further define the scope of the term 'reasonable doubt'.[66] In a contempt of court proceeding, an ICTY TC concluded that although testimony 'raised grave suspicions' about the contact of a lawyer, '[n]ot even the gravest of suspicions can establish proof beyond reasonable doubt…'.[67]

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[58] See, ECommHumRts, *Austria* v. *Italy*, 788/60, 11 Jan. 1961, 784.

[59] UN Doc. E/CN.4/365, UN Doc. E/CN.4/SR.156.

[60] General Comment 13/21, UN Doc. A/39/40, 143–147, para. 7.

[61] May and Wierda (1999) 37 *ColJTransnatL* 754, citing: U.S. Military Tribunal, *United States v. Flick et al.*, (1948) 6 TWC 1, 1188; U.S. Military Tribunal, *United States v. Brandt et al.*, (1948) 2 TWC 1, 184; U.S. Military Tribunal, *United States v. von Weizsaecker* et al. (1948) 14 TWC 1, 315.

[62] U.S. Military Tribunal, *United States v. Pohl et al.*, (1948) 5 TWC 1, 965.

[63] IMT, *France et al. v. Göring et al.*, (1946) 22 IMT 203, 13 ILR 203, 41 *AJIL* 302, 318.

[64] ICTY, *Prosecutor v. Tadić*, TC, Judgment, IT-94-1-T, 7 May 1997, paras. 234–237, 241–242, 261, 279, 302–303, 316, 341, 369–370, 373–375, 387–388, 397, 426, 435, 448, 451–452, 455, 461, 477, 673, 693, 718, 720–721, 726, 730, 732, 734–735, 737–738, 740, 742, 744, 746, 750, 754, 756–757, 760–761, 763–764; ICTR, *Prosecutor v. Akayesu*, AC, Judgment, ICTR-96-4-T, 2 Sep. 1998, containing more than ninety references to the reasonable doubt standard; *Delalić et al.*, IT-96-21-T, 16 Nov. 1998, paras. 43, 599–600, 603, 622–623, 720, 745, 796, 810, 872, 876, 885, 896, 898, 949, 988, 1008, 1034.

[65] *Delalić et al.*, IT-96-21-T, 16 Nov. 1998, para. 601.

[66] ICTY, *Prosecutor v. Tadić*, AC, Judgment, IT-94-1-A, 15 Jul. 1999, 181–183. For the proposals of the Prosecutor, see para. 174.

[67] ICTY, *Prosecutor v. Simić et al.*, TC, Judgment in the Matter of Contempt Allegations Against an Accused and his Counsel, IT-95-9-R77, 30 Jun. 2000.

S. Aktypis, in J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Court Pénale Internationale Commentaire Article par Article,* Vol. I, 1st Ed. (Editions Pedone, 2012), pp. 923-926

Sous la direction de
Julian FERNANDEZ et Xavier PACREAU

Coordinatrice éditoriale
Lola MAZE

STATUT DE ROME DE LA COUR PÉNALE INTERNATIONALE COMMENTAIRE ARTICLE PAR ARTICLE

Avant-propos
Robert BADINTER

Ouverture
Philippe KIRSCH

Tome I

EDITIONS PEDONE
13 rue Soufflot
75005 PARIS

Editeur depuis 1837 - 13, RUE SOUFFLOT

2012

EAN – 978 2 233 00653 0

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[1] *Rapport de la Cour pén*

ARTICLE 31
MOTIFS D'EXONÉRATION DE LA RESPONSABILITÉ PÉNALE

1. Outre les autres motifs d'exonération de la responsabilité pénale prévus par le présent Statut, une personne n'est pas responsable pénalement si, au moment du comportement en cause :

a) Elle souffrait d'une maladie ou d'une déficience mentale qui la privait de la faculté de comprendre le caractère délictueux ou la nature de son comportement, ou de maîtriser celui-ci pour le conformer aux exigences de la loi ;

b) Elle était dans un état d'intoxication qui la privait de la faculté de comprendre le caractère délictueux ou la nature de son comportement, ou de maîtriser celui-ci pour le conformer aux exigences de la loi, à moins qu'elle ne se soit volontairement intoxiquée dans des circonstances telles qu'elle savait que, du fait de son intoxication, elle risquait d'adopter un comportement constituant un crime relevant de la compétence de la Cour, ou qu'elle n'ait tenu aucun compte de ce risque ;

c) Elle a agi raisonnablement pour se défendre, pour défendre autrui ou, dans le cas des crimes de guerre, pour défendre des biens essentiels à sa survie ou à celle d'autrui ou essentiels à l'accomplissement d'une mission militaire, contre un recours imminent et illicite à la force, d'une manière proportionnée à l'ampleur du danger qu'elle courait ou que couraient l'autre personne ou les biens protégés. Le fait qu'une personne ait participé à une opération défensive menée par des forces armées ne constitue pas en soi un motif d'exonération de la responsabilité pénale au titre du présent alinéa ;

d) Le comportement dont il est allégué qu'il constitue un crime relevant de la compétence de la Cour a été adopté sous la contrainte résultant d'une menace de mort imminente ou d'une atteinte grave, continue ou imminente à sa propre intégrité physique ou à celle d'autrui, et si elle a agi par nécessité et de façon raisonnable pour écarter cette menace, à condition qu'elle n'ait pas eu l'intention de causer un dommage plus grand que celui qu'elle cherchait à éviter. Cette menace peut être :

i) Soit exercée par d'autres personnes ;

ii) Soit constituée par d'autres circonstances indépendantes de sa volonté.

