Grounds for Excluding Criminal Responsibility for International Crimes under Domestic Swedish Law

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1 Introduction

This article is concerned with grounds for excluding criminal responsibility for international crimes under Swedish law (*defences*). Specifically, we are interested in what can be called complete substantive defences, by which we mean circumstances that have the power to completely negate criminal liability despite the presence of *actus reus* (in the narrow sense) and *mens rea*. An otherwise criminal act may have been *justified* by the need to protect an opposing interest, e.g. in cases of self-defence. Even if the act was not justified, the actor may be *excused* because he or she could not be expected to act lawfully;[1] duress is an example of an excuse under international law.[2] Some rules concerning defences are statutory, others unwritten. This is true for both Swedish and international law, even though the rules differ somewhat.

It is important to differentiate between complete substantive defences as defined above and other circumstances that sometimes also fall under the scope of the English term "defences". One such category is partial defences, i.e. circumstances that cannot completely negate criminal responsibility but may be taken into account when sentencing as mitigating factors. One example is diminished mental responsibility under the International Criminal Tribunal for the former Yugoslavia (ICTY) regime.[3] Procedural defences, that is, allegations that the necessary conditions for prosecuting the crime have not been met, form another such category. An example is a contention that a statute of limitations precludes prosecution. Both of these categories of defences fall outside the scope of this article. So do questions of mental illness, since this is only a partial defence in Swedish law.

A number of complete substantive defences exist in both Swedish and international law, but we will focus primarily on those that so far have been considered by Swedish courts in cases concerning international crimes, namely duress/necessity and superior orders.

The law on defences has different primary sources in different jurisdictions. The Swedish rules are given mainly in Chapter 24 of the Swedish Criminal Code.[4] Proceedings before the International Criminal Court (ICC) are governed

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1 The distinction between justifications and excuses originates in the civil law tradition and forms part of current Swedish criminal law. It is less pronounced in international law, but we have here followed Ambos in applying the distinction to international law as well. See Ambos, Kai, "Defences in International Criminal Law" in Brown, Bartram S. (ed.), *Research Handbook on International Criminal Law*, Cheltenham: Edward Elgar Publishing, 2011, p. 300–301.

2 See Ambos, 2011, p. 311. As will be seen later, duress (understood as a sub-type of necessity) is a justification under Swedish law. An example of an excuse in that legal system is excessive self-defence. See the Swedish Criminal Code, Ch. 24, Sec. 6; see also NJA 2009 s. 234.

3 See Ambos, 2011, p. 302.

4 Brottsbalken (1962:700). We have, as far as possible, followed the latest official translation of the Swedish Criminal Code published by the Swedish Government (https://www.government.se/government-policy/judicial-system/the-swedish-criminal-code/, updated 7 January 2020, checked 1 February 2020). For older provisions, we have turned to an earlier translation (Ds 1999:36). For terms not found in the Code, we have relied on the official Swedish/English Glossary of the Swedish National Courts Administration (Svensk/engelsk ordlista för Sveriges Domstolar, https://www.domstol.se/om-sveriges-

by the Rome Statute of the ICC (Rome Statute). International customary law, if it exists in this area of law, manifests itself through state practice.

Two questions may be asked directly:

1. Which of these legal frameworks – the Swedish Criminal Code, the Rome Statute or international customary law – should the Swedish courts apply?
2. In what cases and under what conditions can duress/necessity and superior orders negate criminal liability according to current Swedish legislation (Act on Criminal Responsibility for Genocide, Crimes against Humanity and War Crimes (2014:406), referred to below as "the 2014 Act") or its predecessors (Act on Criminal Responsibility for Genocide (1964:169), referred to below as "the 1964 Act", and the now abolished provision on crimes against international law, Ch. 22 Sec. 6 of the Swedish Criminal Code, referred to below as "the 1986 Act")?

These two main questions generate a number of sub-questions such as: Do the Swedish courts apply the general domestic provisions on defences or does the jurisprudence adapt itself to the special needs and purposes of international criminal law? How far can – and should – international law affect the courts' assessment of crimes contrary to the 2014 Act (or, concerning actions before July 1, 2014, contrary to the 1964 and the 1986 Acts)?

The answer to the first question is straightforward: The Swedish courts should apply Swedish law.[5] This is clear from the *travaux préparatoires*[6] to both the Penal Code (the precursor of the Swedish Criminal Code) and the Geneva Conventions[7] of 1949.[8] This also follows from the Swedish – dualistic – view of

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domstolar/for-professionella-aktorer/svenskengelsk-ordlista-for-sveriges-domstolar/, 5 April 2019, checked 1 February 2020). In cases where none of these sources contained a translation, we have translated the Swedish terms ourselves.

5 Asp, Petter, *Internationell straffrätt*, 2 ed., Iustus, 2014, p. 13.

6 In Swedish law, Government White papers and other *travaux préparatoires* have a far greater significance as a basis for interpretation than in many other legal systems.

7 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention (III) relative to the Treatment of Prisoners of War and Convention (IV) relative to the Protection of Civilian Persons in Time of War, all signed at Geneva on 12 August 1949.

8 Prop. 1953:142 on changes to the Penal Code, Ch. 1 and 27, states the following (authors' translation). "According to the *travaux préparatoires* [those of the 1949 Geneva Convention], the national courts should in this respect apply otherwise applicable general principles of criminal law". In a footnote, reference is made to the "Final record of the diplomatic conference of Geneva of 1949 vol. II, section B, p. 114–115", where the following is stated. "The Netherlands Delegation had tabled the International Committee of the Red Cross' Articles as their own amendment. This amendment has been replaced by the joint amendment submitted by the Netherlands, Australia, Belgium, Brazil, the United States of America, France, Italy, Norway, the United Kingdom and Switzerland. The Netherlands Delegate presented the joint amendment with the following introduction: "[…] The word 'crime' instead of 'breach' did not seem to be an improvement, nor could general agreement be reached at this stage regarding the notions of complicity, attempted violation, duress or legitimate defence or the plea 'by orders of a superior'. These should be left to the judges who would apply the national laws. The Diplomatic Conference is not here to work out

the relationship between national and international law.[9] It is good to keep this in mind when reading the rest of the article.

We now examine when and under what conditions duress/necessity and superior orders may negate liability for crimes contrary to the 2014 Act. We will also discuss crimes contrary to the 1986 Act, since some of the case law we examine concerns that piece of legislation.

The article is structured in the following way. The introduction (section 1) is followed by some general remarks on Swedish criminal law in section 2. Section 3 deals specifically with duress/necessity and superior orders under the Swedish Criminal Code. Sections 4 and 5 review the way these defences operate in international customary law and under the Rome Statute, respectively. Section 6 discusses the differences between Swedish criminal law and the Rome Statute. Section 7 contains a review of Swedish case law. The article ends with section 8 where we analyse the available jurisprudence.

