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International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia since 1991

Case No. IT-96-22-A

Date: 7 October 1997

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IN THE APPEALS CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Gabrielle Kirk McDonald
Judge Haopei Li
Judge Ninian Stephen
Judge Lal Chand Vohrah

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **7 October 1997**

PROSECUTOR

v.

DRAŽEN ERDEMOVIĆ

SEPARATE AND DISSENTING OPINION OF JUDGE CASSESE

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Appellant:

Mr. Jovan Babić

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Although I voted for points 1, 2, 3 and 5 of the Disposition, to my regret I find I disagree with both the views and the reasoning of the majority of the Appeals Chamber. As I cannot set out my dissent *in extenso*, I shall confine myself to two questions that appear to me to be particularly important:

(i) the extent to which our International Tribunal may rely on national law for the elucidation of the notion of "guilty plea"; this is a question where, although the views of the majority and my own views have become closer and closer (a normal occurrence in the work of a collegiate body), I still feel I need to set out my approach to the matter, as I propounded it from the outset;

(ii) the question whether duress can be urged and admitted as a defence in case of war crimes and crimes against humanity whose underlying offence involves the killing of innocent persons. This is a question where I radically disagree with the majority and therefore need to append my Dissenting Opinion.

I. THE NOTION OF A GUILTY PLEA

(OR: THE EXTENT TO WHICH AN INTERNATIONAL CRIMINAL COURT CAN RELY UPON NATIONAL LAW FOR THE INTERPRETATION OF INTERNATIONAL PROVISIONS)

A. General Remarks

1. It is my contention that the provisions of the Statute of the International Tribunal ("Statute") and the Rules of Procedure and Evidence ("Rules") - respectively Article 20, paragraph 3, and Rule 62 - dealing with the guilty or not-guilty plea, do not necessarily imply a reference to the legislation and case-law of common-law countries.

Such reference to national law is not indispensable, for the notion of "guilty plea" can be constructed fairly easily on the strength of the Statute. Reference to national law, if at all necessary, can only be made to take account, with all due caution, of the wealth of distinctions propounded by national courts. This reference to national law might cast some light on the possible implications and ramifications of the notion, but ultimately that notion must be autonomously construed on the basis of the international provisions of the Statute.

2. I shall dwell on this matter because it has an importance largely transcending the specific question under discussion. The point at issue is the extent to which an international criminal court may or should draw upon national law concepts and transpose these concepts into international criminal proceedings.

To my mind notions, legal constructs and terms of art upheld in national law should not be automatically applied at the international level. They cannot be mechanically imported into international criminal proceedings. The International Tribunal, being an international body based on the law of nations, must first of all look to the object and purpose of the relevant provisions of its Statute and Rules.

3. This approach is dictated by three fundamental considerations. Firstly, the traditional attitude of international courts to national-law notions suggests that one should explore all the means available at the international level before turning to national law.

On this score it should be noted that international courts have consistently held that even in the case of international rules embodying national-law notions, an effort must be made to construe those notions in the light of the object and purpose of the international rules or of their general spirit. Reliance on legal notions or concepts as laid down in a national legal system can only be justified if international rules make explicit reference to national law or if such reference is necessarily implied by the very content and nature of the concept.

An instance of implied reference to national law can be seen in the customary international rule whereby a State can exercise the right of diplomatic protection, or institute international judicial proceedings, on behalf of its nationals[1]. To apply this international rule, namely to determine whether or not a specific individual has the nationality of a State, the international judge must perforce look into and apply the national legislation of the relevant State[2].

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[1] *See, e.g., Panevezys-Saldutiskis Railway*, P.C.I.J., Series A/B, no. 76, p. 16; *Barcelona Traction* case, I.C.J. Reports 1970, p. 33, para. 36.

[2] *See, e.g., Nottebohm* case, I.C.J. Reports 1955, p. 13 ff.

Whenever reference to national law is not commanded expressly, or imposed by necessary implication, resort to national legislation is not warranted. In this regard, it may suffice to mention two cases. In its Advisory Opinion in the *Exchange of Greek and Turkish Populations* case, the Permanent Court of International Justice asked itself whether, for the purpose of interpreting the word "established" used by the Lausanne Convention VI of 30 January 1923 to describe a portion of the Greek inhabitants of Constantinople, it had to make reference to national legislation. It concluded in the negative, observing that such a reference "would not be in accordance with the spirit of the Convention"; the Court went on to say that "the Convention [was] self-contained" and therefore in order to decide what constituted an "established inhabitant" one "must rely on the natural meaning of the words"[3]. A similar attitude was taken in a Decision of 25 June 1952, by the French-Italian Conciliation Commission. The Commission had to interpret the words "authorised to reside" in Article 79, para. 1, litt.c of the Peace Treaty of 10 February 1947 between the Allied and Associated Powers and Italy. Plainly, the word "residence" is a term of art in most national systems, and one might have expected that the Commission would apply the national law of the relevant State. Indeed, the French Government argued that the verb "reside" implied a reference to the national legislation of the State of residence or alleged residence. The Commission rejected this argument, stating that:

> As the Peace Treaty does not define expressly what is meant by residence, the interpreter must infer this definition from the purpose the Allied and Associated Powers intended to pursue by Art. 79 para. 6 litt. *c*.[4]

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[3] P.C.I.J., Series B, No. 10, p. 20. The Court had started off by considering "whether the Convention contains any express or implicit reference to national legislation for the purpose of determining what persons are to be regarded as 'established'" (*ibid.*, p. 19). After noting that no express reference could be found, the Court wondered whether the Convention made an implicit reference to national legislation. In this connection the Court pointed out that "[I]t does not necessarily follow that, by reason of the nature of the situation contemplated in the Convention, there must be an implied reference to national legislation. Whereas the national status of a person belonging to a State can only be based on the law of that State, and whereas, therefore, any convention dealing with this status must implicitly refer to the national legislation, there is no reason why the local tie indicated by the word 'established' should be determined by the application of some particular law. It may very well be that the Convention contemplated a mere situation of fact, sufficiently defined by the Convention itself without any reference to national legislation. The Court is of opinion that this is the case as regards the condition implied by the word 'established' in Article 2 of the Convention. . . . It is hardly likely that the intention was to fix the criterion by means of a reference to 'national legislation'." (*Ibid.*, pp. 19-20.)

[4] Translation mine. Original French text in *U.N. Reports of International Arbitral Awards*, vol. XIII, p. 398.

One might wonder why international courts show such great caution in drawing upon national law when establishing the meaning of national law concepts and terms. Indeed, such caution might be regarded as inconsistent with the fact that the whole body of international law owes so much to national or municipal rules: as is well known, over the years international norms have greatly borrowed from the internal law of sovereign States, particularly from national private law. However, this historical spilling over from one set of legal systems into the law of nations does not detract from these legal systems (those of States on the one side, and international law, on the other) being radically different: their structure is different, their subjects are different, as are their sources and enforcement mechanisms. It follows that normally it would prove incongruous and inappropriate to apply in an inter-State legal setting a national law concept as such, that is, with its original scope and purport. The body of law into which one may be inclined to transplant the national law notion cannot but reject the transplant, for the notion is felt as extraneous to the whole set of legal ideas, constructs and mechanisms prevailing in the international context. Consequently, the normal attitude of international courts is to try to assimilate or transform the national law notion so as to adjust it to the exigencies and basic principles of international law.

4. The second consideration militating in favour of using great circumspection before transposing national law notions into international law is inextricably bound up with the very subject-matter under discussion. A note of warning about importing national concepts "lock, stock and barrel" into the international field, was sounded by such eminent international judges as McNair[5] and Fitzmaurice[6]. Both judges were referring to private law concepts. Their view should *a fortiori* apply to criminal law. International criminal procedure results from the gradual decanting of national criminal concepts and rules into the international receptacle. However, international criminal procedure does not originate from a uniform body of law. It substantially results from an amalgamation of two different legal systems, that obtaining in common-law countries and the system prevailing in countries of civil-law (although for historical reasons, there currently exists at the international level a clear imbalance in favour of the common-law approach). It is therefore only natural that international criminal proceedings do not uphold the philosophy behind one of the two

[5] *See* his separate opinion in the *South West Africa* case, I.C.J. Reports 1950, pp. 148-49.
[6] *See* his separate opinion in the *Barcelona Traction* case, *supra,* n. 1, pp. 66-67.

national criminal systems to the exclusion of the other; nor do they result from the juxtaposition of elements of the two systems. Rather, they combine and fuse, in a fairly felicitous manner, the adversarial or accusatorial system (chiefly adopted in common-law countries) with a number of significant features of the inquisitorial approach (mostly taken in States of continental Europe and in other countries of civil-law tradition). This combination or amalgamation is unique and begets a legal logic that is qualitatively different from that of each of the two national criminal systems: the philosophy behind international trials is markedly at variance with that underpinning each of those national systems. Also the Statute and Rules of the International Tribunal, in outlining the criminal proceedings before the Trial and Appeals Chambers, do not refer to a specific national criminal approach, but originally take up the accusatorial (or adversarial) system and adapt it to international proceedings, while at the same time upholding some elements of the inquisitorial system.

It follows that - unless expressly or implicitly commanded by the very provisions of international criminal law - it would be inappropriate mechanically to incorporate into international criminal proceedings ideas, legal constructs, concepts or terms of art which only belong, and are unique, to a specific group of national legal systems, say, common-law or civil-law systems. Reliance upon one particular system may be admissible only where indisputably imposed by the very terms of an international norm, or where no autonomous notion can be inferred from the whole context and spirit of international norms.

5. The third reason discouraging a mechanical importation of notions from national law into international criminal proceedings is that such a process may alter or distort the specificity of these proceedings. International trials exhibit a number of features that differentiate them from national criminal proceedings. All these features are linked to the fact that international criminal justice is dispensed in a general setting markedly different from that of national courts: international criminal courts are not part of a State apparatus functioning on a particular territory and exercising an authority of which courts partake. International criminal courts operate at the inter-State level. They discharge their functions in a community consisting of sovereign States. The individuals over whom these courts exercise their jurisdiction are under the sway and control of sovereign States. Many important consequences follow from this state of affairs. Here I shall confine myself to stressing only

the most striking one: an international criminal court has no direct means at its disposal of enforcing its orders, summonses, and other decisions; to compel individuals under the sovereignty of a State to comply with its injunctions, it must rely on the cooperation of that State. To lose sight of this fundamental condition, and thus simply transplant into international law notions originating in national legal systems, might be a source of great confusion and misapprehension. The philosophy behind all national criminal proceedings, whether they take a common-law or a civil-law approach, is unique to those proceedings and stems from the fact that national courts operate in a context where the three fundamental functions (law-making, adjudication and law enforcement) are discharged by central organs partaking of the State's direct authority over individuals. That logic cannot be simply transposed onto the international level: there, a different logic imposed by the different position and role of courts must perforce inspire and govern international criminal proceedings.

6. The foregoing considerations warrant, I submit, the following propositions. Any time international provisions include notions and terms of art originating in national criminal law, the interpreter must first determine whether these notions or terms are given a totally autonomous significance in the international context, i.e., whether, once transposed onto the international level, they have acquired a new lease of life, absolutely independent of their original meaning. If the result of this enquiry is in the negative, the international judge must satisfy himself whether the transplant onto the international procedure entails for the notion or term an adaptation or adjustment to the characteristic features of international proceedings. This exploration should be undertaken by examining whether the general context of international proceedings and the object of the provisions regulating them delineate with sufficient precision the scope and purpose of the notion and its role in the international setting. Only if this enquiry leads to negative conclusions is one warranted to draw upon national legislation and case-law and apply the national legal construct or terms as they are conceived and interpreted in the national context.

As a rule of thumb it can be said that normally neither the first nor the third hypothetical situation arises; it is more plausible and in keeping with the purpose and spirit of international proceedings that the second one will prevail.

A case in point is the notion of a "guilty plea", as I shall endeavour to show below.

B. The Notion Of A Guilty Plea In The Light Of The Tribunal's Statute

7. The system, laid down in Article 20, paragraph 3, of the Statute and enunciated in Rule 62 of the Rules, of pleading guilty or not guilty to the charges set out in the indictment against an accused, is clearly drawn from the criminal procedure of common-law countries. This practice does not have a direct counterpart in the civil-law tradition, where an admission of guilt is simply part of the evidence to be considered and evaluated by the court. However, notwithstanding its origin in a particular national setting, the true import and scope of this notion may be grasped without necessarily referring to the legislation and case-law of common-law countries.

8. It is apparent from the whole spirit of the Statute and the Rules that, by providing for a guilty plea, the draftsmen intended to enable the accused (as well as the Prosecutor) to avoid a possible lengthy trial with all the attendant difficulties. These difficulties - it bears stressing - are all the more notable in international proceedings. Here, it often proves extremely arduous and time-consuming to collect evidence. In addition, it is imperative for the relevant officials of an international court to fulfil the essential but laborious task of protecting victims and witnesses. Furthermore, international criminal proceedings are expensive, on account of the need to provide a host of facilities to the various parties concerned (simultaneous interpretation into various languages; provision of transcripts for the proceedings, again in various languages; transportation of victims and witnesses from far-away countries; provision of various forms of assistance to them during trial, etc.). Thus, by pleading guilty, the accused undoubtedly contributes to public advantage. At the same time, the accused may find his pleading guilty beneficial to his own condition. Firstly, it may help him to salve his conscience and atone for his wrongdoing. Secondly, he will avoid the indignity and the possible demoralisation of undergoing a trial, as well as the psychological ordeal he would have to go through during examination and cross-examination of witnesses (and possibly also of himself as a witness); he will also eschew the public exposure that may ensue from trial, and the adverse consequences for his social position and the life of his family and relatives.

Thirdly, the accused may expect that the court will recognise his cooperative attitude by reducing the sentence it would have imposed had there not been a plea of guilty: in other words, the accused may hope that the court will be more lenient in recognition of his admission of guilt.

9. This procedural "short-cut" must not, however, be allowed to curtail the rights of the accused or, more generally, prove detrimental to the general principle of fair trial. This is barred by Article 20, paragraph 1, of the Statute, whereby:

> The Trial Chamber shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

In other words, under the Statute the demands for expeditiousness and efficiency must not turn out to be prejudicial to, nor to have an adverse bearing upon, the requirements of justice. Attention should be drawn in particular to the provisions of Article 21, notably to paragraphs 2, 3 and 4(g)[7]. These provisions lay down fundamental rights of the accused which constitute absolute minimum guarantees. If the accused, by pleading guilty, decides to waive his right to a trial, this waiver may only be admitted under very stringent conditions.

10. It follows from the above that the guilty plea must be voluntary, that is to say not obtained by threats, inducements or promises. A guilty plea implies that the accused relinquishes his right to a proper trial, namely to proceedings in which he is presumed innocent until his guilt is proved beyond a reasonable doubt and in which he would be entitled to examination and cross-examination of witnesses as well as all the judicial safeguards laid down in Article 21 of the Statute. Therefore, such a waiver of a fundamental right must of

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[7] Art. 21 (Rights of the accused):
". . .
(2) In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute.
(3) The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
(4) In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
(a) - (f) . . .
(g) not to be compelled to testify against himself or to confess guilt."

necessity be free and voluntary. This conclusion is borne out by an important fact: both the Statute and the Rules deliberately do not make provision for plea bargaining - or, at least, of any endorsement or acknowledgement by the Chambers of out-of-court plea bargaining. This means, among other things, that the framers of the Statute and the Rules aimed at averting those distortions of the free will of the accused which may be linked to plea bargaining.