qui inclut également la nécessité militaire[59]. Pour limiter le champ d'application de ce motif extrêmement controversé, la dernière phrase de l'article 31-1-c – un *« real cliffhanger in the working group »*[60] – prévoit que *« [l]e fait qu'une personne ait participé à une opération défensive menée par des forces armées ne constitue pas en soi un motif d'exonération de la responsabilité pénale au titre du présent alinéa »*. Cette phrase réussit en effet à écarter toute confusion entre les règles primaires – les règles du droit international des conflits armés – et les catégories juridiques qui en découlent – les règles secondaires ou règles de droit international pénal –, comme celles de l'article 31 du Statut. Il en ressort plus précisément que la qualification d'une opération défensive au regard du droit international des conflits armés n'influe en rien sur la qualification des actes commis par une personne ayant participé à cette opération à la lumière du Statut de la CPI. Le TPIY en a déjà fait application, en soulignant que *« military operations in self-defence do not provide a justification for serious violations of international humanitarian law »*[61]. Des problèmes d'interprétation également complexes sont au cœur de la disposition suivante, qui consacre la contrainte et l'état de nécessité.

C. Article 31-1-d

1. La difficile « cohabitation » contrainte/nécessité

Le libellé du point 1-d remonte à une proposition de la délégation canadienne qui mettait en évidence les conditions communes à la contrainte et à l'état de nécessité, à savoir la menace *« imminente, réelle et inévitable »*[62]. La disposition est considérée comme une des moins *« convaincantes »*[63] parce qu'elle tente de combiner deux concepts distincts, à savoir la contrainte et la nécessité[64]. La contrainte prive la personne de toute possibilité de choisir, alors que l'état de nécessité se caractérise justement par l'élément du choix – du moindre mal[65]. Dans le cas de la nécessité, l'intérêt sauvegardé grâce à la commission de l'acte illicite, en l'occurrence d'un crime relevant de la compétence de la CPI, doit

[59] Antonio CASSESE, *International Criminal Law*, *op. cit.*, p. 229.

[60] Per SALAND, « International Criminal Law Principles », in Roy S. LEE (ed.), *The International Criminal Court. The making of the Rome Statute*, *op. cit.*, p. 208.

[61] TPIY, *Le Procureur c. Kordic et Cerkez (« La Vallée de la Lasva »)*, Affaire n° IT-95-16-A, Chambre de première instance, jugement du 26 février 2001, § 452.

[62] Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *The Rome Statute of the International Criminal Court : A Commentary*, *op. cit.*, p. 1036.

[63] Albin ESER, « Article 31 », in Otto TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, *op. cit.*, p. 883. Voy. également Per SALAND, « International Criminal Law Principles », in Roy S. LEE (ed.), *The International Criminal Court. The making of the Rome Statute*, *op. cit.*, p. 208.

[64] Sur l'historique de cette disposition, voy. Albin ESER, « Article 31 », in Otto TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, *op. cit.*, pp. 883 et suiv. Sur la confusion dans l'emploi des deux termes dans la doctrine, dans la jurisprudence internationale et dans le droit interne, voy. *ibid.*

[65] Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *The Rome Statute of the International Criminal Court : A Commentary*, *op. cit.*, p. 1036. *Contra* William SCHABAS, *The International Criminal Court. A commentary on the Rome Statute*, *op. cit.*, p. 490.

avoir une valeur supérieure à celle de l'intérêt sacrifié[66]. En revanche, dans le cas de la contrainte, il n'y aucun choix à opérer entre deux intérêts protégés par la loi. La personne sous contrainte ne peut en effet faire autre chose que commettre un crime relevant de la compétence de la CPI, à moins qu'elle ne décide de sacrifier sa propre vie ou sa propre intégrité physique ou celles d'autrui.

Le paragraphe 1-d comprend les éléments suivants :

- une menace de mort imminente ou d'une atteinte grave, continue ou imminente à sa propre intégrité physique ou à celle d'autrui ;

- cette menace peut être i) soit exercée par des personnes autres que la personne objet de la menace ; ii) soit constituée par d'autres circonstances indépendantes de la volonté de l'auteur ;

- une réaction nécessaire et raisonnable pour écarter cette menace ; et

- l'absence d'intention de causer un dommage plus grand que celui que la personne cherchait à éviter en commettant un crime relevant de la compétence de la CPI.

Or, mise à part la menace et ses origines possibles qui sont communes à la notion tant de contrainte que d'état de nécessité, les deux derniers éléments sont propres uniquement à l'état de nécessité, ce qui rend la disposition encore plus confuse.

2. La définition des éléments d'identification

Contrairement à l'interprétation extensive du terme « force » du paragraphe 1-c favorisée par la doctrine, afin d'inclure tant la force physique que psychique, la « menace » du paragraphe 1-d peut comprendre la menace de nature psychologique à condition qu'elle puisse avoir des conséquences sur la vie ou l'intégrité physique de l'auteur du crime ou de toute autre personne[67]. Un danger abstrait ou même une probabilité élevée qu'une situation dangereuse pour la vie de l'auteur ou d'une personne tierce survienne ne suffisent pas[68]. Deux limitations supplémentaires sont apportées à ce motif d'exonération de la responsabilité pénale individuelle. La première figure dans le paragraphe 1-d lui-même : la menace doit être soit exercée par des personnes autres que la personne objet de la menace, soit *« constituée par d'autres circonstances indépendantes de [l]a volonté [de l'auteur de l'acte constitutif d'un des crimes relevant de la compétence de la CPI ou, il faut ajouter, de la victime directe autre que l'auteur] »*. Si l'auteur ou la personne tierce victime directe a contribué de quelque façon que ce soit à l'« éclosion » de la menace, la contrainte ne saurait être invoquée. La deuxième limitation découle des sources de l'article 21-1-c,

[66] Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *The Rome Statute of the International Criminal Court : A Commentary*, *op. cit.*, pp. 1036 et suiv.

