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THE DEFENCE OF DURESS: INCONSISTENT INTERNATIONAL CRIMINAL COURT RULINGS AND NATIONAL LAW GUIDANCE

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ABSTRACT. This article explores how national law principles can address inconsistencies in the application of the defence of duress at the International Criminal Court (ICC). The Rome Statute is the first to codify this defence, but its application remains challenging. In *Ongwen*, both the Trial and Appeal Chambers rejected the defence due to a lack of imminent death or serious harm. Conversely, in *Ag Mahmoud*, Judge Antoine Kesia-Mbe Mindua found the defence applicable, criticising its narrow interpretation in *Ongwen*. A restrictive interpretation risks rendering the defence meaningless, while an overly broad one could undermine the ICC's goal of avoiding impunity. *Ongwen* and *Ag Mahmoud* are examined, highlighting inconsistencies in interpreting the defence of duress. Drawing on general principles from selected legal systems, the article proposes an approach to balance accountability for serious crimes with a meaningful use of this defence by the ICC.

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I INTRODUCTION

International crimes, including war crimes, crimes against humanity, and genocide, "deeply shock the conscience of humanity,"[1] making it historically debatable whether there should be grounds for excluding liability for these crimes.[2] Previous international criminal law (ICL) statutes, including those establishing the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), did not explicitly provide for defences or grounds for exclusion of criminal liability. In the renowned ICTY case of *Prosecutor v. Erdemovic* (*Erdemovic* case),[3] the ICTY dealt quite elaboratively with the defence of duress. Both the majority and dissenting opinions of the judges in the ICTY Appeals Chamber concurred that ICL lacked a provision recognising duress as a complete defence for the killing of innocent lives.[4] However they differed on how this gap should be dealt with. The majority rejected the defence of duress, reasoning from a policy perspective, that commanders and combatants must be legally bound by the principles of international humanitarian law.[5] The judges noted that accepting the defence would disregard their mandate under the ICTY Statute, which seeks to ensure that "international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined."[6] Judge Cassese frowned upon the Majority's policy-

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[1] Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002) 2187 UNTS (hereinafter Rome Statute). Preamble to the Rome Statute, § 2.

[2] See e.g. dissenting opinion of Judge Cassese in *Prosecutor v. Erdemovic*, 'Separate and Dissenting Opinion of Judge Cassese', Case No.IT-96-22-S (Appeals Chamber, 7th October 1997) [Cassese's Opinion] § 42 <http://www.icty.org/x/cases/erdemovic/acjug/en/erd-adojcas971007e.pdf> Accessed 2 October 2024. But see also Y. Din stein and M. Tabory (eds.) *War crimes in international law* (Kluwer Law Interna tional 1996) p.11.

[3] *Prosecutor v. Erdemovic*, 'Joint Separate Opinion of Judge McDonald and Judge Vohrah', Case No.IT-96-22-S (Appeals Chamber 7th October 1997 [McDonald's and Vohrah's Opinion] § 88

[4] Erdemović, No. IT-96-22-A, Dissenting Opinion of Judge Cassese, § 11, 15, 41.

[5] Erdemović, No. IT-96-22-A, Separate Opinions of Judges McDonald and Vohrah, §§ 75-80. See also Erdemović, No. IT-96-22-A, Separate Opinion of Judge Li, § 8.

[6] *Prosecutor v. Erdemovic*, 'Joint Separate Opinion of Judge McDonald and Judge Vohrah', Case No.IT-96-22-S (Appeals Chamber 7th October 1997 [McDonald's and Vohrah's Opinion] § 88.

based opinion, deeming it a violation of the *nullum crimen rule*.[7] Instead, he emphasised the need for realistic guidelines in ICL. Cassese suggested that the defence of duress should be recognised as a complete defence in cases involving the killing of innocent persons under extreme threats under certain conditions.[8] This divergency in opinion still left open the question of whether duress grants an excuse to a defendant who kills innocent civilians to save their own life.

The Rome Statute of the International Criminal Court (Rome Statute) is the first ICL statute to explicitly include grounds for excluding criminal responsibility. Article 31(1)(d) of the Rome Statute lists duress as one such ground, involving three elements: a threat of imminent death or serious harm, actions necessary and reasonable to avoid the threat, and the absence of intention on the part of the accused to cause greater harm than the one avoided.[9] The extensive literature on the implications of these elements for adjudicating cases before the ICC eliminates the need for repetition here.[10] Therefore, this article instead delves into a comprehensive analysis of the inconsistencies present in current ICC jurisprudence, addressing a gap in the existing literature.

The defence of duress has been the subject of discussion in recent ICC jurisprudence in the cases of *Prosecutor v. Dominic Ongwen (Ongwen)*[11] and *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag*

[7] Erdemović, No. IT-96-22-A, Dissenting Opinion of Judge Cassese, §§ 11, 49. See also K. Ambos *Treatise on International Criminal Law: Volume I: Foundations and General Part* (Oxford University Press, Second Edition 2021) 352-355.

[8] Erdemović, No. IT-96-22-A, Dissenting Opinion of Judge Cassese, §§ 16-17, 41, 44, 50. Cassese lists four requirements which are: (1) there must be an immediate threat of severe and irreparable harm to life or limb; (2) there was no adequate means of averting such evil; (3) the defence act was not disproportionate to the evil threatened (lesser of two evils); (4) the duress situation was not voluntarily brought about by the person coerced.

[9] Article 31(1)(d) of the Rome Statute.

[10] On such literature, see e.g. Ambos *supra* note 7, 470, A. Eser and K. Ambos "Article 31: Grounds for excluding criminal responsibility" K. Ambos (ed) *Rome Statute of the International Criminal Court: Article-by-Article Commentary* (Beck, Hart, and Nomos, Fourth Edition 2022) 1370-1376. S. Yeo "Commonwealth and International Perspectives on Self-Defence, Duress and Necessity" (2007) 19(3) *Current Issues in Criminal Justice* 293-313.

[11] *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, 4 February 2021 (*Ongwen* Trial Chamber Judgment); *Prosecutor v. Dominic Ongwen* ICC-02/04-01/15 A, 15 December 2022 (*Ongwen* Appeal Chamber Judgment).

Mohamed Ag Mahmoud (*Ag Mahmoud*).[12] Due to limited prior jurisprudence in ICL on the duress defence, the ICC hardly had any reference point in both cases. In *Ongwen*, both the Trial and Appeal Chambers rejected the duress defence, stating Ongwen did not face imminent death or serious harm. However, Judge Antoine Kesia-Mbe Mindua, in a separate opinion in *Ag Mahmoud*, found the duress defence was misapplied in *Ongwen*,[13] leading to Ag Mahmoud's acquittal for various crimes including all gender-based crimes. How the ICC resolves these inconsistencies is crucial in setting precedent. A restrictive interpretation of the duress defence risks rendering it meaningless, while an overly broad interpretation could undermine accountability for the serious crimes that fall within the jurisdiction of the ICC. In addition, in the absence of guidance, "ICC judges may resort to prioritising their personal knowledge of their own or similar legal systems and may limit their research to means at their disposal and to laws in languages they understand."[14] This is exemplified by Judge Mindua's inclination towards French criminal law in his dissenting opinion in *Ag Mahmoud*, arguably due to his French roots in the Democratic Republic of Congo.[15] Suffice it to note that unlike most common law systems, many civil law systems, including France, recognise duress as a complete defence even in serious cases such as murder. This distinction arguably influenced Judge Mindua's consideration of the defence's applicability in *Ag Mahmoud*. These pitfalls even more underscore the need to develop sufficiently reasoned principles on how to approach the defence of duress at the ICC.

But as the ICC grapples with the complex defence of duress, it is navigating uncharted waters where national courts have long sailed. Opportunely, article 21(1)(c) of the Rome Statute makes room for the

[12] *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, 26 June 2024 (*Ag Mahmoud* Trial Chamber Judgement)

[13] *Ag Mahmoud* Trial Chamber Judgement, Opinion Individuelle Et Partiellement Dissidente Du Juge Antoine Kesia-Mbe Mindua, ICC-01/12-01/18-2594-OPI3, 28 June 2024, § 102. <https://www.icc-cpi.int/sites/default/files/CourtRecords/0902ebd1808bdb3a.pdf> Accessed 26 November 2024 (Hereinafter Judge Mindua Separate Opinion in *Ag Mahmoud*).

[14] M. Delmas-Marty, "The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law" (2003)1 *Journal of International Criminal Justice* 18.