2 General Remarks on Swedish Criminal Law

Before we study the specific defences of necessity/duress and superior orders under the Swedish Criminal Code, we offer some background information on certain general aspects of defences in Swedish criminal law. These remarks will serve as a simple (and thus somewhat superficial) introduction for international readers.

The Swedish Criminal Code recognises, in principle, two types of complete substantive defences: *justifications* (which render the action permissible) and *excuses* (which lead to the actor being excused, despite the action not being permissible).[10] Most justifications will only negate liability if the action in question was justifiable (or, in the case of self-defence, not manifestly unjustifiable). The unjustifiability test is an objective one, but the actor's erroneous perception of the situation may affect the outcome (see below).

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international penal law. Bodies far more competent than we are have tried to do it for years. […] This was adopted."

9 Regarding international law as a source of national law, see for example Sieghart, Paul, *The International Law of Human Rights*, Oxford: Clarendon Press, 1984, p. 40–42. A comment on the conviction of Jackie Arklöv for crimes against international law (Prosecutor ./. Jackie Arklöv, Stockholm District Court, Case B 4084-04, Judgment 18 December 2006) may also be of interest; see Klamberg, Mark, *Fråga om tillämpning av legalitetsprincipen beträffande folkrättsbrott*, Juridisk Tidskrift 2007-08, p. 130–139.

10 *Justifications* are: self-defence (Swedish Criminal Code, Ch. 24 Sec. 1), exercise of legal authority (Swedish Criminal Code, Ch. 24 Sec. 2–3 and Sec. 10 of the Police Act), necessity, which also encompasses duress (Swedish Criminal Code, Ch. 24 Sec. 4), consent (Swedish Criminal Code, Ch. 24 Sec. 7), social adequacy (unwritten rule) and acting against one's own legal sphere (unwritten rule). *Excuses* are: excessive action in situations of self-defence, necessity/duress and in exercise of legal authority (Swedish Criminal Code, Ch. 24 Sec. 6), superior orders (Swedish Criminal Code, Ch. 24 Sec. 8; this defence may be seen as a justification in some cases and as an excuse in others), mistake of law (Swedish Criminal Code, Ch. 24 Sec. 9), voluntary forestalling (Swedish Criminal Code, Ch. 23 Sec. 3) and minor complicity (Swedish Criminal Code, Ch. 23 Sec. 5, which may also be seen as both a justification and an excuse).

The distinction between justifications and excuses is of little importance for the principal actor. He or she will be acquitted if the conditions in any of the defences are met, regardless of whether the defence happens to be a justification or an excuse. For other parties complicit in the action, however, this distinction becomes significant. If liability for the principal actor is denied due to a justification, then there is no *actus reus* (in the broad sense) to be complicit in; there can thus be no liability for complicity (cf. Swedish Criminal Code, Ch. 23 Sec. 4). If, on the other hand, the principal actor is acquitted because of an excuse, then there remains an *actus reus* for other parties to be complicit in; this is so because an excuse does not render the action permissible, but only excuses the specific actor. Criminal complicity is thus possible in cases where an excuse applies to the principal actor.

A corollary of the above is the rules on assisting a person who finds him- or herself in a situation to which a defence applies. If a person has the right, under the rules governing justifications, to commit an act that is otherwise punishable, anyone who helps them has the same right (Swedish Criminal Code, Ch. 24 Sec. 5). This means not only that complicity in such cases is excluded, as stated above, but also that assistants may, in their own right, act within the same legal limits as the person they are assisting. Thus, if person A is being attacked, person B (a passer-by) will have the right to defend person A and in doing so do anything that person A would have had the right to do, *even if person A does nothing to defend him- or herself*. This right to assist does not apply to excuses.

Even *putative (imagined) defences* can negate criminal responsibility. This is because strict criminal liability does not exist in Swedish law. Criminal responsibility requires intent, recklessness or negligence. A mistake of (relevant) fact will therefore exclude liability for intentional crimes because the necessary intent (*mens rea*) is lacking. This applies regardless of whether the mistake was understandable or reasonable. The actor will thus be acquitted of an intentional crime if he or she wrongly believed that the conditions were such that, had they been real, he or she would have had the right to take the action in question. This does not, however, preclude the actor from being convicted of a reckless or negligent crime if the mistake constitutes recklessness or negligence. The actor may for example have been negligent by not ascertaining the true state of affairs, despite having reasons to do so.

The burden of proof for the non-existence of a defence lies on the prosecution. The standard of proof, however, is lower than "beyond reasonable doubt", which is the standard generally applied in criminal cases. If a defendant alleges the existence of a defence, it is enough for a conviction that the prosecution present such evidence as to make the allegation "seem unwarranted".

3 Duress, Necessity and Superior Orders under Swedish Law

3.1 Duress/Necessity

Unlike other legal systems, Swedish law does not differentiate between duress and necessity. Dangers originating from natural causes and dangers emanating from other people both fall under the same provision in the Swedish Criminal

Code, namely Ch. 24 Sec. 4.[11] Even linguistically there is no difference – the Swedish Criminal Code uses the term "necessity" (*nöd*) for both types of situation. We will follow this terminology in the rest of this section.

Necessity is a justification. It is subordinate to self-defence and exercise of legal authority, which is expressly stated in the above-mentioned provision. The wording of this provision is as follows:

> An act committed by a person out of necessity in cases other than those previously mentioned in this Chapter only constitutes an offence if, in view of the nature of the danger, the damage caused to another and the other circumstances, it is unjustifiable.
>
> 'Necessity' exists when a danger threatens life, health, property or some other, important interest that is protected by the legal order.

Three conditions must be fulfilled for the defence of necessity to negate liability:

1. A *danger* must threaten life, health, property or some other, important interest that is protected by the legal order.
2. The danger has to be *imminent*.
3. The action must not be *unjustifiable*.

The cause of the danger is irrelevant.[12] Not even emergencies caused by the actor's own behaviour are excluded from the scope of the defence. Thus, a person who finds him- or herself in danger after a failed suicide attempt and acts to avoid that danger may rely on the defence. Nor is there any requirement that the person act with the purpose of avoiding the danger. In fact, the defence is applicable even if the actor was unaware of the danger and the purpose of the action was improper (e.g. when the actor breaks a window to get back at another person and by so doing inadvertently happens to save the latter from gas poisoning).[13] Imagined necessity negates criminal responsibility under the conditions set out in the previous section. As stated above, everyone has the right to assist a person in a situation of necessity.

Necessity is meant to lead to an acquittal only under exceptional circumstances. That is because necessity implies a collision between two interests, both of which are protected by the law. The difference between self-defence and necessity is said to be that in a case of self-defence, a right opposes a wrong, while in a case of necessity, one right opposes another. As a consequence, the right to act in a situation of necessity is considerably more limited than in self-defence. In the latter case, an action is permitted unless it is *manifestly unjustifiable* (Swedish Criminal Code, Ch. 24 Sec. 1). Under the defence of necessity, however, the action is permitted unless it is *unjustifiable*. In other words, the action must be justifiable in order not to incur criminal liability.