[67] Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *The Rome Statute of the International Criminal Court : A Commentary*, *op. cit.*, p. 1038. Voy. également TPIY, *Le Procureur c. Drazen Erdemovic*, Chambre d'appel, arrêt du 7 octobre 1997, opinion individuelle et dissidente du Juge Antonio Cassese, § 41, qui parle d'*« une menace grave de mort ou d'atteinte à l'intégrité physique »*.

[68] Albin ESER, « Article 31 », in Otto TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, *op. cit.*, p. 885.

notamment des « lois nationales » et concerne le statut de l'auteur de l'acte. En effet, comme il est d'ailleurs prévu dans plusieurs ordres juridiques internes, certaines personnes, comme le personnel militaire, les policiers, les pompiers, *etc.*, ont l'obligation, en raison de leur statut professionnel, d'assumer plus de risques que le reste de la population[69]. Par conséquent, les critères d'évaluation de *« la contrainte résultant d'une menace »* du paragraphe 1-d seraient variables en fonction du statut professionnel de l'auteur du crime.

De manière plus générale, il convient, dans chaque cas d'espèce, d'examiner ce que l'on peut raisonnablement attendre de la personne qui a agi sous contrainte[70], car de toute évidence, nous ne réagissons pas tous de manière identique face à la même situation d'urgence. Cela conduit à se pencher sur les conditions que doit remplir la réaction pour écarter la menace : elle doit en effet être nécessaire et raisonnable. La nécessité se définit de manière négative en l'occurrence : il faut avoir épuisé tout autre moyen à la disposition de l'auteur. Autrement dit, une fois sous contrainte au sens de l'article 31-1-d, pour y faire face, la personne peut recourir en dernier ressort à la commission d'un crime relevant de la compétence de la CPI. Le terme « raisonnable » se rapporte plutôt à la proportionnalité de la réaction par rapport à la menace subie – d'autant plus que, contrairement au paragraphe 1-c et de façon par ailleurs surprenante, la proportionnalité n'y est pas explicitement requise.

Un élément subjectif s'ajoute explicitement aux conditions précédentes : l'absence d'*« intention de causer un dommage plus grand que celui que [l'auteur de l'acte] cherchait à éviter »*. Ce qui importe n'est pas tant de savoir si le dommage causé s'avère *in fine* plus grand que celui que l'auteur du crime cherchait à éviter, mais plutôt s'il avait l'« intention » de causer un dommage plus important[71]. En s'appuyant notamment sur le droit pénal comparé, la doctrine identifie une seconde condition subjective : celui qui invoque la contrainte/nécessité doit non seulement avoir agi en connaissance de l'existence d'une menace, mais aussi avoir eu comme seul motif et objectif d'écarter celle-ci[72].

Malgré certaines réserves liées aux problèmes d'interprétation et à l'identification de l'intention du législateur, il convient d'éviter de se méfier tant de l'état de nécessité que de la contrainte comme motifs d'exonération de la responsabilité pénale[73]. D'ailleurs, le juge international pénal et plus précisément le TPIY a, dans l'affaire *Oric*, reconnu sans difficulté l'état de nécessité comme un principe établi en droit international coutumier[74]. Il faudra à nouveau s'en

[69] Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *The Rome Statute of the International Criminal Court : A Commentary*, *op. cit.*, p. 1039.

[70] Albin ESER, « Article 31 », in Otto TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, *op. cit.*, p. 886.

[71] Voy. Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *op. cit.*, p. 1041.

[72] *Ibid.*

[73] *Ibid.*, p. 1043 et notes 231, 232 et 233.

[74] Décision rendue oralement le 8 juin 2005, Compte rendu de l'audience du 8 juin 2005, disponible sur le site : [http://www.un.org/icty/transe68/050608IT.htm] (août 2011).

remettre à la sagesse des juges de la Cour, ce qui devient encore plus urgent dès lors que l'on se penche sur les motifs d'exonération de la responsabilité pénale autres que ceux prévus au paragraphe 1er.

II. LES MOTIFS D'EXONÉRATION DE LA RESPONSABILITÉ PÉNALE AUTRES QUE CEUX PRÉVUS AU PARAGRAPHE 1ER

Des motifs autres que ceux prévus par le paragraphe 1er pourraient en effet être invoqués devant la CPI. Ces motifs se trouvent aussi bien dans le Statut (A) qu'en dehors de celui-ci (B). Quant à leur applicabilité à chaque cas d'espèce, elle n'est pas automatique, mais elle est remise à l'appréciation des juges de la Cour (C).

A. Les autres motifs prévus dans le Statut

Le libellé du paragraphe 1er est clair en ce que d'autres motifs d'exonération de la responsabilité pénale sont à rechercher dans le Statut lui-même : *« [o]utre les autres motifs d'exonération de la responsabilité pénale prévus par le présent Statut, une personne n'est pas responsable pénalement si [...] »*. Or, la tâche de l'identification de ces *« autres motifs »* est délicate. Ainsi, l'erreur de fait et l'erreur de droit prévues par l'article 32 peuvent être considérées comme des motifs d'exonération de la responsabilité pénale sous certaines conditions[75]. En effet, tout en posant le principe selon lequel la personne qui a commis un crime relevant de la compétence de la CPI sur ordre d'un gouvernement ou d'un supérieur, militaire ou civil, n'est pas exonérée de sa responsabilité pénale, l'article 33 y prévoit aussi une exception dont la mise en jeu est soumise à trois conditions cumulatives : a) l'auteur de l'acte doit avoir eu *« l'obligation légale d'obéir aux ordres du gouvernement ou du supérieur en question »* ; b) l'auteur de l'acte doit ne pas avoir su que l'ordre était illégal ; et c) l'ordre doit ne pas avoir été manifestement illégal[76]. Un autre motif d'exonération de la responsabilité pénale, fondé sur le critère de l'âge cette fois-ci, est implicitement prévu par l'article 26 du Statut relatif à l'incompétence de la CPI à l'égard des personnes de moins de 18 ans[77]. Un troisième motif découle de l'article 25-3-f qui prévoit que *« la personne qui abandonne l'effort tendant à commettre le crime ou en empêche de quelque autre façon l'achèvement ne peut être punie en vertu du présent Statut pour sa tentative si elle a complètement et volontairement renoncé au dessein criminel »*[78].