[15] Judge Mindua Separate Opinion in *Ag Mahmoud,* §§ 105,106, 108 and 114. Judge Mindua also delivered his dissenting judgment of 29 June 2024 in French, exemplifying his inclination towards the French language.

ICC to apply "general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognised norms and standards." Therefore, drawing on the general principles of law from selected legal systems including those that would normally exercise jurisdiction over the crimes in question such as Uganda in respect of Ongwen, I develop principles that can address the inconsistencies in the ICC's approach to the defence of duress in a way that strikes a balance between accountability for serious crimes and a meaningful use of the defence of duress by the accused. The analysis focuses on selected principles governing duress such as the immediacy requirement and prior fault. All these principles function as proxies for assessing whether the accused had a realistic opportunity to avoid the threat. Where the principles identified in national law are out of step with internationally recognised norms and standards, I suggest ways of tweaking them to ensure that the required standards and norms are met. I commence the discussion with a critical engagement with the judgments of the ICC on the defence of duress, highlighting areas of inconsistency and lack of clarity on some notions. I then proceed to demonstrate how national law can provide insight into addressing these inconsistencies and unclarified notions.

II ONGWEN CASE

2.1 *The facts of Ongwen*

Dominic Ongwen was a member of the Lord's resistance Army (LRA), a rebel group that originated in Northern Uganda in the late 1980s.[16] Led by Joseph Kony, the LRA is notorious for its brutal tactics, including the commission of war crimes and crimes against humanity.[17] The group's activities have caused immense suffering and displacement across Uganda, South Sudan, the Central African Republic, and the Democratic Republic of Congo.[18] Ongwen's story within the LRA is both tragic and complex. He was abducted by the

[16] *Ongwen* Trial Chamber Judgment, §§ 1-14.

[17] ibid.

[18] ibid.

LRA at a young age while walking to school. Reports vary on his age at the time, with some stating he was around 9 or 10 years old.[19]

Despite his initial status as a child soldier, Ongwen quickly rose through the ranks. He became a Major in the LRA by the age of 18 and eventually commanded the Sinia Brigade, one of the LRA's four brigades.[20] As a commander, Ongwen was involved in numerous atrocities. Ongwen was captured in 2014 and transferred to the ICC in 2015. He was charged with multiple counts of war crimes and crimes against humanity, including murder, torture, enslavement, the recruitment of child soldiers and several gender-based crimes including rape, forced pregnancy and the inhumane act of forced marriage.[21] His trial began in December 2016, and he was convicted in February 2021 of 61 counts of war crimes and crimes against humanity. On 6 May 2021, Ongwen was sentenced to 25 years in prison.[22] The ICC Trial Chamber decision was upheld on appeal in December 2022 by the ICC Appeal Chamber.[23]

Ongwen's actions had a devastating impact on countless civilians, particularly in Northern Uganda, where the LRA operated. Therefore, on 28 February 2024, the ICC issued the reparation order in the *Ongwen* case.[24] The ICC set Ongwen's financial liability at €52,429,00012.[25] This amount is intended to cover the reparations for the victims of his crimes.

One of the defences Ongwen raised was that of duress as provided for under Article 31(1)(d) of the Rome Statute.[26] Ongwen's main argument centred on his abduction and forced conscription into the LRA as a child. He claimed that he was under continuous threats of death and severe harm, which compelled him to commit the crimes he was charged with. Ongwen argued that his actions were not voluntary but rather a result of the coercive environment and the brutal regime of the LRA, led by Joseph Kony. His Defence highlighted the psychological trauma and lack of freewill due to the constant threat of

[19] *Ongwen* Trial Chamber Judgment, §§ 26-29.

[20] *Ongwen* Trial Chamber Judgment, § 126.

[21] *Ongwen* Trial Chamber Judgment, §§ 32-41.

[22] *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, 6 May 2021, Decision on the sentence.

[23] *Ongwen* Appeal Chamber Judgment.

[24] *Prosecutor v Dominic Ongwen*, ICC-02/04-01/15, 28 February 2024, Reparation Order.

[25] ibid, § 360.

[26] *Ongwen* Trial Chamber Judgment, §§ 2581-2672.

violence, asserting that these factors diminished his criminal responsibility. Despite these arguments, the ICC found that the duress defence did not absolve him of liability for the crimes committed

2.2 *Judgment of Trial Chamber on the defence of duress*

The Trial Chamber delivered its judgment in the *Ongwen* case on 4 February 2021. It began its analysis of the duress defence by identifying its three key elements: i) the conduct alleged to constitute the crime 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; ii) the person acts necessarily and reasonably to avoid the threat; and iii) the person does not intend to cause a greater harm than the one sought to be avoided.[27] Regarding the first element, the Court clarified that the words ''continuing'' and ''imminent'' refer to the nature of the harm that is threatened, rather than the threat itself. In other words, it is not enough that a threat has been made—the harm it portends must be sufficiently immediate or ongoing to justify the accused's actions.[28] This interpretation suggests that the defence of duress is unavailable if the harm is not expected to materialise soon enough to create a compelling need to act. However, as will be demonstrated through discussions on insights from national law in section IV of this article, this approach—requiring the harm to be immediate or ongoing—raises concerns. It lacks clear policy justification, especially considering that other safeguards exist to prevent abuse of the defence. A more nuanced understanding of the temporal dimension of threats may be warranted.

In respect of the second element, the Court determined that the proportionality of the person's actions should be considered in assessing whether the person acted necessarily and reasonably.[29] Although the Court made mention of the concept of proportionality, it did not offer reasoned guidance on how the proportionality test should be applied. Regarding the third element, the Court noted that this is a subjective element which is assessed based on the harms being compared.[30] The Court observed that the inclusion of the term 'in-

[27] *Ongwen* Trial Chamber Judgment, §§ 2581-2584.

[28] *Ongwen* Trial Chamber Judgment, § 2582.

[29] *Ongwen* Trial Chamber Judgment, § 2583.

[30] *Ongwen* Trial Chamber Judgment, § 2584.

tend,' a mental element, implies that the accused does not need to show that they actually avoided the greater harm.[31]

After analysing the evidence on record, the Court concluded that "Ongwen was not under threat of death or serious bodily harm to himself or another person."[32] In finding that the defence of duress was not applicable to Ongwen, the Trial Chamber considered Ongwen's position in the LRA hierarchy, the applicability of its disciplinary regime to him, the executions of senior commanders on Joseph Kony's orders, the possibility of escaping the LRA, Kony's alleged spiritual powers, Ongwen's loyalty and career advancement, and the private nature of some of his crimes.[33] Having found that there was no threat, the Court found no need to address the imminence of the threatened harm, specifically "that it would occur without delay".[34] Additionally, the Court did not find it necessary to discuss the second and third elements of the duress defence.[35] Although the Court did not extend its analysis beyond the first element in its consideration of the defence of duress, it would have been prudent to offer guidance on the components of the second and third element. This is particularly important for establishing precedent in an area where jurisprudential guidance is limited in ICL case law. The decision of the Trial Chamber was appealed by Ongwen's Defence team. They raised numerous grounds for appeal against both his conviction and sentence. Among the grounds raised were the Trial Chamber's findings on the defence of duress.

2.3 *Judgment of the Appeals Chamber on the defence of duress*

The Appeal Chamber delivered the Appeal Judgment in Ongwen on 15 December 2022. The Defence challenged several findings of the Trial Chamber that Mr Ongwen was not subject to a "threat of imminent death or of continuing or imminent serious bodily harm."[36] On this issue, the Defence submitted that the Trial Chamber erred in law in its interpretation of Article 31(1)(d) of the Rome Statute on the defence of duress.[37] The Defence also challenged several findings of

[31] ibid.

[32] *Ongwen* Trial Chamber Judgment, § 2669.

[33] *Ongwen* Trial Chamber Judgment, § 2668.

[34] *Ongwen* Trial Chamber Judgment, § 2669.

[35] ibid.

[36] *Ongwen* Appeal Chamber Judgment, § 1420.

[37] ibid.

the Trial Chamber regarding its assessment of evidence. However, the analysis in this section focusses on the grounds pertaining to the analysis and interpretation of article 31(1)(d) of the Rome Statute rather than Court's application of the evidence on record.

