“Praise indeed is not bestowed, but pardon is.”[[1]](#footnote-1)

A comparative exploration of the defence of duress

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Abstract

This work examines the defence of duress, as codified in the Rome Statute, from the perspective of four domestic jurisdictions in order to determine whether it can be applied at the domestic level for crimes against the person. The laws of England and Wales, France, Germany, and South Africa are examined because of their influence in other countries and also because of their representations of civil and common law systems. The purpose of this analysis is to add to the debate about the defence of duress and to provide a fresh perspective on this contentious issue by examining how domestic jurisdictions deal with crimes committed under duress.

Keywords

Defences – duress – comparative law – international criminal law – Rome Statute

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1. Introduction

The creation of treaties at the international level can often highlight a divergence in approach to law at the domestic level, uncovering areas of contention which were previously undiscussed. No area of international law is more likely to do so than international criminal law, given the roots of international criminal law in domestic law, through custom and general principles.[[2]](#footnote-2) The decision to include defences in the Rome Statute of the International Criminal Court,[[3]](#footnote-3) and in particular, duress,[[4]](#footnote-4) is one which is of particularly significance in this respect: despite its jurisdiction covering the ‘most serious crimes of international concern,’[[5]](#footnote-5) it contains two defences which are not universally accepted as those which may be pleaded for serious crimes: intoxication[[6]](#footnote-6) and duress. The increasing workload of the Court, before which any defences are yet to be pleaded, provides a timely juncture at which to explore the defence of duress from a comparative perspective. The contentious nature of duress for such serious crimes, or indeed an analysis of the defence in the Statute, is not addressed by this work.[[7]](#footnote-7) Rather, a contribution is sought to be made through analysing domestic law and practice, to offer a better understanding of the defence itself, and how it may remove or limit responsibility at the domestic level. Comparative work, from different traditions, allows our understanding to go beyond a textual interpretation of the treaty, by which international lawyers are often limited, and to appreciate the differences at the domestic level that different States have to the same issues of responsibility. In the case of duress, the question at the heart of this work is whether the treaty’s approach represents a consensual anomaly, borne out of necessary compromise, or the embodiment of Cassese’s refusal to set ‘intractable standards of behaviour,’[[8]](#footnote-8) through permitting the defence at the international level. It is possible to provide a new perspective on this by examining domestic approaches to the issue.

The jurisdictions which have been selected for analysis are England and Wales,[[9]](#footnote-9) France, Germany and South Africa. These jurisdictions have been chosen both for their prominence at the international level and the effect which their legal systems have had on the development of law in other countries. For example, Germany in particular has influenced the development of domestic criminal law across the continents, notably in Japan,[[10]](#footnote-10) Argentina[[11]](#footnote-11) and South Africa.[[12]](#footnote-12) When looking to reform the legal system in Japan, legislators looked to both the French and German legal codes for guidance, favouring the German approach overall.[[13]](#footnote-13) Both Chinese and Japanese law were heavily influenced by France and Germany, because of the desire to reform the existing systems and to import useful concepts from other jurisdictions. Equally, French law has been overwhelmingly influential throughout the world, influencing not only Japan, but also India,[[14]](#footnote-14) Cameroon[[15]](#footnote-15) and the criminal codes of Latin America.[[16]](#footnote-16) The influences of the English and French systems is clearly reflective of the colonial pasts of both nations, which continues to affect the linguistic and legal approaches of the countries which were taken over by Britain and France.[[17]](#footnote-17) Interestingly, German law seems to have been an optional choice for many countries, which appeared to admire the systematic approach that the German criminal code takes. Thus, the focus of the selection was rather to ensure that both civil and common law systems were represented, as opposed to specific geographical areas. A brief sketch of each legal system, outlining its sources and operation, will precede the main discussion of the law, avoiding presumed knowledge of each individual system.

The Rome Statute’s definition of duress unifies the ideas of duress and necessity.[[18]](#footnote-18) In some domestic systems, duress and necessity are concepts with different theoretical roots and thus remain separate defences. This will be discussed in the context of each country later but, as a general introduction where this distinction applies, the following differences can be observed. Duress as a defence can be defined as where an individual acts as a result of internal pressure, such as that created by another individual threatening the first, and commits a criminal offence as a result. Necessity, on the other hand, can be deemed to relate to situations where an external pressure compels action, such as action required in the face of a natural disaster and the individual concerned commits a criminal offence. This distinction will be used, where relevant, in this study and both defences will be studied as a result of only one existing in some jurisdictions[[19]](#footnote-19) and no distinction being made between the two in the criminal law of other jurisdictions.[[20]](#footnote-20)

1. England and Wales

The English jurisdiction is based on common law, within which statute and legal precedent set by previous cases constitutes the body of the law. Thus there is no neat legal definition set within a code for what may comprise a defence of duress or necessity and the existence of the defences can be determined through the analysis of in legal literature and case law. English law recognises three defences which relate to the discussion at hand: necessity and two forms of duress: duress of circumstances and duress by threats.[[21]](#footnote-21) Wilson thus notes that there is a clear distinction between necessity and the two types of duress, although holds that necessity has ‘crept into English law via backdoor of duress.’’[[22]](#footnote-22) However, this view may not be entirely correct, as English criminal law acknowledged the existence of a defence known as necessity long before either subdivision of duress was discussed, despite there being no specific definition of what it may constitute.[[23]](#footnote-23) Necessity and duress remain distinct in modern texts[[24]](#footnote-24) but traditionally, the courts have rejected all three defences as applicable to a charge of murder.[[25]](#footnote-25)

The roots of the concepts can be found in the writings of James Stephen[[26]](#footnote-26) who referred to situations of duress and necessity as ‘compulsion’ to commit an unlawful act, of which compulsion bears the greatest relation to duress.[[27]](#footnote-27)

Stephen’s initial identification of the concept in English law,[[28]](#footnote-28) progressively referring to it as an excuse,[[29]](#footnote-29) but one which made no distinction between internal and external forms of compulsion, was published one year prior to the oft-cited case of *R v Dudley.*[[30]](#footnote-30) In this case, the court analysed Stephen’s writings and declared the question before the court to be that of necessity, given that no threats from another individual were involved. The court held in this instance that it had not been, under the circumstances, any more necessary to kill the weaker boy than any of the other occupants of the boat,[[31]](#footnote-31) and from this perspective the issue appears to be that taking the path of least resistance, namely killing the weakest member of the group, denied the defendants the opportunity of claiming necessity as their defence. The court went on further to hold that the admission of such a defence in balancing one life against another would create an ‘awful danger,’ given the difficulty of judging what might be necessary to whom in which circumstances.[[32]](#footnote-32) Stephen’s[[33]](#footnote-33) view that the defence should be decided upon at the present moment was followed in this case and the issue was not that necessity was unavailable, but rather did not apply in those circumstances. The statement that English law demands heroism in a situation of necessity is inaccurate,[[34]](#footnote-34) precisely because the killing in this case was not any more necessary than the killing of any of the other men. Each life was of equal value and accordingly no one life had a greater right to subsist than the other where the issue of self-defence against an aggressor did not arise.