According to the provision in question, the "unjustifiable" test is to be made with regard to

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[11] As we will see later, Swedish law differs in this respect compared to international law.

[12] This is a difference when compared to self-defence, where a precondition is a *criminal* attack.

[13] See SOU 1988:7 p. 94.

- the nature of the danger
- the damage caused to another, and
- the other circumstances.

In case law, these criteria have been interpreted to mean that the action must be necessary and proportional. An action is *necessary* if there was no other reasonable and less harmful way for the actor to avoid the danger. *Proportionality* requires, in this context, that the interest under threat be significantly more valuable than the one sacrificed.[14] It is therefore permissible to sacrifice property in order to save a person's life. The situation is different, however, when one human life is weighed against another. It is never defensible to sacrifice someone else's life to save one's own. Neither is it permissible to sacrifice one life to save many. The reason for this is that the value of human life cannot be quantified and compared.[15] Similarly, it seems unlikely that torture could ever be justified under the necessity defence. The defence might be applicable *per se* (e.g. if the actor was under threat of death), but torture will most likely never be deemed justifiable, since it is categorically prohibited in the Swedish Constitution (see the Instrument of Government, Ch. 2 Sec. 5), as well as in a number of international treaties to which Sweden is party. In cases such as the above, the conflict of interests will instead be considered as a strong mitigating factor (see the Swedish Criminal Code, Ch. 29 Sec. 3 para. 1 p. 5).

Even if an actor acts in a way that goes beyond what is justifiable ("goes too far"), he or she may, under exceptional circumstances, avoid liability under the rule of excessive action. This rule applies if circumstances were such that the actor had difficulty controlling his or her actions (Swedish Criminal Code, Ch. 24 Sec. 6). The nature of the situation – particularly the danger in question and the time at the actor's disposal – will be decisive in establishing whether the rule applies. Excessive action is an excuse, not a justification. It applies regardless of whether the danger was real or imagined (see above).

Swedish case law on necessity is sparse (if one disregards the numerous cases where the prosecution has managed to disprove the existence of any danger, real or imagined). The reason is likely that many cases are dismissed by prosecutors and thus never reach the courts.[16]

3.2 Superior Orders

Can a soldier, regardless of rank, avoid criminal responsibility because he or she acted on the orders of a superior? The answer, as far as Swedish law is

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[14] The Swedish Supreme Court states the following in NJA 2004 s. 786 (authors' translation): "The requirement that the action taken under necessity be not unjustifiable implies that it must be warranted by an interest of considerably greater significance than the one sacrificed by the action. It is natural that the appraisal of different interests will vary over time."

[15] See Norée, Annika, "Dödligt våld möjligt mot befarade självmordsbombare", in Nordlöf, Kerstin (ed.), *Argumentation i nordisk straffrätt*, Stockholm: Norstedts Juridik 2013 p. 140–142.

[16] SOU 1988:7 p. 83.

concerned, is given in the Swedish Criminal Code, Ch. 24 Sec. 8, which states the following:

> An act committed by a person on the orders of the person under whose command they are does not result in them being held responsible if, in view of the nature of the command relationship, the nature of the act and the other circumstances, they have to obey the order.

Generally, a subordinate cannot avoid responsibility by alleging that he or she "simply followed orders". Every soldier is responsible for his or her own actions. The duty to follow orders does not imply blind obedience. Normally, a soldier has no duty to follow an order to commit a criminal act.[17]

It is, however, impossible to maintain this principle in all cases. It is of paramount importance within the armed forces that subordinates follow orders issued by their superiors. Accordingly, Ch. 21 Sec. 5 of the Swedish Criminal Code stipulates that a member of the armed forces who refuses or fails to obey an order from a superior, or improperly delays in carrying out the order, is guilty of insubordination, unless it is obvious that the order did not pertain to their duties. Similar actions during peace time will instead be punishable as evasion of national service contrary to Ch. 10 Sec. 2 of the Total Defence Service Act (1994:1809). It is, of course, unreasonable to punish a subordinate who receives an order to commit a criminal act whether they obey the order or not. An otherwise criminal act will therefore not be punishable, if the actor had to obey the order. It is important to note that the expression "had to obey the order" is understood in a very narrow sense. Any member of the armed forces has a general duty to follow orders; this alone is not enough for the successful application of the defence. In fact, liability is only excluded under exceptional circumstances. This defence is normally reserved for less serious offences. Even imagined superior orders constitute an admissible defence (see above).

Even if a soldier is acquitted under the defence of superior orders, his or her commanders may still be punished. Furthermore, a superior will be liable for failing to prevent and report the international crimes of his or her subordinates, even if the superior did not order the commission of the crimes.[18] An acquittal of one soldier due to superior orders does not preclude the conviction of his or her co-combatants. According to the case law of the Swedish Supreme Court, each member of a group has a certain responsibility for the actions of the group, even though the member in question has no command authority.[19]

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17 See RH 1997:73, which concerned police officers but is still of interest.

18 See Sec. 13–15 of the 2014 Act.

19 See NJA 1987 s. 655. Several policemen had unlawfully transported a person in a police van from the centre of Stockholm to its outskirts. Concerning one of the defendants, the Supreme Court found that he could not be considered a superior with respect to the others in the van. He was still found guilty, however, on the following grounds (authors' translation): "When a group of policemen serve together, as in the present case, each of them must be considered to have a certain responsibility for the actions of the group. Even a person without command authority must have a responsibility to intervene, if he sees another member of the group undertaking a manifestly illegal action, with the consequence that he otherwise may be considered co-responsible for what happens."

The limited scope of superior orders as a complete defence is mitigated by the provision in Ch. 23 Sec. 5 of the Swedish Criminal Code, which stipulates that the penalty for a person who was coerced into being an accomplice to an offence may be set lower than is otherwise prescribed for the offence; in minor cases no responsibility is assigned. This provision may apply to a soldier who has committed a crime because of fear of reprisals. This rule of minor complicity is sometimes seen as a justification, sometimes as an excuse.