The Defence contended that the Trial Chamber misinterpreted and misapplied the terms 'imminent' and 'continuing,' arguing that they should refer to the 'nature of the threatened harm, not the threat itself.' The Defence added that in finding that the defence of duress is not available to the accused if the threatened harm is not going to materialise ''sufficiently soon'', the Trial Chamber imposed a criterion that is not envisaged by article 31(1)(d) of the Rome Statute. It was the Defence's submission that the threat should be interpreted to include a threat to be killed at a later point in time, and that the threat may emanate from the ''perpetual hostile and violent environment'' which ruled Ongwen's life at the relevant time of the charges.

On this ground, the Appeals Chamber determined that the Trial Chamber correctly interpreted the provision. Notably, the terms 'imminent' and 'continuing' in Article 31(1)(d) of the Rome Statute pertain to the threatened harm, such as death or serious bodily harm. The provision's plain language is clear, contrary to the Defence's submissions, the Appeals Chamber ruled. The Appeals Chamber added that although article 31(1)(d) makes no explicit reference to the terms ''sufficiently soon'', the timing of the materialisation of the threat is linked to the terms imminent and continuing and it is one of the criteria considered in the assessment of the existence of a threat. The Appeals Chamber therefore concluded that the Trial Chamber did not err in concluding that duress is not available if the accused is threatened ''with serious bodily harm that is not going to materialise sufficiently soon.''[38] Although the defence's concern regarding Court's interpretation of imminency cannot be dismissed, as I explain in section IV of this article, the defence's argument that the Rome Statute does not support this interpretation is flawed. Comparative law, which has historically shaped some general principles in ICL, demonstrates divergent interpretations of imminency. Some jurisdictions require immediate harm, while others accept harm that materialises later.[39] This ambiguity arises because there is no explicit guidance on this matter, allowing for multiple interpretations, especially since the Rome Statute is silent on this.

[38] *Ongwen* Appeal Chamber Judgment, § 1422.

[39] See detailed discussion of this in section IV of this article.

The Defence also challenged the Trial Chamber's finding that the terms ''threat'' and ''imminent'' should be examined objectively. In the Defence's view, ''threat must be understood from the perspective of the person receiving it'', and that there is a situation of duress as long as ''the recipient of the threat genuinely fears these consequences.''[40] It is problematic that the defence invoked this argument, as the Rome Statute does not recognise a defendant's honest but mistaken belief as a valid criterion for evaluating a threat in situations of duress except for the third element of duress. Not surprisingly, the Appeals Chamber correctly upheld the Trial Chamber finding which determined that the interpretation of the threat must be understood objectively and that the only element that requires a subjective interpretation is the third element of duress.[41] The Trial and Appeal Chambers' disregard of Ongwen's individual circumstances, thereby denying him the defence of duress, underscores that the question of whether duress can excuse defendants who kill innocent individuals remains unresolved.[42] This uncertainty in ICL on this issue has persisted since the ICTY *Erdemović* case.[43]

III AG MAHMOUD CASE

3.1 *The facts of Ag Mahmoud*

Ag Mahmoud Ag Abdoul Aziz Ag Mohamed, a Malian national, faced trial at the ICC for his alleged involvement in crimes committed in Timbuktu, Mali, between April 2012 and January 2013.[44] As a member of the armed groups Ansar Dine and Al-Qaida in the Islamic Maghreb (AQIM), Ag Mahmoud was accused of playing a significant role in the enforcement of a strict interpretation of Sharia law during the occupation of Timbuktu.[45] He was the de facto chief of the Islamic police and was involved in the work of the Islamic court, which led to widespread human rights abuses against the civilian popula-

[40] *Ongwen* Appeal Chamber Judgment, § 1424.

[41] ibid.

[42] For a commentary on this, see Ambos *supra* note 7, 466-469.

[43] *Prosecutor. v. Erdemovic*, ICTY, IT-96-22, AC Judgment of 7 Oct. 1997.

[44] *Ag Mahmoud* Trial Chamber Judgement, §§ 5-9.

[45] ibid.

tion. The charges against him included crimes against humanity, among these, torture, persecution, and other inhumane acts.[46] He was also charged with war crimes, among these, torture, outrages upon personal dignity, and passing sentences without a fair trial.[47]

The trial of Ag Mahmoud began on 14 July 2020 and on 26 June 2024, the ICC Trial Chamber convicted him of several charges, including crimes against humanity and war crimes, but acquitted him of others, such as rape, gender persecution and sexual slavery. This case is notable for being the first case at the ICC to address the crime against humanity of persecution on gender grounds for which he was acquitted. The trial highlighted the severe impact of the armed groups' actions on the civilian population, particularly women and girls who were subjected to various gender-based crimes. On 20 November 2024, Ag Mahmoud was sentenced to 10 years in Prison.[48] Both the Defence and the Prosecutor initially filed notices of appeal against the Trial Chamber's decision. However, on 17 December 2024, both parties discontinued their appeals. This action rendered the verdict and sentence final, eliminating any chance for the Appeal Chamber to address the controversies related to the Trial Chamber's findings on duress.

The defence of duress under article 31(1)(d) of the Rome Statute was one of the defences raised by Ag Mahmoud. Ag Mahmoud's Defence argued that he committed the alleged crimes under the threat of imminent death or serious bodily harm to himself and his family.[49] However, the Majority of the Court found that the defence did not apply because Ag Mahmoud did not meet its requirements.[50]

[46] ibid.

[47] ibid.

[48] *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, ICC-01/12-01/18, 20 November 2024, sentencing decision (*Ag Mahmoud* Sentencing Decision) <https://www.icc-cpi.int/sites/default/files/2024-11/20241120-al-hassan-sentencing-summary-eng.pdf> Accessed 27 November 2024.

[49] *Ag Mahmoud* Trial Chamber Judgement, § 1751.

[50] *Ag Mahmoud* Trial Chamber Judgement, § 1761.

3.2 *The majority judgment of the Trial Chamber on the defence of duress*

The Trial Chamber delivered its judgment in *Ag Mahmoud* on 26 June 2024. Like *Ongwen*, the Court began its analysis of the defence by identifying its three key elements.[51] The Defence argued that the threat need only be imminent, not immediate.[52] According to the Defence, "what matters is that the risk is in existence and affects the mind of the defendant at the time he commits the criminal act(s) in question."[53] The Trial Chamber in *Ag Mahmoud* disagreed with this position. Instead, the Majority judgment, with Judge Mindua dissenting, applied the findings from the Trial Chamber and Appeals Chamber in *Ongwen*, concluding that the phrases 'imminent death' or 'continuing or imminent serious bodily harm' in article 31(1)(d) of the Rome Statute refer to the immediacy of the threatened harm.[54] The Majority endorsed the finding in *Ongwen* that "duress is unavailable if the accused is threatened with [death] or serious bodily harm that is not going to materialise sufficiently soon."[55] Drawing on *Ongwen,* the Trial Chamber in *Ag Mahmoud* emphasised that "the materialisation of the danger cannot lie too far in the future."[56]

As to whether the threat should be assessed objectively or subjectively, the Trial Chamber in *Ag Mahmoud* determined that the threat should be assessed objectively.[57] The Majority, with Judge Mindua dissenting, authoritatively cited the findings of the Appeals Chamber in *Ongwen*, which concluded that:

> "the existence of the threat must be objectively assessed and exist in reality and not merely on the perpetrator's mind, […] [i]t is not sufficient that a threat is simply believed to exist by the accused, [...] it must be established at least that a reasonable person in those circumstances would nonetheless apprehend the risk of serious harm [...] irrespective of whether the accused genuinely but mistakenly believed [him/herself] to be under threat."[58]

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[51] *Ag Mahmoud* Trial Chamber Judgement, § 1742.

[52] *Ag Mahmoud* Trial Chamber Judgement, § 1743; Defence Trial Brief, ICC-01/12-01/18, 10 October 2023 §. 86 <https://www.legal-tools.org/doc/8lrsaf/pdf> Accessed 20 October 2024.

[53] *Ag Mahmoud* Trial Chamber Judgement, § 1743.

[54] ibid.

[55] ibid.

[56] ibid; *Ongwen* Trial Chamber Judgment, § 1423.

[57] *Ag Mahmoud* Trial Chamber Judgement, § 1748.

[58] *Ongwen* Trial Chamber Judgment, § 1424.