Furthermore, the plea must be made by a defendant who is *compos sui*, that is to say whose mental health is not in doubt. The plea must not result from a deranged state of mind whereby the defendant accuses himself of imaginary crimes in order to satisfy a psychological propensity for delusive self-punishment. Plainly, to accept such a plea would be a miscarriage of justice. To ward off such a danger, the court must satisfy itself that the prosecution has collected enough evidence to substantiate or corroborate the guilty plea; in other words, the court must ascertain that a sufficient factual basis for the plea has been shown by the prosecution.

Moreover, the guilty plea must be entered in full cognisance of its legal implications. To uphold a plea not entered knowingly and understandingly would distort justice; more specifically, it would mean jeopardising or vitiating the fundamental right of the accused in Article 21, paragraph 3, of the Statute to be "presumed innocent until proved guilty according to the provisions of the [Tribunal's] Statute".

Another consequence following from the principles set out above is that the guilty plea must not be ambiguous or equivocal. The accused cannot be allowed on the one hand to admit to his guilt and by the same token nullify this plea by claiming that he acted in self-defence, or under a mistake of fact, or for some other reason which would exculpate him. In this case the accused, while affirming that he has committed a crime, would in the same breath deny his responsibility. The rejection of such a guilty plea as invalid proves necessary not only on grounds of legal logic (a court cannot entertain a plea that is inherently contradictory). There is also another, and even more compelling reason for dismissing a guilty plea tainted by the flaw in question. Whenever all the aforementioned requirements for a valid guilty plea are met, a court, with a view to then proceeding to determine the penalty, can accept a plea that the person has indeed committed a crime. For reasons of public

advantage, the court can assume that the "self-incrimination" is valid and move on to the sentencing stage. This skipping of the trial stage is not however admissible with regard to the existence or non-existence of a defence involving the absence of *mens rea* or at any rate constituting an excuse or a justification. Whether or not such a defence can be urged *in casu* must be proved in court, through trial proceedings, for if the specific defence is substantiated in court, it follows that the accused is not guilty and must be acquitted.

These are my conclusions concerning the conditions which must be met before a guilty plea may be accepted by a Trial Chamber. They are reached by virtue of a contemplation of the unique object and purpose of an international criminal court, and the constraints to which such a court is subject, rather than by reference to national criminal courts and their case-law. I submit the former approach may show that the latter is unnecessary and, indeed, inappropriate.

II. DURESS

(OR: THE QUESTION OF WHETHER INTERNATIONAL CRIMINAL LAW UPHOLDS THE COMMON-LAW APPROACH TO DURESS IN CASE OF KILLING)

A. Introduction

11. I also respectfully disagree with the conclusions of the majority of the Appeals Chamber concerning duress, as set out in the Joint Separate Opinion of their Honours Judge McDonald and Judge Vohrah and on the following grounds:

(i) after finding that no specific international rule has evolved on the question of whether duress affords a complete defence to the killing of innocent persons, the majority should have drawn the only conclusion imposed by law and logic, namely that the general rule on duress should apply - subject, of course, to the necessary requirements. In logic, if no exception to a general rule be proved, then the general rule prevails. Likewise in law, if one looks for a special rule governing a specific aspect of a matter and concludes that no such rule has taken shape, the only inference to be drawn is that the specific aspect is regulated by the rule governing the general matter;

(ii) instead of this simple conclusion, the majority of the Appeals Chamber has embarked upon a detailed investigation of "practical policy considerations" and has concluded by upholding "policy considerations" substantially based on English law. I submit that this examination is extraneous to the task of our Tribunal. This International Tribunal is called upon to apply international law, in particular our Statute and principles and rules of international humanitarian law and international criminal law. Our International Tribunal is a court of law; it is bound only by international law. It should therefore refrain from engaging in meta-legal analyses. In addition, it should refrain from relying exclusively on notions, policy considerations or the philosophical underpinnings of common-law countries, while disregarding those of civil-law countries or other systems of law. What is even more important, a policy-oriented approach in the area of criminal law runs contrary to the fundamental customary principle *nullum crimen sine lege*. On the strength of international

principles and rules my conclusions on duress differ widely from those of the majority of the Appeals Chamber. I shall set out below the legal reasons which I believe support my dissent.

12. In short, I consider that: (1) under international criminal law duress may be generally urged as a defence, provided certain strict requirements are met; when it cannot be admitted as a defence, duress may nevertheless be acted upon as a mitigating circumstance; (2) with regard to war crimes or crimes against humanity whose underlying offence is murder or more generally the taking of human life[8], no special rule of customary international law has evolved on the matter; consequently, even with respect to these offences the general rule on duress applies; it follows that duress may amount to a defence provided that its stringent requirements are met. For offences involving killing, it is true, however, that one of the requirements (discussed at paragraph 42 below) - proportionality - would usually not be fulfilled. Nevertheless, in exceptional circumstances this requirement might be met, for example, when the killing would be in any case perpetrated by persons other than the one acting under duress (since then it is not a question of saving your own life by killing another person, but of simply saving your own life when the other person will inevitably die, which may not be 'disproportionate' as a remedy); (3) the Appeals Chamber should therefore remit the case to a Trial Chamber on the issue of duress (as well as on the issue that the plea was not informed), directing the Trial Chamber to enter a not-guilty plea on behalf of Dražen Erdemović (the "Appellant") and then to satisfy itself, in trial proceedings, whether or not the Appellant acted under duress and consequently, whether or not he is excused.

[8] A terminological point: the key issue for consideration here is whether under international law duress may be a complete defence to a charge of crimes against humanity or war crimes when the underlying offence is the killing of an innocent human being. This is the phrase used by the Prosecutor in the Respondent's Brief of 28 Apr. 1997 and it reflects the offence with which the Appellant is charged. It is worth mentioning, however, that the indictment against the Appellant charges him with a crime against humanity (murder) and, alternatively, a violation of the laws or customs of war (murder). The term "murder" is not defined in the Statute, nor in common Article 3 of the 1949 Geneva Conventions which prohibits "murder". The definition of "murder" also varies from one national jurisdiction to another; some jurisdictions, e.g. the State of Pennsylvania in the United States of America, even recognise as many as three different degrees of murder.
For the purposes of this Opinion, the issue is whether duress may be a defence to the killing of innocents. I do not consider that, as far as this issue is concerned, it makes any difference whether one refers to such an offence as "killing", "unlawful killing", or "murder" provided that it is understood that it is the killing of innocents without lawful excuse or justification (except, possibly, the defence of duress) with which we are concerned. Similarly, for our purposes it is not material whether a person is accused of murder, manslaughter, etc., as a principal or as an accessory.

13. Before I dwell on the specific question of duress in relation to crimes involving the taking of innocent lives, I consider it useful, and indeed necessary, briefly to expound the general notion of duress and the conditions for its applicability in international criminal law.

B. Notion And Requirements Of Duress

14. Duress, namely acting under a threat from a third person of severe and irreparable harm to life or limb, entails that no criminal responsibility is incurred by the person acting under that threat. Duress is often termed "necessity", both in national legislation and in cases relating to war crimes or crimes against humanity. I too will have occasion to use these two terms as equivalent. However, as rightly pointed out in the British Manual of Military Law, from a technical viewpoint, necessity proper also covers situations other than those where one is faced with threats or compulsion of a third party, for instance the condition where a person "in extremity of hunger kills [another person] to eat him"[9]. In other words, necessity is a broader heading than duress, encompassing threats to life and limb generally and not only when they emanate from another person.

15. It is also important to mention that, in the case-law, duress is commonly raised in conjunction with superior orders. However there is no necessary connection between the two. Superior orders may be issued without being accompanied by any threats to life or limb. In these circumstances, if the superior order is manifestly illegal under international law, the subordinate is under a duty to refuse to obey the order. If, following such a refusal, the order is reiterated under a threat to life or limb, then the defence of duress may be raised, and superior orders lose any legal relevance. Equally, duress may be raised entirely independently of superior orders, for example, where the threat issues from a fellow serviceman. Thus, where duress is raised in conjunction with manifestly unlawful superior orders, the accused may only have a defence if he first refused to obey the unlawful order and then only carried it out after a threat to life or limb.

[9] *The Law of War on Land*, 1958, para. 630, n. 1.

16. Let us now turn to the conditions applicable to the defence of duress. The relevant case-law is almost unanimous in requiring four strict conditions to be met for duress to be upheld as a defence, namely:

(i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;

(ii) there was no adequate means of averting such evil;

(iii) the crime committed was not disproportionate to the evil threatened (this would, for example, occur in case of killing in order to avert an assault). In other words, in order not to be disproportionate, the crime committed under duress must be, on balance, the lesser of two evils;

(iv) the situation leading to duress must not have been voluntarily brought about by the person coerced[10].

In addition, the relevant national legislation supports the principle that the existence in law of any special duty on the part of the accused towards the victim may preclude the possibility of raising duress as a defence[11].

17. It is worth insisting on the fourth requirement just mentioned, in order to highlight its particular relevance to war-like situations. According to the case-law on international humanitarian law, duress or necessity cannot excuse from criminal responsibility the person who intends to avail himself of such defence if he freely and knowingly chose to become a

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[10] The position on duress is summarised in vol. XV of the *Law Reports of Trials of War Criminals*, U.N. War Crimes Commission (H.M. Stationery Office, London, 1949) ("*Law Reports*"), p. 174. For the relevant case-law *see*, in particular, the *Trial of Otto Ohlendorf et al., ("Einsatzgruppen"* case), in Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, (U.S. Govt Printing Office, Washington D.C., 1950) ("*Trials of War Criminals*"), vol. IV, pp. 471 and 480-81; the *High Command* case, *ibid.*, vol. XI, p. 509; the *Trial of Gustav Alfred Jepsen and Others, Proceedings of a War Crimes Trial held at Lüneburg, Germany* (13-23 Aug. 1946), judgement of 24 Aug. 1946 ("the *Jepsen* case"), (original transcripts in Public Record Office, Kew, Richmond) (I have filed with the International Tribunal's library all those sections of the Proceedings which I mention in this Separate Opinion) at 357; the *Fullriede* case, decision of 10 Jan. 1949 of the Dutch Special Court of Cassation, in *Nederlandse Jurisprudentie* 1949, no. 541, p. 987, and in *Annual Digest*, 1949, p. 549; *Eichmann v. Attorney-General of the Government of Israel, ("*the *Eichmann* case"), decision of the Supreme Court of Israel, 36 I.L.R. 277 (1962) at p. 318; *R. v. Finta*, decision of 24 Mar. 1994, in [1994] 1 R.C.S., at 837.

[11] *See e.g.,* Art. 54 (2) of the Italian Penal Code, Art. 10(4) of the Penal Code of the Socialist Federal Republic of Yugoslavia and the identical Art. 10 (4) of the Penal Code of the Federal Republic of Yugoslavia (Serbia and Montenegro), Art. 35(1) of the German Penal Code.

member of a unit, organisation or group institutionally intent upon actions contrary to international humanitarian law[12].

C. The Question Of Whether Duress Can Be A Defence To Violations Of Humanitarian Law Involving Killing

18. I have set out above, for clarity's sake, the general requirements which the case-law, in my view, establishes in order for duress to succeed as a defence. I shall elaborate on some of these requirements in due course.

Before I enunciate the reasons for my dissent, I should briefly recall that the Office of the Prosecutor (the "Prosecution") and the majority of the Appeals Chamber take a different view of the international legal regulation of duress in cases involving the killing of innocent persons. According to the Prosecution a customary rule, or exception, has evolved in international law specifically excluding the applicability of duress as a defence to such crimes. By contrast, the majority of the Appeals Chamber holds the view that no such special rule has

[12] In addition to the *Einsatzgruppen* case, *supra* n. 10, and *Trial of Erhard Milch* ("the *Milch* case"), *Trials of War Criminals,* vol. III, p. 964 (respectively in *Law Reports*, vol. VIII, p. 91 and vol. VII, p. 40), both decided by United States courts sitting at Nürnberg, some cases brought after the Second World War before German courts are particularly significant in this respect, for those courts also acted on the strength of Control Council Law No. 10 - an international instrument which to a large extent has become part of customary law. Thus, in a case decided by the German Supreme Court in the British Zone, the two accused had been members of the National-Socialist party, one being Colonel (*Standartenführer)* of the SA, the other a committee member of the NSDAP (Nazi party). They had participated in attacks on synagogues on 10 Nov. 1938 (*Kristallnacht*) and in arson. They claimed that they acted upon superior orders and in addition under duress (*Notstand*). The Court dismissed the claim, pointing out that: "As an old member of the [National-Socialist] Party T. knew the programme and the fighting methods of NSDAP. If he nevertheless made himself available as official *Standartenführer*, he had to count from the start that he would be ordered to commit such crimes. Nor, in this condition of necessity for which he himself was to blame, could he have benefited from a possible misapprehension of the circumstances that could have misled him as to the condition of necessity or compulsion (*see Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. 1, 1949, p. 201 (translation mine). *See also* the following German cases: decision of 17 Feb. 1949 of the *Oberlandesgericht* of Freiburg im Breisgau (text in *Höchstrichterliche Entscheidungen. Sammlung der Oberlandesgerichte und der Obersten Gerichte in Strafsachen*, vol. II, pp. 200-03) as well as the decision of 5 Sept. 1950 by the German Supreme Court in the British occupied zone (*ibid.*, vol. 1, pp. 129-30).
A number of cases brought before the Italian Court of Cassation can also be mentioned: *see, e.g.*, the decision of 24 Sept. 1945 in the *Spadini* case (in *Rivista penale*, 1946, p. 354), the decision of 10 May 1947 in the *Toller* case (*ibid.*, 1947, p. 920), the decision of 24 Feb. 1950 in the *Fumi* case (*ibid.*, 1950, vol. II, p. 380).
The same position has been recently taken by the Court of Appeal of Versailles in the *Touvier* case (decision of 2 June 1993). The Court held that: "[N]o justification, be it founded on the state of necessity or on the defence of a third party, can be legitimately invoked by an official of the Militia such as Touvier who, by virtue of his office, was naturally under the obligation to satisfy the requirements of the Nazi authorities. The very nature of this occupation, which he freely chose, implied regular cooperation with operations such as the SD or the Gestapo" (unpublished text, translation mine).

come into being; however they contend that in the absence of such a rule one ought to apply general policy considerations; the result of this application is the same as the one reached by the Prosecution through a different path: also for the majority of the Appeals Chamber duress cannot be admitted as a defence for crimes involving killing, but might only be urged in mitigation.

I disagree with both views. For the sake of clarity, I shall start with the arguments put forward by the Prosecution.

1. The Prosecution's contention

19. The Prosecution has submitted that there exists a "sufficiently clear norm" of customary international law which specifically precludes duress as a defence to violations of humanitarian law involving the taking of innocent life[13]. The Prosecution has based this conclusion on the following reasoning:

(i) the authoritative source on which one can draw to determine whether an international rule has evolved on the matter is the case-law of military tribunals of the occupying powers sitting in judgement after the Second World War. This case-law has greater precedential value than national case-law since those military tribunals were established under Control Council Law No. 10 of 20 December 1945, which has become part of customary international law;

(ii) three cases brought before these courts have decisive weight, because the issue of duress was not decided upon as an *obiter dictum* but by way of *ratio decidendi* and in addition the ruling of these courts was supported by legal authorities. These cases are *Stalag Luft III*[14] and *Feurstein*[15], both decided by British courts in Germany, plus *Hölzer et al*[16], decided by a Canadian court in Germany.