The concept of necessity was also used to justify the court’s ruling in favour of the separation of conjoined twins in the *Re A (Children)*[[35]](#footnote-35) case. In this case, the court based its reasoning on the elements of Stephen’s formulation of necessity, in which it identified a ‘doctrine’[[36]](#footnote-36) of necessity, in which instance an individual may be acquitted of a crime on the grounds that he or she acted as the result of pressure. Brooke LJ concludes that the three requirements of Stephen’s doctrine of necessity were met in this instance and thus that the separation of the twins was justified in law. This demonstrates that the defence of necessity may be available as a defence to murder in ‘circumstances like these.’ Brooke LJ concluded that

*‘there need be no room for the concern felt by Sir James Stephen that people would be too ready to avail themselves of exceptions to the law which they might suppose to apply to their cases, at the risk of other people’s lives. Such an operation is, and is always likely to be, an exceptionally rare event.’[[37]](#footnote-37)*

The unfortunate and inevitable death of a child that would result following the operation was not require the use of a defence by the surgeons, rather ought to have been carried out on the grounds of necessity for the preservation of the life of the healthier twin. There was no clear approach in the case[[38]](#footnote-38) to the idea of a defence of necessity, and the judges looked on it as a doctrine to balance conflicting duties.[[39]](#footnote-39) This line of argument was further supported by the more recent case of *Nicklinson.*[[40]](#footnote-40) In this case, it was held by the court that a defence of necessity would not be available to anyone who helped Mr Nicklinson to commit suicide, where he was unable to do so independently as a consequence of the degenerative condition from which he suffered. The court affirmed that there was no common law or codified defence of necessity or duress to murder,[[41]](#footnote-41) and, again, that it would not create one.[[42]](#footnote-42) Thus neither would apply where the charge was of actively assisting a person to commit suicide.[[43]](#footnote-43) The existence of the doctrine of necessity in English law, where there is a risk of ‘consequences’ which could lead to an ‘irreparable and inevitable’ evil is therefore unchallenged. However, the use of a defence of necessity, and its applicability to a charge of murder, is something which must be declared by Parliament, as the current common law defence does not extend to cover such situations.

Thus, the notion of necessity in English law is separate from that of duress. Stephen’s concept of compulsion bears the greatest relation to the modern concepts of duress of circumstances and duress by threats, and his unified version of the defences has much in common with the Rome Statute’s definition of duress in that there is no distinction made on the basis of the source of the threat which requires the individual in question to commit the unlawful act.[[44]](#footnote-44) However, he notes that the defence is only available to those who were supporting the principal to carry out the act by aiding and abetting.[[45]](#footnote-45) The courts have applied Stephen’s ideas, refining the concepts into separate ideas which are distinguished by the source of the threat. Most recently, duress by circumstances has been acknowledged as a form of necessity[[46]](#footnote-46) and there is much to suggest that the modern law holds that necessity is only available where duress of circumstances can be proved,[[47]](#footnote-47) demonstrating a lack of clear distinction between the concept of necessity and the idea of duress of circumstances. Neither would be available at present for a charge of murder and the above cases generally relate to driving offences, where the defence may be used.

The defence of duress by threats is much more distinct and far more contentious than that above. The definition of duress has not been dealt with extensively by the courts and more serious cases tend to focus on its applicability, rather than the extent to which the individual has been threatened. The judgment in *Howe*[[48]](#footnote-48) relies on the definition written in Hale’s Pleas of the Crown,[[49]](#footnote-49) which holds that there has to be a ‘fear of death’ threatened by another individual compelling the accused to act. The case of *Hudson*[[50]](#footnote-50) holds that the question is really one of whether the will of the accused was ‘overborne’, which is an issue of proof to be decided by the jury.[[51]](#footnote-51) The defence was raised again in the case of *Lynch*[[52]](#footnote-52)where it was held that it could be available to an individual aiding and abetting the commission of a murder, on the basis that *‘a man who is attacked is allowed within reason to take necessary steps to defend himself. The law would be censorious and inhumane which did not recognise the appalling plight of a person who perhaps suddenly finds his life in jeopardy unless he submits and obeys.’*[[53]](#footnote-53)The subsequent case of *Abbott*[[54]](#footnote-54)rejected outright the defence on the grounds that the accused had been a principal actor in the murder, in which it was argued that accepting the defence would have constituted creating a new defence to the crime of murder.[[55]](#footnote-55)

The notable case of *Howe[[56]](#footnote-56)* discussed extensively the idea of the defence of duress to a charge of murder for both the principal and any who had aided and abetted his or her action. Howe formally overturned the judgment in Lynch, removing the possibility that duress by threats could ever be used as a defence to murder. Lord Hailsham held:

*“In general, I must say that I do not at all accept in relation to the defence of murder it is either good morals, good policy or good law to suggest, as did the majority in Lynch and the minority in* Abbott *that the ordinary man of reasonable fortitude is not to be supposed to be capable of heroism if he is asked to take an innocent life rather than sacrifice his own. Doubtless in actual practice many will succumb to temptation, as they did in Dudley and Stephens. But many will not, and I do not believe that as a "concession to human frailty" the former should be exempt from liability to criminal sanctions if they do. I have known in my own lifetime of too many acts of heroism by ordinary human beings of no more than ordinary fortitude to regard a law as either "just or humane" which withdraws the protection of the criminal law from the innocent victim.”[[57]](#footnote-57)*

Thus, the approach in English law is one which focuses on the suffering of the victims, which is not to be undermined by reference to the situation in which the accused has been placed. This echoes the earlier statement, of duress, rather than necessity, requires heroism in English law and that any lesser standard may amount to criminal behaviour. The harshness of this approach was recognised by the Law Commission and, following these cases, it published a study of select defences, including duress.[[58]](#footnote-58) Its recommendation was that a statutory formulation of duress should be passed and that it should apply to murder as well as other offences.[[59]](#footnote-59) An attempt was made to formulate a definition, which was contained in a draft Bill annexed to the report, as follows:

*‘A person shall be regarded for the purposes of this section as having taken any action under duress if he was induced to take it by any threat of harm to himself or another at the time when he took it he believed (whether or not on reasonable grounds) –*

1. *That the harm threatened was death or serious personal injury (physical or mental);*
2. *That the threat would be carried out immediately if he did not take the action in question or, if not immediately, before he could have any real opportunity of seeking official protection; and*
3. *That there was no other way of avoiding or preventing the harm threatened;*

*Provided, however, that in all circumstances of the case (including what he believed with respect to the matters mentioned in paragraphs (a) to (c) above and any of his personal circumstances which are relevant) he could not reasonably have been expected to resist the threat.’* [[60]](#footnote-60)

However as of 2014, there has been no attempt to define duress within a statute.[[61]](#footnote-61) The definition created by the Law Commission report was considered and applied by later authority, although it was regarded as a narrow construction of the concept of duress.[[62]](#footnote-62) The authority in question, Howe[[63]](#footnote-63) ruled that the test for duress ought to be ‘objective in part and subjective in part,’[[64]](#footnote-64) reflecting part (c) of the definition above. The definition was generally met with approval by the bench in this case, but ultimately it was rejected where the individual had taken part in the murder of an innocent to protect his own life. The lack of statutory force behind the definition meant that the recommendation that Parliament ought to take steps to codify the defence was ignored. This was despite the support extended by the judgment of Lord Mackay[[65]](#footnote-65) for codification, or at least clarification of the bounds, of the defence, as a failure to do so would leave inconsistencies in English law.

This judgment creates further smoke around the concept by referring to another jurisdiction to determine the limits of the defence of duress to a charge of murder.[[66]](#footnote-66) The unusual factor here is that the jurisdiction in question, South Africa, has a very different conception of duress and necessity from that of England. The criminal law of South Africa formulates duress and necessity as compulsion, and makes no differentiation between compulsion emanating from threats from an individual or from certain circumstances. The application of such a concept to the areas of duress and necessity would amalgamate previously separate conceptions of the defence. Interestingly, this draws the idea of necessity full circle, to its original definition as elucidated by Stephen, and would create something of a parallel with South Africa, a jurisdiction with a very different approach to duress.