Worth noting, the circumstances of Ongwen and Ag Mahmoud differ significantly. Ongwen was abducted as a child to join the LRA, whereas Ag Mahmoud joined Ansar Dine as an adult. This distinction brings sharply into focus the concept of prior fault, particularly for those who join rebel groups voluntarily. Unlike most national criminal laws on duress, the Rome Statute is silent on whether a threat can be considered beyond the accused's control if they voluntarily exposed themselves to the conditions that led to the threat. Despite the silence of the Rome Statute on this issue, the Majority in *Ag Mahmoud* determined that "a risk created by the accused cannot satisfy the elements of duress set out in Article 31(1)(d) of the Statute. Mr Al Hassan [Ag Mahmoud] voluntarily joined Ansar Dine/AQIM having been told of their goals for Timbuktu. Having voluntarily joined Ansar Dine/AQIM and subjecting himself to the governance of their members, Mr Al Hassan [Ag Mahmoud] cannot now claim duress as a result of a harm he willing exposed himself to."[59]

After analysing the evidence on record, the Majority concluded that Ag Mahmoud did not face a threat of imminent death or of continuing or imminent serious bodily harm.[60] The Trial Chamber therefore saw no need to assess element two and three against the evidence as the first ground had not been met.[61] The Trial Chamber may indeed be justified in refraining from addressing the second and final element, having determined that the first element was not satisfied. However, this position appears to be a strategic manoeuvre by the ICC to avoid confronting the flawed codification of the defence of duress, which conflates duress with necessity. This conflation not only renders it challenging for the defendant to substantiate their defence when innocent civilians are killed but also precludes the development of a reasoned engagement with the defence that could serve as a precedent for future cases.

3.3 *The separate opinion of Judge Mindua on the defence of duress*

The Judgment of Judge Mindua was handed down on 28 June 2024, two days after the Majority Judgment. Having dissented from the Majority, Judge Mindua's separate judgment arrived at different conclusions on several issues including the defence of duress. Contrary to the Majority's opinion, Judge Mindua concluded that Ag

[59] *Ag Mahmoud* Trial Chamber Judgement, § 1755.

[60] *Ag Mahmoud* Trial Chamber Judgement, § 1762.

[61] ibid.

Mahmoud acted under duress within the meaning of Article 31(1)(d) of the Rome Statute.

Apart from emphasising that he was not bound by previous jurisprudence, in this regard the *Ongwen* Appeal Chamber decision, Judge Mindua determined that the "Appeals Chamber interpreted Article 31(1)(d) of the Statute too narrowly, with the risk of rendering it meaningless." It was also Judge Mindua's view that the *Ongwen* case and *Ag Mahmoud* case were different and so the findings in *Ongwen* could not be applied in *Ag Mahmoud*. Suffice it to note that Article 21(2) of the Rome Statute provides that the ICC "may apply principles and rules of law as interpreted in its previous decisions." While Judge Mindua is not under obligation to apply the decision in *Ongwen* based on the article 21(2)'s reference to the term "may", in the spirit of ensuring consistency and predictability, upholding fairness and equality, providing legal certainty, enhancing efficiency, and contributing to the development of ICL on a defence that is still in its nascent stages before the ICC, a departure from a previous Appeal Chamber decision arguably needed adequate justification, which was lacking in Judge Mindua's Separate opinion.

Regarding the nature of the threat, Judge Mindua disagreed with the Appeals Chamber's findings in *Ongwen* that the threatened death or serious bodily harm must "materialise sufficiently soon."[62] He added that the notion of imminence does not mean "immediate realisation" and to interpret it that way would be to annihilate the entire defence of duress.[63] Instead, Judge Mindua observed that Ag Mahmoud was perpetually under an objective threat to his physical safety or that of his family, which could have become reality at any time.[64] But importantly, Judge Mindua failed to refer to any concrete evidence of the severe bodily harm or death Ag Mahmoud would have encountered had he decided to abandon his responsibilities within Ansar Dine and depart from the group. Moreover, even assuming that the requirement for the immediate materialisation of the threat is a misinterpretation of the concept of imminence, Judge Mindua's opinion failed to justify this conclusion and did not address the necessary safeguards, which have been thoroughly examined in comparative law.[65] Effectively, Judge Mindua departed from estab-

[62] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 111.

[63] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 113.

[64] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 113.

[65] See my detailed discussion of comparative law on this in section IV of this article.

lished ICC jurisprudence in *Ongwen* regarding the interpretation of the notion of imminence without providing reasoned conclusions for such departure.

Concerning the nature that the assessment of the threat should take, Judge Mindua alluded to the need for the Court to appreciate the subjective or perceived nature of the threat.[66] In Judge Mindua's view, ''it is indeed the perception of the accused that leads him to take the decision to act.''[67] Thus, contrary to the position that ''the existence of the threat must be objectively assessed and exist in reality and not merely on the perpetrator's mind'' as held in *Ongwen* and the Majority in *Ag Mahmoud*,[68] Judge Mindua's finding was that the assessment should not be devoid of a subjective analysis, with the personal perception of the person concerned also warranting consideration. This conclusion is problematic since as already alluded to the Rome Statute does not follow the route of subjectification of the nature of threat.[69] This evaluation is based on an objective standard, indicating that a reasonable individual in comparable situations would have yielded to the pressure and participated in the criminal activity to avert the threatened harm.[70]

Judge Mindua also engaged with the notion of prior fault, finding that for a threat to be beyond one's control, it must not be provoked or caused by the accused.[71] He, however, failed to engage with concrete evidence to support his conclusion. Crucially, Ag Mahmoud voluntarily joined Ansar Dine/AQIM and subjected himself to the governance of their members. In fact, in a separate judgment, Judge Prost found that ''there is not a scintilla of evidence that Mr Al Hassan or any member of Ansar Dine/AQIM faced any form of compulsion to commit or contribute to these violent acts.''[72] Furthermore, Ag Mahmoud's age, educational background, and swift ascent to power challenge Judge Mindua's portrayal of him as a

[66] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 115.

[67] ibid.

[68] *Ag Mahmoud* Trial Chamber Judgement, § 1748; *Ongwen* Trial Chamber Judgment, § 1424.

[69] See also Ambos Treatise volume 1 page 357.

[70] Eser and Ambos *supra* note 10, 1374, § 55; Ambos *supra* note 7, 472; D. Cryer, D. Robinson and S. Vasiliev *An introduction to international criminal law and procedure* (Cambridge University Press Fourth Edition 2019) 390.

[71] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 114.

[72] Separate and partly dissenting opinion of Judge Kimberly Prost, ICC-01/12-01/18-2594-OPI2 26-06-2024 1/11 T, § 18.

young, timid person who was coerced into joining and complying with Ansar Dine/AQIM. Moreover, although Judge Mindua emphasised the concept of foreseeability,[73] a critical element in assessing prior fault, the judgment lacks a thorough and reasoned analysis of the criteria for such an assessment. Specifically, it remains unclear whether foreseeability pertains to the crime or the threat. Despite these shortcomings in Judge Mindua's separate opinion, he concluded that Ag Mahmoud acted under duress.[74]

IV THE INCONSISTENCIES BY THE ICC REGARDING THE DEFENCE OF DURESS: INSIGHTS FROM PRINCIPLES OF LAW FROM NATIONAL LAW

A central theme underlying the structure of the duress defence, reflected across various legal systems and subtly echoed in ICC jurisprudence, is whether the accused had a realistic opportunity to avoid the threat. The cases of *Ongwen* and *Ag Mahmoud* reveal several inconsistencies regarding this issue. Key issues pertaining to this central theme are whether the term 'imminent' necessitates that the threat materialises 'sufficiently soon' and whether the threat should be assessed objectively or subjectively. Additionally, the ICC has only briefly mentioned certain principles without providing clarity on their meaning and application. These principles include the doctrine of prior fault and the concept of proportionality in the context of the defence of duress. The lack of thorough examination of these principles leaves significant gaps in understanding how they should be applied, highlighting the need for clearer guidelines and more comprehensive analysis in future cases. Furthermore, since all the ICC Chambers have halted their analysis of the defence of duress at the first element, the complex issue of how to practically apply the second and third element of the duress defence in a real case scenario remains unresolved.

As noted, under article 21(1)(c) of the Rome Statute, the ICC shall apply general principles of law derived from global legal systems. The first ICC case to address the defense of duress was *Ongwen*. Since Ongwen is Ugandan and Uganda would typically have jurisdiction, I refer to Uganda's national law on duress to identify general principles relevant to the inconsistencies observed in the ICC cases of *Ongwen*

[73] ibid.

