Public Annex C

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Excusable Evil

An Analysis of Complete Defenses in International Criminal Law

intersentia

SCHOOL OF HUMAN RIGHTS RESEARCH

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Chapter I
Introduction

1. Excusable evil?

Students usually walk out of a classroom chitchatting or checking their smart phones. Not when we have been discussing *Prosecutor v. Erdemović*. Packing books and pens, slowly moving towards the door, they continue the discussion:

"He should have been acquitted."

"No, convicted."

"But he did not have a choice."

"Yeah, but he killed about 70 people. With an automatic rifle."

This case gets to the students. Always. I'm not surprised. *Prosecutor v. Erdemović* has haunted me for years. The case has triggered me to write this thesis.

Prosecutor v. Erdemović revolves around a young Croatian soldier named Dražen Erdemović. In the early nineties he decides to join the Bosnian Serb Army (VRS) to support himself and his family and to gain some status as a Croat in Serbian territory. He deliberately joins a multi-ethnic VRS unit and carries out ordinary military tasks, such as reconnaissance in force. Up to this point, the story of Dražen Erdemović is little staggering.

Everything changes in the early morning of 16 July 1995. Erdemović is ordered to prepare for a secret mission. When he arrives at a farm in Pilica, Erdemović is told he is to massacre hundreds of Muslims that day. Erdemović immediately refuses to carry out the order. However, his refusal is countered with an instant death threat. "If you don't carry out the order," his superiors tell him, "you can hand in your rifle and stand between the Muslims, so we can shoot you".

Erdemović has the choice to kill or be killed. He chooses to kill. That day he is one of the many participants in the mass killings of 7,000–8,000 Bosnian Muslims following the fall of Srebrenica. Approximately 1,200 of them were murdered at Pilica. Erdemović estimates he killed about 70 men himself.

A year later, Erdemović is charged for crimes against humanity by the International Criminal Tribunal for the Former Yugoslavia (ICTY). When pleading guilty to these charges, he adds:

> Your honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: "If you're sorry for them, stand up, line up with them and we will kill you too." I am not sorry for myself but for my family, my wife, my son who then had nine months, and I could not refuse because then they would have killed me".[1]

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1 ICTY, *Prosecutor v. Erdemović*, Trial Chamber I, 27 November 1996, par. 10.

Erdemović acknowledges that he did something evil, but pleads to be excused. In legal technical terms Erdemović brings up the complete defense of necessity or duress,[2] which amounts to saying: "I did commit a crime, but I was forced to do so. Therefore I should not be punished". The Chambers dealing with this case have a hard time coming to a decision. On the one hand Erdemović killed about 70 people, on the other hand he did not really have a choice – apart from sacrificing his own life. In the end Erdemović is convicted, but the extremity of the situation is brought in mitigation.

Had Erdemović – under the same amount of pressure – committed *one single murder*, he would have been able to successfully plead duress under most national jurisdictions.[3] The rejection of duress in the Erdemović case therefore raises the question whether not only duress, but also other *complete defenses* (i.e. reasons why a defendant should not be punished) such as self-defense and insanity, can be available to a defendant charged with international crimes. Are these crimes so large scale and horrendous, that they can never be excused? Or should a defendant charged with an international crime have access to the same legal arguments as a defendant charged under domestic law? These are the questions underlying the key research question of this thesis:

> *How, if at all, should complete defenses be available in case of international crimes?*

2. Relevance of the key question

Why is it important to know whether and how complete defenses should be available in case of international crimes? To understand the relevance of this study, one has to look at the larger picture of international criminal law in general and individual criminal responsibility for international crimes specifically. With the establishment of the International Military Tribunal of Nuremberg (IMT) after World War II, individual criminal responsibility for international crimes was a fact.[4] After Nuremberg international criminal law has developed as a separate field of law. However, like any relatively new field of law, international criminal law is experiencing teething troubles. One of these troubles is the role of complete defenses. Despite a catalogue of complete defenses in the Statute of the International Criminal Court (ICC), their status is not unchallenged, as this book will

2 The nature of the defense brought up by Erdemović and the difference between the defenses of necessity and duress in the case law of international criminal courts are, respectively, discussed in Chapter IX, Section 4.1 and 7.3.