Swedish legal scholarship is split on the question of whether superior orders itself is a justification or an excuse.[20] Those who contend that it should be seen as a justification argue that the defence centres on a conflict of interests between preventing crimes and maintaining obedience.[21] They also maintain that seeing superior orders as an excuse implies that it would be unreasonable to demand that a person who has been taught to follow orders should question them. [22]

In our opinion, there are good reasons for seeing superior orders as an excuse (which seems to be the way the defence is viewed under the Rome Statute). Any defence can be construed as a conflict of interests (otherwise, there would be no reasons for recognising the defence in the first place). The question, rather, is whether, under the conditions of the defence, the action was objectively permissible (was not a breach of the legal order) or was prohibited, but excusable for the actor (the action was a breach of the legal order, but the situation was such that it would be unreasonable to demand that the actor follow the law). It does not seem reasonable to us to view an action as permissible, i.e. as not constituting a breach of the law, just because it is undertaken in obedience to an order. It makes more sense to consider the action as prohibited, but to recognise the difficult position of the actor, who finds him- or herself caught between the law and the order. Neither is there any need to resort to claiming that soldiers are automatons incapable of questioning the orders given to them. Rather, seeing superior orders as an excuse relies on the understanding that refusing to follow an order may lead to criminal liability and disciplinary sanctions. The rationale of the defence is thus a soldier's warranted fear of such consequences. This fear should be taken seriously by the legal order (otherwise, it would work against itself) while at the same time it is a circumstance pertaining to the soldier personally (a civilian will have no reason to feel such fear). We believe, therefore, that superior orders should be seen as an excuse.

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[20] See Asp, Petter, Ulväng, Magnus, & Jareborg, Nils, *Kriminalrättens grunder*, 2 ed., Uppsala: Iustus 2013, p. 239–240; Asp, Petter, *[Anmälan av] Annika Norée: Laga befogenhet. Polisens rätt att använda våld*, Juridisk Tidskrift 2001–02 p. 163–164; cf. Frände, Dan, *Allmän straffrätt*, Helsingfors: Forum Iuris, 2012, p. 189; and Norée, Annika, *Laga befogehet. Polisens rätt att använda våld*, Stockholm: Jure, 2000, p. 244 and 252–253; Norée, Annika, *Dagens straffrätt*, Stockholm: Norstedts Juridik, 2016 p. 117–119; See also Leijonhufvud, Madeleine, Wennberg, Suzanne, & Ågren, Jack, *Straffansvar*, 10 ed., Stockholm: Norstedts Juridik, 2018, p. 85; and Ågren, Jack, *Brott och straff*, Stockholm: Norstedts Juridik, 2018, p. 54.

[21] See Asp, Ulväng, & Jareborg, 2013, p. 239.

[22] See Asp, Ulväng, & Jareborg, 2013, p. 240.

4 International Customary Law

Customary law is created through states' intentional application of a certain rule over time. That means that some questions might remain unregulated, either because states have not had the opportunity to consider them or because there are different opinions and none has prevailed. This is the case with defences in international criminal law. Scholarship on the issue is surprisingly sparse[23] and it is often difficult to distinguish a clear state practice. One reason for this may be that defences are a sensitive topic considering the kind of offences to which international criminal law applies.[24] Another is that defences are treated differently in common-law and civil-law systems (as demonstrated by the *Erdemovic* case discussed in the next section). Whatever the reason, it is often difficult to give a clear description of the way defences operate in international customary law.

4.1 Duress and Necessity

Unlike Swedish law, international criminal law distinguishes between the defence of duress and the defence of necessity. *Duress* obtains when the actor is threatened *by another person*. *Necessity*, on the other hand, applies when the danger that threatens the actor *does not emanate from another person*.[25]

It seems clear that duress as such is accepted as a defence in international customary law. The criteria for the application of the defence have in some sources been formulated as follows:

1. The act charged was committed under an immediate threat of severe and irreparable harm to life or limb.
2. There was no adequate means of averting such evil.
3. The crime committed was not disproportionate to the evil threatened.
4. The situation leading to duress must not have been voluntarily brought about by the person coerced.[26]

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[23] Eser, Albin, "Defences' in War Crime Trials", in Dinstein, Yoram & Tabory, Mala (ed.), *War Crimes in International Law*, The Hague: Martinus Nijhoff, 1996, p. 252.

[24] Ibid.

[25] See, for instance, Knoops, Geert-Jan Alexander, "The Diverging Position of Criminal Law Defences Before the ICTY and the ICC: Contemporary Developments", in Doria, José; Gasser, Hans-Peter & Bassiouni, M. Cherif (ed.), *The Legal Regime of The International Criminal Court*, Leiden: Martinus Nijhoff, 2009, p. 785. A broader definition of necessity may be found in the Separate and dissenting opinion of Judge Cassese in the case of *Prosecutor v. Erdemovic* (Case No. IT-96-22-A), ICTY A. Ch., Judgment, 7 October 1997, para. 14.

[26] Separate and dissenting opinion of Judge Cassese in the case of *Erdemovic*, ICTY A. Ch., 7 October 1997, para. 16. Cf. the passage quoted in Joint separate opinion of Judge McDonald and Judge Vohrah in the same case, para. 42. See also van der Wilt, Harmen, "Justifications and Excuses in International Criminal Law: An Assessment of the Case-law of the ICTY" in Swart, Bert & Sluiter, Göran (ed.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia*, Oxford: Oxford University Press, 2011, p. 289.

There is, however, no consensus on the specific meaning of these conditions. This is illustrated by the *Erdemovic* case from the ICTY.[27] The facts of the case were as follows. The defendant, while taking part in the Yugoslav wars, had been made to choose between participating in the execution of innocent civilians and being executed himself. He chose the former. One of the main questions before the Tribunal was whether duress can be a defence when the alleged crime is the killing of innocent civilians. The majority ruled that it could not. It found that no rule existed in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings.[28] Nor could any answer be found in general principles of law recognised by civilised nations.[29] In the absence of a clear answer in the legal sources, the majority based its decision on what can be described as considerations of policy.[30] One of the dissenting judges, Judge Cassese (presiding), agreed with the majority that no special rule of customary international law had evolved regarding the killing of innocent civilians, but concluded from this that the general rule on duress applied, i.e. that duress may amount to a defence.[31] It has been said that this decision illustrates the difference in the way duress is treated in common law (the majority) and civil law (the minority).[32] What is clear from the judgment is that international customary law has no rule regarding the applicability of duress in cases of the killing of innocent civilians.

It seems likely that necessity too is recognised as a defence in international customary law. It is, however, difficult to pinpoint the exact conditions necessary for its application.[33] In some cases, the courts have applied conditions similar to those applicable to duress.[34] Whether these decisions are representative of international customary law in general is unclear.

4.2 Superior Orders

Customary rules regarding duress and necessity might be somewhat vague in their outline, but it is even harder to find agreement on the question of whether the fact that the defendant was following orders can constitute a defence. The statutes of the Nuremberg and Tokyo tribunals in the wake of World War II as well as those of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) expressly excluded superior orders as a possible defence.[35] Legal scholarship is split on the subject, with views ranging from the argument that

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27 *Erdemovic*, ICTY A. Ch., 7 October 1997.

