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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

Original: English

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

JOINT SEPARATE OPINION OF JUDGE MCDONALD AND JUDGE VOHRAH

The Office of the Prosecutor:

Mr. Grant Niemann
Mr. Payam Akhavan

Counsel for the Appellant:

Mr. Jovan Babić

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I. INTRODUCTION

1. The issues for consideration in this Appeal have been set out in the Judgement of the Appeals Chamber. In our view, the proper determination of the present Appeal should begin with an examination of the guilty plea of the Appellant.

II. THE GUILTY PLEA

A. The proper construction of the notion of the guilty plea as it appears in the Statute and the Rules

2. A few words might be said to clarify our concern with the Appellant's plea having regard to the fact that the Trial Chamber has dealt with the plea at some length in the Sentencing Judgement of 29 November 1996 ("*Sentencing Judgement*") and was satisfied that the plea was valid. The concept of the guilty plea *per se* is the peculiar product of the adversarial system of the common law which recognises the advantage it provides to the public in minimising costs, in the saving of court time and in avoiding the inconvenience to many, particularly to witnesses. This common law institution of the guilty plea should, in our view, find a ready place in an international criminal forum such as the International Tribunal confronted by cases which, by their inherent nature, are very complex and necessarily require lengthy hearings if they go to trial under stringent financial constraints arising from allocations made by the United Nations itself dependent upon the contributions of States.

1. The proper construction of the Statute and the Rules

3. This Appeals Chamber has the task of interpreting the meaning of the guilty plea as it exists within the Statute and the Rules. We would take this opportunity to define what, in our view, is the proper manner in which the Statute and the Rules are to be construed. As a starting

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proposition, it appears to us that the first step in the proper construction of the Statute and the Rules must always involve an examination of the provisions of the Statute and the Rules themselves. The terms used in these instruments must be construed according to their plain and ordinary meaning. Our approach is consistent with Article 31 of the Vienna Convention on the Law of Treaties[1] which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

We would add that regard may also be had to the preparatory work relating to the formulation of the Statute and the Rules for the purpose of statutory interpretation in the light of Article 32 of the Vienna Convention which reads:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
> (b) leads to a result which is manifestly absurd or unreasonable.

4. The second step in the proper interpretation of the Statute and the Rules involves a consideration of international law authorities which may offer further elucidation of the meaning of terms employed in the Statute and the Rules. We would, however, state the caveat that no credence may be given to such international authorities if they are inconsistent with the spirit, object and purpose of the Statute and the Rules as discerned from the plain meaning of the terms used therein.

5. In the event that international authority is entirely lacking or is insufficient, recourse may then be had to national law to assist in the interpretation of terms and concepts used in the Statute and the Rules. We would stress again that no credence may be given to such national law authorities if they do not comport with the spirit, object and purpose of the Statute and the Rules. This is the third step in the proper construction of these basic documents and the terms and concepts used therein. In our observation, there is no stricture in international law which

[1] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 *U.N.T.S.* 331

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prevents us from making reference to national law for guidance as to the true meaning of concepts and terms used in the Statute and the Rules. In the *Exchange of Greek and Turkish Populations case*[2] decided by the Permanent Court of International Justice and in a decision of 25 June 1952 by the French-Italian Concilations Commission[3], the principle was affirmed that reliance upon legal concepts in national legal systems is justified when international rules make explicit reference to national laws or where such reference is necessarily implied by the very content and nature of the concept. Further, the Court of Justice of the European Communities held in the case *Assider v. High Authority*[4] that when treaties use technical legal terms derived from the laws of member States, the Court naturally looks at the laws of those member States to see what the terms mean.

2. The construction of the guilty plea as it appears in the Statute and the Rules

6. The procedure of pleading guilty is rather ambiguously referred to in Article 20, paragraph 3, of the Statute which provides that "the Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial."