En revanche, la prescription des crimes et la qualité officielle de l'auteur du crime sont explicitement écartées en tant que motifs d'exonération de la

[75] Voy. dans cet ouvrage le commentaire spécifique de cette disposition.
[76] Voy. dans cet ouvrage le commentaire spécifique de cette disposition.
[77] Albin ESER, « Article 31 », in Otto TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, *op. cit.*, p. 868. Voy. aussi Antonio CASSESE, *International Criminal Law*, *op. cit.*, p. 229.
[78] Albin ESER, « Article 31 », in Otto TRIFFTERER, *Commentary on the Rome Statute of the International Criminal Court*, *op. cit.*, p. 867 et suiv. *Contra* Kai AMBOS, « Other Grounds for Excluding Criminal Responsibility », in Antonio CASSESE, Paola GAETA, John R. W. D. JONES, *The Rome Statute of the International Criminal Court : A Commentary*, *op. cit.*, p. 1028.

devant la Cour au titre de l'article 31,
uveau crucial en raison de l'équilibre
les intérêts des accusés et les objectifs
seconde condition de la prise en
fs en dehors du Statut, est d'ordre
e.

pplicabilité des motifs d'exonération

nnaire en matière d'applicabilité des
pénale, qu'il s'agisse des motifs en
e Statut.

notifs en dehors du Statut prévue

il est indiqué que *« [l]a procédure*
ée dans le Règlement de procédure et
manière assez détaillée par la règle 80
oquer un motif d'exonération de la
paragraphe 3 de l'article 31 du

e de première instance et au Procureur
nération de la responsabilité pénale en
le 31. Cette notification doit être faite
ocès pour que le Procureur ait le temps

ar la disposition 1 ci-dessus, la Chambre
et la défense avant de déterminer si la
on de la responsabilité pénale.
motif d'exonération de la responsabilité
peut autoriser l'ajournement du procès
miner le motif en question. »

à la CPI de se montrer prudente dans
âche, afin d'éviter les pièges que la
ant de son droit d'invoquer des motifs
en dehors du Statut. La Cour doit agir
lors qu'elle exerce son pouvoir

ment prévue des motifs *« prévus dans*

Cour se prononce sur la question de
responsabilité pénale prévus dans le
elle est saisie ». Il est étonnant que le
dans le Statut » et qu'il exclue par là

les motifs identifiables en dehors du Statut et invocables devant la Cour en vertu du paragraphe 3. Cette disposition fait écho à une proposition qui figurait déjà dans le « Projet de Syracuse » de 1996 et a été reprise, reformulée et présentée par Singapour au Comité préparatoire[82], qui l'a intégrée dans son projet[83]. Selon Singapour, le projet de disposition

> *« donne à la Cour le pouvoir de se prononcer sur des questions telles que celle de savoir si un moyen de défense peut être invoqué en général, s'il peut être invoqué à propos d'un crime particulier ou d'une catégorie particulière de crimes, quels sont les principes applicables en l'espèce, quelles sont les conditions pour que le motif invoqué soit applicable et quels en seront les effets si la Cour le déclare recevable, à savoir : [...] »*[84].

En définitive, on peut considérer l'article 31-2 comme « anodin »[85] en rappelant justement que la Cour demeure liée par les paragraphes 1 et 3 de cette même disposition et qu'il ne s'agit alors que de souligner la nécessaire appréciation au cas par cas de ces motifs d'exonération. La disposition demeure cependant troublante. En effet, même dans sa formulation actuelle, elle limite considérablement le droit consacré dans le paragraphe 1 et dans l'article 67-1-e dans la mesure où il accorde à la Cour le pouvoir de refuser ou même d'adapter *« au cas dont elle est saisie »* l'applicabilité des motifs d'exonération de la responsabilité pénale qui sont prévus non seulement au paragraphe 1 de l'article 31 mais aussi dans le Statut dans son ensemble. Le pouvoir accordé à la CPI par le paragraphe 2 peut alors être considérable. Pourquoi une telle équivoque ? Il faut simplement rappeler que lors des négociations sur le Statut, certains étaient de l'avis que les motifs d'exonération de la responsabilité pénale auraient dû être davantage définis, alors que d'autres n'étaient pas satisfaits de leur définition telle qu'elle figure dans le Statut. Le paragraphe 2 cristalliserait justement le compromis entre ces deux « camps »[86]. Il revient à la Cour de transformer cette disposition en une sorte de garde-fou contre toute dérive dans l'un ou l'autre sens.