28 Joint separate opinion of Judge McDonald and Judge Vohrah, para. 55.

29 Ibid., para. 72.

30 Ibid., para. 73–88.

31 Separate and dissenting opinion of Judge Cassese in the same case, para. 12.

32 Zahar, Alexander and Sluiter, Göran, *International Criminal Law, A Critical Introduction*, Oxford: Oxford University Press, 2008, pp. 428-429; SOU 2002:98 p. 283.

33 Eser, 1996, p. 261–262.

34 Knoops, 2009, p. 786.

35 Ambos, 2011, p. 322.

superior orders should not even constitute a mitigating factor to the view that superior orders always should lead to an acquittal. A middle-of-the-road approach has gained ground in recent decades. This is the view that superior orders should be recognised as a complete defence, but only be applied with considerable restrictions.[36] As will be seen below in section 5.2, this is the solution adopted by the Rome Statute. It would be going too far, however, to contend that this approach – not to mention its specific formulation in the Rome Statute – reflects customary international law. One can only conclude that customary law lacks a rule on the applicability of superior orders as a defence in international criminal law.

5 The Rome Statute

5.1 Duress and Necessity

The main provision on duress and necessity in the Rome Statute is its article 31.1.d.[37] This stipulates that an actor shall not be criminally responsible if the conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may be either:

(i) made by other persons; or
(ii) constituted by other circumstances beyond that person's control.

The article is thus applicable both in the case of a threat made by another person and in the case of a danger that does not emanate from a human being. Hence the Rome Statute does not differentiate between duress and necessity (contrast this with what is said about international customary law in section 4.1 above). In the remainder of this section, we use the term “duress” for both kinds of situation.

Under the Rome Statute, duress will exclude criminal responsibility if the following five conditions are met:

1. There existed *a threat of imminent death or of continuing or imminent serious bodily harm* against the actor or another person.

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[36] Eser, 1996, p. 254–261.

[37] The Statute also contains a provision that grants a defence in cases which, under Swedish law, would be considered as self-defence or necessity (art. 31.1.c). The article in question stipulates that a person shall not be criminally responsible if, at the time of that person's conduct, he or she acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected.

2. The threat emanated from *other persons* or other *circumstances beyond the actor's control*.
3. The action was *necessary* to avoid the threat.
4. The action was *reasonable*.
5. The actor *did not intend to cause a greater harm* than the one sought to be avoided.

The threat must have been *real*, i.e. not just imagined by the actor.[38] He or she must have been *aware* of the existence of the threat.[39] The actor must furthermore have acted with the *purpose* of avoiding the threat ("acts [...] to avoid this threat").[40] As stated above, it does not matter whether the threat was made by other persons or caused by other circumstances beyond the actor's control, as long as the action was motivated by the threat.[41] Threats caused by the actor fall outside the scope of the defence.[42]

If the defence is applicable, the effects of the action will be weighed against the severity of the threat. Under some circumstances, this test might lead to the exclusion of culpability in a case of *killing under duress*.[43] This means that the Rome Statute, at least in theory, goes further in the application of this defence than both the Swedish Criminal Code and the majority in the *Erdemovic* case (discussed in section 4.1 above). This is another indicator of the lack of established customary practice on the issue.

5.2 Superior Orders

Article 33 of the Rome Statute contains a provision on superior orders and prescription of law. It is formulated as follows:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:

(a) The person was under a legal obligation to obey orders of the Government or the superior in question,

(b) The person did not know that the order was unlawful, and

(c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

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38 Satzger, Helmut, *International and European Criminal Law*, Munich: C.H. Beck, Hart, Nomos, 2012, p. 230.

39 Ambos, Kai, *Treatise on International Criminal law, Volume I: Foundations and General Part*, Oxford: Oxford University Press, 2013, p. 360.

40 Satzger, 2012, p. 230.

41 Cryer, Robert, Friman, Håkan, Robinson, Darryl, & Wilmshurst, Elizabeth, *An Introduction to International Criminal Law and Procedure*, Cambridge: Cambridge University Press, 2007, p. 340.

42 Satzger, 2012, p. 231.

43 Ambos, 2013, p. 363 and 366.

Generally, superior orders will not exclude criminal liability under the Rome Statute. However, there are situations where this defence can lead to an acquittal. As noted above (section 4.2), this is a difference compared to the regimes of the earlier temporary international tribunals. This indicates a lack of clear state practice on the issue.

According to article 31.1, the successful application of the defence requires that

(a) the person was under a *legal obligation* to obey the order,
(b) the person *did not know* that the order was unlawful, and
(c) the order was *not manifestly unlawful*.

If these three conditions are met, the actor will avoid responsibility. He or she may have acted contrary to law, but it would be unreasonable to punish a subordinate who believed that the order was lawful. In such circumstances, the actor must be able to rely on it not being illegal to follow the order. The defence of superior orders is therefore an excuse under the Rome Statute (even if this is not stated explicitly).[44] Consequently, the Statute requires that the actor did not know that the order was unlawful. This is logical, because it makes little sense to argue that one should be able to rely on it not being illegal to follow an order that one knows to be contrary to international law.

According to article 33.2, orders to commit genocide or crimes against humanity are manifestly unlawful by definition. This means that the defence is only applicable to war crimes.

There is a close connection between superior orders and duress. In practice, it may be hard to draw a clear line between the scopes of these two defences and they have often been considered together in international jurisprudence.[45]

6 The Differences between Swedish Law and the Rome Statute

In this section, we summarise the differences between Swedish law and the Rome Statute. We omit other international regimes from the comparison, e.g. the rules governing the ICTY and ICTR as well as international customary law. The reasons for this omission are, first, that these regimes (particularly customary law) can be vague in their outlines, and second, that it seems unlikely that Swedish (or other national) courts will apply these rules in a national case, something that has happened with the Rome Statute (see section 7).

The following table illustrates the central differences between Swedish law and the Rome Statute.

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[44] Ambos, 2013, p. 310 and 385.

[45] A thorough survey of the defence of superior orders as applied by national courts in international contexts can be found in Obote-Odora, Alex, *The Judging of War Criminals. Individual Criminal Responsibility Under International Law*, Stockholm: Stockholms universitet, 1997, p. 81–91. See also the above-mentioned case of *Erdemovic*, ICTY A. Ch., 7 October 1997.