3 Blomsma, J., *Mens rea and defences in European Criminal Law*, Intersentia, Antwerp, 2012, pp. 457–460.

4 Usually illustrated with the famous quote: "Crimes against international law are committed by men, not by abstract entities". See: IMT, Judgment and sentences, 1 October 1946, In: *American Journal of International Law*, 41 (1947), p. 221.

demonstrate. However, if fair trials are to be conducted at international criminal courts, defendants, judges and prosecutors must know how *criminal liability* is defined. Criminal liability is not only dependent on the definitions of specific crimes such as 'genocide' or 'crimes against humanity', but also on other tenets represented by the so-called general part of criminal law containing for example matters like participation, inchoate offenses (e.g. preparation, attempt) and complete defenses. Since complete defenses co-determine the criminal liability of the defendant, their status should be undisputed and their contents foreseeable.

3. Key question: Definitions

In order to gain some deeper understanding of the key research question of this thesis *How, if at all, should complete defenses be applied in case of international crimes?* The concepts contained in this question need further clarification. This paragraph first discusses the concept of complete defenses (3.1), followed by an explanation of the scope of international crimes (3.2).

3.1. Complete defenses

A defense, in its most simple sense, is a claim submitted by the defendant seeking acquittal.[5] This could be any kind of argument from "I could not have done it, because I was out of the country" to "I did it, but I was forced to do so". This thesis however does not cover just any kind of defense, but is restricted to *general complete substantive defenses* invoked by *individuals*.

The notion *general* refers to the fact that these defenses may be raised against any criminal offense. The counterparts of general defenses are so-called specific defenses that can only be invoked against particular crimes.[6] For example, under Dutch law 'acting in good faith in the interest of the general public' is a specific defense to libel,[7] so that not every newspaper is in trouble for revealing dirt on prominent figures.

The word *complete* denotes that a successful appeal to such a defense will *completely* absolve the defendant from criminal liability. A complete defense thus leads to acquittal, instead of mere mitigation.[8]

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5 Bantekas, I., 'Defences in International Criminal Law', In: McColdrick, D. (ed.), *The Permanent International Criminal Court*, Hart Publishing, Oxford, 2004, pp. 263–284, p. 263 and Zahar, A. and Sluiter, G., *International Criminal Law*, Oxford University Press, 2008, p. 396.

6 Bantekas, I. and Nash, S., *International Criminal Law*, Third Edition, Routledge-Cavendish, London and New York, 2007, p. 52 and Schabas, W.A., *Genocide in International Law*, Second Edition, Cambridge University Press, 2009, p. 368.

7 See article 261(2) of the Dutch Penal Code.

8 Scaliotti, M., 'Defences before the International Criminal Court: Substantive Grounds for Excluding Criminal Responsibility – Part 1', In: *International Criminal Law Review*, Vol. 1, 2001, pp. 111–172, p. 111 and Werle, G., *Principles of International Criminal Law*, T.M.C. Asser

The expression *substantive* defense refers to the situation where the defendant argues: "I did it, but I don't think I should be punished". In other words, the defendant admits that he committed the actual crime,[9] but for a reason which is acceptable under the relevant criminal justice system.[10] For example, the defendant has ignored a "no trespassing" sign (crime), but he did so in order to save a child from drowning in a pond (acceptable reason). Substantive defenses are to be distinguished from defenses that deny a crime (the "I did it" part) has taken place, such as alibi ("I could not have committed the crime because I was not there") and abandonment ("I did not attempt to commit a crime because I voluntarily gave up going through with it").

Sometimes the acceptable reason is incorporated into the definition of a crime. With reference to the "no trespassing" example above, this would be the case when the same crime was defined as "trespassing is prohibited when no person is drowning". In this case, arguing that trespassing took place for the acceptable reason that a person was drowning, would not amount to a substantive defense, for the defendant does not acknowledge that "he did it" (i.e. that he trespassed without anyone drowning). On the contrary, he denies committing the crime *by denying part of the definition* (the part that no person is drowning). Defenses that negate part of the definition of a crime[11] are called *definitional defenses*.[12] They are normally not general substantive defenses and therefore not subject to the research reflected in this thesis.[13]

Substantive defenses must also be distinguished from procedural defenses. These defenses precede substantive defenses. They do not discuss the merits, but argue that no prosecution should take place due to the fact that procedural rules have been violated.[14] Referring again to the example above, this means that the defendant does not argue whether he violated the prohibition on trespassing or not,

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Press, The Hague, 2005, p. 96. See also: ICTY, *Prosecutor v. Delalić et al.*, Appeals Chamber, 20 February 2001, par. 582.