Spyridon AKTYPIS
Docteur en droit,
Université européenne de Chypre,
Fondation Marangopoulos pour les droits de l'homme

[82] Version française identique à la proposition déposée le 21 février 1997, Comité préparatoire pour la création d'une Cour criminelle internationale, A/AC.249/1997/WG.2/DP.4, 28 novembre 1997.
[83] Comité préparatoire, décisions, 1997, p. 22.
[84] *Ibid.*, note n° 3.
[85] William SCHABAS, *The International Criminal Court. A Commentary on the Rome Statute*, *op. cit.*, p. 491.
[86] Per SALAND, « International Criminal Law Principles », in Roy S. LEE (ed.), *The International Criminal Court. The making of the Rome Statute*, *op. cit.*, p. 208.

Y. Jurovics, ‘Article 7 : Crimes contre l’humanité’ in J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article*, Vol. I, 2nd Ed. (Editions Pedone: Paris, 2019), pp. 574-575

gouvernementales de civils appartenant principalement aux groupes *four*, *massalit* et *zaghawa*[27]. L'auteur sera alors coupable même s'il ne tue qu'une personne, dès lors que ses actes s'inscrivent dans le cadre d'une telle tuerie[28]. La possibilité est d'autant plus pertinente si le meurtre en question est un acte initial déclenchant ou donnant un signal, le prélude à un massacre[29]. Le second élément intéressant concerne la planification supplémentaire d'une tuerie généralisée qui se greffe sur l'attaque contre la population civile. Il est clairement exigé : « [o]utre la perpétration de meurtres à grande échelle ou la soumission d'un groupe à des conditions d'existence devant entraîner des morts en série parmi ses membres, le crime d'extermination suppose également une planification de sa commission »[30]. En résumé, l'auteur du crime d'extermination tue une ou plusieurs personnes ou lui (leur) impose des conditions d'existence propres à entraîner la destruction d'une partie de la population, alors que son (ou ses) acte(s) constitue(nt) un massacre ou en fait (font) partie et que l'auteur en est conscient, ce qui, pour ce dernier point, dans le silence du Statut de la CPI, ressort de l'esprit même de la notion et de la jurisprudence[31].

C. La réduction en esclavage

Cette disposition n'est pas innovante tant l'esclavage s'inscrit dans les politiques criminelles contre l'humanité et, par suite, est inclus dans toutes les définitions de la notion et condamné dès les premières décisions[32]. L'article 7-2-c dispose que « par « réduction en esclavage », on entend le fait d'exercer sur une personne l'un quelconque ou l'ensemble des pouvoirs liés au droit de propriété » et reflète ainsi le droit international coutumier[33]. C'est précisément ce que reprend le premier paragraphe des Eléments des crimes en indiquant que « [l]'auteur a exercé l'un quelconque ou l'ensemble des pouvoirs liés au droit de propriété sur une ou plusieurs personnes ». Les situations de réduction en esclavage soumises à la Cour pourront donc être variées dans leur apparence (servitude pour dettes, exploitation sexuelle ou économique, voire enfants soldats) mais devront toutes comporter une privation de liberté réalisée par l'exercice d'un pouvoir, de l'un des attributs du droit de propriété. Dans l'affaire *Kunarac et al*, la Chambre d'appel du TPIY, qui se réfère au droit coutumier, a bien précisé l'étendue et la nature de ce crime en tenant compte des évolutions dont il avait pu être l'objet. Ainsi, elle précise que :

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[27] CPI, *Al Bashir*, Décision relative à la requête de l'Accusation aux fins de délivrance d'un mandat d'arrêt à l'encontre d'Omar Hassan Ahmad Al Bashir, préc., § 97.

[28] TPIR, *Kayishema*, préc., § 147 : « pour que la mise à mort d'une personne isolée relève de l'extermination, il faut qu'elle s'inscrive effectivement dans ce cadre. On considère qu'on est en présence d'un tel cas dès lors que s'observe entre les tueries une proximité spatiale et temporelle avérée ».

[29] Eléments des crimes 7-1-b.

[30] TPIR, *Kayishema*, préc., § 146.

[31] *Ibid.*, § 147.

[32] Voy. Affaire *Pohl*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law n°10, Nuremberg, octobre 1946 – avril 1949, Washington, U.S. Government Printing Office, 1949-1953 (*infra* : « *U.S. Mil. Tribunal* »), Vol. V, pp. 997-998 (*Fanslau*), pp. 999-1001 (*Loerner*) et pp. 1010 et 1015 (*Tschentscher*) au sujet du programme de réduction en esclavage et de travaux forcés dans les camps de concentration nazis. Voy. surtout TPIY, *Kunarac et al. (« Foca »)*, IT-96-23 & 23/1, jugement, 22 février 2001, chefs n°18 pour Kunarac et n°22 pour Kovac.

[33] Article 1er-1 de la Convention de 1926 relative à l'esclavage, SDN, *Recueil des traités*, Vol. LX, p. 253 : « l'état ou condition d'un individu sur lequel s'exercent les attributs du droit de propriété ».

« le concept traditionnel d'esclavage, tel qu'il est défini dans la Convention de 1926 relative à l'esclavage, et selon lequel les personnes sont souvent considérées comme des biens meubles, a évolué pour englober diverses formes contemporaines d'esclavage qui se fondent elles aussi sur l'exercice de l'un quelconque ou de l'ensemble des attributs du droit de propriété. Dans les diverses formes contemporaines d'esclavage, la victime n'est pas soumise à l'exercice du droit de propriété sous sa forme la plus extrême, comme c'est le cas lorsque l'esclave est considéré comme un bien meuble ; mais dans tous les cas, l'exercice de l'un quelconque ou de l'ensemble des attributs du droit de propriété entraine, dans une certaine mesure, une destruction de la personnalité juridique. Cette destruction est plus grave dans le cas de l'esclave considéré comme un bien meuble, mais il ne s'agit là que d'une différence de degré »[34].