[74] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 118.

and *Ag Mahmoud*.[75] Additionally, because Uganda's law on duress is influenced by English law and Ugandan courts continue to apply English law principles, I also consider English case law to identify general principles that can address these inconsistencies.[76] To ensure a comprehensive engagement with diverse legal traditions, encompassing both common law and civil law systems, I also draw upon principles of duress as developed in Germany, Canada, France, Dutch law, Islamic law drawn from Iran and Afghanistan, the United States, and New Zealand. Critically, where the application of national law principles would either render the defence meaningless or undermine accountability for serious crimes, I suggest approaches that strike a balance between the meaningful use of the defence of duress by the accused and accountability for atrocious crimes before the ICC.

4.1 *The notion* 'imminent'

As noted, a recurring theme in the defence of duress is whether the accused had a realistic opportunity to evade the threat. Therefore, how the court conceptualises the notion 'imminent' is central to courts' determination of whether the accused had a realistic opportunity to avoid the threat. *Ongwen* decided that 'imminence' implies a threat should materialise sufficiently soon. The majority judgment in *Ag Mahmoud* agreed with *Ongwen* on this issue.[77] In contrast, Judge

[75] Considering that all individuals accused before the ICC thus far are African, and their alleged crimes have occurred, at least in part, on African soil, I argue that the ICC should, when necessary, refer to the national laws and applicable legal standards of the African state where the crime took place to resolve issues of interpretation in these cases. This approach aligns with the principle of *nullum crimen sine lege,* ensuring that the crimes for which the accused are prosecuted are foreseeable, as they are based on laws and legal standards familiar to the accused. For arguments on the need for the ICC to make use of African laws, see S. Manley, P. Tehrani & R. Rasiah "The (Non-)Use of African Law by the International Criminal Court" (2023)34 *European Journal of International Law* 555-580. For the Rome Statute emphasis on adherence to the principle of legality, in particular, the need for the law to be clear and unambiguous at the time of commission of an offence, see Ambos *supra* note 7, 90.

[76] In Uganda, as is the case in the laws of other former British colonies like Ghana, Kenya and Nigeria, the legal system, including the applicable laws resembled the English common law even more after independence than before. Uganda has retained the colonial legal systems, with courts directly applying English case law in their judgments.

[77] *Ag Mahmoud* Trial Chamber Judgement, § 1743.

Mindua's dissenting Judgment in *Ag Mahmoud* concluded that imminence does not require immediate realisation.[78] These judgments reveal inconsistencies on what the required time between the issuance of a threat and its potential materialisation to satisfy the 'imminence' criterion. The question then arises: what is the status of national law on this issue, and would such interpretation ensure accountability for serious crimes without rendering the defence of duress meaningless?

Uganda's law recognises the defence of duress and refers to it as the defence of compulsion. Section 14 of Uganda's Penal Code Act codifies it as follows:

> ''A person is not criminally responsible for an offence if it is committed by two or more offenders and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or her or do him or her grievous bodily harm if he or she refuses; but threats of future injury do not excuse any offence.''[79]

Regarding the length of time between the issuance of the threat and the potential materialisation of the threat that would satisfy this 'imminence' criterion, Uganda's law requires the materialisation of the threat to be 'instant'.[80] The Provision emphasises immediacy of materialisation of the threat by stating that ''threats of future injury do not excuse any offence.''[81] English case law, which has been applied in Ugandan courts, applies a similar standard. In *R v. Hasan* (*Hasan*), the House of Lords emphasised that for the threshold of imminence to be met, the threat must be of immediate or almost immediate harm.[82] Lord Bingham stressed that if the threatened harm is not expected to follow immediately or almost immediately upon failure to comply, the defendant should have taken evasive action, such as going to the police.[83] Islamic law, including the criminal laws of Afghanistan and Iran, applies a similar doctrine, emphasising that the threat must be both obvious and imminent. This

[78] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 111.

[79] Penal Code Act of Uganda, Chapter 120, Laws of Uganda, § 14.

[80] ibid.

[81] ibid.

[82] *R v. Hasan* [2005] UKHL 22; [2005] 2 AC 467 (Hereinafter *Hasan*).

[83] *Hasan* § 28.

doctrine stipulates that the defendant must have no alternative, such as the ability to seek assistance from law enforcement authorities.[84] Dutch law also excludes the defence of duress if a way out was open to the defendant.[85] New Zealand criminal law requires that the threat against the defendant must materialise "immediately".[86] The New Zealand courts have interpreted this to mean that the harm will take place "there and then" if the defendant does not commit the crime.[87]

One gathers that in requiring that the threat materialises sufficiently soon, the Trial Chamber and Appeal Chamber Judgments in *Ongwen* and the Majority judgment in *Ag Mahmoud* invoked an immediacy/instant criterion as applied in some civil and common law jurisdictions including Uganda, England, New Zealand, Iran, Afghanistan and the Netherlands. Despite the settled status of such an approach in these legal systems, I argue that this approach to interpreting the notion of 'imminence' renders the defence illusory and should neither be invoked by the ICC nor set precedent for national accountability for international crimes. I advance three reasons for this. First, the reasoning behind this strict standard has no policy justification. In *Hasan*, Lord Bingham observed that the reason for requiring immediacy of materialisation of the threat for the threshold of imminence to be met is to exclude individuals who had the option to seek police protection or take evasive action.[88] This ensures that the duress defence is not abused. However, this reasoning fails to consider individuals who have no realistic access to police protection, regardless of whether the harm is expected to occur immediately or not. As the relevant legal requirement is that one should seek police assistance to protect against the threat if such protection is realistically available, where the police cannot secure the threatened party—at least without risking their death, duress ought

[84] M. Mohammad *"Islamic law"* in A. Reed and M. Bohlander (eds) *General defences in criminal law: Domestic and comparative perspectives* (Ashgate Publishing 2014) 241, 250.

[85] E. Gritter "*The Netherlands*" in A. Reed Allan and M. Bohlander (eds) *General defences in criminal law: Domestic and comparative perspectives* (Ashgate Publishing 2014) 255, 265.

[86] *R v Teichelman* (1981)2 NZLR 64.

[87] *R v Neho* (2009)NZCA 299(9).

[88] ibid.

still to be available.[89] A rigid imminence requirement may exclude individuals who are genuinely under coercive pressure but lack safe alternatives, even if the threatened harm is not immediate. In such cases, the strict standard risks undermining the protective function of the duress defence.

Secondly, there are other safeguards incorporated within the duress defence that can address the concern of abusing it. Notably, the aim of avoiding the abuse of the defence can be achieved by requiring the accused to act reasonably, which is the second element of the duress defence under article 31(1)(d) of the Rome Statute. In requiring the accused to act reasonably to avoid the threat, the Court can exercise its discretion to decide whether the actions of the accused were appropriate given the circumstances the accused found themselves. Where the actions of the accused are not appropriate given the circumstances, the defence does not apply, and this inevitably addresses the concern of abuse of the defence while also fostering accountability for serious crimes within the ICC's jurisdiction.

Thirdly, precedent and penal law enactments in some national laws confirm that a more flexible approach to the notion of imminence is feasible. For instance, under the United States Model Penal Code, it is an affirmative defense that the actor engaged in the conduct constituting an offense because they were coerced by the use of, or threat to use, unlawful force against themselves or another person, which a person of reasonable firmness in their situation would have been unable to resist.[90] This penal provision does not require that the threat compelling the defendant to act be imminent.[91] Similarly, under the Canadian Criminal Code, the defence of duress is available

[89] See e.g. *R v Hudson and Taylor* [1971] 2 All ER 244. The trial judge ruled that the defence of duress was not available because the threats were not "present and immediate" and because the girls could have sought police protection. However, the Court of Appeal overturned this, holding that the threat did not need to be immediate in the strictest sense, especially if the threat was still effective at the time of the offence and police protection was not realistically sufficient

[90] American Law Institute *Model Penal Code: Official Draft and Explanatory Notes: Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962* (Philadelphia, PA: The Institute 1985).