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[13] *See* Respondent's Brief on Preliminary Questions as Required by the Scheduling Order of 5 May 1997, filed, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, 20 May 1997, pp. 2-8; Transcript, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, *("Appeals Transcript")* 26 May 1997, pp. 16-23.

[14] *See Trial of Max Wielen and 17 Others, Proceedings of a Military Court held at Hamburg* (*"Stalag Luft III"* case) (1 July 1947 - 1 Sept. 1947), judgement of 2-3 Sept. 1947 (files WO 235/424-32 in Public Record Office, Kew, Richmond), (I have filed with the International Tribunal's library those sections of the Proceedings that I mention in this Opinion); *Law Reports,* vol. XI, p. 31.

[15] *See Trial of Valentin Feurstein et al., Proceedings of a Military Court held at Hamburg* (4-24 Aug. 1948), Public Record Office, Kew, Richmond, file no. WO 235/525. *("Feurstein et al.")* (I have filed with the International Tribunal's library those sections of the Proceedings that I mention in this Opinion); *Law Reports,*

Two other cases, which took a contrary position, namely *Jepsen*[17], decided by a British court sitting in Germany and *Einsatzgruppen*[18], decided by a United States Court sitting at Nürnberg, should, according to the Prosecution, be disregarded. The former, because it did not provide any authority and in addition preceded in time the other two aforementioned British cases, hence was overruled by them as *lex posterior*; the latter case because the American court did not take account of the previous British and Canadian cases, provided no authority for its *ratio decidendi* and hence substantially made an "arbitrary statement" of law.

(iii) The three aforementioned cases reflect customary international law as well as general principles of law; consequently it is warranted to conclude that there exists a customary rule of international law barring duress as a defence to killing.

I respectfully find that the Prosecution's argument is wholly lacking in merit.

2. Critical appraisal of the Prosecution's arguments based on case-law

20. My objections to the Prosecution's submissions are based (i) on the case-law invoked by the Prosecution and (ii) on the case-law it does not invoke.

21. As for the case-law relied upon by the Prosecution, let me start with a minor objection. It is simply not correct to contend that the military tribunals of the Occupying Powers referred to by the Prosecutor "were jurisdictions of equal authority" constituted under Control Council Law No. 10, which has acquired customary international law status; consequently, that their decisions would have more weight than those of national jurisdictions on the issue at stake[19]. Contrary to the Prosecution's submissions, the three British military tribunals were instituted under the Royal Warrant of 14 June 1945 and the Regulations for the Trial of War Criminals

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vol. XV at p. 173.

[16] *See Record of Proceedings of the Trial by Canadian Military Court of Robert Hölzer and Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany,* ("*Hölzer et al.*") 25 Mar.- 6 Apr. 1946, vol. 1. (I am grateful to the Canadian Department of National Defence - Office of the Judge-Advocate-General - for providing me with copy of these records, that are now on file in the International Tribunal's library.)

[17] *See Jepsen* case, *supra,* n. 10.

[18] *See Einsatzgruppen* case, *supra,* n. 10.

[19] *Appeals Transcript, supra,* n. 13, p. 53.

appended thereto[20]. They consequently were of national jurisdiction. Similarly, the Canadian military tribunal which decided *Hölzer et al.* was set up under the War Crimes Regulations (Canada)[21] and was, therefore, also of national jurisdiction. Both the British and Canadian tribunals applied their own national law on matters not covered by international criminal law, such as duress[22]. By contrast, the United States Military Tribunal II, sitting at Nürnberg - which heard the *Einsatzgruppen* case - was established under Control Council Law No. 10. Therefore, of the Tribunals referred to, this alone can be regarded as having an international character - at least, as far as its origin was concerned. Besides, on matters not covered by that Law, it applied German law (the law of the defendants) besides referring to Soviet law (the law of the territory where most crimes had been committed, or *lex loci delicti commissi*).

22. My major objection, however, is that a careful perusal of the cases at issue (the original records of which I consulted in the British Public Record Office in Kew, Richmond) shows that they have been misinterpreted by the Prosecution.

For the British Military cases, the Prosecution contends that *Jepsen* - which allowed duress, in principle, for violations of humanitarian law involving killing - has been overruled in time by *Stalag Luft III* and *Feurstein et al.* As I will show, this is simply not the case. *Stalag Luft III* also left open the possibility that duress could be a defence to unlawful killing. As for *Feurstein et al* the Judge-Advocate's *dictum* on duress was *obiter* since none of the accused raised the defence of duress.

23. As the Prosecutor admitted, the *Jepsen*[23] case stands for the proposition that duress may be a defence even where the underlying offence involves the killing of innocents. This case related to the killing of six internees by Jepsen, a Dane who worked as a guard in a German concentration camp. In April 1945, as the Allied troops were approaching, the German authorities ordered that the internees be transferred to another camp, those who were fit on foot, those who were ill by train. Jepsen was one of the guards escorting the train. During the

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[20] Text in Telford Taylor, *Final Report of the Secretary of the Army on the Nuernberg War Crimes Trials under Control Council No. 10*, Washington, 1949, p. 254 ff.
[21] P.C. 5831 of 10 Sept. 1945.
[22] However *Stalag Luft III* also referred to international law as expounded by H. Lauterpacht: *see infra*, para. 24.
[23] *Jepsen* case, *supra*, n. 10.

transfer there were various air raids and a large number of internees died, many of illnesses or starvation. At one point it was ordered that 52 internees still alive should be shot "to avoid typhus". Jepsen participated in the shooting by killing six internees. Although in his deposition made under oath he had not mentioned duress[24], during the trial proceedings, and then before sentencing, he claimed that the German *Obermaat* Engelmann who had given the order to kill all the internees, had compelled him at gunpoint to participate in shooting the internees[25]. His defence counsel pleaded among other things the state of necessity (*Notstand*) as provided for in Section 54 of the German Criminal Code[26]. The Judge-Advocate, in his summing-up, stated that duress could be invoked in the case, provided the requisite conditions were met[27]. The court found Jepsen guilty but, as the Judge-Advocate put it, since there was "an element of doubt as to whether or not [he] acted under some degree of compulsion", he was sentenced to life imprisonment rather than to death[28]. As I shall emphasise below (*see* paragraph 43), what appears to be particularly relevant in this case are the specific factual circumstances under which the alleged duress occurred, namely the inevitability of the victims' deaths.

24. Let us now move to the *Stalag Luft III* case, decided by a British Military Tribunal, sitting at Hamburg, Germany[29]. The 18 accused, all members of the SS, had separately

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[24] *Ibid.*, file WO 235/229, pp. 222-24.

[25] It should be noted that the two versions he gave of the episode were markedly different. In the course of trial proceedings, the accused was asked by his defence counsel what happened when he refused to obey the *Obermaat* Engelmann's order to shoot the internees. He answered that the *Obermaat* said "Well, you are an SS man . . . . And the SS is always so brutal and rough". According to Jepsen, he also said "This order stands just as much for you as for all others" and "If you do not take part [in the shooting] you will also immediately be shot on the spot" (*ibid.*, pp. 233-51, at 250). By contrast, after conviction and before being sentenced, Jepsen stated: "I have nothing to do with the whole transport and Engelmann held the pistol to my chest, counted to three and said if by the time he had counted to three I did not go over to help to shoot the internees he would shoot me" (*ibid.*, p. 363.)

[26] *Ibid.*, pp. 338-41. Section 54 of the German Criminal Code substantially corresponded to Section 35(1) of the German Criminal Code currently in force. Section 54 of the 1871 German Criminal Code provided that: "Apart from a case of self-defence, an act does not constitute a crime if it was committed in a situation of necessity for which the perpetrator was not responsible and which was not otherwise avoidable in order to avert a present danger to his own, or one of his close relatives' life or limb" (translation mine).

[27] "Duress can seldom provide a defence; it can never do so unless the threat which is offered as a result of which the unlawful act is perpetrated is a threat of immediate harm of a degree far far greater than that which would be created if the order were obeyed. . . . If you are contemplating that possibly this threat of death may provide a defence then let me ask you not to give effect to it unless you think that he [i.e. the accused] really was in danger of imminent death and that the evil threatened him was on balance greater than the evil which he was called upon to perpetrate" (*ibid.*, pp. 357-59).

[28] *Ibid.*, p. 363.

[29] *Stalag Luft III* case, *supra*, n. 14.

participated in the killing of 50 members of the RAF who, after escaping from a prisoner of war camp (*Stalag Luft III*) had been recaptured by the German Criminal Police (*Kripo*). Some of the accused urged among other things, that they had acted under duress: had they not obeyed the secret order of Himmler to kill all the escapees, they would have been put to death and be subjected to the so-called *Sippenhaft* (liability of all members of a family for the crimes of one member)[30]. The Judge-Advocate, in his summing-up, mentioned this plea of duress and, as a point of reference, started by quoting "our legal Bible", namely *Archbold's Criminal Law*, according to which, in case of killing, duress is no legal excuse. However, he then went on to consider the "more help[ful]" sources under international law, citing the international jurist, Sir Hersch Lauterpacht, who stated that: "[S]uch a degree of compulsion as must be deemed to exist in the case of a soldier or officer exposing himself to immediate danger of death as the result of a refusal to obey an order excludes *pro tanto* the accountability of the accused". (Emphasis added.) He qualified this by saying:

> [U]nless, indeed, we adopt the view, which cannot lightly be dismissed, that the person threatened with such summary punishment is not entitled to save his own life at the expense of the victim or, in particular, of many victims.[31]

Thus, the notion of excluding duress where it is a question of saving one's own life at the expense of others was mooted by Lauterpacht, but he did not pronounce upon its merits except to say that it should not "lightly be dismissed". Rather, as is clear from the further extracts of Lauterpacht cited with approval by the Judge-Advocate, Lauterpacht left open the possibility of duress as a defence where the accused was "acting under the immediate impact of fear of drastic consequences"[32]. Thus the Judge-Advocate did not unequivocally exclude the plea as a defence to unlawful killing; in fact, he expounded both the relevant British law

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[30] *Ibid.*, file 235/429, p. 22.

[31] Sir Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes,* 21 British Yearbook of International Law, (1944).

[32] "[T]he fact of superior orders . . . will not shield acts committed in pursuance of orders so glaringly offending against fundamental conceptions of law and humanity as to remove them from the orbit of any possible justification, including that of immediate danger to the person charged with the execution of the orders; it will not excuse crimes committed in obedience to unlawful orders in circumstances in which the person executing the crime was not acting under the immediate impact of fear of drastic consequences or summary martial justice following upon a refusal to act" (emphasis added): *See* transcript of the forty-eighth day of the trial, *Stalag Luft III* case, *supra,* n. 14, pp. 4-5.

and the rather ambivalent state of international law, as set out by Lauterpacht[33]. Crucially, then - and contrary to the Prosecutor's submissions - the *Stalag Luft III* case does not stand for the proposition that duress cannot be a defence to the killing of innocents. It did not, therefore, overrule the *Jepsen* case on this point.

To have a complete picture of the court's motivations, one should also emphasise that the Judge-Advocate insisted that in actual fact no instance of duress followed by death or "family collective punishment" had been provided by defence counsel in spite of the request of the Prosecutor. Also, the Judge-Advocate showed that in many of the specific cases at issue, it was extremely doubtful that the accused had actually been subjected to duress[34]. The same point had been forcefully made by the Prosecutor in his closing statement[35]. Almost all the defendants, including those who raised the defence of duress, were sentenced to death, which makes it clear that the court did not believe that the accused had acted under any form of coercion, since otherwise it would have entitled them to mitigation.

25. In *Feurstein et al.*[36] the accused were five senior German officers charged by the prosecution with the killing of unarmed British soldiers who had been taken prisoner. More specifically, they were all charged with participation in the execution of two prisoners of war at Ponzano, near La Spezia, Italy; in addition, two of the accused were charged with participation in the killing of two British prisoners of war at La Cisa Pass, Italy. In his opening statement the prosecutor pointed out that the defendants could not plead that they were under compulsion because of the so-called Führer Order, as they were officers and not ordinary soldiers detailed to be members of an execution squad. The prosecutor, however, clearly left open the possibility of duress being available to the accused. He stated:

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[33] In this respect, the report of the *Stalag Luft III* case which appears in vol. XV of the *Law Reports* is misleading in that it mentions the Judge-Advocate's quotation from Archbold as if this were the *ratio decidendi* of the case, but without mentioning that this was merely a quotation, nor that the Judge-Advocate went on to cite, with approval, another source which took a different approach.

[34] *Stalag Luft III* case, *supra,* n. 14, summing-up of the Judge-Advocate, p. 12 ff.

[35] In the case under discussion, the prosecutor, in his closing statement, mentioned duress and cited "the law of England"; however, he did not exclude its applicability to the case at issue on the ground that it involved killing; rather, he ruled out duress because in his view no compulsion had actually been exercised on the accused and in addition almost none of them had taken "a subordinate part" in the killing of the escapees. (*Ibid.*, transcript of the forty-seventh day of the trial, pp. 40-42.) It was also significant that all but one of the accused were members of the SS; hence, the voluntary membership of a criminal organization exception, referred to above, would have applied. (*See ibid.*, closing statement of the prosecutor, p. 40.)

[36] *Feurstein et al, supra,* n. 15.

> Now the question that arises here is that it will - I say inevitably - of course be the defence of some or all of these officers in the dock that they were as much under compulsion as the private soldiers who formed the execution platoon. That, of course, is a matter for you, and for you alone, to decide, and if, of course, you find that they were, well then you will acquit them". (Emphasis added.)

The prosecutor went on to say:

> [T]here was in existence at that time a special order known alternatively . . . as the Commando Order or as the Führer Order, which laid special obligations upon all officers in dealing with special categories of troops. . . . [I]t is possible, of course, that the accused - some or all of them - may plead in their defence that they were acting in accordance with superior orders. Well now, I think I can put it plainly and correctly in this way: that superior orders in themselves have never been a defence to a charge. You cannot, either in these courts . . . and certainly not in the criminal courts of England, go into the dock or into the box and say in your defence "So-and-so told me to do it". A man is personally responsible for his own action. What is a defence, of course, is a compulsion so strong that no free will is left to you, and again with regard to these men and that Commando Order, you have got to decide whether, in fact, the existence of the Commando Order put such a strong compulsion upon any or all these men that they were left with no option but to do what they did. (Emphasis added.)[37]

Although the prosecutor anticipated at the opening of the trial that a defence of duress or compulsion might be raised, none of the accused did so[38]. Therefore, when, in his summing-up, the Judge-Advocate ruled out the applicability of the defence of duress for killing, this was an *obiter dictum*[39]. The Judge-Advocate's direction was also a very narrow one, as it was based on a single decision of a British court - the *Dudley and Stephens* case[40]. In the event,

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[37] *See ibid.*, transcript of the first day of the trial, p. 4.

[38] Two of the accused (Knesebeck and von Menges) raised the defence of superior orders in relation to the Führer Order. (*See ibid.*, exhibit No. 38 and exhibit No. 39.)

[39] The Judge-Advocate stated: "[The] defence of 'duress and coercion' is not a defence in law. You are not entitled, even if you wished to save your own life, to take the life of another. There I may remind you of a case which is known as the Mignonette case [i.e., the *Dudley and Stephens* case], and in which a number of shipwrecked sailors, seeing no hope of reaching land, decided to kill one of their companions and to eat him. Lots were drawn, and in the end this object was carried out and one of these companions found his death in that way. Fortunately or unfortunately for these sailors, they were picked up and duly brought to trial . . . and they raised just this defence. They said: 'If we had not killed our companion, and had not eaten him, all of us would have starved and none of us would have been alive today'. This defence, Gentlemen, was rejected by the Court, and it was said that you must not take another's life in order to save your own" (*ibid.*, file WO 235/525, p. 6).