The vague and imprecise language of Article 20, paragraph 3, may at first glance suggest that a trial shall be held even if the accused pleads guilty. However, Article 15 of the Statute directs the Judges of the International Tribunal to draft rules of procedure and evidence for the conduct of proceedings before the International Tribunal. Rule 62 explicitly incorporates the common law adversarial trial procedure because it reads:

> Upon his transfer to the seat of the Tribunal, the accused shall be brought before a Trial Chamber without delay, and shall be formally charged. The Trial Chamber shall:
>
> (i) satisfy itself that the right of the accused to counsel is respected;

[2] Advisory Opinion (1925), P.C.I.J. Reports, Series B, No.10, pp. 19-20.
[3] U.N. Reports of International Arbitral Awards, vol. XIII, at pp. 398-399.
[4] *Assider v. High Authority* [1954-6] E.C.R. 63 at p. 74.

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(ii) read or have the indictment read to the accused in a language he speaks and understands, and satisfy itself that the accused understands the indictment;

(iii) call upon the accused to enter a plea of guilty or not guilty on each count; should the accused fail to do so, enter a plea of not guilty on his behalf;

(iv) in case of a plea of not guilty, instruct the Registrar to set a date for trial;

(v) in case of a plea of guilty, instruct the Registrar to set a date for the pre-sentencing hearing;

(vi) instruct the Registrar to set such other dates as appropriate. (Emphasis added.)

Noting that there is no international jurisprudence or authority to lend us further assistance in the interpretation of the guilty plea as it exists in the Statute and the Rules, we are of the opinion that we may have regard to national common law authorities for guidance as to the true meaning of the guilty plea and as to the safeguards for its acceptance. The expressions "enter a plea" and "enter a plea of guilty or not guilty", appearing in the Statute and the Rules which form the infrastructure for our international criminal trials imply necessarily, in our view, a reference to the national jurisdictions from which the notion of the guilty plea was derived. In addition, an examination of the preparatory work relating to the drafting of the Rules reveals the parentage of the expression "plea of guilty or not guilty" in Rule 62. Rule 62 reflects substantially Rule 15 of the *Suggestions Made by the Government of the United States of America, Rules of Procedure and Evidence for the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Former Yugoslavia*[5].

Accordingly, we can see no impropriety in turning to the common law for guidance as to the proper meaning to be given to the guilty plea and for the necessary safeguards for its acceptance.

[5] Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia,* (Transnational Publishers, New York, 1995), vol. 2, pp. 531-532.

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B. The guilty plea in the procedure of the Tribunal

7. The institution of the guilty plea, though securing "administrative efficiency", must not in any way prejudice the Appellant's rights as provided for in Article 20, paragraph 1, of the Statute:

> The Trial Chambers 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.

Though the Statute and the Rules are largely silent on the nature and extent of these rights, we do not propose an exhaustive and definitive statement of the rights beyond what is strictly necessary for the disposal of this case. The rights of the accused are contained in Article 21 of the Statute which is based, almost verbatim, upon Article 14 of the International Covenant on Civil and Political Rights[6]. The relevant parts of Article 21 read:

> 1. . . . .
>
> 2. In the determination of the charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute [protection of witnesses].
>
> 3. The accused shall be presumed innocent until proven 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) - (d) . . . .
>
> (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) . . . .

[6] *See* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Tadić,* Case No. IT-94-1-A, A.Ch., 2 Oct. 1995, para. 46.

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(g) not to be compelled to testify against himself or to confess guilt.

8. Thus, the immediate consequences which befall an accused who pleads guilty are that he forfeits his entitlement to be tried, to be considered innocent until proven guilty, to test the Prosecution case by cross-examination of the Prosecution's witnesses and to present his own case. It follows, therefore, that certain pre-conditions must be satisfied before a plea of guilty can be entered. In our view, the minimum pre-conditions are as follows:

(a) The guilty plea must be voluntary. It must be made by an accused who is mentally fit to understand the consequences of pleading guilty and who is not affected by any threats, inducements or promises.