1. France

France is a civil law jurisdiction with a criminal code. The current version in force is the Criminal Code of 1994, but the French Parliament can make amendments as it sees fit, and periodically does so.[[67]](#footnote-67) This is the main source of criminal law, as decisions from French courts do not constitute a binding source of law, and therefore the focus of this part of the work will largely be on the Code. The legal theory underpinning French criminal law will also be of value when determining the application of these defences to serious crimes and the relevance of the Declaration of the Rights of Man[[68]](#footnote-68) will also be discussed as a restraint on the power of freeing individuals from criminal liability which may otherwise be imposed by provisions of the Code. The use of the Declaration as a source of constitutional principle through which the State’s power is limited is affirmed by the Constitution of the Fifth Republic.[[69]](#footnote-69)

The revised French criminal code has its own versions of duress and necessity, the former being termed ‘constraint.’[[70]](#footnote-70) As to the wording of the defence, the Code states:

*‘N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contrainte à laquelle elle n'a pu résister.’*[[71]](#footnote-71)

There is no further exclusion of circumstances in which this defence would not be permitted nor further elaboration as to what a constraint or force might amount. The generally understood principle is that the defence of constraint refers to a ‘psychological’ constraint, such as that which relates to threats made by another individual.[[72]](#footnote-72) The defence of necessity is then stated by the Code as follows:

*‘N'est pas pénalement responsable la personne qui, face à un danger actuel ou imminent qui menace elle-même, autrui ou un bien, accomplit un acte nécessaire à la sauvegarde de la personne ou du bien, sauf s'il y a disproportion entre les moyens employés et la gravité de la menace.’*[[73]](#footnote-73)

The only restraint here on the method employed is therefore the potential lack of proportionality between the threats suffered by the individual and the means he or she uses to avert it. In this context, the means used would be the intentional killing of an innocent individual, and from a cursory reading of the text, it is ambiguous as to whether either defence would be available to answer such a charge. However it should be noted that the Code has been amended in part by additions to the criminal procedure code and these state that the power is divulged to the juge d’instruction[[74]](#footnote-74) to determine the applicability of the defence in the particular circumstances of a case. This line of discourse is arguably self-defeating, as the Code is the main source of law and, in the absence of any restraining principles contained therein, the defence would be applicable to all charges, regardless of the seriousness. The cases discussed by Elliott regarding constraint, however, do not even permit constraint for crimes which are not against the person, [[75]](#footnote-75) even if constrained circumstances have arguably existed. Further to that, situations such as stealing meat to feed children, where the defendant was not entirely without money[[76]](#footnote-76) was rejected on the grounds of a lack of proportionality. The defence has also been rejected in the case where an individual fell ill in a car and crashed through a level crossing barrier, where the illness pre-dated the accident and the accused had fallen ill in such a manner before.[[77]](#footnote-77) It was accepted, however, when an individual crashed and injured his passengers after passing out for the first time before the wheel.[[78]](#footnote-78) These examples, however, demonstrate the reluctance of the French courts to deploy the defence for relatively minor criminal activity.

A critical point, thus, to be made in relation to both defences is that the defence of necessity has never been admitted in respect of charge of serious crime against the person,[[79]](#footnote-79) despite there being no explicit constitutional principle which prevents a balancing exercise being made in respect of one person’s right to life against another. Indeed, this was clearly shown in the case of Maurice Papon,[[80]](#footnote-80) who was accused of crimes against humanity during the Second World War and tried by the French courts. The French Cour de Cassation held in this case that the defence of duress was explicitly excluded from application in cases of crimes against humanity. As such, the French courts are empowered by the Code to apply the defence without being restrained by any other legal principles, but actively choose not to do so. The most likely sources, the French Constitution, and the human rights principles derived therefrom, do not extend to such a prohibition. The issue appears to be completely in the application of the defence by the courts.

The subtle differences between the defences can be seen, as the commentary in this area suggests,[[81]](#footnote-81) through the categorisation of such defences as ‘subjective’ and ‘objective.’ This distinction is, as with the Anglo-American distinction between justifications and excuses, a theoretical one as an admissible defence from either category would still exclude the imposition of criminal liability. Elliott holds that constraint would fall under the heading of a ‘subjective’ defence,[[82]](#footnote-82) as the test for determining whether an individual could rely on constraint would have to be determined on an individual basis. Such defences reflect an inability on an individual basis to comply with the law, as a uniform conception of constraint, or what constitutes pressure, would be too difficult a standard to create in law. The wording of the provision reflects this, in that the pressure was something which ‘he or she could not withstand,’[[83]](#footnote-83) rather than an objective standard of what ought to be tolerable to individuals in general. The failure to apply the defence, however, means that this test is almost ignored where crimes against the person are concerned.

Necessity, as codified in French law, breaks away at this point from duress and would thereby be categorised as an objective defence.[[84]](#footnote-84) This, again, relates to the way in which the defence is phrased within the Code. The defence of necessity relates more to a positive action which is consciously and deliberately committed in support of an aim which is considered to outweigh in importance the law which the individual violates. The objectivity of the standard is greater than that which would be applied in order to determine the availability of the defence of constraint as the concept of ‘an immediate or actual danger’[[85]](#footnote-85) is clearly not thought to have the same variance between individuals as what may constitute psychological pressure. Accordingly the defences are separated in terms of how they may be applied, rather than the Anglo-American distinction of their effect on criminality. However a closer examination of the way in which French crimes are formulated within the law leads to similar conclusions as the effect of defences which justify and those which excuse.

In French law, the components of an offence are threefold, those being legal, moral and material.[[86]](#footnote-86) The legal part to the crime refers to the law which prohibits or restrains such conduct, preventing such acts from being legal. The moral aspect to the crime is the intention to commit the act, and the material aspect to the criminal act links the two, in that the individual who intended to commit the crime through his act must have caused the harm libelled as a result of his act. The first two parts to such a crime can be likened to *actus reus* and *mens rea* respectively in English and US law,[[87]](#footnote-87) with the last part broadly reflecting the concept of causation. Separating the act into two distinct parts in such a way allows defences to be applied in a different way than in the two previous jurisdictions discussed. Similarly to both, the Code reflects that the admission of a defence nullifies the existence of any offence,[[88]](#footnote-88) but it is the position of the defence within the analysis of an offence which leads to different consequences for the criminality of an offence. It should be noted that the lack of *mens rea* for an offence in English / US law would constitute a defence in itself, whereas the admissibility of a defence would be argued on the grounds that there was an alternative explanation, or a further answer to a criminal charge. In French law, intention is always required for the commission of an offence.[[89]](#footnote-89) This demonstrates in which criminality is affected by the positioning of defences. French criminal law would arguably apply an objective defence to ‘block’ or remove the material element of the crime, which would then decriminalise the act.[[90]](#footnote-90) This allows the defence to function as a justification and is claimed to be separate from a defence in this sense,[[91]](#footnote-91) as the act is fully decriminalised and therefore would not require any defence to be pled. It thereby follows from this that the act was correct and appropriate behaviour in the circumstances without having to argue or defend the conduct in question following this. The concept of a subjective defence, it is then argued, relates to the moral element of the offence.[[92]](#footnote-92) Subjective defences relate rather to removing the criminal liability from the individual[[93]](#footnote-93) and thereby make the act in question the right choice in the circumstances. The individual is then not criminally liable for the act libelled at that point in time.

Although the net effect of subjective and objective defences is the same as justifications and excuses, there is a clearer indication, possibility as a result of the codified form of the French system, that the justified conduct is correct in the circumstances. This clarifies why the defence of necessity, functioning as a justification and removing the criminality of the act, has not been admitted as a defence for crimes against the person. Such a clarification can assist when deciding as to how these defences ought to be applied and whether their application is appropriate for charges of serious crimes. In the case of France, it is clear that as a justification or excuse, and whether necessity or duress as such defences may be termed, are not acceptable grounds for denying the existence of the legal or moral elements of a crime against the person.