[91] E. Chiesa "*United States of America*" in A. Reed and M. Bohlander Michael (eds) *General defences in criminal law: Domestic and comparative perspectives* (Ashgate Publishing 2014) 329, 340.

to a defendant who is compelled by threats of immediate death or bodily harm.[92] However, in *R v Ruzic*, the Supreme Court of Canada held that the requirement of immediacy violates Section 7 of the Canadian Charter, which guarantees the right to life, liberty, and security of the person.[93] Furthermore, in subsequent decisions, the Supreme Court of Canada has established safeguards for eliminating the requirement of immediacy. In *R v Ryan*, the Court ruled that the common law requirements that provide safeguards include: 1) a temporal connection between the threats and the accused's response, 2) no safe avenue for escape, 3) the defendant's reasonable belief that the threats could be carried out, and 4) proportionality between the harm threatened and the harm inflicted by the accused.[94]

Similarly, in England, in the 1971 case of *R v. Hudson and Taylor*, where two teenage witnesses lied in court due to threats of serious harm from a gang, who were present in the courtroom, the English Court of Appeal accepted the duress defence for perjury, noting that the immediacy of the threat was irrelevant as the girls believed it was imminent and acted under that pressure.[95] Likewise, in *R v. Abdul Hussain*, the English Court of Appeal ruled that "the period of time which elapses between the inception of the peril and the defendant's act, and between that act and execution of the threat, are relevant but not determinative factors […] in deciding whether duress operates."[96] Although these decisions were overruled in the 2005 decision of *Hasan* in favour of a stricter criterion, the basis for overruling them rests on the concern that the defence can potentially be abused, an issue which as I have argued above is not grounded in policy and can be addressed through other means.

I therefore argue that the interpretation of the notion of imminence under article 31(1)(d) of the Rome Statute should not be synonymous with 'instant', 'sufficiently soon' or 'immediately'. Instead, I suggest a less restrictive interpretation that recognises the time restriction without considering it determinative. This suggested approach neither undermines accountability for serious crimes nor results in the abuse of the defence as there are other safeguards such as reasonableness that can guard against its abuse. Conversely, inter-

[92] Section 17 Criminal Code, RSC 1985, c C-46. Department of Justice Canada, 1985.

[93] *R v Ruzic* (2001) 1 SCR 687.

[94] *R v Ryan* (2013) SCC (3d) 97 (SCC) 49-54.

[95] *Hudson and Taylor* [1971] 2 QB 202.

[96] *R v. Abdul Hussain* [1999] Crim LR 570.

preting the notion 'imminent' based on immediacy renders the defence of duress illusory. Such an approach potentially undermines the accused's right to a fair trial which I argue requires a reasoned interpretation and application of defences in a manner that does not render them useless or unavailable to the accused.

4.2 *Objective or subjective assessment of threat?*

Whether the threat is assessed objectively or subjectively directly impacts on the court's conclusion on whether the accused could have reasonably avoided the coercive situation. Both *Ongwen* and the Majority in *Ag Mahmoud* decided that the existence of the threat must be objectively assessed.[97] Therefore, the test is that of a reasonable person and not merely what is on the perpetrator's mind or the perpetrator's perception. Judge Mindua on his part determined that it is important for the Court to consider the subjective or perceived nature of the threat.[98] Section 14 of Uganda's Penal Code Act and Malian law are both silent on this issue. An issue that arises is whether the threat should be assessed objectively or subjectively.

English law, which has influenced Ugandan criminal law, has long adopted an objective standard. In *R v Graham*, the Court of Appeal established that the accused's belief in the threat must be both genuine and reasonable.[99] Although *R v Martin* later suggested that a genuine belief alone might suffice,[100] this was clarified in *Hasan*, where the House of Lords reaffirmed the *Graham* standard. Lord Bingham stated, "there is no warrant for relaxing the requirement that the belief must be reasonable as well as genuine." [101] This means the accused must honestly believe in the threat, and that belief must also be one that a reasonable person would hold under the same circumstances. French law, which informs Malian criminal law, applies a strictly objective standard.[102] The *Cour de cassation* has held

[97] *Ag Mahmoud* Trial Chamber Judgement, § 1748; *Ongwen* Trial Chamber Judgment, § 1424.

[98] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 115.

[99] *R v Graham* [1982] 1 WLR 294 (CA).

[100] *R v. Martin* [2002] 2 Cr App R 42.

[101] *Hasan* § 23.

[102] Crim 8 fev 1936, DP, 1936.I.44, note Donnedieu de Vabres; Crim 21 mai 1941, GP, 1941.2.132.

that the assessment is based on the standard of an ordinary person, without regard to the individual circumstances of the accused.[103] Similarly, New Zealand law applies an objective test, excluding mistaken beliefs about threats, even if those beliefs are reasonable.[104]

There may be concern that the above framing makes the defence of duress overly strict. In both *Ongwen* and *Ag Mahmoud*, the Defence argued that "the threat must be understood from the perspective of the person receiving it."[105] If the recipient genuinely fears the consequences, the defence should apply.[106] I argue that the ICC should adopt a standard that combines genuineness with a contextualised reasonableness test—one that asks not what any person would believe, but what a reasonable person in the accused's position would believe. This approach offers two key advantages. First, it balances fairness with legal rigour by recognising the accused's individual experiences such as trauma, cultural background, or prolonged exposure to coercion, which may shape their perception of threat. These factors were overlooked in *Ongwen* and the *Ag Mahmoud* Majority Judgment, where the accused's perception was treated as irrelevant.[107] A contextualised analysis allows the Court to assess whether the accused's belief in the threat was not only genuine but also reasonable in light of their circumstances. Second, this standard ensures that duress remains a defence only for those whose belief in the threat was both sincere and justifiable. It excludes cases where the accused's fear, though genuine, would not be reasonable even when their personal context is considered. This preserves accountability while allowing for a more nuanced and humane application of the defence.

Notable subjective factors in *Ongwen* and *Ag Mahmoud* including childhood indoctrination, mental trauma, prolonged coercion, cultural and religious conditioning, fear of retaliation, and isolation from external support—should inform what it was reasonable for the

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[103] Ibid.

[104] J. Tolmie "*New Zealand*" in A. Reed and M. Bohlander (eds) *General defences in criminal law: Domestic and comparative perspectives* (Ashgate Publishing 2014) 273, 279.

[105] Defence Appeal Brief Against the Convictions in the Judgment of 4 February 2021", filed on 21 July 2021 as ICC-02/04-01/15-1866-Conf, § 508. See also *Ag Mahmoud* Majority Judgment, § 1748.

[106] Ibid.

[107] *Ag Mahmoud* Trial Chamber Judgement, § 1748; *Ongwen* Trial Chamber Judgment, § 1424.

accused to believe. A purely objective standard risks overlooking the lived realities of individuals like *Ongwen*, whose capacity to assess threats was shaped by years of psychological and physical subjugation. Therefore, a contextualised reasonableness test—one that considers how a reasonable person in the accused's specific circumstances would perceive the threat, is more just and better suited to ICL. This approach ensures that the defence of duress is applied with sensitivity to vulnerability and trauma, without compromising legal accountability.

4.3 *The doctrine of proportionality*

The doctrine of proportionality, though not explicitly mentioned in Article 31(1)(d) of the Rome Statute, also functions as an evaluative tool in deciding whether the accused had a realistic opportunity to evade the threat. In both the *Ongwen* and *Ag Mahmoud* cases, the doctrine of proportionality was hinted at when interpreting the second element of duress.[108] The Trial Chamber in both cases stated that the accused need not take all conceivable actions to avoid the threat, and that consideration should be given to the proportionality of the accused's actions.[109] Despite mentioning the doctrine of proportionality, the ICC in both *Ongwen* and *Ag Mahmoud* provided no guidance on what it entails. How the ICC interprets and applies this doctrine is important in development of jurisprudence on the defence of duress.

Criminal law doctrine in Canada and Germany recognises the doctrine of proportionality between the harm threatened and the harm inflicted by the defendant in evaluating the defence of duress.[110] Both jurisdictions, however, provide no guidance on what proportionality entails. There is similarly scholarly consensus that the doctrine of proportionality should inform the assessment of reasonableness in as far as the second element of duress is concerned. Ambos, for example, submits that even though article 31(1(d) of the Rome Statute makes no reference to proportionality, the term 'reasonable' under Article 31(d) is an 'umbrella term' covering 'necessary'

[108] The second element is that the defendant acts necessarily and reasonably to avoid the threat

[109] *Ongwen* Trial Chamber Judgment, § 2583.