(b) The guilty plea must be informed, that is, the accused must understand the nature of the charges against him and the consequences of pleading guilty to them. The accused must know to what he is pleading guilty;

(c) The guilty plea must not be equivocal. It must not be accompanied by words amounting to a defence contradicting an admission of criminal responsibility;

9. We find ample support for our view that the above three pre-conditions must be satisfied in a consistent and long-established line of authorities obtaining throughout the common law jurisdictions of the world. We would like to reiterate, however, that we do not in any way consider the common law authorities as binding upon us; we merely consider them as relevant material, throwing light upon the proper construction to be given to the guilty plea as employed in the procedure of the International Tribunal and as supporting the conclusions we have arrived at with regard to the pre-conditions for the acceptance of a guilty plea to ensure the protection of the accused's rights specifically provided for in the Statute and the Rules.

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C. Was the guilty plea voluntary?

10. It is a requirement in all common law jurisdictions that a guilty plea be made voluntarily[7]. Voluntariness involves two elements. Firstly, an accused person must have been mentally competent to understand the consequences of his actions when pleading guilty. For instance, in the Canadian case of *R v. Hansen*[8], the court held that the accused was permitted to withdraw his guilty plea to second degree murder and a new trial was ordered because the accused was in a disturbed state of mind at the time of pleading and was under the false impression that if he did not plead guilty, the Crown would proceed on a charge of first degree murder.

Secondly, the plea must not have been the result of any threat or inducement other than the expectation of receiving credit for a guilty plea by way of some reduction of sentence. For instance, in *Brady v. United States*, the United States Supreme Court said:

> [A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harrassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[9]

The court also stated in that case that guilty pleas could not be treated as involuntary simply because they were

> motivated by the defendant's desire to accept the certainty . . . of a lesser penalty rather than . . . [a trial which might result in] conviction and a higher penalty.[10]

11. In the *Sentencing Judgement*, the Trial Chamber examined the voluntariness of the guilty plea under the heading "Formal validity" in the following manner. It noted that it had

[7] *See*, for example, Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 1995), at para. 4-91 ("Archbold"); *Adgey v. The Queen* (1973) 13 CCC (2d.) 177, 23 CRNS 298 (SCC).
[8] *R v. Hansen* (1977) 37 CCC (2d.) 371 (Man CA).
[9] *Brady v. United States*, 90 S.Ct. 1463 (1970).
[10] *Ibid.*

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appointed a panel of psychiatric experts to examine the mental condition of the Appellant, presumably due to his disturbed disposition at the initial appearance. Significantly, it was during this first appearance that the Appellant entered his guilty plea.

The relevant question which the Trial Chamber posed to the panel of experts was:

> Does the examination of the subject reveal that he currently suffers from a psychiatric or neuro-psychiatric disorder or from an emotional disturbance which affects his judgement or his volition? If so, please describe it and indicate precisely to which affections it is related. *(Psychiatric Report, 24 June 1996, p.1)*

The panel of experts concluded in its report dated 24 June 1996 that the Appellant was not fit to stand trial in his "present condition" because he was suffering from

> post-traumatic shock disorder which took the form of depressions accompanied by a feeling of guilt vis-a-vis his behaviour during the war in the former Yugoslavia.[11]

The Trial Chamber then found that the guilty plea of the Appellant was voluntary for two reasons which appear at paragraph 12 of the *Sentencing Judgement*. Firstly, the Trial Chamber explained that the second psychiatric report submitted on 17 October 1996 indicated that the Appellant's "conscience was clear" and that he showed "no signs of memory impairment". Secondly, the Trial Chamber stressed that the Appellant reaffirmed his plea of guilty on several occasions, the last at the pre-sentencing hearing of 19 and 20 November 1996 at which time the second psychiatric report had declared the Appellant mentally fit to stand trial.