1. Germany

The German legal system is, similarly, a civil law system in which the German Criminal Code forms the basis of the criminal law. As with the US, Germany is a federal state but criminal law remains a federal issue and therefore the Criminal Code has binding force throughout the jurisdiction. The propellant for development in the criminal law within the German system is doctrine[[94]](#footnote-94) and the approach to defences in particularly demonstrates a degree of clarity which has been absent from the positive law within the jurisdictions heretofore examined. German law also must comply with constitutional principles, specifically those enumerated within the Basic Law.[[95]](#footnote-95) This Law sets out the Constitution of the German Federal Republic and places certain restraints on the legislative function of the Government, as well as limits on the interpretation of the law. The constitutional principle pertinent to this study is ultimately the inviolability of human dignity,[[96]](#footnote-96) which must be upheld by all State authorities. The corollary to this is that the State cannot legislate in a way which would impugn the dignity of the individual and State organs such as courts are prohibited from interpreting a law which would equally have such an effect. This restriction will be examined in the context of the codified defences of justified[[97]](#footnote-97) and excused necessity[[98]](#footnote-98) within German criminal law. Although precedent does not form a source of German law, cases can demonstrate the court’s approach to the interpretation of the Code, through the application of defences in relation to serious crimes against the person, specifically where the argued admissibility of the defences to such crimes[[99]](#footnote-99) conflicts with the rulings of the court.

German law does not distinguish between duress and necessity *per se*, but rather has developed a fundamental theoretical distinction between two forms of necessity.[[100]](#footnote-100) The component parts of a German criminal offence allow for the accused to raise a justification before guilt is determined[[101]](#footnote-101) and so necessity is divided in two categories: justified and excused. The first form, justified necessity, is phrased thus:

*‘Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib, Freiheit, Ehre, Eigentum oder ein anderes Rechtsgut eine Tat begeht, um die Gefahr von sich oder einem anderen abzuwenden, handelt nicht rechtswidrig, wenn bei Abwägung der widerstreitenden Interessen, namentlich der betroffenen Rechtsgüter und des Grades der ihnen drohenden Gefahren, das geschützte Interesse das beeinträchtigte wesentlich überwiegt. Dies gilt jedoch nur, soweit die Tat ein angemessenes Mittel ist, die Gefahr abzuwenden.’[[102]](#footnote-102)*

The central part of this defence is that, first, the individual has to commit a positive act and second, the act is nominally unlawful. In the circumstances, however, the individual’s action is wholly appropriate provided it is proportionate to the harm avoided. The analogy here between justification and excuse theory and this form of categorising the defences is evident, but the difference here is that this distinction is represented by positive law. Another unique feature of this form of the defence is that an exercise in balancing competing interests must be undertaken, in which the interest protected by the otherwise unlawful act must be prior in importance to the one affected by the act. This standard is slightly higher than the other incarnations of the defence, and is more difficult to accept theoretically when used to answer a charge of a crime against the person.

The second form of necessity within the Code is that of excused necessity, which is worded as follows:

*‘Wer in einer gegenwärtigen, nicht anders abwendbaren Gefahr für Leben, Leib oder Freiheit eine rechtswidrige Tat begeht, um die Gefahr von sich, einem Angehörigen oder einer anderen ihm nahestehenden Person abzuwenden, handelt ohne Schuld. Dies gilt nicht, soweit dem Täter nach den Umständen, namentlich weil er die Gefahr selbst verursacht hat oder weil er in einem besonderen Rechtsverhältnis stand, zugemutet werden konnte, die Gefahr hinzunehmen; jedoch kann die Strafe nach § 49 Abs. 1 gemildert werden, wenn der Täter nicht mit Rücksicht auf ein besonderes Rechtsverhältnis die Gefahr hinzunehmen hatte.’*[[103]](#footnote-103)

Again the individual in question must commit a positive act, but this time the act remains unlawful and instead the person is not to be considered guilty. The difference here, therefore, is to distinguish between the lawfulness of the act and the guilt of the individual. In German law, it is held that the individual ought to suffer less of a punishment[[104]](#footnote-104) where he or she is less guilty, as the individual’s guilt ought to be the ‘basis for measuring his punishment.’ Therefore the distinction between justified and excused necessity centres on whether the law removes criminality from the act or from the actor. Removing criminality from a serious offence effectively permits its commission in certain circumstances, and the effect of this on serious crimes against the person is not to be underestimated, particularly where a balancing exercise of one person’s rights against another’s has to be undertaken.

One fundamental tenet which may restrict the possible use of this balancing exercise is a principle contained within the German Basic Law. The Basic Law forms the foundation of German law and is especially relevant to criminal law as a restraint on the legislative power of the State. The article in question[[105]](#footnote-105) speaks in unqualified terms: ‘*Human dignity shall be inviolable.’*[[106]](#footnote-106) This inviolability cannot be restricted by any State provision, as the wording is absolute. Similarly to the French Constitution, the Basic Law represents the source of power from which the law derives its authority. Therefore it is not possible for codified law to override this provision as there is no qualification or limitation which would permit the restriction of individual dignity. The silence of the Basic Law as to the kind of dignity referred implies that both physical and psychological integrity ought to be absolutely respected and consequently, the application of either version of the necessity defence in respect of crimes against the person is not possible. German law prevents one person’s physical or mental integrity being subjugated to the ends of necessity. It is also relevant to note that this line of argument, concerning the Basic Law, ought to apply to the duties of the State through its own agents and also its duties in protecting society as a whole. Therefore it is submitted that the State could neither act through its own agents whom may use the defence of necessity, nor permit the defence of necessity to be used in the criminal law by individuals accused of crimes against the person.

Here, it is also relevant to note the importance of the principle promulgated by Gustav Radbruch,[[107]](#footnote-107) which applies in circumstances where statutory law conflicts with the ends of justice. It holds that if the written law does not match the requirements of justice ‘to an intolerable degree’ then it ought to be disregarded.[[108]](#footnote-108) It is in cases of serious crimes against the person that it is arguable that this principle, espoused by subsequent decisions delivered by German courts, would equally require the court to disregard the applicability of either version of the necessity defence.

One of the most compelling cases of recent years which sought to apply the defence of excused necessity to the conduct of the accused was that of Wolfgang Daschner.[[109]](#footnote-109) The Daschner case concerned a police chief who authorised the threat of torture to an individual under interrogation. The individual in question was suspected of abducting a child and the aim of the threat was to uncover the child’s whereabouts. Upon being threatened, he confessed to killing the child and disclosed the location of the body. The police chief was then charged and convicted of threatening to torture the individual and the judgment discussed at length the application of the defence of necessity, particular in the form of a justification.[[110]](#footnote-110) It was held by the court that there could be no justification of such a threat and particularly that the dignity of the individual could not be balanced against a protected interest as required by the defence of necessity, and also denied the application of the excused form of the necessity defence. This indicates that the application of the defences, theoretically available to charges of serious crimes against the person, is restricted where serious injury is likely to result, even if the likelihood of death is severely restricted by the presence of medical personnel. The legal foundation of the Basic Law is that which is considered to be prior to the interests and demands of the codified criminal law.

Interestingly the Court favoured a ‘guilty, but not to be punished’[[111]](#footnote-111) verdict which incorporated the grounds for mitigation that the Court saw in Daschner’s actions. It is this aspect that is most intriguing about the German approach. The codified law reflects a progressive and straightforward view of the defences of excused and justified necessity, yet the application of the defences indicates a stronger inclination towards respecting the dignity of the individual. The deep-rooted pragmatism of this approach is evident in the judgment delivered by this case.