9 In technical legal terms the defendant agrees that he – at least – committed the objective element of the crime, see Chapter II, Section 2.1.1.

10 See for this distinction: e.g. Bantekas, I. and Nash, S., 2007, p. 53 and Eser, A., '"Defences" in War Crime Trials', In: Dinstein, Y. and Tabory, M. (ed.), *War Crimes in International Law*, Martinus Nijhoff Publishers, The Hague, 1996, pp. 251–273, p. 251.

11 In a technical legal sense: defenses that negate the *objective element* of a crime. See Chapter II.

12 Bantekas, I. and Nash, S., 2007, p. 69.

13 For more information on these kinds of defenses, see: Bogert, P.C., *Voor rechtvaardiging en schulduitsluiting*, Kluwer, Deventer, 2005, especially p. 310. For examples of these kinds of defenses in international criminal law, see the Elements of Crime of the ICC Statute, e.g. article 8 (2) (b) (xiii) (War crime of destroying or seizing the enemy's property), which can be justified by military necessity. For an ICTY example, see the definition of deportation, which must be preformed "without grounds permitted under international law" (ICTY, *Prosecutor v. Martić*, Trial Chamber, 12 June 2007, par. 107).

14 Cryer, R., *et al.*, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, 2007, p. 33; Scaliotti, M., 2001, p. 111; Schabas, W.A., 2009, p. 368 and Werle, G., 2005, p. 96.

but argues that he should not be prosecuted for this crime because, for instance, he has been prosecuted for the same crime before (*ne bis in idem*). Other examples of procedural defenses are *nullum crimen* and *nulla poena sine lege*, statute of limitations, amnesties, truth and reconciliation committees, immunities and age.[15] Procedural defenses are not subject to the research reflected in this thesis.

General complete substantive defenses (hereinafter 'complete defenses') can be either criminal law defenses or international law defenses. The difference between these two types is that criminal law defenses have their roots in domestic criminal law, while international law defenses originate from public international law.[16] Consequently, criminal law defenses tend to avert responsibility for a *personal act*, while international law defenses traditionally negate the responsibility of the *State*. For instance, when a *State* is attacked, it has the right to strike back in self-defense. On the other hand, if an individual is *personally* attacked, he can invoke self-defense as a criminal law defense. However, in international criminal law the distinction between international law defenses and criminal law defenses has blurred, because the individual charged with an international crime can invoke both types of defenses.[17] In the context of this thesis, the following defenses with an international law origin have arisen: international self-defense, lawful belligerent reprisals and *tu quoque*.[18] Criminal law defenses that have surfaced are necessity/duress, private self-defense, consent, insanity, intoxication, mistake of fact, mistake of law and superior orders. Both types of defenses are subject to the research reflected in this thesis. However, international law defenses will only be considered in as far as individuals have invoked them. The concept of complete defenses is further elaborated on in Chapter II of this thesis.

3.2. International crimes

3.2.1. International crimes in general

In order to answer the core question of this thesis *How, if at all, should complete defenses be applied in case of international crimes?* the concept of international crimes must also be defined. Formally, international crimes are breaches of international rules entailing the personal criminal liability of individuals.[19] This definition, however, provokes a subsequent question: which international rules

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15 Khan, K. and Dixon, R. (eds.), *Archbold International Criminal Courts: Practice, Procedure and Evidence*, Sweet and Maxwell, Second Edition, London, 2005, p. 759–774 and Werle, G., 2005, p. 96.

16 Sliedregt, E. van, *Individual Criminal Responsibility in International Law*, Oxford University Press, 2012, p. 215.

17 Sliedregt, E. van, 2012, p. 215.

18 Schabas, W.A., 2009, p. 367.

19 Cassese, A., *International Criminal Law*, Second Edition, Oxford University Press, 2008, p. 11 and Werle, G., 2005, p. 37.