[40] *R. v. Dudley and Stephens*, (1884) 14 QBD 273, also known as the *Mignonette* case. Moreover, although the case is often held up as authority that necessity is no defence to killing, the court held in that case that the killing of the victim was not, as a matter of fact, necessary. As Lord Coleridge, C.J., pointed out: "They might possibly have been picked up the next day by a passing ship; they might possibly not have been picked up at all; in either

the tribunal found three defendants not guilty while the other two were sentenced to six months' imprisonment[41].

In conclusion, neither *Stalag Luft III* nor the *Feurstein et al* case support the proposition that duress is unavailable to an accused charged with unlawful killing; therefore they do not, as the Prosecution and the majority of the Appeals Chamber maintain, constitute *lex posterior* overruling *Jepsen*.

26. The next case to be considered, since it was referred to in argument by the Prosecution, is *Hölzer et al.*, decided on 6 April 1946 by a Canadian Military Court sitting at Aurich, Germany, and applying Canadian law[42]. In March 1945 three Canadian airmen abandoned their disabled aircraft near Opladen, in Germany, and were captured by German soldiers. One of the Canadians, who was wounded, was subsequently killed by the three German accused. These raised the defence of superior orders, as well as that of duress, claiming that they had been compelled at gunpoint by Lieutenant Schaefer (not among the accused) to kill the wounded airman[43]. Hölzer's defence counsel insisted on this plea of duress, both in his Opening Address and in his Closing Address. He relied generally on international law[44], but on the issue of duress he quoted German law and in particular Articles 52 and 54 of the

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case it is obvious that the killing of the boy would have been an unnecessary and profitless act" (emphasis added). In other words, that it was necessary to kill the victim was, at the time, pure speculation on the part of the accused.

It is interesting to note that a fairly similar occurrence, the killing and eating of their companions by 15 shipwrecked survivors on the raft of the *Méduse* in 1816, had a different judicial outcome in France. No prosecution was initiated for such killing and eating, but criminal proceedings were instituted in 1817 against the ship's captain for causing the shipwreck and abandoning the ship. *See* P. Moriaud, *Du délit nécessaire et de l'état de nécessité*, 1889, pp. 9-10; E. Sermet, *L'état de nécessité en matière criminelle*, 1903, p. 23; H. de Hoon, "*De l'état de nécessité en droit pénal et civil*", *Revue de droit belge*, 1911, pp. 30-31; Ph. Masson, *L'affaire de la Méduse - le naufrage et le procès*, 1972, especially p. 111 ff. *See also* Schadewaldt, *L'odyssée du "Radeau de la Méduse": Un exemple classique de "l'état de nécessité"*, *Revue internationale de criminologie et de police technique*, 1969, no. 2, p. 119 ff.; J. Graven, *L'"état de nécessité" justificatif des naufragés. À propos du Radeau de La Méduse, ibid.*, p. 135 ff.

[41] *Feurstein., supra,* n. 15, pp. 26-28.

[42] *See Hölzer et al., supra,* n. 16.

[43] Hölzer averred in his sworn statement that Schaefer had "pulled his pistol, held it against [him] and said 'Do you want to, or don't you want to?'"; when Hölzer gave the impression that his pistol had jammed, the lieutenant again "threatened [him] with his pistol" (*see ibid.*, vol. II, p. 26). His defence counsel stated before the Court that Hölzer had been forced to shoot after his life had been threatened by Schaeffer (*ibid.*, vol. I, pp. 289-99).

[44] *Ibid.*, p. 295.

German Criminal Code [45]. Also the defence counsel for the other two accused insisted on this plea[46].

The plea was however assailed by the prosecutor in his closing address: citing English law he excluded duress as a defence in the case of the taking of innocent lives[47]. In stating the law to the members of the court, the Judge-Advocate took the same position as the prosecutor: he too relied on English law to support his contention that duress can never excuse killing innocents[48]. The court sentenced both Hölzer and another accused (Weigel) to death, while it sentenced the third accused (Ossenbach) to 15 years' imprisonment[49].

In sum, this is the only case where the prosecutor and the Judge-Advocate clearly upheld - unquestionably by way of *ratio decidendi* - the position to the effect that duress can never excuse violations of humanitarian law involving killing of innocents. The prosecutor and the Judge-Advocate thereby applied the traditional common-law position which excludes duress to charges of the taking of innocent lives. However, the weight of this decision is belittled by the fact that in his summing-up the Judge-Advocate explicitly stated that the court should apply the Canadian War Crimes Regulations and Canadian law, not international law. In mentioning the Canadian Regulations as the law governing the case, he pointed out that they

> [N]either add[ed] to or creat[ed] new international law, but rather govern[ed] matters of procedure and evidence, upon which subjects international law is

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[45] *See ibid.*, Opening Address, vol. II, pp. 1-4; Closing Address, vol. I, pp. 289-90, 291-92, 304.

[46] Weigel's and Ossenbach's defence counsel relied upon duress in less forceful terms and only in passing (*see ibid.*, vol. I, p. 304; *see also* p. 312).

[47] *Ibid.*, vol. I, p. 315.

[48] The Judge-Advocate stated the following: "The threats contemplated as offering a defence are those of immediate death or grievous bodily harm from a person actually present[,] but such defence will not avail in crimes of a heinous character or if the person threatened is a party to an association or conspiracy such as the Court might find existed in this case. As to the law applicable upon the question of compulsion by threats, I would advise the Court that there can be no doubt that a man is entitled to preserve his own life and limb, and on this ground he may justify much which would otherwise be punishable. The case of a person setting up a defence that he was compelled to commit a crime is one of every day. There is no doubt on the authorities that compulsion is a defence when the crime is not of a heinous character. But the killing of an innocent person can never be justified. . . . Accordingly, if the Court does find that Hölzer fired after being subjected to dire threats on his own life, on which there is conflicting testimony, even then he is not excused upon the above mentioned fundamental principles, but it more properly goes in mitigation of punishment" (emphasis added), *ibid.*, vol. I, pp. 345-46. The Judge-Advocate relied upon British cases to support his proposition (*see ibid.*, p. 346).

[49] *See ibid.*, vol. I, p. 354. It should be noted that Ossenbach had not participated in the actual killing of the Canadian airman.

silent, and every State is entitled to make such provisions as it deems necessary and expedient.[50]

Among these matters of procedure and evidence the Judge-Advocate indicated the issue of superior orders, governed by Regulation 15; then, when he came to the question of duress, the Judge-Advocate mentioned British cases as precedents valid for Canadian law, and said that this was the applicable law[51]. It is thus clear that he himself was aware that the court was not applying international law on the issue of duress.

27. The opposite view was however taken in the *Einsatzgruppen* case by the United States Military Tribunal II sitting at Nürnberg[52]. As I pointed out before, this Tribunal, unlike all the other ones cited so far, acted under Control Council Law No. 10, and therefore its decisions carry more weight than the ones by national courts acting under national legislation. Indeed, as Control Council Law No. 10 can be regarded as an international agreement among the four Occupying Powers (subsequently transformed, to a large extent, into customary law), the action of the courts established or acting under that Law acquires an international relevance that cannot be attributed to national courts pronouncing solely on the strength of national law. However, as some issues such as that of duress were not covered by Control Council Law No. 10, the question arose of which law was applicable. In the *Einsatzgruppen* case the defence counsel for the lead defendant Ohlendorf submitted in his opening statement that the question of duress (or necessity, as he termed it) was to be looked at on the basis of three legal systems: United States law (as the law of the State administering justice in the case at issue), German law (as the law of the defendant) and Soviet law (as the law of the place where the alleged crimes had been committed)[53]. He then applied the three legal systems and concluded that necessity was applicable[54]. The Military Tribunal, in dealing with the plea of duress, cited

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[50] *Ibid.*, p. 338.

[51] *Ibid.*, pp. 345-46. It should be noted that the Regulations, while they contemplated the question of superior orders, were silent on duress; the Judge-Advocate therefore substantially suggested that this matter was to be settled in accordance with Canadian law. It is also to be noted that it was disingenuous of the Judge-Advocate to suggest that matters of defence were procedural and evidentiary issues upon which international law is silent. The question of possible defences - going, as it does, to the core of guilt or innocence - is clearly a matter of substantive law, and one about which international law may be ambivalent, as demonstrated above, but is certainly not "silent".

[52] *See Einsatzgruppen* case, *Trials of War Criminals, supra,* n. 10.

[53] *Ibid.*, pp. 56-59.

[54] *Ibid.*, pp. 61-82.

both Soviet law and German law[55], and held that duress could be urged as a defence even in case of unlawful killing, provided certain requirements were met. It is worth quoting the most important passage of the judgement:

> [I]t is stated that in military law even if the subordinate realises that the act he is called upon to perform is a crime, he may not refuse its execution without incurring serious consequences, and that this, therefore, constitutes duress. Let it be said at once that there is no law which requires that an innocent man must forfeit his life or suffer serious harm in order to avoid committing a crime which he condemns. The threat, however, must be imminent, real and inevitable. No court will punish a man who, with a loaded pistol at his head, is compelled to pull a lethal lever. Nor need the peril be that imminent in order to escape punishment. But were any of the defendants coerced into killing Jews under the threat to be killed themselves if they failed in their homicidal mission? The test to be applied is whether the subordinate acted under coercion or whether he himself approved of the principle involved in the order." (Emphasis added.)[56]

Before our Appeals Chamber the Prosecution submitted that this statement is to be disregarded, as the Military Tribunal did not cite any authority in support thereof. With respect, I disagree. It is apparent from the whole judgement that the Tribunal did not need to cite any case-law for, as stated above[57], it substantially relied upon German law, which recognises duress as a defence to any charges[58]. It should be added that *in casu* the Military Tribunal did not uphold the plea of duress and sentenced most of the defendants to death.

28. It appears from the above survey of the case-law cited by the Prosecution that it is unwarranted to contend that an exception to the customary rule that duress is a defence to a criminal charge has evolved on the matter, removing offences involving unlawful killing from the ambit of duress. This alleged exception would only be supported by one case, *Hölzer et al.*, and would run counter to a case of greater authority, *Einsatzgruppen*.

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[55] *Ibid.*, pp. 462-63, pp. 471-72.
[56] *Ibid.*, p. 480.
[57] *See supra*, para. 21.
[58] Although the Tribunal did not cite any specific provision of German law when dealing with the issue of duress, it repeatedly mentioned German provisions when discussing the more general question of superior orders (which it sometimes conflated with duress); *see Trials of War Criminals, supra,* n. 10, pp. 471-73, 483-88.

29. Admittedly, the view propounded in *Hölzer et al.* is also upheld in the provisions of two military manuals. One is the British Military Manual, paragraph 629 of which provides:

> No criminal responsibility is incurred by a person for an act performed by him under an immediate and well-grounded fear for his own life, provided that the act does not involve the taking of innocent life. Otherwise threats afford no defence to a person accused of a war crime but may be considered in mitigation of sentence. (Emphasis added.)

The other military manual is the United States Manual for courts-martial, of 1984, whereby duress is a defence "to any offence except killing an innocent person"[59]. The view upheld in the case-law and military manuals just mentioned is clearly under the strong influence of English criminal law, which has traditionally rejected the notion that duress may ever excuse the killing of an innocent person[60], largely on the strength of the old authorities *Hale, Blackstone* and *Stephen*[61]. However, recent trends suggest fluctuations in this area of English law[62]. Besides, as has been cogently emphasised by Judge Stephen in his Separate and Dissenting Opinion, the case-law of common-law countries only envisages situations where an accused has a choice between his own life and the life of another, as distinct from cases where instead the choice was either death for another or death for both. This may be because the latter situation, which in its typical form arises where the accused is an unwilling member of a squad engaged in mass execution, almost never arises in a nation during peacetime, but only when the nation is at war. Be that as it may, it would clearly be unwarranted to infer, on the basis of one case decided under Canadian law (*Hölzer et al.*) and the international military regulations of two States, that a customary rule excepting murder-type offences from the ambit of duress has evolved in international criminal law.

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[59] *See* Rule 916(h) of the Rules for court-martial: "(h) coercion or duress: It is a defense to any offense except killing an innocent person that the accused's participation in the offense was caused by a reasonable apprehension that the accused or another innocent person would be immediately killed or would immediately suffer serious bodily injury if the accused did not commit the act. The apprehension must reasonably continue throughout the commission of the act. If the accused has any reasonable opportunity to avoid committing the act without subjecting the accused or another innocent person to the harm threatened, this defense shall not apply".

[60] *See, e.g., R. v. Howe and others* [1987], 1 AC 417, (House of Lords).

[61] Lord Hale, *Pleas of the Crown* (1800), vol. 1, at p. 51; *Blackstone's Commentaries on the Laws of England (4 Bl Com (1857 edn) 28),* Sir J. Stephen, *History of the Criminal Law of England (1883)*. See A. Dienstag's comment, "The common-law approach may be understood as a legacy of an earlier jurisprudence, but one cannot today accept its dogmatic imperatives" (*Fedorenko v. United States*: *War Crimes, the Defence of Duress, and American Nationality Law*, Columbia Law Review, vol. 82, pp. 120-83, at p. 145).

[62] Moreover, even in common-law jurisdictions, "abolishing the homicide exceptions to the duress defence is favoured by the weight of scholarly commentary" (Dienstag, *loc. cit.,* fn. 72)

30. In addition to the paucity of "evidentiary" material supporting the Prosecution's contention, there is an even more compelling reason for dismissing it. The Prosecution has failed to mention many other cases of violations of international law involving killing where the defence of duress was raised by the accused and which support a contrary conclusion. According to these cases, which are consistent with the penal law of the relevant States[63], if some basic conditions (corresponding to those I have set out above, in paragraphs 16-17) are met, duress can be regarded as a defence even when it entails the taking of innocent human life.

I shall dwell first on the case-law where the defence of duress, while being admitted by the courts in law, was dismissed on the facts. I shall then survey the case-law where duress was specifically considered available *in casu*.

3. Cases where courts did not except violations of international humanitarian law involving killing from the ambit and scope of duress

31. Before briefly surveying the cases where the defence of duress was rejected only on the facts, let me stress two points. Firstly, all these cases concern unlawful killing. Secondly, all the courts I shall cite indisputably started from the assumption that duress was available in cases of unlawful killing. They did not need to say so in so many words for the very simple reason that they were applying the relevant provision of their criminal codes which set up duress as a general defence without any exclusion for the taking of innocent life. It was therefore superfluous for them to discuss whether or not duress might apply to charges

[63] As examples of national criminal provisions contemplating duress for all offences, including murder, see Art. 10 of the 1975 Criminal Code of Austria; Art. 71 of the 1867 Criminal Code of Belgium; Art. 25 of the 1969 Criminal Code of Brazil; Art. 25 and Art. 32 of the 1950 Criminal Code of Greece; Art. 54 of the 1930 Criminal Code of Italy; Art. 40 of the 1881 Criminal Code of the Netherlands; Art. 122-2 of the French Penal Code; Section 34 and Art. 35 of the 1975 Criminal Code of Germany; Art. 85 of the 1924 Criminal Code of Peru; Art. 8 of the 1944 Criminal Code Spain; Art. 34 of the 1937 Criminal Code of Switzerland; Art. 4, Chapter XXIV of the Criminal Code of Sweden; Art. 10 of the Penal Code of the Socialist Federal Republic of [the former] Yugoslavia provided for the defence of "extreme necessity" to any crime. This article has been incorporated unchanged into the Penal Code of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Penal Code of the Republic of Croatia and the Penal Code of Bosnia.
See also Art. 17 of the Penal Code of Tanzania, and the *Josia v. Republic* case, decision of the Court of Appeal of Dar Es Salaam of 27 Oct. 1971, in 1972 (EA) *East Africa Law Reports*, at 157-58.

involving the taking of innocent lives. Those courts applied their national law and found that *in casu* the requirements for duress were not met.