1. South Africa

The South African system is a mixed legal system, with elements of other jurisdictions incorporated in a system with its own unique approaches in certain areas.[[112]](#footnote-112) A common law approach is favoured for the criminal law aspect to the system and civil law principles apply in most areas of private law.[[113]](#footnote-113) Case law is therefore an important source of law for the criminal law, all of which ought to be decided in compliance with the provisions of the Bill of Rights.[[114]](#footnote-114) The enduring influence of English law, particularly in the area of defences, is not to be underestimated,[[115]](#footnote-115) although the precedent on compulsion set by the South African courts has replaced English authority in this area.[[116]](#footnote-116) The legal theory of justifications and excuses, in terms of the categorising defences, is also evident even in early cases relating to the defence of necessity, characterised in South African law as compulsion.[[117]](#footnote-117)

The domestic criminal law in this jurisdiction is lead by the courts, which have recognised the existence of a defence of compulsion which covers both duress and necessity, with the theory applied in case law that the defence may be a justification or excuse depending on the circumstances in which it is raised.[[118]](#footnote-118) The argument presented by noted authors has been raised that there is much in common with German law in this area.[[119]](#footnote-119) Compulsion, rather than necessity, can emanate from both internal and external pressures and no legal distinction is made between the two.[[120]](#footnote-120) The definition of the defence of compulsion in South African criminal law is:

*‘the endangering of a legal interested of the accused by a threat which has already commenced or is imminent, which threat is not caused by the accused fault making it necessary for the accused to avert the danger (using means which) are reasonable in the circumstances.’*[[121]](#footnote-121)

It is clear, therefore, that the conception of a threat may relate to circumstances which threaten or to an individual who applies psychological pressure to another, with the only two caveats being that the individual cannot rely on the defence if he or she has placed him or herself in the threatened position and that the means used must be reasonable in the circumstances. The threat, however, must be of a physical nature and the threat of losing money is held to be insufficient to allow for the defence to be admitted.[[122]](#footnote-122) Similarly to German Law, the required promotion of the values of the Constitution[[123]](#footnote-123) would create a prohibition on balancing one innocent life against another. However the wording of the South African Constitution is not as strong as the German Basic Law, as it simply states that the individual has the right to respect for their dignity.[[124]](#footnote-124) The more flexible conception of ‘respect for’ rather than ‘inviolability of’ human dignity makes for a difference in the application of the defence within the case law. South Africa’s approach, particularly where the charge is that of a serious crime against the person, is the most distinct, and extensive, of all the legal systems examined thus far.

One of the first cases which discussed the idea of compulsion in South African law concerned German soldiers who were held in a prisoner-of-war camp in South Africa.[[125]](#footnote-125) The case did not discuss any specific formulation of the concept of compulsion and instead referred broadly to the idea of necessity under English law. Compulsion was raised as a defence to a charge of murder, of which a German soldier had been accused following the ‘execution’ of another prisoner who was deemed to be an informer to the camp authorities. Using the English concept of necessity as the basis of the South African idea of compulsion, the court held that the accused was attempting to stretch the limits of the defence of necessity in this case to cover the crime of murder, and additionally that there was limited evidence of any compulsion under which the accused might have acted. The Court held that *‘the killing of an innocent person is never legally justifiable by compulsion or necessity’*[[126]](#footnote-126)and would not be drawn on the extent to which such a defence might excuse the accused.[[127]](#footnote-127) The case also referred to earlier authorities[[128]](#footnote-128) which concurred with the perspective that South African law did not accept that compulsion could justify the commission of a murder. The law was further developed in this area to reject the defence of compulsion where the individual had placed themselves in danger,[[129]](#footnote-129) the case in question concerning a gang member who was compelled to kill. The aim of the defence in this case, however, was not to justify the act but rather to escape the death penalty, which was mandatory at that time for murder. As an extenuating circumstance, rather than a defence, compulsion was accepted and the sentence commuted.

The real change to South African criminal law, which distinguishes it from all other legal systems discussed in this study, emanates from the *Goliath*[[130]](#footnote-130) judgment which was handed down in 1972. In this case, the court held that compulsion was acceptable grounds on which to defend a charge of murder, when the individual in question had assisted the principal in his commission of the crime. The court held that the previous rejection of the defence was based on ‘emotive rather than legal grounds’ and this approach ought to be replaced by a more pragmatic acceptance that individuals can be justified in committing murder in certain circumstances as a result of the pressures that they may face. The main reason given for the court’s decision was that the law as it stood set an unreasonable standard of conduct in which individuals were expected to sacrifice their most dearly-held interest, that of their own life, for the life of another individual. The court considered it unacceptable to set such a standard as a principle of criminal law, as it claimed that the ordinary man would be required, in order to comply with the law, to become a hero and conduct which did not amount to this standard would be rendered criminal activity.

Indeed this was welcomed as rejecting the English-derived ‘blueprint for saintliness’[[131]](#footnote-131) and embraced as approaching the issue of compulsion in a more reasonable fashion. In particular, the decision in the English case of *Dudley* was held to have been made on such emotional grounds and, from this perspective, on a flawed basis. The potential of the criminal law to send out ‘clear moral messages’ has been recognised by the literature[[132]](#footnote-132) which makes the justification for killing as held within the domestic law of this jurisdiction difficult to reconcile with the concept of murder as a very serious breach of the criminal law, and particularly as the most serious assault possible on the dignity of the individual. One voice within the literature argues that the idea of punishment may be the answer to such an incongruity,[[133]](#footnote-133) whereby sentencing may be diminished on account of the lack of guilt of the individual who acts under duress. However the law as determined by South African judicial precedent at present demonstrates that the importance of a reasonable standard, to which individuals can be held in difficult circumstances, is more critical than a rigid adherence to the concept of the dignity of the individual.

Despite the settled authority, an examination of some of the literature in this area demonstrates an understanding of the conflict between setting reasonable standards against the contention that an innocent life ought to be balanced against another in certain circumstances. Particularly difficult is the assertion that, effectively, that killing can be justified in the context of an innocent life, as opposed to an aggressor. One author writes:

*‘It is not morally, or legally, defensible (or possible) to weight human lives in the balance and conclude that one life is more important than another. All lives are equal in the eyes of God and should also be equal under the law.’*[[134]](#footnote-134)

Despite this strongly-worded rejection of the priority of any one innocent life over another, he continues to state that if the compulsion is ‘of a sufficient degree’[[135]](#footnote-135) then the individual’s act ought to be justified. This indicates the judicial applicability, but philosophical incongruity, in deciding whether to prioritise dignity or an act deemed to be that which a reasonable individual would commit under extreme circumstances, even when the law in the area of necessity, duress or compulsion, however termed, appears to be settled within the jurisdiction. The priority of international obligations, as contained within the Constitution,[[136]](#footnote-136) only serves to further complicate this area, and an investigation of international standards, which prioritise the application of international human rights law, leads to the conclusion that the standards espoused by the South African jurisdiction may not be as robust internationally as they are binding domestically.

1. What does this tell us about the defence of duress?

The jurisdictions above can be viewed as a spectrum of approaches to the issue, broadly, of compulsion to act, and to commit criminal offences. English law is at one end of the spectrum approach, in that the defences of both duress and necessity could never be used where the perpetrator was accused of carrying out a murder, and may not even be available to those aiding and abetting the destruction of human life. However, the doctrine of necessity persists and creates a basis for a potential statutory defence, which could be delineated clearly by Parliament. As of yet, there have been no concrete attempts to do so. It has a more specific distinction between duress and necessity, although the response to the availability of either for a charge of murder is the same.

South African law is thus at the other: as a jurisdiction, it uses English law as a basis to disagree with that approach and to craft a defence of duress which can be used where the charge is one of murder. It unifies the defences, ignoring the source of the threat and focuses instead on whether the individual could reasonably have been expected to withstand the pressure, taking what it views as a more pragmatic approach to the limits of human behaviour. South Africa is unique as a jurisdiction in openly recognising the existence of the defence and the extent to which the defence can be used, as well as being the only jurisdiction to permit the defence to be used where the charge is murder. The South African approach is the closest one reaches at the domestic level to the approach taken by the Rome Statute, but its perspective is not shared by any other jurisdictions.

Going back to the spectrum of approaches to duress, Germany and France appear to sit in the middle. If anything France could be placed closer to England than South Africa: it is similar in that it recognises two defences: duress and necessity. Both are contained within the criminal code and there are no obvious restrictions on the availability of either defence to any charge, be it murder or otherwise. French law does possess constitutional principles enshrined in its own bill of rights, but these are not referred to as part of the criminal code. Despite this, French courts are reluctant to use either defence in any cases, and have formally rejected the applicability of the defence to murder. In this way, the French approach has far more in common with the English, where it is recognised but never applied.