[110] *R v Ryan supra* note 94, 49-54; K. Ambos and S. Bock "*Germany*" in A. Reed Allan and M. Bohlander (eds) *General defences in criminal law: Domestic and comparative perspectives* (Ashgate Publishing 2014) 227, 236.

and 'proportionate.'[111] This implies that a defendant's actions are considered reasonable if their response is proportionate. Therefore, the second element of duress envisages the proportionality test, and other scholars concur with this viewpoint.[112]

However, scholars differ on the meaning of the concept of proportionality. Ambos argues that for an action to be reasonable, the harm caused must be less than the harm avoided, making the crime the lesser of two evils.[113] But it is worth noting that the accused's actions may be the greater of two evils yet still reasonable. Conversely, earlier work by Eser takes a more lenient stance, suggesting that the accused's actions should not be 'unreasonably disproportionate' to achieve the intended outcome.[114] I argue that proportionality in the context of duress should not be interpreted rigidly as requiring that the harm caused must always be less than the harm avoided. Such a strict formulation risks excluding individuals who acted under extreme coercion in morally complex situations. Instead, I argue that the ICC should adopt a flexible and context-sensitive proportionality test, one that allows for a nuanced assessment of whether the accused's actions were reasonable in light of the totality of the circumstances. This approach recognises that in the extreme environments often encountered in international crimes including systemic violence, coercive group dynamics, and limited avenues for resistance, the accused may not always be able to choose the lesser evil in a strict sense. A flexible standard would still exclude actions that are disproportionate or clearly unjustifiable, but it would allow the Court to consider the broader context in which the accused acted. This ensures that the defence of duress remains accessible in appropriate cases, while maintaining a high threshold that upholds accountability and the integrity of international criminal justice.

4.4 *The doctrine of prior fault*

The doctrine of prior fault reflects another dimension of the broader inquiry into whether the accused had a realistic opportunity to evade

[111] K. Ambos "Defences in international criminal law" in Bertram S. Brown (ed.), *Research handbook on international criminal law* (Elgar 2011) 313. See also Eser and Ambos *supra* note 10, 1347, 1375, § 57; Ambos *supra* note 7, 474.

[112] A. Eser 'Article 31 – Grounds for excluding criminal responsibility' in O. Triffterer, *Commentary onthe Rome Statute of the International Criminal Court: Observers' Notes, Article-by-Article* (Nomos1999) 551.

[113] Ambos *supra* note 111, 313. See also Eser and Ambos *supra* note 10, 1375, § 57.

[114] Eser *supra* note 112, 551.

the threat. In *Ongwen*, both the Trial Chamber and the Appeals Chamber did not address the doctrine of prior fault, likely because Ongwen was abducted into the LRA as a child and did not join voluntarily. However, this doctrine became central in *Ag Mahmoud*, where the accused joined Ansar Dine/AQIM as an adult. This raised the question of whether he had voluntarily created the risk of being subjected to duress, thereby disqualifying him from relying on the defence.

The doctrine of prior fault is complicated by the fact that Article 31(1)(d) of the Rome Statute does not explicitly reference it. In contrast, several national criminal justice systems do recognise it. For instance, Uganda, which would typically have jurisdiction over *Ongwen*, acknowledges this doctrine through applicable English case law, despite Section 14 of Uganda's Penal Code Act being silent on it. Similarly, Mali, which would typically have jurisdiction over Ag Mahmoud, is influenced by French law, which recognises the doctrine of prior fault. French law stipulates that to benefit from the defence of duress, the accused must not have voluntarily assumed the risk of being subjected to duress.[115] Under German Criminal law, the defence of duress fails where the defendant caused the danger.[116]

Although the Rome Statute does not explicitly provide for this doctrine, scholars argue that it is implicitly recognised by Article 31(1)(d) of the Rome Statute through its reference to "circumstances beyond that person's control."[117] In other words, circumstances caused by the accused or risks voluntarily assumed by the accused are within their control and therefore do not meet this requirement. However, the issue at hand concerns the definition of prior fault and the circumstances under which it prevents the accused from using the defence of duress. Ambos notes that the delegates in Rome could not agree on a definition of self-exposure that would preclude these defences, leaving it to the ICC to decide.[118] The Majority in the *Ag Mahmoud* Trial Chamber judgment concurred, stating that the Rome Statute implicitly includes the notion of prior fault. They further

[115] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 114. See also Criminal Code of the French Republic 1994 as amended, § 122-2.

[116] Section 35(1) German Criminal Code (Strafgesetzbuch - StGB).

[117] Ambos *supra* note 111, 312-313; Eser and Ambos *supra* note 10, 1373; Ambos *supra* note 7, 472.

[118] Ambos *supra* note 111, M. Scaliotti "Defences before the international criminal court: Substantive grounds for excluding criminal responsibility – Part 1" (2001)1 *International Criminal Law Review* 111, 153.

stated that "a risk created by the person him/herself cannot satisfy the elements of duress."[119] Judge Mindua also recognised the notion of prior fault and found that Ag Mahmoud had no prior fault, allowing him to benefit from the duress defence.[120] However, both judgments left the meaning of prior fault underdeveloped, particularly regarding the type of association required and the foreseeability of coercion, both of which are important principles in determining prior fault. This lack of clarity risks inconsistent application and may undermine either the rights of the accused or the pursuit of justice for victims. Clearer principles are therefore needed.

English case law offers guidance on these two key aspects: the nature of the accused's association with a criminal group and the foreseeability of coercion. Regarding the nature of the accused's association, initially, in *R v Sharp*,[121] the court held that joining a criminal organisation with knowledge of its nature precluded reliance on duress. Later, in *R v Baker and Ward*,[122] the court expanded the scope to include engaging in criminal activity, even without formal group membership. I argue that this broader interpretation better supports accountability for serious crimes, especially where individuals commit atrocities without formally joining a group. Limiting prior fault to formal membership risks creating accountability gaps. Notably, some individuals commit atrocious crimes without formally joining rebel groups, and it is crucial to hold them accountable to prevent an accountability gap. Moreover, if association were solely based on joining rebel groups, proving such membership could pose challenges, even for those who commit heinous crimes. An interpretation that includes both joining and mere engagement in criminal activities ensures comprehensive accountability. This approach prevents those who engage in criminal acts without joining a rebel group from escaping justice.

The second issue in assessing prior fault concerns the foreseeability of compulsion. The legal standard, as clarified in the English decision of *Hasan*[123] and the New Zealand decision of *R v Joyce*,[124] is objective: the accused must have foreseen or ought reasonably to

[119] *Ag Mahmoud* Majority Judgment, § 1747.

[120] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 108.

[121] *R v. Sharp* [1987] QB 583.

[122] *R v. Baker and Ward* [1999] 2 Cr App R 355.

[123] *Hasan*, § 38.

[124] *R v Joyce* (1968) NZLR 1070 (CA).

have foreseen the risk of being subjected to compulsion by threats of violence. This is not a test of what the accused actually knew or believed, but of what a reasonable person in their position would have anticipated. This standard was reaffirmed in *R v Ali*,[125] where the court emphasised that the relevant risk is not the specific crime, but the general risk of coercion through threats. This objective foreseeability test is particularly important in the context of international crimes, including gender-based violence. Given the widespread and systematic nature of such crimes in armed conflict, individuals associating with armed groups should reasonably foresee the risk of being compelled to participate in them. This approach ensures that those who exploit conflict to commit atrocities cannot evade responsibility by claiming failure to foresee compulsion in respect of specific crimes.

The standard articulated in *Joyce* and *Hasan* is undoubtedly stringent. As previously noted, it does not require the accused to have foreseen risk of compulsion in respect of the specific crime for which they are on trial, but rather to have reasonably foreseen the risk of being subjected to coercion or threats of violence more generally. Accordingly, the defence of duress may fail even if the accused did not foresee the risk of being compelled to commit, for instance, gender-based crimes, so long as the broader risk of coercion was reasonably foreseeable. For example, if the accused anticipated the possibility of being pressured to commit torture but not gender-based crimes, liability may still attach for the latter. However, while the *Hasan* and *Joyce* standard is demanding, it does not render the duress defence illusory. The prosecution still bears the burden of proving that the accused's association involved a reasonably foreseeable risk of coercion. In cases such as *Ongwen*, where the accused was abducted as a child and may not have comprehended the criminal nature of the group, the defence may remain available. In sum, adopting an objective foreseeability standard, rather than a subjective one, provides a principled and objective framework for interpreting Article 31(1)(d) of the Rome Statute that preserves the integrity of the defence while ensuring accountability for serious crimes.

4.5 *The ICC's inability to analyse and apply elements 2 and 3 of the duress defence, along with unresolved issues in the wording of this defence under the Rome Statute*

[125] *R v. Ali* [2008] All ER (D) 56.