THE SWEDISH CRIMINAL CODE	THE ROME STATUTE
DURESS / NECESSITY	
Ch. 24 Sec. 4	Art. 31.1.d
Exists when a danger threatens life, health, property or some other, important interest that is protected by the legal order.	Requires a threat of imminent death or of continuing or imminent serious bodily harm against the actor or another person.
Cannot completely exclude criminal responsibility in cases of intentional killing.	Can, in theory, completely exclude criminal responsibility in cases of intentional killing.
Constitutes a justification.	Constitutes an excuse, at least when the threat originates from another person.[46]
The origin of the danger is irrelevant.	The actor must not have caused the threat (art. 31.1.d i and ii *e contrario*).
It is irrelevant whether the actor is aware of the danger.	The actor must be aware of the threat.
The prosecution must present such evidence as to make the allegation seem unwarranted.	The prosecution must prove beyond reasonable doubt that a situation of duress / necessity was not at hand.[47]
SUPERIOR ORDERS	
Ch. 24 Sec. 8	Art. 33
Applicable to all crimes.	Cannot be applied in cases of crimes against humanity and genocide (art. 33.1.c and 33.2).
Does not require that the actor was unaware that the order was illegal.	Requires that the actor was unaware that the order was illegal (art. 33.1.b).
Has often been described as a justification.[48]	Is considered an excuse.[49]

7 Swedish Case Law

Of the ten or so cases concerning international crimes that have been adjudicated by the Swedish courts, seven have featured claims that a defence was applicable. In this section, we summarise these judgments, focusing on the question of defences. The cases are presented in chronological order.

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[46] Ambos, 2013, p. 364.

[47] Ambos, 2013, p. 313.

[48] See section 3.2 above.

[49] This seems to be relatively uncontroversial. The reason for this position is that it is difficult to ever consider the actions in question – war crimes – *justified* (permitted by the legal order). Instead, the defence takes into account the difficult situation facing a soldier who has received an illegal order.

The case of Makitan (Stockholm District Court, case B 382-10)

The defendant was charged with, *inter alia*, gross crimes against international law contrary to the 1986 Act. According to the indictment, the defendant had, during an international armed conflict between, on the one hand, Yugoslavia and, on the other, Bosnia-Herzegovina and Croatia, as a member of a paramilitary organisation, guarded illegally detained civilians in a camp and contributed to the infliction on them of serious suffering and inhuman treatment.

The defendant admitted to having been a member of the paramilitary organisation and to having guarded prisoners to a certain extent. He pleaded not guilty, however, arguing, among other things, that he was merely following orders.

The District Court concluded that the defendant had acted partly in a way that constituted crimes against international law. When dealing with the defence of superior orders, the Court mentioned both the Swedish provisions and the corresponding articles of the Rome Statute. Thereafter, the Court observed that superior orders, both according to Swedish legislation and under international law, normally do not exclude criminal responsibility if the orders were unlawful. Given the circumstances of the case, the Court found it obvious that any orders, if such existed, had been unlawful. The defendant could therefore not avoid responsibility even if he in some cases had acted under the orders of a superior.[50] The defendant was found guilty of gross crimes against international law.

The case of M.M. (Stockholm District Court, case B 5373-10 / Svea Court of Appeal, case B 1248-12)

The defendant was charged with, *inter alia*, gross crimes against international law contrary to the 1986 Act. According to the indictment, the defendant had, as a member of the Serbian special forces, during a non-international armed conflict between Serbia and an Albanian paramilitary organisation, taken part in murder, kidnapping and arson directed against persons who had not taken active part in the hostilities or had ceased to do so.

The defendant pleaded not guilty to the criminal charges, alleging that he had not been present when the crimes were committed. He also contested the victims' action for damages, first on the ground that he had not committed the crimes and secondly on the ground that all actions alleged by the prosecution would in any case have been undertaken pursuant to superior orders and that the claims therefore ought to be directed against the Serbian state.

The District Court concluded that the defendant *had* taken part in some of the actions alleged in the indictment and found him guilty of, among other things, gross crimes against international law. The Court did not discuss any defence in connection with the criminal charges. When considering the action for damages, the Court outlined the rules on superior orders in both the Swedish Criminal Code and the Rome Statute. Thereafter, the Court stated, using the same

[50] See p. 77 of the judgment. The page numbers in this and the following footnotes refer to the page in the original Swedish version of the judgment.

reasoning as in the Makitan case (see above),[51] that superior orders, both according to Swedish legislation and under international law, do not normally exclude criminal responsibility if the orders were unlawful. Given the circumstances of the case, the Court found it obvious that any orders, if such existed, had been unlawful. The defendant could therefore not avoid civil liability even if he had acted on a superior's orders.[52]

The Court of Appeal found that the prosecution had failed to prove that the defendant had taken part in the actions alleged in the indictment. The Court therefore dismissed the criminal charges as well as the action for damages.

The case of Abdulkareem (Blekinge District Court, case B 569-16 / Scania and Blekinge Court of Appeal, case B 3187-16)

The defendant was charged with war crimes contrary to Sec. 4, para. 1 p. 7 and para. 2 of the 2014 Act. According to the indictment, the defendant had, during an internal armed conflict between Iraq and the Islamic State, as a member of the Iraqi army or a militia loyal to said army, subjected protected persons to humiliating or degrading treatment by, *inter alia*, posing and letting himself be photographed next to the desecrated bodies of deceased persons.

The defendant admitted to posing next to the bodies and letting himself be photographed with them, but alleged that he had been ordered to do so and that he could have been killed if he had not been fully loyal to the army.

The District Court found that some of the photographs in the indictment were such that they objectively constituted war crimes. Thereafter, the Court went on to simultaneously consider the defendant's intent and his allegation that he had been coerced into posing for the photographs. The Court found that nothing in the evidence suggested that the defendant had been forced to take part in the photographs. The Court considered that the circumstances were such that the prosecution had disproved the defendant's allegations of lack of intent and of necessity.[53] The defendant was found guilty of war crimes.

The Court of Appeal found that the acts of posing for all the photographs in the indictment objectively constituted war crimes. The Court of Appeal then referred to the reasons given by the District Court and agreed with that Court's conclusion that it was proved that the defendant had not acted in a situation of necessity or had lacked intent.[54] The Court thus also found the defendant guilty of war crimes.

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51 Note that a district court judgment is not generally considered an authority in Swedish law.

52 See p. 57 of the judgment.

53 See p. 17–18 of the judgment.

54 See p. 3–4 of the judgment.

The case of Droubi (Södertörn District Court, cases B 13656-14 and B 2639-16 / Svea Court of Appeal, case B 4770-16)

The defendant was charged with exceptionally gross assault contrary to Ch. 3 Sec. 6 of the Swedish Criminal Code and crimes against international law contrary to the 1986 Act. According to the indictment, the defendant, a member of the Free Syrian Army, had, during an internal armed conflict between Syria and the Free Syrian Army, inflicted severe bodily harm on a person placed *hors de combat*.

At the first District Court trial (case B 13656-14), the defendant admitted to having harmed a person placed *hors de combat*, but pleaded not guilty, alleging, among other things, that he had acted in order to avoid being killed himself. He claimed that he had been forced to become a member of the armed group, that he was told to commit the assault and that he himself would have been killed or injured if he had refused.

The District Court found that the accused had acted in the way the prosecution alleged in the indictment. Regarding the defendant's claim that he had been at risk of being murdered or injured himself, the Court found, without giving any grounds, that there could be no doubt that the accused had acted of his own free will.[55] He was found guilty of, *inter alia*, crimes against international law.