La Chambre d'appel précise en outre que l'absence de consentement de la victime et la durée de la réduction en esclavage ne constituent pas des éléments de ce crime[35]. Quant à l'élément psychologique requis de ce crime, il « réside dans l'intention d'exercer les attributs du droit de propriété »[36].

Bien qu'il puisse être exercé sans astreinte au travail, l'esclavage prend généralement la forme du travail forcé sous laquelle il est effectivement condamné (pratiqué, par exemple, dans tous les pays occupés au cours de la Seconde Guerre mondiale). Le travail forcé constitue donc un moyen d'identification de l'esclavage parmi d'autres : le contrôle des mouvements d'autrui, la limitation de la liberté de choix ou de circulation, le contrôle de l'environnement physique, le contrôle psychologique, les mesures empêchant et prévenant la fuite, le recours à la force, la menace ou la contrainte, des traitements cruels, le contrôle de la sexualité ou l'utilisation sexuelle, *etc.*[37]

En choisissant de viser le droit international coutumier, le Statut poursuit cette tendance incriminant toute pratique ressemblant à la réduction en esclavage. Les Eléments des crimes (7-1-c, note 11) renvoient d'ailleurs aux textes internationaux pour incriminer les « pratiques analogues à l'esclavage »[38]. Certains travaux forcés, imposés, ne sont toutefois pas punissables de ce chef, comme le fait de forcer les citoyens d'un pays occupé à travailler afin de subvenir à leurs propres besoins ou pour sauvegarder leur économie nationale[39]. Le travail forcé est donc une méthode de réduction en esclavage

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[34] TPIY, ChA., *Kunarac, Kovac et Vuković*, IT-96-23 & IT-96-23/1-A, 12 juin 2002, p. 39, § 117.
[35] *Ibid.*, p. 40, § 120 et p. 41, § 122.
[36] *Ibid.*, p.41, § 122.
[37] Voy. TPIY, *Kunarac et al. (« Foča »)*, 22 février 2001, préc., § 543 ; confirmé par la ChA. : TPIY, *Kunarac, Kovac et Vuković*, ChA., préc., 12 juin 2002, p. 40, § 119.
[38] Voy. nbp. relative au premier paragraphe des Eléments des crimes relatifs à la réduction en esclavage qui précise qu'« [i]l est entendu qu'une telle privation de liberté peut, dans certaines circonstances, inclure des travaux forcés ou d'autres moyens de réduire une personne à l'état de servitude, tel qu'il est défini dans la Convention supplémentaire de 1956 relative à l'abolition de l'esclavage, de la traite des esclaves et des institutions et pratiques analogues à l'esclavage. Il est aussi entendu que le comportement décrit dans cet élément inclut la traite d'êtres humains, en particulier de femmes et d'enfants ».
[39] La CDI distingue l'esclavage « des situations inspirées dans certains pays par les nécessités du développement économique, et qui prenaient la forme d'institutions appelées 'service civique' ou d'un autre nom » (*Ann. CDI 1989*, Vol. II-2, p. 68, § 174) ; dans le même sens, Cherif BASSIOUNI, *Crimes Against Humanity in International Criminal Law*, *op. cit.*, p. 295 : « *It is not illegal for an*

D. Bernard, 'Article 20 : *Ne bis in idem*' J. Fernandez and X. Pacreau (eds.), *Statut de Rome de la Cour Pénale Internationale: Commentaire Article par Article*, Vol. I, 2nd Ed. (Editions Pedone: Paris, 2019), pp. 947-948

II. ANALYSE DE LA DISPOSITION, PARAGRAPHE PAR PARAGRAPHE

Chacun des paragraphes de l'article 20 est consacré à une interaction juridictionnelle distincte – entre affaires devant la Cour (1), d'une part, et lorsqu'une procédure est menée devant une juridiction tierce, d'autre part, après une condamnation ou un acquittement par la Cour (2) ou avant que la Cour se soit prononcée (3). Elles sont détaillées ci-après.

Quoi qu'il en soit, la Chambre de première instance a jugé que, dès lors qu'elle a été constituée, le principe *ne bis in idem* ne peut être invoqué qu'à titre excep-tionnel et avec sa permission. En principe, et en l'état de la jurisprudence, il semble donc que le principe *ne bis in idem* relève de la compé-tence de la Chambre préliminaire mais puisse, contrairement aux autres règles de recevabilité, être également invoqué aux stades ultérieurs de la procédure[36].

A. Paragraphe 1

Issu des dernières discussions sur le futur Statut de Rome, au printemps 1998[37], le premier paragraphe de l'article 20 interdit que la Cour juge d'affaires dans lesquelles elle s'est déjà prononcée ; le principe *ne bis in idem* est donc prévu là dans un cadre intra-juridictionnel, interne à la Cour. Cette disposition paraît appeler trois commentaires.

Premièrement, ceci s'applique « sauf disposition contraire du Statut », hors donc les appels et révisions régis par la partie VIII du Statut[38]. Cette précision apparaît dans ce seul paragraphe de l'article 20, mais, lorsque le conflit de juridictions successives concerne la Cour et d'autres instances, le principe *ne bis in idem* ne s'applique aussi aux seules décisions finales[39].