32. Duress was invoked as early as 1921 before the Leipzig Supreme Court in the *Llandovery Castle* case. The court found that the two accused were guilty of killing shipwrecked persons in execution of an order of their superior. The court among other things took into consideration an argument put forward by the defence, whereby the accused "must have considered that Patzig [the commander who has issued the order to shoot] would have enforced his orders, weapon in hand, if they had not obeyed them". The court dismissed this argument out of hand, as follows:

> This possibility is rejected. If Patzig had been faced by refusal on the part of his subordinates, he would have been obliged to desist from his purpose, as then it would have been impossible for him to attain his object, namely the concealment of the torpedoing of the *Llandovery Castle*. This was also quite well-known to the accused, who had witnessed the situation. From the point of view of coercion (*Nötigung)* (Section 52 of the Penal Code), they can thus not claim to go unpunished.[64]

Thus, the court considered that duress might apply in principle, although it dismissed the defence on the facts.

33. Another case where the court did not exclude the application of duress to killing of innocents, although it ruled that the specific circumstances at issue did not justify the plea, is *Müller et al.*, brought first before the Belgian Military Court of Brussels[65] and then the Belgian Court of Cassation[66]. The accused were charged, *inter alia,* with war crimes in connection with the execution of hostages. Upon conviction, one appellant, Mehden, complained to the Court of Cassation that the first instance court had not dealt with his plea

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[64] Original text in *Verhandlungen des Reichstages. I Wahlperiode 1920, Band 368. Anlagen zu den Stenographischen Berichten Nr 2254 bis 2628*, Berlin, p. 2586; English translation (slightly revised by me) in 16 A.J.I.L. 1922, pp. 722-23. Section 52(1) of the 1871 German Criminal Code (which has been replaced by Sections 34 and 35 of the Criminal Code currently in force) provided: "An act does not constitute a crime if the perpetrator was compelled to commit the act by irresistible force or by a threat related to a present danger to his own, or one of his close relatives', life or limb which could not be otherwise averted" (translation mine).

[65] 31 Jan. 1949. *See Annual Digest and Reports of Public International Cases*, 1949, pp. 400-03.

[66] 4 July 1949. *Ibid.*

based on coercion. The court rejected this ground of appeal holding that: "[T]he decision of the lower Court states without ambiguity that all the accused acted freely".

Similarly, the Supreme Court of Israel in the *Eichmann* case, in the context of its discussion of the law on superior orders, did not exclude duress or necessity as a defence to the charges brought against Eichmann (which included crimes against humanity) arising out of his participation in, amongst other things, the mass killing of Jews, although Eichmann had not expressly pleaded duress as a defence. The Supreme Court excluded the applicability of necessity to Eichmann because, far from being coerced to organise the extermination of Jews, he had enthusiastically participated in it. As the court said:

> As stated, the applicability of these defences [constraint or necessity] as relieving from responsibility in respect of the offences the subject of the [Israeli] Law of 1950 [on the Nazi and Nazi Collaborators (Punishment)] has been excluded by Section II thereof. But even had the Law permitted the accused to rely on the defence that in carrying out the order to commit the crime he was acting in circumstances of "constraint" or "necessity", he would still not succeed unless the following two facts were proved: (1) that the danger to his life was imminent; (2) that he carried out the criminal task out of a desire to save his own life and because he saw no other possibility of doing so. The American Tribunal II A which applied Control Council Law No. 10 also insisted on these two conditions [in the *Einsatzgruppen* case] . . . [N]either of the said conditions has been met in this case. But we stress in particular the non-fulfilment of the second condition because each of the said two defences goes to the question of the *motive* that urged the accused to carry out the criminal act - the motive to save his own life - and also because the District Court relied in the main on its finding that the appellant performed the order of extermination at all times *con amore*, that is to say, with full zeal and devotion to the task. . . . He was not coerced into doing what he did and was not in any danger of his life, since, as we have seen above, he did far more than was demanded or expected of him by his superiors in the chain of command.[67]

The significance of this holding of the Israeli Supreme Court deserves to be duly emphasised since it emanates from a common-law system, modelled on English law, namely Israeli law after the British Mandate in Palestine. Furthermore, although the aforementioned passage arguably constituted an *obiter dictum*, it is important in that it reflects the view that the Supreme Court of Israel took of the applicable rule of international law: under international

[67] 36 I.L.R., 318, at p. 340.

law, as enunciated in the *Einsatzgruppen* case, duress may also apply to crimes involving killing.

34. Other cases where the possibility of raising duress as a defence to a charge of killing innocent people was conceded by the court, although it failed in those cases on the facts, include *Touvier* and *Papon*, by French courts[68], *Priebke*, by an Italian court[69], *Retzlaff et al.*

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[68] For *Touvier, see* excerpt from the judgement of the Court of Appeal of Versailles of 2 June 1993, quoted *supra*, n. 12. It should be noted that the Court of Appeal summarised as follows the Defendant's claim that he had acted in a "state of necessity: . . . Touvier relies unhesitatingly on the pressures exerted by the Germans to claim a state of necessity susceptible of constituting a justification . . ." The Court of Appeal's decision was confirmed by the Court of Cassation (decision of 21 Oct. 1993) (*see Bulletin Criminel* (1993), No. 307, pp. 770-74).

With regard to the *Papon* case (Papon had been accused among other things of complicity in the extermination of Jews) in its judgement of 18 Sept. 1996, the *Chambre d'accusation* of the Bordeaux Court of Appeal stated that: "Maurice Papon's plea of duress cannot succeed. Indeed, although the German demands may have been expressed with energy and determination, and in certain cases accompanied by threats of reprisals against French police officers, it cannot be concluded from the investigation that the pressures so exerted were of an intensity as to constitute duress abolishing the free will of Maurice PAPON". (Translation mine: p. 151 of the unpublished transcript, *Cour d'appel de Bordeaux, Chambre d'accusation, Arrêt du 18 septembre* 1996, no. 806).

[69] The *Priebke* case was decided by the Military Tribunal of Rome on 1 Aug. 1996 (the judgement was filed on 30 Sept. 1996). Priebke was charged with participation in the execution of 335 civilians in 1944. Before the Rome Tribunal he argued that he had been unable to refuse the order because, *inter alia*, the Captain who commanded the operation said to the other subordinate officers "that those who did not want to take part in the shooting had no other choice than to stand alongside the prisoners and die with them" (translation mine from the typewritten unpublished text, p. 21, which I have deposited with the International Tribunal's library). The Tribunal dismissed this version of the facts, while recognising that it could, nevertheless, afford a complete defence to the charges if it were proven. Observing that, had the accused, in fact, faced such an imminent threat of death, he would no longer have been under a duty to refuse the order as he would have been acting in a state of necessity, the Tribunal went on to say: "In this event [of imminent threat of death] he could have backed down from refusing to obey the order and participated in the executions only in order to save his own life, claiming the defence of state of necessity, which is provided for in all legal orders, including German law; indeed, in this case, no person could have expected Priebke to act as a hero and to sacrifice his own life in order to avoid participating in the inhumane execution. Thus, in all of the possibilities with which we have dealt, Priebke could have had a way out: this way out, however, certainly could not be that of obeying a manifestly unlawful order, except in case of imminent danger to his life; as such a danger was never realistically made apparent in this case, it follows that he has full responsibility for the entire massacre, as an accomplice, with the other executioners *[a titolo di concorso con gli altri esecutori]*" (emphasis added) (translation mine, *ibid.*, pp 80-81).

By a decision of 6 Nov. 1996 the Court of Cassation quashed the judgement of the Rome Military Tribunal on procedural grounds (the Court upheld the request that the President of the Tribunal be disqualified).

The Rome Military Tribunal, to which the case was remitted, joined it with the case against another German officer accused of participating in the execution, K. Hass. In its judgement of 22 July 1997, filed on 15 Sept. 1997 (*Hass and Priebke*) the court rejected on the facts the defence of duress (*stato di necessità*). After noting that the defendants claimed that they "had killed only to escape the danger of being brought before SS courts", the court averred that, contrary to the allegations of the defendants, in point of fact neither Colonel Kappler nor Captain Schutz ever threatened the defendants to kill them in case of non-execution of their orders. The court goes on to say that "it would be utterly unreasonable to state that the defendants were threatened, as it were, implicitly by the very structure of the SS, to which they had voluntarily adhered and within which they had reached positions of high authority". The court then concludes: "Lastly, only for the sake of completeness should one add that, at any rate, another obstacle stood insurmountably in the way of the applicability of the defence of duress, namely the clear disproportion between the danger *ex hypothesi* threatening the accused and

by a Soviet court[70], as well as a string of German cases[71] and a case recently dealt with by a Military Court of Belgrade[72].

4. Cases where courts upheld duress as a defence to war crimes or crimes against humanity involving unlawful killing

35. I shall now mention a few cases where the court upheld duress as a defence with regard to unlawful killing.

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the offence that they had allegedly been compelled to perpetrate" (translation mine, pp. 55-57 of the typewritten text, kindly provided by the Rome Tribunal's President, and deposited with the International Tribunal's Library). The significance of this last proposition (manifestly an *obiter dictum*) is not clear; in particular it is not apparent to what the "lack of proportionality" refers: does it concern the possible death (by killing) of the defendants on the one side, and their participation in the execution, on the other? Or does it instead relate to the fear by the defendants to be court-martialled by an SS court, on the one side, and their participation in the execution, on the other?

[70] *See* the *Retzlaff et al.* case, decided on 18 Dec. 1943 by a Soviet military court sitting in Kharkov. The defendants, three German officers and a Soviet driver, had been accused of atrocities in the town of Kharkov during the German military occupation of that town. In their final statements, all the defendants pleaded that they had been compelled to commit atrocities because of the general dictatorial nature of the Nazi regime; had they failed to execute orders, they would have been sentenced to death (*The People's Verdict. A full Report of the Proceedings at the Krasnodar and Kharkov Atrocity Trials*, London-New York, without date, pp. 118-20). However, although defence counsel asked that the life of the defendants be spared, in its Judgement the Military Tribunal sentenced all the accused to death by hanging (*ibid.*, p. 124).

[71] *See*, for instance, the *Wernicke and Wieczorek* case, decision of the Berlin Supreme Court (*Kammergericht)* of 24 Aug. 1946, in *Justiz und NS-Verbrechen, Sammlung Deutscher Strafurteile wegen National-sozialistischer Tötungsverbrechen 1945-1966,* vol. I, 1968, p. 42; the so-called *Euthanasie* case, decision of the District Court of Frankfurt am Main of 21 Dec. 1946, *ibid.*, pp. 158-59, upheld by the Court of Appeal of Frankfurt am Main by decision of 17 Aug. 1947, *ibid.*, pp. 179-80; *Kaufmann G. et al.* case, decision of the District Court of Frankfurt am Main of 30 Jan. 1947, *ibid.*, pp. 255-57, upheld by decision of the *Oberlandesgericht* (Court of Appeal) of 16 April 1948, *ibid.*, p. 15; decision of the District Court of Frankfurt am Main of 21 Mar. 1947 in the *Adolf Wahlmann et al.* case, *ibid.*, pp. 352-55, upheld by the Court of Appeal by its decision of 20 Oct. 1947, *ibid.*, pp. 373-74; decision of 5 Apr. 1950 of the District Court of Frankfrut am Main in the *Heinrich Baab* case, *ibid.*, vol. VI, p. 396; decision of 27 May 1955 of the District Court of Frankfurt am Main in the *Dr. Gerhard P.* case, *ibid.*, vol. XIII, p. 187; decision of 14 Nov. 1955 of the District Court of Weiden/Opf. in the *Nies Adolf* case, *ibid.*, p. 429; decision of the District Court of Weiden of 29 May 1956 in the *Dr. Fischer Hermann* case, *ibid.*, pp. 754-58; decision of the District Court of Ulm of 29 Aug. 1958 in the *Bernhard Fischer-Schweder et al., ibid.*, vol. XV, pp. 246-51; decision of the District Court of Berlin of 9 Mar. 1960, in the *Fritz Franz Hermann Knop et al.* case, *ibid.*, vol. XVI, pp. 369-70; decision of 10 May 1961 of the District Court of Tübingen in the *Hans Richard Wiechert et al.* case, *ibid.*, vol. XVII, p. 395; decision of 22 Dec. 1965 of the District Court of Detmold in *Karl Dietrich* case, *ibid.*, vol. XXII, pp. 482-83.

[72] See the *Sablić et al.* case, decided on 26 June 1992 by the Military Court of Belgrade. One of the defendants, Cibarić, had been accused of a war crime against civilians, pursuant to Article 142, para 1 of the Yugoslav Criminal Code, in that he had allegedly killed four civilians, upon order of another defendant, Sablić. Before the court Cibarić's defence counsel argued that: "[Cibarić] executed the married couple and two women by order of the defendant Sablić and a military policeman, who threatened him that he had to obey everything that had been ordered or 'your head is off'" (unpublished text; unofficial translation, p. 37). The Court, however, both rejected the plea of duress and sentenced Cibarić to death (*ibid.*, pp. 126, 130-31).

I shall first cite a few Italian cases, all involving the execution of partisans during the Second World War, by militias or soldiers of the so-called *Repubblica Sociale Italiana* (Italian Social Republic or "RSI"), an entity set up in 1943 in central and northern Italy by ultra-fascists with the decisive assistance and support, and under the control, of Nazi Germany[73]. In all these cases militias or RSI soldiers executed groups of partisans upon the order of their superior authorities and under threat of death.

The first case is *Bernardi and Randazzo*, decided by two courts of assize and, on two different occasions, by the Court of Cassation (the decision relevant to us is that of 14 July 1947)[74]. Two police officers, a captain and lieutenant, had been ordered by their superior authorities (the *prefetto*, i.e., the representative of the central authorities in the district, and the *questore*, that is the head of police) to arrange for the execution of three captured partisans. When the provincial secretary of the fascist party notified the *prefetto*'s order to Captain Bernardi, he refused to obey and was summoned by the *questore* who, together with the *prefetto,* sternly reprimanded the captain. A violent altercation ensued, during which the *prefetto*, according to a witness, said to Bernardi: "If you refuse, I shall have you shot . . . and I shall also have the three partisans executed". (Emphasis added.)