The German approach is slightly clearer, but again, favours the same outcome as the English. Both duress and necessity are recognised as differing forms of necessity, and there is clear provision for both in the German criminal code. However, the application of the defence by the courts has been rejected for serious crimes against the person, on the basis that to permit the defence would violate the constitutional principle of human dignity. Thus, no state of duress or necessity can ever affect criminal liability on the part of the individual where the crime libelled is murder or torture. Again, the German system appears to be closer to the English on the spectrum of approaches to necessity and duress.

 The South African jurisdiction remains the only one analysed above which allows for compulsion to be raised as a justification for acting where the act involved committing murder, in an open fashion. The South African courts, although sharing the constitutional principles of Germany which are enshrined in a similar manner, do not come to the same conclusion as the German courts when applying the defence. However, the argument that the application of the defence could violate South African constitutional principles when the charge is murder or a serious crime against the person does not appear to have been made, by either the authors of the literature or lawyers before the courts.

The difficulty with the defence, overall, appears to be sanctioning murder of an innocent individual in order to preserve the compelled person’s life. There appears to be considerable tension between the defence of duress and the State’s responsibility to protect human dignity, stretching from prevention of the most minor of assaults to the protection of life. The presence of a formal constitution which prevents the balancing of one life against another appears key in restraining the application of the defence where the crime itself may lead to the death of an innocent individual. It is interesting that such difficulties exist in developed domestic systems with deeply-rooted constitutional principles, as this may demonstrate a wider discomfort with the idea of permitting the defence for a charge of murder where an innocent person has lost their life. This makes the issue of the defence of duress in the Rome Statute all the more perplexing: if such a lack of consensus exists at the domestic level, why, then, should be permitted for worse crimes at the international level? Even where the defence is recognised, it is seldom applied and only one jurisdiction, of those surveyed, could bring itself to permit the defence to be applied to a charge of murder. It could be argued that this is a more pragmatic approach, which takes a more realistic view of human behaviour. Indeed, its rejection of the English standard of ‘saintliness’ highlights an issue with an inflexible approach of never permitting any variation of the defence in any circumstances. The French and German approaches, from this perspective, are not much better: one is put in mind of metaphors of rugs being pulled and goalposts being moved; the rules changing without any prior warning. But the rebuttal provided above, by Lord Hailsham in *Howe,* does provide a compelling case: ordinary individuals are capable of withstanding great deals of pressure, of acting heroically, and of, essentially, sacrificing their own interests.

1. Conclusion

What, then, should the law do? The international approach of consensus is undoubtedly much preferred, for ease, to investigating the customary perspective, which the above study arguably represents. The uncovered lack of clarity and discordant sounds indicate that the defence is recognised, but not often applied. However, the fact that the States have, on one occasion agreed does not make good law. The contribution an analysis such as this makes to the debate is to show how difficult the issue is, and to demonstrate inconsistencies in the legal approaches that could be rooted in emotive responses, rather than legal principles. This is particularly evident where the case law shows in practice the choice that needs to be made between the interests of the victim and those of the accused. From the above comparative perspective, the issues of duress and necessity at the international level are complex.

This study identifies a problem with the Rome Statute’s inclusion of a generalised form of the defence, without any further information on how it ought to be applied. The comparative work demonstrates how difficult the situation is for domestic jurisdictions, with conflicting constitutional principles, and shows that the only jurisdiction to permit a defence of duress, South Africa, may be in conflict with its own principles in doing so. However, it also shows a failure of other jurisdictions, to clearly codify the inapplicability of the defence to serious crimes against the person, such as the case of France and Germany. This lack of clarity evidences an overall discomfort and ultimately, a rejection of the defence tantamount to the English approach. This is not to say that the English approach is correct, or even of value given the problems it creates for the courts, and the harshness of the outcomes it generates, but that the underlying reasoning is ultimately supported by other jurisdictions. From this perspective, where domestic jurisdictions struggle to apply such a defence for domestic crimes, it is difficult to imagine why agreement was cemented for the defence in the Rome Statute of the International Criminal Court.

1. Aristotle, *The Nicomachean ethics* (OUP 2009), 39. [↑](#footnote-ref-1)
2. Described as a ‘fusion’ in Ilias Bantekas and Susan Nash, *International criminal law* (Routledge Cavendish, 2007), 1. [↑](#footnote-ref-2)
3. ##  1998 (hereafter, ‘Rome Statute’); articles 31-33; see Massimo Scaliotti, ‘Defences before the International Criminal Court: substantive grounds for excluding criminal responsibility: Part 2’ (2002) 2 ICLR 1 for an overview of the defence of intoxication at 28 *et seq*.