The second and third elements of the duress defence, namely, the requirement that the act be necessary and reasonable, and that the accused did not intend to cause greater harm than the one avoided, are essential in determining whether the accused responded proportionately to the threat and whether they had a realistic opportunity to avoid it.[126] In both the *Ongwen* and *Ag Mahmoud* cases, the Trial Chambers concluded that neither Ongwen nor Ag Mahmoud were under threat of death or serious bodily harm to themselves or others. As a result, the Chambers did not address the other two requirements of the duress defence under Article 31(1)(d): the necessity and reasonableness of the act undertaken to avoid the threat, which requires an objective assessment, and the requirement that the person did not intend to cause greater harm than the one sought to be avoided, which requires a subjective assessment.[127]

The ICC's handling of the duress defense in the *Ongwen* and *Ag Mahmoud* cases highlights a significant issue. By focusing solely on the first element i.e. a threat of imminent death or serious harm, the Court avoided the complex evaluation of the last two elements. This selective engagement overlooks the inherent difficulties in applying these two elements. For instance, the accused might have acted reasonably but intended to cause greater harm than the one sought to be avoided. Then again, the accused might have acted unreasonably but intended to cause lesser harm. Yet, individuals acting under duress typically do not avert a harm greater than the one they cause.[128] Thus, requiring the act to be both objectively necessary and reasonable and subjectively intended to cause lesser harm makes the duress defence problematic, warranting a more comprehensive judicial approach which the ICC did not bother to engage in. This confusion stems from the Rome Statute's blending of two distinct theoretical frameworks: excuse and justification. In Anglo-American legal the-

[126] Regarding element 2 (necessity and reasonableness of the act), it directly addresses whether the accused's response to the threat was proportionate and whether they had viable alternatives. If the act was not necessary or reasonable, it implies that the accused could have avoided the threat through other means - thus failing the core test of duress. Element 3 (intention not to cause greater harm than the one avoided) introduces a subjective proportionality assessment. It asks whether the accused's mental state reflects a genuine attempt to minimise harm. If the accused intended to cause greater harm, it suggests they were not acting under the kind of constrained moral choice that duress presupposes - again implying that they had agency and possibly alternatives.

[127] *Ongwen* Trial Chamber Judgment, § 2669.

[128] Chiesa *supra* note 91, 339.

ory, duress is traditionally treated as an excuse—it acknowledges that the act was wrongful but absolves the actor of blame due to coercion. In contrast, the requirement that the accused must not intend to cause a greater harm than the one avoided introduces a "lesser evil" logic, which is characteristic of justification. But if the accused truly acted to prevent a greater harm, the more appropriate classification would be justification, not excuse. The Rome Statute's formulation, therefore, imposes a hybrid standard that is, as scholars note, "unprecedented in comparative law."[129] Other scholars have questioned how the subjective intention of the accused fits in.[130] Judge Mindua also highlighted the problematic nature of the Rome Statute's approach and concluded that the wording of the defence of duress under the Rome Statute is confusing as it conflates the defences of duress and necessity.[131] This is accurate, as comparative law in both civil and common law jurisdictions demonstrates that necessity and duress are distinct defences.[132] Indeed the wording of the Rome Statute is unprecedented in comparative law as criminal law doctrine in Uganda, Germany, France, Canada, England, among others, does not conflate the two defences. As Chiesa aptly puts it, this means that "a person may even kill several innocents to save his own life."[133] The Rome Statute's approach, by contrast, imposes a balancing of harms that is foreign to the doctrinal structure of duress in most legal systems. A more coherent and principled approach would require the ICC to disentangle these theoretical strands and clarify the normative basis of the duress defence.

All considered, comparative criminal law adopts a stringent approach to the defence of duress, underpinned by robust safeguards designed to prevent its misuse.[134] The prevailing policy rationale is to deter individuals from voluntarily associating with criminal actors or placing themselves in situations where coercion is foreseeable. By imposing a high threshold for the successful invocation of duress,

[129] Ambos *supra* note 111, 314, for a detailed discussion on the recognition of the defence of duress and necessity as separate defences in both civil law and common law systems, see Ambos *supra* note 7, 456-461.

[130] Yeo *supra* note 10, 358; S Yeo "Compulsion and Necessity in African Criminal Law" (2009) 53 (1) *Journal of African Law* 90-110.

[131] Judge Mindua Separate Opinion in *Ag Mahmoud*, § 110.

[132] Ambos *supra* note 7, 344-347; Ambos and Bock *supra* note 110, 227 & 236.

[133] Chiesa *supra* note 95.

[134] See e.g. *Hasan* § 23, *R v Teichelman* (1981)2 NZLR 64; *R v Neho* (2009)NZCA 299(9).

legal systems aim to ensure that the defence is not exploited as a shield for culpable conduct. However, this strictness must not render the defence illusory or practically unattainable. Article 31(1)(d) of the Rome Statute introduces a formulation that risks doing precisely that – rendering the defence illusory. The requirement that the accused must have acted both necessarily and reasonably and must not have intended to cause a greater harm than the one sought to be avoided, imposes a dual threshold that is exceptionally difficult to satisfy. While the second element—necessity and reasonableness—already incorporates a proportionality assessment, the third element effectively duplicates this test by introducing an additional, subjective balancing of harms. This layering of proportionality standards is not only redundant but also doctrinally problematic. In comparative law, the proportionality assessment is typically embedded within the reasonableness requirement.

Accordingly, I argue that the inclusion of the third element in Article 31(1)(d) —requiring the accused to intend to cause lesser harm—is unnecessary and counterproductive. It conflates the logic of justification with that of excuse and imposes an additional burden that is not reflected in the doctrinal structure of duress in most civil and common law systems. A more coherent and balanced approach would be to rely solely on the necessity and reasonableness standard, which already serves the policy goal of preventing abuse while preserving the defence's accessibility. This would better align the Rome Statute with comparative criminal law and uphold the principle that defences must remain meaningfully available to accused persons, particularly in the context of international crimes.

V CONCLUSION

In conclusion, the ICC has demonstrated inconsistency in its handling of the defence of duress, which necessitates redress. This inconsistency not only affects the ICC but also sets a precedent for national courts that use the ICC as a model when prosecuting international crimes.[135] The analysis in this article has shown that national legal systems have developed principles on the defence of duress that could guide the ICC, with necessary modifications. To strike a balance between accountability for international crimes and the meaningful application of the defence of duress, I have argued for a reconsideration of the notions of imminence, threat assessment, proportionality, and prior fault by the ICC. Despite these proposed lenses, challenges persist in the practical application of the defence due to the inclusion of the third subjective element, which risks rendering the defence meaningless. Therefore, I recommend the complete exclusion of this subjective element from article 31(1)(d) of the Rome Statute to ensure the defence of duress can be applied effectively. Without such reforms, the ICC will continue to face significant difficulties in the application of the defence of duress, undermining its credibility and the pursuit of justice at the ICC.

Fundamentally, the divergent approaches between civil law and common law systems regarding the applicability of duress as a complete defence in cases involving the killing of innocent civilians, continues to pose significant challenges, even assuming amendments are made to the Rome Statute. The international community generally condemns such atrocious crimes, viewing punishment as the most effective means of conveying their unacceptability. Consequently, while amendments may be enacted, the ICC may still set an insurmountable threshold for the first element of ''threat of imminent death or of continuing or imminent serious bodily harm'', making it

[135] This is particularly critical as several states which have ratified the Rome Statute have incorporated the provisions under the Rome Statute directly. See e.g. International Criminal Act of Uganda 2010 (ICC Act) which refers to the wording of the Rome Statute regarding various criminal law principles including crime definitions and defences. Section 19(1)(ix) of the Ugandan ICC Act specifically states that article 31 of the Rome Statute on grounds for excluding criminal responsibility shall apply in Uganda's justice system. Due to the limitations of legislation on ordinary crimes, courts often have to resort to laws that adhere to international norms such as the Rome Statute. For discussions on limitations of national laws, see EC. Lubaale ''Limitations of the Ordinary-Crimes Approach to the International Crime of Rape: the Case of Uganda'' (2020)12 *African Journal of Legal Studies* 266-297.

exceedingly difficult for defendants to meet this criterion, as evidenced in the cases of *Ongwen* and the Majority decision in *Ag Mahmoud*. Crucially, the unresolved controversy since the *Erdemovic* case centres on whether duress should be a complete defence in cases involving heinous crimes. Courts have shown an implicit inclination towards the non-applicability of this defence, often conducting analyses that appear to mask a bias against its application in such cases.

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