12. We admit to some difficulty with the proposition that the fact that the second psychiatric report showed the Appellant's conscience was clear and that he was free from memory impairment would somehow dispose of the question whether the Appellant was mentally fit to plead guilty, as the Trial Chamber appears to assert at paragraph 12 of the *Sentencing Judgement*. Indeed, we find persuasive the Prosecution's submission in reply to the third preliminary question that the psychiatric report focused primarily upon the Appellant's

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[11] Sentencing Judgement, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, T.Ch.I, 29 Nov. 1996 ("*Sentencing Judgement*"), para. 98.

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fitness to withstand the rigours of trial and should not form the sole basis of any conclusions that the Appellant was also unfit to plead guilty. However, if there are any doubts remaining about the mental fitness of the Appellant to plead arising from the conclusions of the report, these doubts are allayed by the fact that the Appellant consistently reiterated his plea of guilty, in particular, after the second psychiatric report found him fit to stand trial. To find the Appellant's plea invalid on the ground of his mental incompetence at the initial appearance, when he clearly affirmed his plea after being declared mentally competent, would defy common sense and require the Appellant to endure another round of lengthy procedures at which he would plead no differently, as clearly evidenced by his subsequent affirmations.

13. Apparently, the Trial Chamber also satisfied itself that the plea was not solicited by any threat or inducement by the following exchange at the initial appearance:

> THE PRESIDING JUDGE: Mr. Erdemovic, would you rise again? On behalf of my colleagues and on behalf of the Tribunal, I would like to ask you before you decided to plead guilty or not guilty whether you were threatened or promised anything in order to orientate you in one direction rather than another? Were you told, for example, that you must plead guilty, or you have to do this, you must do that? This is a question I must ask you.
>
> THE ACCUSED ERDEMOVIĆ: No, no one threatened me.[12]

Although it appears that the Appellant did not in his reply address the question whether he was promised anything for his plea, in the absence of any suggestion that the plea was improperly solicited, we would find that the Appellant pleaded guilty voluntarily whilst he was mentally competent to comprehend the consequences of his so pleading.

D. Was the plea informed?

14. The fact that the Appellant was mentally competent to comprehend the consequences of pleading guilty does not necessarily mean that the plea was "informed". Indeed, all common law jurisdictions insist that an accused who pleads guilty must understand the nature and

[12] Trial Transcript, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-T, T.Ch.I, 31 May 1996 ("Trial Transcript"), pp. 11-12.

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consequences of his plea and to what precisely he is pleading guilty[13]. A statement in a Malaysian authority puts the issue succinctly and accurately. In *Huang Chin Shin v. Rex*, Spenser Wilkinson J said:

> It is to my mind essential to the validity of a plea of guilty that the accused should fully understand what he is pleading to. [14]

In respect of the present case, an informed plea would require that the Appellant understand

(a) the nature of the charges against him and the consequences of pleading guilty generally; and

(b) the nature and distinction between the alternative charges and the consequences of pleading guilty to one rather than the other.

1. Did the Appellant understand the nature and consequences of pleading guilty in general?

15. Before asking the Appellant to enter a plea, the Presiding Judge explained the consequences of pleading guilty in the following language:

> THE PRESIDING JUDGE: Are you prepared to plead, given the fact that the Tribunal would like to recall to you that you can plead either guilty or not guilty? This is the procedure which was adopted in this Tribunal with it being understood, of course, that the consequences are not the same. I will explain them to you.

[13] United States Federal Rules of Criminal Procedure, Rule 11(c)(1) which provides that the court must "address the defendant personally in open court and inform the defendant of, and determine that the defendant understands . . . the nature of the charges to which the plea is offered" and inform the defendant personally of the possible consequences of the plea such as the maximum penalty provided by law. *See also Halsbury's Laws of England*, (Butterworths, London, 4th ed., 1990), vol. 11(2), p. 823.; Malaysian Code of Criminal Procedure, Chapter XIX, section 173(b): "If the accused pleads guilty to a charge . . . the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him".
[14] *Huang Chin Shin v. Rex* [1952] M.L.J. 7.