 [↑](#footnote-ref-3)
4. Article 31(1)(d), Rome Statute. [↑](#footnote-ref-4)
5. Preamble, Rome Statute. [↑](#footnote-ref-5)
6. Article 31(1)(b), Rome Statute. [↑](#footnote-ref-6)
7. Roy Lee (ed), *The International Criminal Court: The making of the Rome Statute* (Kluwer Law International, 1999); William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010); O. Triffterer, (ed) *Commentary on the Rome Statute of the International Criminal Court* (Beck Hart Nomos, 2008); Elies van Sliedregt, *Criminal responsibility in international law* (Oxford University Press, 2012) and Mohamed E Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart, 2013), all of which deal in part with the defence of duress in the Rome Statute. [↑](#footnote-ref-7)
8. *Prosecutor v Erdemovic* IT-96-22- A, Separate and dissenting opinion of Judge Cassese 7 October 1997, para 47 [↑](#footnote-ref-8)
9. As noted above, this will be abbreviated to ‘England.’ [↑](#footnote-ref-9)
10. See Kevin J Heller and Markus D Drubber, *The handbook of comparative criminal law* (Stanford: Standford University Press, 2011). [↑](#footnote-ref-10)
11. Kevin J Heller and Markus D Drubber, *The handbook of comparative criminal law* (Stanford: Standford University Press, 2011) at 4. [↑](#footnote-ref-11)
12. South African criminal law has elements of German criminal law in its approach; see Jonathan Burchell, South Africa in Kevin J. Heller and Markus Drubber *The handbook of comparative criminal law* (Stanford: Standford University Press, 2011) at 456. [↑](#footnote-ref-12)
13. Percy Luney, *Traditions and foreign influences: Law in China and Japan* (1989) 52 LCP 129-150, 147. [↑](#footnote-ref-13)
14. Kevin J. Heller and Markus Drubber *The handbook of comparative criminal law* (Stanford: Standford University Press, 2011) at 6. [↑](#footnote-ref-14)
15. Peter Bringer, *The abiding influence of English and French law in one African country* (1981) 25 JAL 1-13. [↑](#footnote-ref-15)
16. Kenneth Karst and Keith S Rosenn, *Law and development in Latin America* (Berkeley: University of California Press, 1975). [↑](#footnote-ref-16)
17. Peter Bringer, *The abiding influence of English and French law in one African country* (1981) 25 JAL 1-13, 1. [↑](#footnote-ref-17)
18. Article 31(d), Rome Statute [↑](#footnote-ref-18)
19. For example, England recognises only the defence of necessity for the crime of murder (nominally) and renders in applicable a defence of duress by threats for a charge of murder as either principal or accessory [↑](#footnote-ref-19)
20. For example, the defence of compulsion in South Africa extends to both internal and external pressures [↑](#footnote-ref-20)
21. J.W. Herring, *Criminal law: text, cases and materials,* Oxford University Press at 664 and Nicola Padfield, *Criminal law,* Oxford University Press, 2008 at 111 [↑](#footnote-ref-21)
22. W. Wilson, *Criminal law: Doctrine and theory,* Longman, 1998 at 280 [↑](#footnote-ref-22)
23. J. Stephen, *History of the criminal law of England*, 1883, vol. 2 at 108 [↑](#footnote-ref-23)
24. J.W. Herring, *Criminal law: text, cases and materials,* Oxford University Press, 2012 at 656-664; 665-668 and N. Padfield, *Criminal law,* Oxford University Press 2008 at 103 and 107 [↑](#footnote-ref-24)
25. *R* v Dudley *and* Stephens [1884] 14 QBD 273 [↑](#footnote-ref-25)
26. J. Stephen, *Digest of the criminal law*, 1887 [↑](#footnote-ref-26)
27. J. Stephen, *History of the criminal law of England,* 1883 at 108 [↑](#footnote-ref-27)
28. J. Stephen, *History of the criminal law of England,* 1883 at 108 [↑](#footnote-ref-28)
29. The theory of justifications and excuses is one with Anglo-American roots. See J. D. Ohlin, *The bounds of necessity,* J.I.C.J. 6 (2008) 289-308; D. Varona Gomez., *Duress and the antcolony’s ethic: reflections on the foundations of the defense and its limits*, 11 New Crim. L. Rev. 615-644 2008; P. Robinson, *Criminal law defenses: A systematic analysis*, Colum L R 82(2) 199-291 1982; M Gur-Arye, *Should a criminal code distinguish between justification and excuse?* 5 Can. J.L & Jurisprudence 215-236 (1992). [↑](#footnote-ref-29)
30. *R* v Dudley *and* Stephens [1884] 14 QBD 273 [↑](#footnote-ref-30)
31. *R* v Dudley *and* Stephens [1884] 14 QBD 273 at 288 [↑](#footnote-ref-31)
32. *Ibid*. at 287 [↑](#footnote-ref-32)
33. J. Stephen, *History of the criminal law of England*, 1883, vol. 2 at 108 [↑](#footnote-ref-33)
34. J. Burchell, *South African Criminal Law and Procedure: Volume I- General Principles of Criminal Law*, Juta, 2011 at 162 [↑](#footnote-ref-34)
35. *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam. 147 [↑](#footnote-ref-35)
36. *Ibid.,* Brooke LJ at 219 [↑](#footnote-ref-36)
37. *Ibid.* at 240 [↑](#footnote-ref-37)
38. Nathan Tamblyn, ‘Necessity and murder’ (2015) 79 JCL 46-54, 49-50 [↑](#footnote-ref-38)
39. Nathan Tamblyn, ‘Necessity and murder’ (2015) 79 JCL 46-54, 51. [↑](#footnote-ref-39)
40. *R (on the application of Nicklinson) v Ministry of Justice* [2012] EWHC 2381 (Admin) [↑](#footnote-ref-40)
41. *Ibid.*, Toulson L.J. at para 84 [↑](#footnote-ref-41)
42. Adam Jackson, ‘"Thou shalt not kill; but needst not strive officiously to keep alive": further clarification of the law regarding mercy killing, euthanasia and assisted suicide’ (2013) 77 JCL 468-475, 472. [↑](#footnote-ref-42)
43. See also Ben Livings, ‘A right to assist? Assisted dying and the interim policy’ (2010) 74 JCL 31-52. [↑](#footnote-ref-43)
44. Even the literature sometimes discusses the defences together: Birju Kotecha, ‘Necessity as a defence to murder: An Anglo-Canadian perspective’ (2014) 78 JCL 341-362. [↑](#footnote-ref-44)
45. J. Stephen, *Digest of the criminal law*, 1887 at 23 [↑](#footnote-ref-45)
46. *R. v Sasikaran Selvaratnam* [2006] EWCA Crim 1321 [↑](#footnote-ref-46)
47. *R. v Conway* [1989] Q.B. 290 [↑](#footnote-ref-47)
48. *R v Howe* [1987] A.C. 417 at 453 [↑](#footnote-ref-48)
49. *R v Howe* [1987] A.C. 417, Opinion of Lord Hailsham, at 427. See also Kenneth J Arenson, ‘The paradox of disallowing duress as a defence to murder’ (2014) 78 JCL 65-79. [↑](#footnote-ref-49)
50. [1971] 2 Q.B. 202 [↑](#footnote-ref-50)
51. [1971] 2 Q.B. 202 at 206 [↑](#footnote-ref-51)
52. [1975] A.C. 653 [↑](#footnote-ref-52)
53. *Ibid.*, Lord Morris of Borth-y-Gest at 671 [↑](#footnote-ref-53)
54. [1977] A.C. 755 [↑](#footnote-ref-54)
55. *R v Abbott* [1977] A.C. 755 Judgment at 767 [↑](#footnote-ref-55)
56. [1987] A.C. 417 [↑](#footnote-ref-56)
57. *R v Howe* [1987] A.C. 417, Opinion of Lord Hailsham at 432 [↑](#footnote-ref-57)
58. *Criminal law report on defences of general application,* Law Com. No. 83, Law Commission of England and Wales, 28 July 1977 [↑](#footnote-ref-58)
59. *Ibid.* at 2.44 [↑](#footnote-ref-59)
60. *Ibid.,* appendix 1, clause 1 [↑](#footnote-ref-60)
61. A 2005 Law Commission report on Partial Defences to Murder declined to discuss duress as the last set of recommendations had not been implemented by Parliament [↑](#footnote-ref-61)
62. *R v Howe* [1987] AC 417 [↑](#footnote-ref-62)
63. *Ibid.* [↑](#footnote-ref-63)
64. *Ibid.* [↑](#footnote-ref-64)
65. *R v Howe* [1987] AC 417 at 457 [↑](#footnote-ref-65)
66. *R v Lynch* [1975] A.C. 653 at 683, referring to a South African case [↑](#footnote-ref-66)
67. The defences to which reference is made in this part have been revised as recently as 2008; Law no 2008-174 25 February 2008, article 4(v) [↑](#footnote-ref-67)
68. La Déclaration des droits de l’Homme et du citoyen 1789 [↑](#footnote-ref-68)
69. Preamble to the Constitution of the Fifth French Republic 1958 [↑](#footnote-ref-69)
70. Article 122-2, French Criminal Code 1994 [↑](#footnote-ref-70)
71. *‘A person is not criminally responsible who acted under the influence of a force or a constraint which he or she could not withstand,*’ Article 122-2, French Criminal Code 1994 [↑](#footnote-ref-71)
72. C. Elliott, *French criminal law,* Willow, 2001 at 117 [↑](#footnote-ref-72)