[73] The *Repubblica Sociale Italiana* (RSI) was established on 1 December 1943 in northern and central Italy but gradually shrank as a result of the victorious thrust of the Allies and the Italian resistance movement, so that eventually it only wielded authority over most of northern Italy. It came to an end on 25 April 1945. Under international law the RSI can be regarded as a *de facto Government* fighting against the Italian Royal Government and the "Committee for the National Liberation of Northern Italy" (CLNAI), which embraced various groups of Italian partisans and had been recognised by the Italian Royal Government as their representatives in the North. Alternatively, the RSI could be regarded as a puppet Government under such a strong German military control that its organs could be considered as acting on behalf of Germany. Accordingly, one could either characterise the armed conflict between the resistance movement and the Royal Government, on the one side, and the RSI, on the other, as a civil war, or one could prefer to speak of an international conflict between the Italian Government (incorporating the various groups of partisans) and the Allies, on the one side, and Germany and the RSI, on the other. Be that as it may, what matters from our viewpoint is that (as reported by a great authority, M. S. Giannini, *Repubblica sociale italiana*, *Enciclopedia del diritto*, vol. XXXIX, (1988) p. 901) the opposing military authorities proceeded to an exchange of notes to the effect that either party regarded the military units of the other as combatants under the laws of warfare and therefore applied those laws *inter se.*

[74] The case was first brought before the Court of Assize of Vercelli, which sentenced the two accused to 20 years' imprisonment. On appeal, the Court of Cassation on 18 December 1946 quashed the sentence on procedural grounds as well as, with regard to Captain Bernardi, on the ground that the decision failed to provide any reasons on the issue of duress (*stato di necessità*). The case was therefore remitted to the Court of Assize of Turin which, on 25 March 1947, sentenced the two to 16 years' imprisonment. The accused lodged an appeal with the Court of Cassation, contending that, on the basis of the facts as proved by the trial court, the Court of Cassation should uphold the defence of duress.

Bernardi complied with the order and executed the partisans. The Special Court of Assize of Turin found Bernardi and Randazzo guilty and sentenced them to 16 years' imprisonment[75]. However the Court of Cassation quashed the sentence, holding that the defendants had acted under duress[76].

The same stand was taken by the Court of Cassation in two other cases, both concerning military officers who, after refusing to command an execution squad, had been threatened with shooting: in both cases the court held that such a situation was covered by duress[77]. In *Srà et al.*, Srà had commanded the execution squad charged with shooting a captured partisan and the other two accused had been members of such squad. With regard to Srà the court quashed the decision of the Special Court of Assize of Como convicting the accused of killing because, while setting out facts which could justify recourse to duress, it had failed to provide any legal reasoning justifying its refusal[78]. In this connection the Court of Cassation emphasised that it was apparent from the evidence examined by the trial court that when Srà

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[75] *See* the text of the unpublished hand-written judgement of the Court of Assize of Turin, pp. 3-12 (this text has been kindly provided by the Public Record Office of Turin, and is deposited with the International Tribunal's library). The court made a careful and detailed examination of the facts and concluded that, in point of fact, the defendants could not invoke duress (*stato di necessità*).

[76] Duress is provided as a complete defence to any charges by Art. 54(1), of the Italian Criminal Code, whereby: "No one shall be punished for acts committed under the constraint of necessity to preserve himself or others from the present danger or a serious personal harm, which is not caused voluntarily nor otherwise avoidable, and provided that the acts committed are proportionate to the threatened harm" (translation mine).
The Court held that the injury threatened by the superior authorities was to be regarded as serious; in this connection, after recalling the aforementioned threats of the *prefetto*, the Court stressed that (i) the *prefetto* was well known for being "a violent and cruel person and a persecutor of anti-fascists", (ii) the two defendants had in fact been in contact with members of the resistance movement to whom they had provided information and weapons, hence their marked reluctance to shoot the three partisans; (iii) in view of the fact that at that period military courts were under the strong influence and authority of *prefetti*, the utterances of the *prefetto* to Captain Bernardi could not but constitute a serious threat; (iv) under the circumstances, it was impossible for the two defendants to try and prevaricate or at any rate somehow shun the order.
The Court held that duress "does not require a condition of such absolute compulsion as to cause inability to understand and to will, as if the person under duress lost any control over himself and became a simple instrument of others' will. . . . Duress leaves intact all the elements of criminal imputability. The person at issue acts with a diminished freedom of determination, but acts voluntarily in order to escape an imminent and inevitable serious danger to his body and limb." (Translation mine. Text of the headnote in *Rivista penale*, 1947, pp. 921-22. I have primarily used the unpublished hand-written text of the Court of Cassation's decision of 14 July 1947, kindly provided by the Central Public Record Office in Rome; copy of such text has been filed with the International Tribunal's library).

[77] *See* decision 6 Nov. 1947, *Srà et als.* case, in *Giurisprudenza completa della Corte Suprema di Cassazione, sez. pen.*, 1947, No. 2557, p. 414; decision of 17 Nov. 1947, *Masetti* case, in *Massimario della Seconda Sezione della Cassazione,* 1947, p. 416, no. 2569. In both cases only the headnotes have been published. I have used the original hand-written text of both decisions, kindly provided by the Rome Central Public Record Office (copy has been filed with the International Tribunal's library).

[78] It should be added that the Court of Cassation quashed the decision of the Special Court of Assize also because it failed to prove that the three defendants had been aware of and intended to execute a partisan.

had refused to execute the order of his colonel, the colonel had threatened that he himself would be shot; this threat was subsequently confirmed by the captain (Srà's direct superior), to whom Srà had reported. Hence, the Court of Cassation, holding that the factual requirements for duress might be met, remitted the case to another trial court, the Court of Assize of Milan. This court found that all defendants had acted under duress and acquitted them[79].

A similar stand was taken by the Court of Cassation in the *Masetti* case[80]. It should be noted that there, again, the trial court to which the case was remitted by the Court of Cassation found that the accused had acted under duress when commanding an execution squad; it accordingly acquitted him[81]. The trial court among other things noted that:

> [T]he possible sacrifice [of their lives] by Masetti [the accused] and his men [the members of the execution platoon] would have been in any case to no avail and without any effect (*vano ed inoperoso*) in that it would have had no impact whatsoever on the plight of the [two] persons to be shot, who would have been executed anyway even without him [the accused]. (Emphasis added.)[82]

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[79] *See* the unpublished hand-written text of the judgement of 28 September 1948 (this text had been kindly provided by the Appellate Court of Assize of Milan, and is deposited with the International Tribunal's library). While the Court of Cassation had remitted the case on two grounds, one concerning all three defendants (the previous trial court had not provided any legal reasoning on the issue of whether the defendants were aware that the person they shot was a partisan), the other one only concerning defendant Srà (the lack of any legal reasoning on the issue of duress), the Court of Assize of Milan held that the second ground was the preliminary one, for it could be dispositive of the matter in that it actually concerned all three defendants. It therefore pronounced on this ground and concluded that duress was available to the three accused.

[80] On 11 October 1946 the Special Court of Assize of Forlì had sentenced Masetti to 30 years' imprisonment for commanding the execution squad responsible for the killing of two partisans. The Court of Cassation found that the trial court had mixed up the issue of superior order with that of duress; it then held that the trial court had also been inconsistent because it had first established and set out all the factual requirements necessary for duress and had then concluded that the accused was guilty. It therefore remitted the case to the Court of Assize of L'Aquila.

With regard to duress, the court noted that the trial court had established the following facts: upon receiving the order to execute the partisans, Masetti had refused to obey, as a consequence of which "a row broke out, with shouts and threats, between the battalion commander and Masetti"; the threat against Masetti and the ensuing state of necessity in which he was put, were all the more serious as he had been chosen by the German military authorities (which in fact had imposed upon the commander of the Italian battalion the order to execute the partisans) because he was the youngest officer in his battalion, hence the most vulnerable" (pp. 3-4 of the hand-written text).

[81] *See* decision of the Court of Assize of L'Aquila of 15 June 1948 (unpublished; copy of the hand-written original has been kindly provided by the Registry of the Court of Appeal of L'Aquila and has been deposited with the library of the International Tribunal).

After carefully examining the evidence, the court among other things stressed that the accused had been coerced to command the execution squad also because of the physical compulsion of a German officer who, with his unit, prevented him from shunning the order to execute the two partisans, and actually forced him to take part in the execution.

[82] *Ibid.*, p. 8 of the unpublished text (translation mine).

36. A few judgements of German courts should also be mentioned. Four striking features of these cases should be underlined.

Firstly, normally German courts pronouncing upon the plea of duress after the Second World War dismissed such plea, finding that the basic requirements for duress were not met *in casu* (*see supra* note 71); the cases I shall mention now constitute an exception to such general trend - and this of course renders them all the more significant. It should in addition be emphasised that in many of the numerous cases I shall now review or mention, the plea of duress was not upheld across the board, as it were, but only with regard to some of the defendants, while it was rejected with respect to other defendants, i.e., it was applied with discrimination.

Secondly, in the first group of cases at issue, namely in those handled in the period from 1946 to 1950, German courts adjudicated on the strength of Control Council Law No. 10 (although the Law was formally repealed in 1956, as early as 1951 the British and French Occupying Powers had already repealed their regulations authorising German courts to pronounce on the strength of Article III of the Law)[83]. In other words, those courts acted by virtue of an international agreement and to a large extent applied international law.

Thirdly, almost all of these cases concern execution squads or execution groups and duress was upheld with regard to minor executants, whereas it was ruled out with respect to those who had issued orders or to senior officials who, following orders from the highest authorities, had in their turn ordered the execution of innocent persons.

Fourthly, duress was admitted by the various courts either in the form of a state of necessity arising out of an imminent and unavoidable danger threatening life and limb (*Notstand*) or in the form of a state of necessity resulting from coercion from a third person (*Nötigung*) or in the form of putative coercion (*Putative Nötigung*).

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[83] On the vicissitudes of Control Council Law No. 10, *see* among others, H. Ostendorf, *"Die - widersprüchlichen - Auswirkungen der Nürnberger Prozesse auf die westdeutsche Justiz", Strafgerichte gegen Menschheitsverbrechen - Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen*, G. Hankel and G. Stuby (eds.), Hamburg 1995, p. 75. *See also* H. Meyrowitz, *La Répression par les Tribunaux Allemands des Crimes Contre l'Humanité et de l'Appartenance à une Organisation Criminelle*, 1960, pp. 114 and 118.

37. In the first case to be mentioned, *Wülfing and K.*, the two accused were respectively an officer and a sergeant of the German army, serving on the army's Special Services (*Truppensonderdienst).* They were accused of a crime against humanity, in that on 13 April 1945, while the American troops were approaching the German town where they were stationed, they had killed a German civilian opposed to national socialism, whom they considered guilty of instigation to desertion. The officer had ordered the other accused (K.) and a non-commissioned officer to execute the German civilian; the officer then finished him off with his pistol. In a decision of 4 August 1947 the District Court of Hagen, acting by virtue of Control Council Law No. 10, found that the murder (*Mord*) was a crime against humanity and therefore sentenced Wülfing to life imprisonment; by contrast it found that K., who in any case might have been held responsible of intentional killing *(Totschlag)*[84] only, was in fact not guilty because he had acted under mistake (he had believed that he was participating in the execution of a death sentence passed by a regular court), and in addition he had acted under duress (*Notstand)* (he had feared that, would he not carry out the order to shoot, he himself would be killed by the officer who was standing by, pistol in his hand)[85].

Also in another case (*S. and K.)*, brought before the *Landgericht* of Ravensburg, the court exercised its jurisdiction pursuant to Control Council Law No. 10. In this case one of the accused, S., a member of the Gestapo, in April 1945 had participated in the shooting of three Germans detained in a Gestapo prison. The head of the prison, an SS *Hauptscharführer*, had ordered S. and other two prison guards to take the three prisoners out of the prison into a forest and there shoot them from behind. Each prison guard was ordered to shoot one detainee. The head of the prison followed them closely in order to check whether they duly executed his orders. The court found that although S's action could not be defined as *Mord* but only as *Totschlag* (intentional killing), he had acted under duress (*Notstand*). S. had been ordered twice to take part in the killing, and the order had been accompanied by the threat that any refusal to obey would entail death. According to the court, the defendant therefore faced an inevitable serious threat to his life and limb, as a result of which his freedom of choice was

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[84] In German criminal law *Totschlag* means intentional killing, whilst *Mord* means intentional killing characterised by either base motives or certain aggravating circumstances (e.g. cruelty).

[85] Text in *Justiz und NS-Verbrechen*, vol. I, 1968, pp. 605-21; the part on duress is at pp. 620-21. The decision was upheld by *Oberlandesgericht* of Hamm on 15 Apr. 1948 (*ibid.*, pp. 622-28).

suppressed and an "alien will" was imposed upon him. The court also emphasised on the one hand that the head of the prison was a "violent brute" and, on the other, that S. had no alternative to the execution of the order, in particular he could not escape. S. was consequently acquitted[86].

In a third case as well (*K. and L.*), the tribunal (the Court of Assize of Aachen) pronounced on the basis of Control Council Law No. 10. This case is particularly important because, before discussing duress, the court inquired into the relevant applicable law, with particular reference to international law (by contrast, the other courts had applied the German law on duress without first asking themselves whether this was justified under Control Council Law No. 10). The facts of the case are as follows: in September 1944 in Aachen, a head of the Gestapo (called Ba.), while investigating cases of pillage and unauthorised stay of persons within the communal area, had come across a German civilian (the undertaker Salvini) who had appeared suspicious. Upon his refusal to provide his name and whereabouts Salvini had been severely beaten by a group of Gestapo members; thereafter Ba., pistol in hand, had ordered two members of the Border police acting under the control of the Gestapo (K. and another) to execute Salvini. K. had been accused by the prosecutor of a crime against humanity consisting in the intentional killing (*Totschlag)* of Salvini. As the defence counsel had pleaded duress, the court set about ascertaining what the applicable law was. It first excluded that one could simply apply German criminal law: as the court was acting pursuant to Control Council Law No. 10 and this Law substantially constituted international law, the court pointed out that the solution was to be found in this body of law. It then developed a complex and rather contorted reasoning that can be summarised as follows: (1) the Statute and the judgement of the International Military Tribunal at Nürnberg as well as Control Council

[86] Decision of 21 May 1948, *ibid.*, vol. II, 1969, p. 521 ff., at 526-27. The decision was upheld by the *Oberlandesgericht* of Tübingen, on 30 Nov. 1948 (*ibid.*, p. 528 ff.) which upheld in particular the finding on duress, although it pointed out that this finding was superfluous, since the trial court had already held that S. lacked the "required knowledge of the illegality (*das erforderliche Bewusstsein der Rechtswidrigkeit*) of his action" (pp. 533-34). It should be noted that the *Tribunal supérieur* of the French military authorities quashed both decisions on 6 Dec. 1950, for violation of Control Council Law No. 10 (it would seem that the reasons for the quashing were that the two German courts had determined whether the relevant facts constituted offences under German criminal law instead of applying the provisions of Control Council Law No. 10 on crimes against humanity). The *Tribunal supérieur* consequently remitted the case to the *Landgericht* of Rottweil for retrial. This court, however, decided to discontinue the proceedings, because meanwhile Regulation no. 154 of the French High Commissioner of 1 June 1950, providing for that power of the *Tribunal supérieur,* had been repealed by Regulation no. 171 of 31 Aug. 1951 (*see* the text of the decision of 18 Feb. 1952 by the *Landgericht* of Rottweil, *ibid.*, p. 535).