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> If you plead not guilty, you are entitled to a trial during which, of course, with your lawyer you will contest the charges and the allegations and the charges presented against you by the Prosecutor, as I will remind you. Alternatively, either one or the other violations, crime against humanity or war crime, violations of laws or customs of war.
>
> If you plead guilty, the trial will continue but completely differently, which I am sure you understand but which I have to explain to you. At that point you will have the opportunity during another hearing at a date which we will set at that point in agreement with everybody, you will plead guilty but you will plead under other circumstances, that is, that there were attenuating circumstances, mitigating circumstances, or aggravating circumstances. Then there will be a discussion between your attorney and the Prosecution which will not be the same.
>
> Having explained this to you, the Tribunal must now ask you whether you are prepared to plead and do you plead guilty or not guilty?
>
> THE ACCUSED ERDEMOVIC: Your Honour, I have told my counsel that I plead guilty.[15]

We feel unable to hold with any confidence that the Appellant was adequately informed of the consequences of pleading guilty by the explanation offered during the initial hearing. It was not clearly intimated to the Appellant that by pleading guilty, he would lose his right to a trial, to be considered innocent until proven guilty and to assert his innocence and his lack of criminal responsibility for the offences in any way. It was explained to the Appellant that, if he pleaded not guilty he would have to contest the charges, whereas, if he pleaded guilty he would be given the opportunity of explaining the circumstances under which the offence was committed.

16. Moreover, it appears to us that defence counsel consistently advanced arguments contradicting the admission of guilt and criminal responsibility implicit in a guilty plea. If the defence had truly understood the nature of a guilty plea, it would not have persisted in its arguments which were obviously at odds with such a plea. In his closing submissions during the Sentencing Hearing, defence counsel urged that the uncorroborated evidence of the Appellant alone was insufficient to ground a conviction. He argued:

[15] Trial Transcript, 31 May 1996, pp. 6-7.

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> Erdemovic's plea of guilty and the explanation given by his counsel must be confirmed so that a Court can reach an objective and legally acceptable judgement beyond any doubt. My intention was not to challenge Erdemovic's plea on his behalf. However, according to the principle in *dubio prop reo*, certain questions arose yesterday . . . [I]f there is any shade of doubt in that answer to that question, then the decision of the Court should go in favour of the accused Erdemovic, because regardless of his plea of guilty, if his statement is not corroborated, the alleged crime cannot be proved and the criminal responsibility cannot be established.[16]

From his foregoing statement, defence counsel did not seem to appreciate that a guilty plea had finally decided the issue of conviction or acquittal. Defence counsel was apparently advancing arguments asserting insufficiency of evidence to convict the Appellant and urging for an acquittal during a sentencing hearing after the Appellant had pleaded guilty. Indeed, the Trial Chamber did nothing to dissuade defence counsel from this course of action since it merely said that if the Appellant were to plead guilty, "the trial will continue, but completely differently", and that he would have the opportunity to explain attenuating circumstances. This intricate issue as to whether the defence asserted arguments contradicting a guilty plea is dealt with further when we come to consider the question as to whether the Appellant's plea was equivocal or not. However, it is clear to us thus far that the Appellant did not understand the true nature and consequences of making a guilty plea.

2. Did the Appellant understand the nature of the charges against him?

17. During the initial appearance of the Appellant, the Presiding Judge questioned defence counsel regarding the Indictment:

> THE PRESIDING JUDGE: . . . . First of all, I would like to turn to Mr. Babic: Mr. Babic, have you received a copy of the indictment in a language which you understand and which, of course, the accused understands? . . .
> MR. BABIC: Yes . . . We have received the text of the indictment in Serbo-Croatian and both the accused and myself have understood it.

[16] *Ibid.*, 20 Nov. 1996, pp. 61-62.