Deuxièmement, la formule « actes constitutifs de crime » est ambiguë : le principe *ne bis in idem* s'applique-t-il ici *in concreto,* aux « actes » de l'accusé quelle qu'ait été leur qualification juridique dans la première décision rendue par la Cour, ou *in abstracto* aux *crimes* qu'ils constituent, ce qui permettrait une seconde décision pour peu qu'elle repose sur une qualification juridique nouvelle ? La version espagnole du Statut paraît pousser à une interprétation « abstraite » de l'élément *idem* : on y lit en effet qu'est interdit un second jugement pour « *las conductas constitutivas de crimenes por* los *cuales ya hubiere sido condenado o absuelto por la Corte* » (nous

[36] CPI, ChPI. II, *Ngudjolo*, ICC-01/04-01/07, Motifs de la décision orale relative à l'exception d'irrecevabilité de l'affaire, 16 juin 2009, § 47 ; en ce sens également, par ex., CPI, ChPI. III, *Bemba*, ICC-01/05-01/08, *Decision on the admissibility and abuse of process challenges,* 24 juin 2010, § 209.

[37] Voy. PrepCom, « Rapport de la réunion intersessions tenue du 19 au 30 janvier 1998 à Zutphen », 4 février 1998, préc., où la disposition n'apparaît pas, puis « Rapport pour la création d'une cour criminelle internationale », A/CONF.183/2 /Add.1, 14 avril 1998, p. 45. Pour les débats à ce sujet, voy. John T. HOLMES, « The principle of complementarity », *in* Roy S. LEE (dir.), *The International criminal court. The making of the Rome Statute : issues, negociations, results,* La Haye, Kluwer, 1999, p. 58.

[38] Lorraine FINLAY, « Does the International Criminal Court protect against double jeopardy : an analysis of article 20 of the Rome Statute », *University of California Davis Journal of International Law and Policy,* vol. 15, 2008-2009, n° 2, p. 229.

[39] CPI, ChPI. I, *Gadaffi*, ICC-01/11-01/11, *Decision on the admissibility challenge by Dr. Saif Al-Islam Gaddafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute*, 5 avril 2019, § 48, appuyé sur les §§ 36-47.

soulignons l'accord au masculin, que nous pourrions traduire en français par « les conduites constitutives de crimes pour *lesquels* » un premier jugement a été rendu par la Cour). Plusieurs arguments poussent néanmoins à ne pas prendre en considération cette interprétation littérale de la formulation espagnole. D'abord, par application du principe de légalité, on ne peut être « condamné ou acquitté » que pour un crime (non pour un acte), ce qui peut expliquer le choix grammatical qui y est marqué. Ensuite, l'accusé ne serait guère protégé des risques d'une « *double jeopardy* », et la sécurité juridique ne serait pas garantie, si une requalification par la Cour lui suffisait pour rouvrir une affaire close – ceci irait à l'encontre de la *ratio legis* du principe *ne bis in idem*. Enfin, la doctrine paraît unanime à ce sujet, ce qui constitue un argument d'autorité : l'article 20-1 est à interpréter dans un sens concret, interdisant à la Cour de juger un *comportement* au sujet duquel elle a déjà prononcé une condamnation ou un acquittement.

Troisièmement, on lit dans l'article 20-1, que la Cour ne peut juger à nouveau celui qu'elle a déjà « condamné ou acquitté » pour les mêmes actes constitutifs de crimes, ce qui paraît exclure les procédures en cours : un verdict doit avoir été prononcé pour que la règle entre en jeu[40]. Plus précisément, cette formulation ne recouvre pas les décisions interlocutoires, tels l'amendement des charges, leur retrait ou leur non-confirmation : en bref, le principe *ne bis in idem* s'applique si une décision a été rendue sur le fond de l'affaire[41].

Techniquement et plus ponctuellement, ici comme pour le paragraphe 2, la question se pose d'une introduction de nouvelles procédures *in idem* avant l'échéance du délai ouvert pour appel devant la Cour (règle 150-1) – avant, donc, que la décision soit dotée d'une autorité de la chose jugée *finale* et définitive. L'appel et la révision étant considérés comme des recours non ordinaires, l'extinction de ce délai ne semble cependant pas nécessaire à l'application du principe *ne bis in idem* : une décision sur le fond, même par une Chambre de première instance, suffit à le fonder[42].

B. Paragraphe 2

Le deuxième paragraphe de l'article 20 consacre une application inter-juridictionnelle du principe, l'appliquant lorsque la CPI s'est déjà prononcée dans une affaire et qu'une autre juridiction (nationale, le plus probablement) veut ultérieurement juger *in idem* : il établit que quiconque a déjà été condamné ou acquitté par la Cour « ne peut être jugé par une autre juridiction pour un crime visé à l'article 5 » du Statut. Ceci suscite trois commentaires.

Premièrement, l'*idem* est ici abstrait, restreint à la qualification juridique : d'autres procédures peuvent suivre le jugement de la juridiction internationale s'ils s'appuient sur une autre incrimination que celle qui a fondé la condamnation ou l'acquittement par la Cour[43]. Autrement dit, des poursuites sont possibles si elles portent soit sur un

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[40] Immi TALLGREN et Astrid REISINGER CORACINI, « Article 20 », *op. cit.*, p. 915.
[41] Dans le droit fil de la jurisprudence des TPI, voy. TPIR, ChA., *Barayagwiza*, ICTR-97-19-AR72, *Decision on the Prosecutor's Request for reconsideration*, 31 mars 2000, § 49.
[42] Immi TALLGREN et Astrid REISINGER CORACINI, « Article 20 », *op. cit.*, p. 915.
[43] Lorraine FINLAY, « Does the International Criminal Court protect against double jeopardy », *op. cit.*, p. 230.

R. Cryer et al., *An Introduction to International Criminal Law and Procedure* (CUP, 2014), pp. 400, 408

deal with defences in any systematic way.[13] Its provisions were the outcome of compromises between a large number of States, some of which came from the common law tradition, and some from their civil law counterparts. While the provisions therefore leave something to be desired from a criminal law point of view, they provide a sensible structure within which to investigate defences in international criminal law. Article 31 sets out a reasonable proportion of the defences which are applicable to international crimes, providing for defences of insanity, intoxication, self-defence (including defence of others or, exceptionally, property), duress and necessity.