73. ‘*A person is not criminally responsible when, faced with a present or imminent danger which threatens him or her, another individual or property, commits a necessary act to safeguard the person or property, except if there is a lack of proportion between the means used and the gravity of the threat,’* Article 122-7, French Criminal Code 1994 [↑](#footnote-ref-73)
74. The French investigating judge has the power to apply or disapply the defence under Article 177, French Criminal Procedure Code 1995 [↑](#footnote-ref-74)
75. C. Elliott, *French criminal law,* Willow, 2001 at 117-119. [↑](#footnote-ref-75)
76. Poitiers, 11 avril 1997 [↑](#footnote-ref-76)
77. Rennes, 12 avril 1954 [↑](#footnote-ref-77)
78. See Cour d'appel de Douai, 6e chambre correctionnelle, 24 octobre 2000 [↑](#footnote-ref-78)
79. J. Bell et al., *Principles of French law,* Oxford University Press, 2007at 210 [↑](#footnote-ref-79)
80. Cour de Cassation, 23 janvier 1997 [↑](#footnote-ref-80)
81. C. Elliott, *A comparative analysis of defences in English and French criminal law,* 8 Eur. J. Crime, Crim. L. and Crim. Just. 319-326 2000 at 319 [↑](#footnote-ref-81)
82. *Ibid.* [↑](#footnote-ref-82)
83. Article 122-2, French Criminal Code 1994 [↑](#footnote-ref-83)
84. C. Elliott, *A comparative analysis of defences in English and French criminal law,* 8 Eur. J. Crime, Crim. L. and Crim. Just. 319-326 2000 at 319 [↑](#footnote-ref-84)
85. Article 122-7, French Criminal Code 1994 [↑](#footnote-ref-85)
86. J. Bell et al., *Principles of French law,* Oxford University Press, 2007 at 205 [↑](#footnote-ref-86)
87. J. Bell, *Principles of French law*, Oxford University Press, 2007 at 205 [↑](#footnote-ref-87)
88. Article 327-328, French Criminal Code 1994 [↑](#footnote-ref-88)
89. Article 121-3, French Criminal Code 1994 [↑](#footnote-ref-89)
90. J. Bell et al., *Principles of French law,* Oxford University Press, 2007 at 206 and 210 [↑](#footnote-ref-90)
91. B. Dickson, *Introduction to French law*, Pitman, 1994 at 103 [↑](#footnote-ref-91)
92. B. Dickson, *Introduction to French law*, Pitman, 1994 at 103 [↑](#footnote-ref-92)
93. C. Elliott, *French criminal law*, Willow, 2001 at 116 [↑](#footnote-ref-93)
94. M. Bohlander, *Principles of German criminal law,* Hart, 2008 at 7 [↑](#footnote-ref-94)
95. Basic Law for the Federal Republic of Germany 1949, as updated in 2008 [↑](#footnote-ref-95)
96. Article 1(1), German Basic Law 1949 [↑](#footnote-ref-96)
97. s34, German Criminal Code 1998 [↑](#footnote-ref-97)
98. s34, German Criminal Code 1998 [↑](#footnote-ref-98)
99. M. Bohlander, *Principles of German criminal law,* Hart, 2008 at 101 [↑](#footnote-ref-99)
100. s34-35, German Criminal Code 1994 [↑](#footnote-ref-100)
101. M. Bohlander, *Principles of German criminal law,* Hart, 2008 at 101 [↑](#footnote-ref-101)
102. s34, German Criminal Code 1994; Bohlander, M., *Principles of German criminal law,* Hart, 2008 translates this as *‘A person who, faced with an imminent danger to life, limb, freedom, honour, property or any other legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of danger facing them, the protected interest substantially outweighs the one interfered with. This shall apply only if and to the extent that the act is an adequate means to avert the danger’* at 101 [↑](#footnote-ref-102)
103. s35(1), German Criminal Code 1994; Bohlander, M., Principles of German criminal law, Hart, 2008 translates this as ‘A person who, faced with an imminent danger to life, limb or freedom which cannot otherwise be averted, commits an unlawful act to avert the danger from himself, a relative or person close to him, acts without guilt. This shall not apply if and to the extent that the offender could be expected, under the circumstances, to accept the danger, in particular, because he himself had caused the danger or was under a special legal obligation to do so, the sentence may be mitigated, unless the offender was required to accept the danger because of a special legal obligation to do so’ at 108 [↑](#footnote-ref-103)
104. E. Binavince, *The structure and theory of the German penal code,* 24 Am. J. Comp. L. 594-601 1976 at 597 [↑](#footnote-ref-104)
105. Article 1(1), German Basic Law 1949 [↑](#footnote-ref-105)
106. Article 1(1), German Basic Law 1949 [↑](#footnote-ref-106)
107. See K. Ludersson, *Enlightened criminal policy or the struggle against evil,* Buff. Crim. L. Rev. 3(2) Jan. 2000, 687-700 [↑](#footnote-ref-107)
108. *Ibid.* at 697 [↑](#footnote-ref-108)
109. Judgment of 20 December 2004, District Court of Frankfurt am Main. The full facts of the case can be found in the European Court of Human Rights judgment *Gäfgen v Germany* (2011) 52 EHRR 1 in English and French, and the case has also been discussed in M. Gur-Aye and F. Jessberger, *The Protection of Human Dignity in Interrogations: May Interrogative Torture Ever Be Tolerated - Reflections in Light of Recent German and Israeli Experiences* ILR (2011) 44 229-262 and F. Jessberger (tr.) *Respect for human dignity in today’s Germany* JICJ (2006) 4 862-865. [↑](#footnote-ref-109)
110. F. Jessberger, *Bad torture – good torture,* J.I.C.J. 3 (2005), 1059-1073 at 1064 [↑](#footnote-ref-110)
111. Jessberger, F., *Bad torture – good torture,* J.I.C.J. 3 (2005), 1059-1073 at 1073 [↑](#footnote-ref-111)
112. J. Burchell and J. Milton, *Principles of criminal law,* Juta, 2007 at 138 [↑](#footnote-ref-112)
113. *Ibid.*at 138 [↑](#footnote-ref-113)
114. J. Burchell, *South African criminal law and procedure: Volume 1 – General principles of criminal law*, Juta, 2011 at 13; see also Chapter 2, Bill of Rights, Constitution of the Republic of South Africa 1996, as amended [↑](#footnote-ref-114)
115. J.M. Burchell, *Duress and intentional killing,* 94 S. African L.J. 282-290 1977, discussing *Abbott v The Queen* [1977] A.C. 755 and *DPP v Lynch* [1975] A.C. 653; this effect is arguably reciprocal in part as discussed earlier in relation to the English context [↑](#footnote-ref-115)
116. *S v Goliath* 1972 (3) SA 1 (A) [↑](#footnote-ref-116)
117. *R v Werner* 1947 (2) South African Law Reports 828 (A), in which the idea of compulsion justifying a crime is rejected, and its potential as an excuse is not discussed by the court [↑](#footnote-ref-117)
118. *S v Bailey* 1982 (3) SA 772 A [51] [↑](#footnote-ref-118)
119. J. Burchell, and J. Milton, *Principles of criminal law,* Juta, 2007 at 279 [↑](#footnote-ref-119)
120. *S v Goliath* 1972 (3) SA 1 (A) [↑](#footnote-ref-120)
121. S. Yeo, *Compulsion and necessity in African criminal law,* J.A.L. 2009, 53(1), 90-110 at 94 [↑](#footnote-ref-121)
122. *R v Canestra* 1951 (2) SA 317 (A) [↑](#footnote-ref-122)
123. s39(2), Bill of Rights, Constitution of the Republic of South Africa 1996, as amended [↑](#footnote-ref-123)
124. s10 Bill of Rights, Constitution of the Republic of South Africa 1996, as amended [↑](#footnote-ref-124)
125. *R v Werner* 1947 (2) South African Law Reports 828 (A) [↑](#footnote-ref-125)
126. *Ibid.,* Judgment of Watermeyer C.J. at 837 [↑](#footnote-ref-126)
127. *Ibid.* at 837 [↑](#footnote-ref-127)
128. Specifically *Rex* v. *Mtetwa* (1921, T.P.D. 227) *and Rex* v. *Garnsworthy* (1923, W.L.D. 17) [↑](#footnote-ref-128)
129. *S v Bradbury* 1967 (1) SA 387 (A) [↑](#footnote-ref-129)
130. *S v Goliath* 1972 (3) SA 1 (A) [↑](#footnote-ref-130)
131. J. Burchell and J. Milton, *Principles of criminal law,* Juta, 2007 at 142 [↑](#footnote-ref-131)
132. P. Eden, *Criminal liability and the defence of superior orders,* 108 S. African L.J. 640-655 1991 at 644 [↑](#footnote-ref-132)
133. J.J. Taitz, *Compulsion as a defence to murder: South African perspectives,* 7273 Law and Just. – Christian L. Rev. 10-23 1982 at 23 [↑](#footnote-ref-133)
134. J. Burchell, *Heroes, poltroons and persons of reasonable fortitude – juristic perceptions on killing under compulsion,* 1 S. Afr. J. Crim. Just. 18-34 1988 at 27 [↑](#footnote-ref-134)
135. *Ibid.*at 30 [↑](#footnote-ref-135)
136. s39(1)(b), Bill of Rights, Constitution of the Republic of South Africa 1996, as amended [↑](#footnote-ref-136)