Law No. 10, while excluding superior orders as a defence, did not rule out necessity; (2) since however no express regulation of duress was to be found in that Law, recourse was to be had to the general principles of criminal law of the four Allied Powers that had enacted the Law; such recourse showed that continental European as well as Anglo-American law did not deny duress as a defence to subordinates obeying superior orders; however, Anglo-American law ruled out duress as an exculpatory cause for very serious crimes and demanded for such cases "self-sacrifice"; (3) nevertheless, neither the text nor the spirit of the Law upheld the Anglo-American views, and this was borne out by the drafting history (*Entstehungsgeschichte)* of the Law: clearly the "restrictive attitude" (*einschränkende Stellungnahme)* of Anglo-American law was not recognised and upheld by international rules; (4) faced with no indication in international law about the legal regulation of duress, except for the fact that the Anglo-American attitude was not adopted, a court of law could not but apply the "generally recognised rules of criminal law"; proceeding on the premise that the not-generally recognised restrictive limitations of Anglo-American law should be disregarded, such generally recognised rules provided that duress was admissible any time there was a serious, imminent and unavoidable threat to life or limb; (5) this regulation was in accordance with the relevant penal provisions of German law (Sections 52 and 54 of the German Criminal Code)[87]. The court then applied the concept of duress to the case at issue, and found that K. had acted under compulsion for his life and was therefore to be acquitted[88].

Another case decided upon on the strength of Control Council Law No. 10 concerned crimes against humanity in the form of euthanasia against Germans (case *M. et al.)*. A number of persons had been accused of participating in the implementation of the so-called euthanasia programme in 1939-40 in some areas of Germany. Most defendants were found guilty. Five of them had pleaded duress. The Court of Assize of Tübingen, to which the case had been brought, in its decision of 5 July 1949 first noted that "according to the prevailing opinion, from which there is no reason to depart, also in the case of crimes in violation of Control Council Law No. 10 it is possible to rely upon the general causes for exclusion of guilt provided for in Sections 52 and 54 of the German Criminal Code"[89]. The court then

[87] Decision of 6 Jan. 1949, *ibid.*, vol. III, 1969, pp. 721-23. The whole text of the decision is at pp. 713-24.
[88] *Ibid.*, p. 723.
[89] *Ibid.*, vol. V, 1970, p. 103.

acquitted two accused (W. and H.) because they had acted under coercion (*Nötigung*)[90]. The judgement was upheld by the Supreme Court of Tübingen on 14 March 1950[91].

38. Following the repeal, by the Occupying Powers, of the authorisation to German courts to pronounce on the strength of Article III of Control Council Law No. 10, German courts tended to pronounce on war crimes and crimes against humanity on the strength of German law. They continued to apply duress or compulsion in numerous cases concerning war crimes. These cases can be classed according to the type of war crime.

Some cases related to the killing in Germany of foreign civilians or prisoners of war by members of the SS or of Gestapo or at least members of German police or military units acting under the control of the Gestapo. By way of example I shall mention the *Z. et al.* case. On 31 March 1949 in Kassel the head of a group of policemen acting as members of a *Volkssturmkommando*, was ordered by a *Sturmbannführer* of the SS to execute 78 Italian civilian workers who had been arrested for pillaging a train containing victuals for the army. The head of the policemen passed on the order of execution to his group and the order was carried out. The Court of Assize of Kassel found that although the order was illegal, six of the seven defendants were to be acquitted of the crime of intentional killing (*Totschlag*) both because they were not aware of the illegal nature of the order (they believed that a proper trial had preceded the order of execution) and because at any rate they had acted under coercion (*Nötigung*), in that they feared they would themselves be shot if they did not carry out the order[92]. This finding was confirmed by the *Oberlandesgericht of* Hessen, in a decision of 4 May 1950[93]. In a number of other cases courts took a similar stand[94].

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[90] *See ibid.*, vol. V, 1970, p. 89 ff.; the relevant parts are at pp. 103-05 and 123.
[91] *See ibid.*, p. 123.
[92] *See ibid.*, vol. V, 1970, pp. 507-11 (the part on compulsion is at p. 510).
[93] *See ibid.*, pp. 512-16, especially p. 515.
[94] *See e.g.* the decision of the District Court of Kassel of 8 Feb. 1950, *ibid.*, vol. VI, p. 129, upheld on 10 Aug. 1950 by the Supreme Court of Hessen, *ibid.*, pp. 132-39. See also the decision of the District Court of Bochum of 4 Dec. 1950, *ibid.*, vol. VII, pp. 742-46; the decision of the Court of Assize of Mönchen-Gladbach of 20 Nov. 1951, *ibid.*, vol. IX, p. 99 ff.; the decision of the Court of Assize of Dortmund of 4 Apr. 1952, *ibid.*, vol. IX, pp. 517, 525, 529-39; the decision of the same court of 29 Apr. 1952, *ibid.*, p. 589 ff.; the decision of the Court of Assize of Osnabrück of 7 Oct. 1959, *ibid.*, vol. XVI, p. 57 ff.

Other cases concern the killing of inmates in concentration or extermination camps[95]. Another category of cases includes those relating to the killing of foreign civilians or prisoners of war in occupied territories. For instance, in the *Warsaw Ghetto* case, the 19 accused had been members of a German police company which in June - July 1942, upon orders of the SS leadership in Poland, had executed 110 Jews, taken from the Warsaw ghetto into a nearby forest. The Court of Assize attached to the District Court of Dortmund, in a decision of 31 March 1954, first found that the defendants were only to be regarded as accomplices (*Gehilfen*) in murder[96], then dwelt at great length on the issue of duress. The court held that all the defendants, except for one, had acted under duress and were therefore to be acquitted[97].

In the *Wetzling et al.* case the six defendants, all officers of an army division, had been accused of three mass executions, on 21 March 1945, of 208 Russian and Polish nationals deported to Germany and used there as workers. The defendants had all been charged with murder or complicity in murder. Four defendants pleaded duress. The Court of Assize of Arnsberg, in a decision of 12 February 1958, upheld duress only with regard to three defendants (A., G. and Z.)[98]. It should be noted that the court pointed out that in reaching this

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[95] *See, e.g.*, the decision of the District Court of Frankfurt/Main of 25 Aug. 1950, *ibid.*, vol. VII, pp. 285-87 (of the two accused, who had allegedly participated in the extermination programme in the Sobibor camp, one was sentenced to life imprisonment, the other was acquitted because he thought that he found himself in a situation otherwise inevitable of danger for his life). *See also* the decision of the District Court of Mönchen-Gladbach of 15 Nov. 1951, *ibid.*, vol. IX, pp. 70-71; the decision of 5 July 1952 of the Court of Assize of Stuttgart on Buchenwald, confirmed by the *Bundesgerichtshof* on 19 Feb. 1952, *ibid.*, vol. IX, pp. 780 and 782 respectively; the decision of 18 July 1952 of the Court of Assize of Hagen, confirmed by the *Bundesgerichtshof* on 3 Dec. 1953, *ibid.*, vol. X, pp. 40-44; the decision of the Court of Assize of Düsseldorf of 3 Sept. 1965 on Treblinka, *ibid.*, vol. XXII, pp. 210-12.

[96] *See Warsaw Ghetto* case, the decision of the Court of Assize of Dortmund of 31 Mar. 1954, *ibid.*, vol. XII, 1974, pp. 340-41.

[97] *See ibid.*, pp. 346-48. The court stressed in particular that at the time the accused were under the special jurisdiction of SS and police courts and knew that such courts imposed the most severe sentences in case of disobedience; in addition, when they had first been deployed in Warsaw, the company had been obliged to watch the sentencing to death and execution of two members of the police battalion they had replaced; furthermore, some of the accused had been made to attend the proceedings of an SS and police special court, manifestly with a view to scaring and warning them. The court also emphasised that the defendants had no alternative: they could neither shun the order by escaping, nor could they refuse to obey by reporting ill, nor had they any other way of avoiding participation in the execution. It should be noted that the decision was upheld by the *Bundesgerichtshof*, decision of 21 Sept. 1955 (4 StR 225/55), quoted *ibid.*, p. 351, note 1.

[98] *See ibid.*, vol. XIV, 1976, p. 563 ff. The part concerning duress (*Notstand*) is at pp. 616-23. The decision was upheld, at least with regard to the three accused A., G. and Z., by the *Bundesgerichtshof*, by its decision of 13 Mar. 1959 (4 StR 438/58, Lfd no. 486), cited *ibid.*, p. 625, note 1.

conclusion it had taken into account the principles always underscored in the German case-law whereby duress can be admitted only under the most stringent conditions,

> because only in real cases involving the most serious duress can a legal order (*Rechtsordnung*) approve of an inroad in one of the protected legal values, particularly - as it is the case here - when what is at stake is the most important legal value (*das höchste Rechtsgut*), namely the right to life. On the basis of the evidence examined the court of Assize has satisfied itself that such an exceptional case (*Ausnahmefall*) existed with regard to the accused A., G and Z.[99]

Duress was also taken into account in many other cases concerning the killing of civilians or prisoners of war in the territories occupied by Germany[100].

39. It behoves me to add a general remark on the German case-law I have surveyed. This case-law shows beyond any doubt that a number of courts did indeed admit duress as a defence to war crimes and crimes against humanity whose underlying offence was the killing, or the participation in the killing, of innocent persons. However, taking account of the legal significance of this case-law does not entail that one should be blind to the flaws of such case-law from an historical viewpoint; in other words, whilst one is warranted in taking into account the legal weight of those cases, one may just as legitimately entertain serious misgivings about the veracity of the factual presuppositions or underpinning of most of those cases[101].

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[99] *Ibid.*, p. 623 (translation mine).

[100] *See e.g.* the decision of the Court of Assize of Giessen of 27 Apr. 1959, *ibid.*, vol. XV, pp. 742-46; the decision of the Court of Assize of München of 21 July 1961, *ibid.*, vol. XVII, pp. 704-05; the decision of the Court of Assize of Freiburg in Breisgau of 12 July 1963, *ibid.*, vol. XIX, pp. 467-69; decision of the Court of Assize of Kempten of 27 Feb. 1964, *ibid.*, vol. XIX, pp. 752-54.

[101] It is well known that serious doubts may be expressed about whether, in actual reality, German members of police or of the military were threatened by their superiors with death and not simply, in most instances, with transfer to the Eastern front or disciplinary punishment. Accounts of eye-witnesses tend to show that the latter situation materialised. *See e.g.* P. Levi, *The Drowned and the Saved*, 1988, pp. 13-17, 42-43, 50-51; *cf.* also D. Rousset, *L'univers concentrationnaire*, 1965, pp. 149-50. Recent historical research tends to corroborate these testimonies. *See e.g.* D.J. Goldhagen, *Hitler's Willing Executioners - Ordinary Germans and the Holocaust*, 1996, pp. 239-80, 375-415.
Furthermore, one should more generally bear in mind the critical appraisal of the German case-law of such a distinguished German author as H. Ostendorf, *"Die - widersprüchlichen - Auswirkungen der Nürnberger Prozesse aud die westdeutsche Justiz", op. cit,* pp. 73-95.

5. The inferences to be drawn from the case-law on duress, with regard to war crimes and crimes against humanity involving the killing of persons

40. I referred above to the Prosecution's contention that an exception has evolved in customary international law excluding duress as an admissible defence in offences involving the taking of innocent lives. This contention can only find support in one Canadian case (*Hölzer et al.*, mentioned in paragraph 26, *supra*) as well as the military regulations of the United Kingdom and the United States (paragraph 29, *supra*). With these elements of practice one should contrast the contrary, copious case-law I have just surveyed as well as the legislation to the contrary of so many civil-law countries (*see* note 63, *supra*)[102]. In my opinion, this manifest inconsistency of State practice warrants the dismissal of the Prosecution's contention: no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in case of crimes involving the killing of persons.

41. As I pointed out above, the majority of the Appeals Chamber has reached this same conclusion, although through different arguments. However - and here I disagree with the majority as well - the Appeals Chamber majority does not draw from the absence of that special rule the only conclusion logically warranted: that one must apply, on a case-by-case basis, the general rule on duress to all categories of crime, whether or not they involve killing. I shall delve below into what I regard - with respect - as the flaws in the majority's view. For now I shall elaborate on the logical conclusion I have just enunciated. This conclusion is that even in case of war crimes and crimes against humanity involving killing, if confronted with the defence of duress, an international criminal court must apply, as a minimum, the four criteria enunciated above (*see* paragraph 16, *supra*), namely (1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat; (4) the situation of duress should not have been self-induced.

[102] This case-law also proves that Lord Salmon was wrong when, in delivering the Privy Council's advice in *Abbot v. The Queen*, he contended that the invocation of duress for war crimes involving the killing of innocents "has always been universally rejected" (*Abbot v. The Queen* [1976] 3 All E.R. at 146).

42. The third criterion - proportionality (meaning that the remedy should not be disproportionate to the evil or that the lesser of two evils should be chosen) - will, in practice, be the hardest to satisfy where the underlying offence involves the killing of innocents. Perhaps - although that will be a matter for a Trial Chamber or a Judge to decide - it will never be satisfied where the accused is saving his own life at the expense of his victim, since there are enormous, perhaps insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others in this way: how can a judge satisfy himself that the death of one person is a lesser evil that the death of another? Conversely, however, where it is not a case of a direct choice between the life of the person acting under duress and the life of the victim - in situations, in other words, where there is a high probability that the person under duress will not be able to save the lives of the victims whatever he does - then duress may succeed as a defence. Again, this will be a matter for the judge or court hearing the case to decide in the light of the evidence available in this regard. The court may decide, in a given case, that the accused did not do all he could to save the victims before yielding to duress, or that it is too speculative to assert that they would have died in any event. The important point, however - and this is the fundamental source of my disagreement with the majority - is that this question should be for the Trial Chamber to decide with all the facts before it. The defence should not be cut off absolutely and *a priori* from invoking the excuse of duress by a ruling of this International Tribunal whereby, in law, the fact of acting under duress can never be a defence to killing innocents. This is altogether too dogmatic and, moreover, it is a stance unsupported by international law, where there is no rule to this effect; in international law there only exists a general rule stating that duress may be a defence when certain requirements are met.

43. These inferences, which I have drawn from the case-law, find support in the following considerations:

Firstly, it is extremely difficult to meet the requirements for duress where the offence involves killing of innocent human beings. This I infer from the fact that courts have very rarely allowed the defence of duress to succeed in cases involving unlawful killing even where they have in principle admitted the applicability of this defence. But for the Italian and German cases mentioned above (paragraphs 35-39, *supra*), which stand out as exceptional, the

only cases where national courts have upheld the plea of duress in relation to violations of international humanitarian law relate to offences other than killing. In this connection mention can be made of the well-known cases brought before United States Military Tribunals sitting at Nuremberg, *Flick* and *Farben*[103], as well as a few German cases. To my mind, this bears out the strong reluctance of national courts to make duress available in case of offences involving killing.

The reason for this restrictive approach no doubt has its roots in the fundamental importance of human life to law and society. As the German Court of Assize of Arnsberg rightly pointed out in *Wetzling et al.* (*see* paragraph 38, *supra*), the right to life is one of the most fundamental and precious human rights, and any legal system is keen to safeguard it at the utmost; it follows that any legal endorsement of attacks on, or interference with, this right must be very strictly construed and only exceptionally admitted.