Certain points ought to be noted at the outset. First, as Article 31(1) makes clear, it is not intended to be exhaustive. There are other parts of the Statute (in particular Articles 32 and 33, which deal with mistakes of fact and law and the defence of superior orders respectively) that are also relevant. Second, as the definitions of defences given in the Statute are the outcome of difficult negotiations, Article 31(2) provides that 'the Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it'. It has been argued, by one of its drafters, that this provision recognizes that the ICC has a residual power to refuse to apply a defence to an individual case even where the text of the ICC Statute might require it.[14] This might be criticized on the basis that a person ought to be able to rely on the defences that the Statute ostensibly sets down without the risk that it will be set aside in an individual case. A better way to interpret this provision may be that the ICC has discretion to determine the factual applicability of a defence before entering into serious discussion of it at trial. In other words, the Court may require an 'air of reality' of a defence to be established before permitting detailed argument and evidence to be tendered.[15]

On the other side, Article 31(3) of the ICC Statute recognizes that there are defences applicable to international crimes which it does not enumerate. Article 31(3) reads:

> At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in Article 21.[16]

Pursuant to this Article, a defendant may plead defences before the ICC which have their basis outside the ICC Statute, i.e. in other applicable treaties, customary law and general principles of law.[17] There are a number of such defences, to which we shall return. However, owing to the hierarchy of sources established in Article 21 (which places the Statute at the apex of authority), arguments that defences contained within Article 31 are narrower than those available under customary law are not admissible under this head, although they may have purchase in arguments about the appropriate application of Article 31(2).

[13] See Albin Eser, 'Article 31' in Triffterer, *Observers' Notes*, 863, 865–6.
[14] Per Saland, 'International Criminal Law Principles' in Lee, *The Making of the Rome Statute*, 189, 208–9.
[15] This is particularly relevant where evidence, such as of consent in sexual offences, is sensitive and examination of witnesses can be distressing. See r. 72 of the ICC RPE.
[16] Art. 21 provides (in addition to the ICC Statute, the Elements of Crimes and the RPE) for the use of applicable treaties, principles and rules of international law (i.e. custom) and, 'failing that', general principles of law.
[17] If seeking to do so, the defence must inform the Trial Chamber and Prosecutor in advance, giving them sufficient time to prepare on point: r. 80 of the ICC RPE.

threats must be of imminent danger. It is by no means clear that imminent means the same thing here as in Article 31(1)(c). The threats may be against the accused or others; there is no requirement that there be any particular relationship between the accused and the people threatened. The threat must be real, however, and not simply believed to exist by the defendant.[83]

As recognized by Article 31(1)(d)(ii), the threat must be outside the control of the defendant. The use of the term 'other' in that part of the Article implies that this condition also applies to duress in (i). This would probably exclude the situation where a person had 'courted' the threats by others, such as in the instance where a person had joined a group notorious for its criminality. This condition was considered a part of customary law by Judges Cassese and Stephen in *Erdemović*,[84] and is consistent with national practice.[85]

16.6.2 *Necessary and reasonable actions*

As with self-defence, pressure, whether from another or by virtue of circumstance, does not suffice to defend *any* reaction. The reactions of the person seeking to use the defence must be both necessary and reasonable in the circumstances to avoid the threat. The test is similar, but not necessarily identical, to that of proportionality in self-defence.[86] This includes the question of whether a reasonable person would have given in to the threats.[87] One issue that does arise, however, is what can be expected of soldiers, who, although frequently in very stressful situations,[88] have undergone military training, and are expected to put themselves in harm's way to protect others,[89] with respect to this aspect of the test. In such circumstances, the test is perhaps best formulated as what would be considered necessary and reasonable by a service member of the experience and rank of the defendant. Such a nuance to the test seems appropriate (after all, the test of reasonableness always begs the question of reasonable to whom?)[90] and finds some support in Judge Cassese's interpretation of the existing jurisprudence on point in *Erdemović*.[91]

16.6.3 *Causation*

It is an express requirement that the threats caused the impugned conduct. If a person would have acted as he or she did anyway, he or she will not be able to take advantage of this defence. Article 31(1)(d) is silent on whether the threats have to be the sole cause of the defendant's conduct, or whether they only need to be one of a number of causes. This also

[83] The *Krupp* case may have seen things differently: *Krupp*, X LRTWC 69, 148. See also Commentary, XV LRTWC 174.
[84] *Erdemović*, ICTY A. Ch., 7 October 1997, Opinion of Judge Cassese, para. 16; Opinion of Judge Stephen, para. 68.
[85] Werle, *Principles*, 208.
[86] The test is described in proportionality terms in *Erdemović*, ICTY A. Ch., 7 October 1997, Opinion of Judge Cassese, para. 16; Opinion of Judges McDonald and Vohrah, para. 37. See also Eser, 'Article 31', 886–7.
[87] Eser, 'Article 31', 885–6.
[88] See Larry May, *War Crimes and Just War* (Cambridge, 2007) Chapter 13.
[89] See e.g. the comments in *R* v. *Dudley and Stevens* (1884–5) LR 14 QBD 273; 287, Werle, *Principles*, 209.
[90] Such a test, it ought to be accepted, may be difficult, albeit not impossible, to apply in the case of civilians or rebel forces.
[91] *Erdemović*, ICTY A. Ch., 7 October 1997, Opinion of Judge Cassese, para. 45.