The judgment was appealed against and the case was taken up by the Court of Appeal. At that point, the victim, whose identity had been unknown, was identified. Due to the changed evidentiary situation, the Court of Appeal remanded the case to the District Court.

At the second District Court trial (case B 2639-16), the defendant took by and large the same position as at the first trial *vis-à-vis* the question of defences.

The District Court found that the defendant had assaulted the injured party substantially in accordance with the indictment. Concerning the question of defences, the Court concluded, on specific grounds, that neither the accused nor the witnesses for the defence were credible and that the allegation that the defendant had acted out of necessity therefore was unwarranted.[56] The defendant was found guilty of exceptionally gross assault. He was, however, acquitted of crimes against international law on grounds that had no connection with defences.

The judgment was appealed again and the case was taken up by the Court of Appeal (case B 4770-16). The Appeals Court wholly shared the District Court's reasoning regarding the question of necessity,[57] thus also finding the defendant guilty of exceptionally gross assault. He was moreover found guilty of crimes against international law.

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55 See p. 16 of the judgment.

56 See p. 35 of the judgment.

57 See p. 4 of the judgment.

The case of Haisam (Stockholm District Court, case B 3787-16 / Svea Court of Appeal, case B 2259-17)

The defendant was charged primarily with gross crimes against international law contrary to the 1986 Act. According to the indictment, the defendant had, during a non-international armed conflict between Syria and a number of armed groups, as a member of one such group, participated in the execution of a number of persons placed *hors de combat*.

The defendant admitted having participated in the execution but alleged that he had been ordered to carry out a death sentence pronounced by a legitimate court.

The District Court interpreted the defendant's allegation as a plea of *inter alia* the defence of superior orders. In the pertinent part of the judgment, the Court first outlined the rules on superior orders in the Rome Statute. The Court stated that the principles enunciated in the Statute were only meant to govern the jurisprudence of the ICC and that, consequently, there was no obligation to incorporate them in national legal orders. The Court nonetheless chose to mention these provisions, but without giving reasons for doing so. It then went on to outline the Swedish provisions on superior orders. Concerning the case at hand, the Court found that it could be ruled out that the executions had been preceded by a fair trial in a legitimate court, that the accused must have been aware of this and that the prosecution therefore had proved its case.[58]

The Court of Appeal concurred with the District Court's conclusions that the executions had not been preceded by a fair trial in a legitimate court and that the accused had been aware of this. Thereafter, the Court of Appeal stated that this conclusion regarding the defendant's knowledge meant that there was no reason to consider the rest of his arguments, among them the defence of superior orders.[59] The Court of Appeal affirmed the District Court's judgment.

An appeal was launched to the Supreme Court (case B 3157-17), but the case was not given a review permit, meaning that the Supreme Court declined to try the case and left the Appeals Court judgment standing.

The case of Abdullah (Södertörn District Court, case B 11191-17)

The defendant was charged with crimes against international law contrary to the 1986 Act. According to the indictment, the defendant had, during a non-international armed conflict in Syria, as a member of the Syrian armed forces, subjected protected persons to humiliating or degrading treatment by, *inter alia*, posing and letting himself be photographed next to dead or severely injured persons that had been positioned in a degrading way.

The defendant admitted to having posed next to the persons and letting himself be photographed with them, but pleaded not guilty, arguing that he had only followed orders and that a failure to do so would have resulted in him being executed or humiliated.

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58 See p. 28–40 of the judgment, primarily p. 28–29 and 39–40.

59 See p. 6–7 of the judgment.

The District Court found that the defendant's actions constituted the *actus reus* of crimes against international law. Regarding the question of defences, the Court outlined the Swedish provisions on necessity and concluded, on specific grounds, that the defendant's allegation of necessity seemed unwarranted and, furthermore, that he could not have believed that a situation of necessity was at hand.[60] The defendant was found guilty of crimes against international law.

The case of Saeed (Örebro District Court, case B 1662-18 / Göta Court of Appeal, case B 939-19)

The defendant was charged with war crimes contrary to Sec. 4, para. 1 p. 7 and para. 2 of the 2014 Act. According to the indictment, the defendant had, during a non-international armed conflict in Iraq, taken part in the hostilities on the side of the Iraqi state against the Islamic State, and had in four instances, together with others, subjected protected persons to humiliating or degrading treatment by posing and letting himself be photographed and filmed next to dead persons' bodies which were lying on the ground, in some cases mutilated.

The defendant admitted to posing next to the bodies and letting himself be photographed with them, but pleaded not guilty on the grounds that he had been ordered to be in the photographs. Had he refused, he would have been treated in the same way.

The District Court found, on specific grounds, that the prosecution had disproved the defendant's claim that he had been coerced into participating. The Court also pointed out that the allegation of coercion first appeared at the main hearing (i.e. not during the police interrogations).[61] The defendant was found guilty of war crimes.

The Court of Appeal found that the accused's own actions themselves "constituted crimes of such nature that he, in any case, could not have avoided criminal responsibility due to superior orders". The Court of Appeal affirmed the District Court's guilty verdict but lowered the sentence (from one year and three months to one year).[62]

The Appeals Court verdict has been appealed against and the Supreme Court has decided to grant a review permit (case B 5595-19). The case is currently pending before the Supreme Court.

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60 See p. 5–6 and 15–16 of the judgment.

61 See p. 13–14 of the judgment.

62 The Court of Appeal noted that the case law on crimes against dead bodies committed on foreign soil is sparse. If the defendant had committed a similar act in Sweden in peacetime, it would have been considered an offence against the peace of the grave (see Ch. 16 Sec. 10 of the Swedish Criminal Code). The punishment for that crime ranges from a fine to two years' imprisonment. Given this background, the Court found that the combined penal value of the defendant's crimes corresponded to one year's imprisonment.

8 Analysis

Above, we have briefly outlined the two defences so far considered by Swedish courts in cases concerning international crimes: necessity (including duress) and superior orders. We have also demonstrated how the Swedish provisions differ from the international rules and reported on seven cases concerning international crimes where Swedish courts have had to consider defence pleas. In this final section, we analyse the case law against the background of the discussion in the previous sections.

8.1 Applicable Law

Swedish judges seem to be unsure of which legal regime – the Swedish Criminal Code or international law – ought to be applied to defences, and particularly to superior orders (e.g. the District Court in the *Haisam* case, the *Makitan* case and the District Court in the case of *M.M.*). Given that superior orders are treated somewhat differently in the two legal systems, the question of choice might have some importance (even though the likelihood of acquittal is rightly minimal under both systems).