Secondly, it is a relevant consideration that the crime would have been committed in any case by a person other than the one acting under duress. This is borne out by a comparison of two different sets of cases. In cases such as *Hölzer et al.*, where the accused did not raise any issue that the victims would have died in any event, and where he therefore raised duress simply as a choice between his life or that of his victim, the defence has been refused in principle, applying the classical formula that you are not entitled to save your own life at the expense of others (*see* paragraph 26, *supra*). However, where the accused has been charged with participation in a collective killing which would have proceeded irrespective of whether the accused was a participant, the defence has in principle been allowed. In such cases, if duress failed as a defence, this was because the courts were not satisfied that duress had in fact been exerted on the accused - not because the remedy was disproportionate to the harm to be avoided. As far as the proportionality requirement is concerned, in all these cases

[103] In both cases the question at issue concerned some German industrialists who, within the "slave labour programme" set up by the German authorities, had utilised tens of thousands of civilians deported from other countries as well as concentration camp inmates and prisoners of war. They had been accused (as principals or accessories) of having participated in the enslavement and deportation of foreign civilians on a gigantic scale. In particular, they had been accused of having exploited such labourers under inhumane conditions. The United States Tribunals found that some of the defendants had acted under duress and acquitted them of this charge (for the *Flick* case *see Trial of Friedrich Flick and Five Others, Trials of War Criminals*, vol. VI, pp. 1197 and 1201; for the *Farben* case, *see United States v. Carl Krauch, ibid.*, vol. VIII, p. 1175). Another United States Tribunal, in the *Krupp* case came to the opposite conclusion, but only in point of fact (*see United States v. Alfried Krupp, ibid.*, vol. IX, pp. 1439-48).

the harm caused by not obeying the illegal order would not have been much greater than the harm which would have resulted from obeying it. This notion was manifestly the underlying idea in all the cases where duress was upheld by Italian and German courts after the Second World War (*see* paragraphs 35-39, *supra*)[104]. Arguably, the same reasoning was applied by the Judge-Advocate in the *Jepsen* case when he accepted that, in principle, duress could be a defence where the underlying offence is killing, because, on the accused's version of the facts, he could do nothing to save the lives of the victims and by refusing to obey the order would have only added the forfeiture of his life to theirs. However, the court, i.e., the jury, evidently did not believe Jepsen's account and convicted him (*see* paragraph 23, *supra*).

44. Thus the case-law seems to make an exception for those instances where - on the facts - it is highly probable, if not certain, that if the person acting under duress had refused to commit the crime, the crime would in any event have been carried out by persons other than the accused. The commonest example of such a case is where an execution squad has been assembled to kill the victims, and the accused participates, in some form, in the execution squad, either as an active member[105] or as an organiser[106], albeit only under the threat of death. In this case, if an individual member of the execution squad first refuses to obey but has then to comply with the order as a result of duress, he may be excused: indeed, whether or not he is killed or instead takes part in the execution, the civilians, prisoners of war, etc., would be shot anyway. Were he to comply with his legal duty not to shoot innocent persons, he would forfeit his life for no benefit to anyone and no effect whatsoever apart from setting a heroic example for mankind (which the law cannot demand him to set): his sacrifice of his own life would be to no avail. In this case the evil threatened (the menace to his life and his subsequent death) would be greater than the remedy (his refraining from committing the crime, i.e., from participating in the execution).

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[104] In the *Priebke* case (judgement of 1 Aug. 1996), too, where duress was, again, admitted in principle, but not *in casu*, the theory upon which it was admitted was that the victims of the execution would have been killed in any event even if Priebke himself had refused to participate in their execution (*see* judgement of 1 Aug. 1996, *supra*, n. 69).

[105] *See*, for example, the *Stalag Luft III* case, *supra*, n. 14, as well as two German cases cited *supra*, at paras. 37-38, namely *S. and K.* and *Warsaw Ghetto*.

[106] *See* the three Italian cases cited *supra*, at para. 35, as well as *Wetzling et al.* cited *supra*, at para. 38.

In sum, the customary rule of international law on duress, as evolved on the basis of case-law and the military regulations of some States, does not exclude the applicability of duress to war crimes and crimes against humanity whose underlying offence is murder or unlawful killing. However, as the right to life is the most fundamental human right, the rule demands that the general requirements for duress be applied particularly strictly in the case of killing of innocent persons.

45. In evaluating the factual circumstances which may be relevant to duress, according to a trend discernible in the case-law, there may arise the need to distinguish between the various ranks of the military or civilian hierarchy. As pointed out by the Supreme Court of Canada in the *Finta* case, the lower the rank of the recipient of an order accompanied by duress, the less it is likely that he enjoyed any real moral choice[107]. This, as stressed by the prosecutor in the *Feurstein et al.* case, may be all the more true in the case of the ordinary soldiers making up an execution platoon: he contended that as a rule they should not be held responsible of the crime they may have been ordered to commit[108].

46. Furthermore, a trial court adjudicating a plea of duress might also want to take into account another factor, namely whether and to what extent the person assertedly acting under duress willed the commission of the offence. For this purpose the court might enquire whether the person allegedly acting under duress confessed at the earliest possible opportunity to the act he had committed and denounced it to the relevant authorities. If the person at issue

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[107] As put by Judge Cory for the majority: "The lower the rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice. It cannot be forgotten that the whole concept of the military is to a certain extent coercive. Orders must be obeyed. The question of moral choice will arise far less in the case of a private accused of a war crime or a crime against humanity than in the case of a general or other high-ranking officer". *R. v. Finta,* [1994] 1 S.C.R., at 838.

[108] The prosecutor pointed out that the five accused were all officers of varying rank, who had simply set in motion the machinery for the shooting of four prisoners of war, although they had not themselves been part of the execution squads. He then said that, since the soldiers making up an execution squad could not be held responsible, the question at issue was whether the officers as well could be held not criminally liable. (Opening statement of the prosecutor, in *Feurstein et al., supra,* n. 15, file WO 235/525, p. 4).
See also "*Report to the President of June 6, 1945*", in *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, where he says, when discussing superior orders: "There is doubtless a sphere in which the defence of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out . . . . But the case may be greatly altered where one has discretion because of the rank or the latitude of his orders". (Emphasis added.)

refrained from so doing, the inference might be warranted that he acquiesced in, and thus willed, the act which he perpetrated under duress[109].

6. Concluding considerations

47. I contend that the international legal regulation of duress in case of murder, as I have endeavoured to infer it from case-law and practice, is both realistic and flexible. It also takes account of social expectations more than the rule suggested by the Prosecution and that propounded by the majority.

Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below those standards.

Consider the following example. A driver of a van unwittingly transporting victims to a place of execution, upon arrival is told by the executioners he must shoot one of the victims or he himself will be shot. This, of course, is done in order to assure his silence since he will then be implicated in the unlawful killing. The victims who are at the execution site will certainly die in any event. Can society reasonably expect the driver in these circumstances to sacrifice his life? In such situations it may be too demanding to require of the person under duress that they do not perpetrate the offence. I should add that the war in the former Yugoslavia furnishes us with so many examples of such atrocities that this International Tribunal ought not to dismiss any possible scenario as fanciful or far-fetched.

Let us consider another case, a variation of an example drawn from proceedings which have taken place before this very International Tribunal. An inmate of a concentration camp, starved and beaten for months, is then told, after a savage beating, that if he does not kill another inmate, who has already been beaten with metal bars and will certainly be beaten to death before long, then his eyes will, then and there, be gouged out. He kills the other inmate as a result. Perhaps a hero could accept a swift bullet in his skull to avoid having to kill, but it would require an extraordinary - and perhaps impossible - act of courage to accept one's eyes

[109] *Cf. Einsatzgruppen* case, *supra*, n. 10, p. 481.

being plucked out. Can one truly say that the man in this example should have allowed his eyes to be gouged out and that he is a criminal for not having done so? This example, and one can imagine still worse, is one of those rare cases, in my opinion, where duress should be entertained as a complete defence. Any answer to the question of duress has to be able to cope with such examples which the war in Yugoslavia - and wars throughout the world - have generated and, regretfully, will continue to generate[110].

48. Another remark seems apposite. I do not see any point in contending that, since duress can be urged in mitigation, a court of law could take account of the situations just discussed by sentencing the person who acted under duress to a minimum or token penalty. Any such contention would neglect a critical, inescapable point, namely that the purpose of criminal law, including international criminal law, is to punish behaviour which is criminal, i.e., morally reprehensible or injurious to society, not to condemn behaviour which is "the product of coercion that is truly irresistible"[111] or the choice of the lesser of two evils. No matter how much mitigation a court allows an accused, the fundamental fact remains that if it convicts him, it regards his behaviour as criminal, and considers that he should have behaved differently. I have tried to demonstrate that this may be unjust and unreasonable where the accused can do nothing to save the victims by laying down his own life.

Nor is it, in my view, acceptable to have resort to the, in my opinion, extremely questionable expedient of some form of discharge. One might suggest that such a discharge can go so far that a conviction is not even recorded. But this is the very vanishing point of criminal law. If a conviction is not recorded, what is this but an acquittal? Moreover, it would shun the crucial issue: should the accused, in my example, have elected to have his eyes gouged out? Is he a criminal for not having done so? Any reasonable judgement on this matter must, in my view, address this issue.

[110] Nor is it an answer to this to say that the inmate in this example would never be brought to trial. It is true that in common-law countries where there is a doctrine of prosecutorial discretion, a prosecutor will typically decide not to take the matter to trial if there is strong evidence of duress. Thus many cases where the defence might have been upheld simply do not reach the trial stage. But this supports rather than vitiates the proposition that a person in this situation who acts under duress is not a criminal whom society demands should be prosecuted and punished.

[111] American Law Institute, Model Penal Code (1985), comment 2.

49. What I have argued so far leads me to the conclusion that international criminal law on duress is not ambiguous or uncertain. Here lies the main point of my disagreement with the Appeals Chamber's majority. Admittedly, when duress is urged as a defence for a war crime or a crime against humanity where the underlying offence is the killing of innocent persons, it proves particularly difficult for the international judge to establish whether the relevant facts are present and the necessary high requirements laid down in law are satisfied. But this is a matter for the trial judge to look into. However difficult and tricky his judicial investigation, he is not left empty-handed by law: on the contrary, he can draw from international law fairly accurate guidelines, spelled out in a number of national cases dealing with war crimes and crimes against humanity (as I have shown in paragraphs 27 and 36-37 *supra*, some of these cases were based on Control Council Law No. 10 and are therefore endowed with a more authoritative weight).

It should therefore be no surprise that I do not share the views of the majority of the Appeals Chamber, according to which, since international criminal law is ambiguous or uncertain on this matter, it is warranted to make a policy-directed choice and thus rely on "considerations of social and economic policy". I disagree not only because, as I have already repeatedly stated, in my view international law is not ambiguous or uncertain, but also because to uphold in this area of criminal law the concept of recourse to a policy-directed choice is tantamount to running foul of the customary principle *nullum crimen sine lege.* An international court must apply *lex lata,* that is to say, the existing rules of international law as they are created through the sources of the international legal system. If it has instead recourse to policy considerations or moral principles, it acts *ultra vires.*

In any event, even assuming that no clear legal regulation of the matter were available in international law, arguably the Appeals Chamber majority should have drawn upon the law applicable in the former Yugoslavia. In the former Yugoslavia and in the present States of the area the relevant criminal law provides that duress (called "extreme necessity") may amount to a total defence for any crime, whether or not implying the killing of persons[112]. A national of one of the States of that region fighting in an armed conflict was required to know those

[112] *See* Art. 10 of the Penal Code of the Socialist Federal Republic of Yugoslavia, as amended in 1990, and the identical Art. 10 of the 1993 Penal Code of the Federal Republic of Yugoslavia (Serbia and Montenegro).

national criminal provisions and base his expectations on their contents. Were *ex hypothesi* international criminal law really ambiguous on duress or were it even to contain a gap, it would therefore be appropriate and judicious to have recourse - as a last resort - to the national legislation of the accused, rather than to moral considerations or policy-oriented principles. In the specific instance under discussion, where the State at stake is one of the former Yugoslavia, this approach would also be supported by the general maxim *in dubio pro reo* (which in this case should be *in dubio pro accusato*).

D. Application To The Judgement Under Appeal

50. In view of my finding, above, that in exceptional circumstances duress can be urged in defence to a charge of crimes against humanity or war crimes, it follows that the Appellant's guilty plea was equivocal[113]. Thus, the Trial Chamber should have entered a plea of not guilty and held a trial. Accordingly, I would remit the case to a Trial Chamber for entry of a not-guilty plea and a determination on the issue of whether or not Appellant was acting under duress when he committed the crime, so that he would not be criminally responsible within the meaning of Article 7 of the Statute of the International Tribunal[114].

More particularly, in applying the conclusions of law which I have reached above, in my view the Trial Chamber to which the matter is remitted must first of all determine whether the situation leading to duress was voluntarily brought about by the Appellant. In particular, the Trial Chamber must satisfy itself whether the military unit to which he belonged and in which he had voluntarily enlisted (the 10th Sabotage Unit) was purposefully intent upon actions contrary to international humanitarian law and the Appellant either knew or should have

[113] At his initial appearance the Appellant appended the following declaration to his guilty plea: "Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused, they told me: 'If you are sorry for them, stand up, line up with them and we will kill you too. . . . I could not refuse because then they would have killed me." *See* Transcript, *Prosecutor v. Dražen Erdemović,* Case No. IT-96-22-T, 31 May 1996, p. 9.

[114] The situation is complicated by the fact that the Trial Chamber hearing the case proceeded, after entry of the guilty plea by the Appellant, to something resembling a trial, namely a series of hearings at which witnesses, including the Appellant, testified and which resulted in the rendering of a Judgement by the Chamber. But these hearings cannot be regarded as a trial for two reasons: (1) they proceeded upon a guilty plea, which pursuant to the Rules, means that no trial takes place; and (2) the Trial Chamber did not seek proof of guilt 'beyond a reasonable doubt'; the standard of proof to which the accused is entitled if there is a possibility that he is not guilty.

known of this when he joined the Unit or, if he only later became aware of it, that he then failed to leave the Unit or otherwise disengage himself from such actions. If the answer to this be in the affirmative, the Appellant could not plead duress. Equally, he could not raise this defence if he in any other way voluntarily placed himself in a situation he knew would entail the unlawful execution of civilians.

If, on the other hand, the above question be answered in the negative, the Appellant would be entitled to urge duress, and then the Trial Chamber must satisfy itself that the other strict conditions required by international criminal law to prove duress are met in the instant case, namely:

(i) whether Appellant acted under a threat constituting imminent harm, both serious and irreparable, to his life or limb, or to the life or limb of his family, when he killed approximatively 70 unarmed Muslim civilians at the Branjevo farm near Pilica in Bosnia on 16 July 1995;

(ii) whether Appellant had no other adequate means of averting this harm other than executing the said civilians;

(iii) whether the execution of the said civilians was proportionate to the harm Appellant sought to avoid. As I have stated above, this requirement cannot normally be met with respect to offences involving the killing of innocents, since it is impossible to balance one life against another. However, the Trial Chamber should determine, on its assessment of the evidence, whether the choice faced by Appellant was between refusing to participate in the killing of the Muslim civilians and being killed himself or participating in the killing of the Muslim civilians who would be killed in any case by the other soldiers and thus being allowed to live. If the Trial Chamber concludes that it is the latter, then Appellant's defence of duress will have succeeded.

51. In addition, bearing in mind that, as stated above, the lower the rank of a serviceman the greater his propensity to yield to compulsion, the Trial Chamber, in determining whether or not Appellant acted under duress, should also take into account his military rank. Furthermore, the Trial Chamber should consider whether Appellant confessed at the earliest possible opportunity to the act he had committed and denounced it to the relevant authorities. If he did so, this might contribute to lending credibility to his plea of duress.

Done in English and French, the English being authoritative.

Antonio Cassese

Dated this seventh day of October 1997
At The Hague
The Netherlands

[Seal of the Tribunal]