As already pointed out in the introduction to this article, Swedish courts must apply Swedish legislation when they adjudicate cases of international crimes. This is a corollary of the basic principle that Swedish courts may only apply Swedish criminal law. International law may thus be incorporated into Swedish penal practice only if internal Swedish provisions refer to it, as has been done in several instances in the 2014 Act.[63] Such a reference has never been made, however, regarding defences, and this in all likelihood is due to the lack of consensus within international law on how these are to be formulated. The general rule on the exclusive applicability of Swedish law must therefore apply.

In this context, we particularly want to stress that Swedish courts should not directly apply the Rome Statute when dealing with defences. The Statute governs the work of the ICC. It implies no obligation for the contracting parties to criminalise the actions described in it or to adopt its rules on defences.[64] The Statute is thus not a legal order that is superior to internal Swedish law, but one that is parallel to it. Applying the Rome Statute can therefore not be compared to directly relying on an EU directive in a Swedish case; rather, it is comparable to applying German law in a Swedish case.

Neither is it possible to argue that the Rome Statute reflects international customary law when it comes to defences. As has been shown above, this is an area where consensus has been lacking. Rather than reflecting the customary law that was in force at the time, the Statute therefore is the result of a compromise made by the contracting parties at the time of its creation.

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63 E.g. Sec. 2 para. 1 p. 4–8.

64 See Friman, Håkan, "Political and Legal Considerations in Sweden Relating to the Rome Statute for the International Criminal Court" in Lee, R S (ed.), *States' Responses to Issues Arising from the ICC Statute, Constitutional, Sovereignty, Judicial Cooperation and Criminal Law*, p. 121–145, Ardsley: Transnational Publishers, 2005, p. 139–140; and prop. 2013/14:146, p. 67 and 71. See also Klamberg, Mark, *The Evolution of Swedish Legislation on International Crimes*, Scandinavian Studies in Law, 2020, vol. 66, Section 6.

The simple upshot of the above discussion is that Swedish courts should apply internal Swedish rules on defences (mainly Ch. 24 of the Swedish Criminal Code) when dealing with international crimes. This is also true of the standard of proof, i.e. the defendant's claim must seem unwarranted in order to be disregarded.

8.2 Correctly Identifying the Applicable Defence

In four of the seven cases discussed above (*Abdulkareem*, *Droubi*, *Abdullah* and *Saeed*), the defendants' allegations that a defence was applicable were dismissed on evidentiary grounds – simply put, the courts did not believe them. This is in line with what one would expect, given how such allegations are usually treated by the Swedish courts.

However, the courts do not always observe that the same factual allegation may encompass several defences; it is of no relevance here whether the defendant expressly pleads only one defence.[65] In this context, it is particularly important to note that an allegation that a defendant was following orders and that refusal to do so could lead to him or her being executed encompasses both the defence of necessity (duress under international law) and that of superior orders (see the cases of *Abdulkareem, Abdullah* and *Saeed*). This is important because it will often be more difficult to dismiss the defence of superior orders on evidentiary grounds than is the case with necessity. It may be easy, in light of a video recording or similar evidence, to find that the accused participated voluntarily and that the claim of coercion seems unwarranted. It is more difficult to dismiss an allegation of having acted under orders, at least in a military context, because the defence of superior orders will be applicable even if the defendant was happy to obey. In practice, the importance of this observation for the question of criminal liability as such is limited, since the kinds of action discussed here will, for all intents and purposes, never be completely excused due to superior orders under Swedish law. What does seem possible, at least in less serious cases (e.g. the *Abdullah* and *Saeed* judgments), is that superior orders may be considered as a mitigating circumstance when sentencing under Ch. 29, Sec. 3 para. 1 p. 5 of the Swedish Criminal Code. It is therefore important to keep in mind that the same factual allegation may encompass several defences.

8.3 Defences and Intent

The courts sometimes seem to have difficulty in distinguishing between an allegation that a defence is applicable and an allegation that the defendant was lacking intent (e.g. the case of *Abdulkareem* and the Court of Appeal in the *Haisam* case). To shed some light on this problem, it makes sense to divide it into several sub-questions.

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[65] Without going too much into Swedish procedural law, it is enough to point out that the court must independently assess all the facts of the case and consider whether any of them are such that the defendant must be acquitted. The court is therefore not bound by the defences expressly pleaded by the accused.

First, as stated above, Swedish law requires that the defendant committed the *actus reus* (in the narrow sense) with intent. For instance, a question might arise whether the defendant killed a certain person intentionally or was aware[66] of the fact that said person was injured and therefore a protected person (see Sec. 3 and Sec. 4 para. 1 p. 1 of the 2014 Act). These types of question must be settled first, before the court considers whether any defence might be applicable. This is because these two concepts – intent and defences – are separate from one another. It is possible that a defendant committed the *actus reus* with intent (e.g. killed an injured person) but that this happened in a situation where a defence is applicable (e.g. threat of death to the actor); the opposite can of course also happen. These two questions should therefore not be confused.

Another issue is whether a defence requires that the accused was aware of the situation that made the defence applicable. In Swedish law the answer is no, at least as far as justifications are concerned.[67] Even an actor who is unaware of the fact that a situation of necessity is at hand may rely on that defence. Excuses, on the other hand, are defences of a personal nature and require awareness on the part of the actor. The most common excuse under Swedish law – excessive action – is, moreover, hard to even imagine without awareness on the part of the actor.

The third problem concerning intent is the opposite of the second – what happens if the situation in reality was not such that a defence is applicable, but the defendant thought that this was the case? As explained above (see section 2), these kinds of imagined defences are accepted in Swedish law. This applies to all kinds of defences. If the defendant believed him- or herself to be in a situation that, had it been real, would have met the requirements of a defence, the court must base its judgment on the defendant's (erroneous) understanding of reality and acquit him or her, if the action had been permitted in a corresponding real situation.[68]

8.4 Conclusions

Our survey of Swedish case law shows that none of the defendants was acquitted due to a defence. Such a restrictive attitude seems reasonable in light of the severity of the crimes in question. It is, however, important to remember that defences should not be dismissed perfunctorily, since they can have bearing not only on the question of criminal responsibility as such, but also on the sentencing. Besides this, our survey shows a clear uncertainty concerning the applicable law. As discussed above, we believe that the answer to this question is simple: Swedish courts should exclusively apply Swedish rules on defences.

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66 In reality, the Swedish law of intent is rather more complicated than the expression "be aware of" suggests, see Lekvall, Ebba and Martinsson, Dennis, *The Mens Rea Element of Intent in the Context of International Criminal Trials in Sweden*, Scandinavian Studies in Law, 2020, vol. 66.

67 See prop. 1993/94:130 p. 31. See also Asp, Ulväng, & Jareborg, 2013, p. 215. The provisions of the Rome Statute, as we have seen above in section 5, differ in this respect, but Swedish courts should not apply them.

68 More on this topic in Asp, Ulväng, & Jareborg, 2013, p. 344–345.

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