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> THE PRESIDING JUDGE: . . . . Have you deliberated a long time about the contents of this indictment with the accused and explained what defence strategy can be used, which you are going to use with him?
> MR. BABIC: With my client, I spent some time, several hours, studying the indictment and studying his rights according to the Statute and Rules of the Tribunal. I think that he had enough time to comprehend what he is charged with by this indictment and to understand his rights on that basis.[17]

The Presiding Judge then addressed questions directly to the Appellant regarding the Indictment:

> THE PRESIDING JUDGE: . . . . You have heard what your counsel has just said. On behalf of my colleagues and on behalf of the International Tribunal, I would like to ask you the same question, the one that I asked your attorney: Have you read the indictment, have you had the opportunity, have you had the time, to speak about it with Mr. Babic? Have the facts in that indictment been presented to you, have they been presented to you in a language which you understand, that is, Serbo-Croat?
> THE ACCUSED ERDEMOVIC: Yes, your Honour. Yes.[18]

The Registrar then read the Indictment and the Presiding Judge continued to question the Appellant:

> THE PRESIDING JUDGE: . . . . Mr. Erdemovic . . . According to what you said before, you understood what is contained in his indictment as well as the charges against you, those charges which the Prosecution has made against you. Have you spoken about these charges with your counsel, Mr. Babic? I am asking you a question now.
> THE ACCUSED ERDEMOVIC: Yes.[19]

18. The Trial Chamber has by these exchanges established no more than that the Appellant was advised by his counsel regarding the Indictment before he entered his plea, that the Indictment was available to the Appellant in a language he understood, and that the Appellant understood that the Indictment charged him with two offences. There is no indication that the Appellant understood the nature of the charges. Indeed, there is every indication that the Appellant had no idea what a war crime or a crime against humanity was in terms of the legal

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[17] *Ibid.*, 31 May 1996, p. 3.
[18] *Ibid.*
[19] *Ibid.*, p. 6.

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requirements of either of these two offences. Our conclusion is supported by what seems to have been some misapprehension on the part of defence counsel himself as to the nature of the charges. When questioned by the President of the International Tribunal during the hearing of 26 May 1997 as to the elements of a war crime, the following exchange took place:

> MR. BABIC: . . . . We did not have the option of war crime, because the elements -- all the elements of the criminal offence of the war crime were not present. So we discussed that.
> PRESIDENT CASSESE: Sorry. May I ask you -- I did not understand you correctly. You said that some elements of war crimes were not present. Which elements of war crimes were not present?
> MR. BABIC: Yes.
> PRESIDENT CASSESE: Which ones?
> MR. BABIC: The presence of the civilian population is not an element of the war crime; it is an element of the crime against humanity.
> PRESIDENT CASSESE: Do you mean to say that in an armed conflict, whatever its classification, whether it is classified as internal or international, the killing of civilians may not be regarded as a war crime? I mean, if you go through the case law of --
> MR. BABIC: During combat operations, yes, during combat operations.
> PRESIDENT CASSESE: All right. Thank you.[20]

Defence counsel's statements would indicate a lack of understanding of the offence of a war crime. We, therefore, hold that the Appellant did not understand the nature of the charges he was facing nor the charge to which he pleaded guilty. Although the Appellant did repeat his plea of guilty on several occasions, he remained on each of these occasions, and probably even to this day, ignorant of the true nature of each of the two charges against him, as it was never adequately explained to him either by the Trial Chamber or by defence counsel.

3. Did the Appellant comprehend the distinction between the alternative charges and the consequences of pleading guilty to one rather than the other?

19. It is the answer to this question which, in our view, determines decisively the issue of the validity of the Appellant's guilty plea. Upon the Appellant entering his plea of guilty during

[20] Appeals Transcript, *Prosecutor v. Dražen Erdemović,* Case No. IT-96-22-A, A.Ch., 26 May 1997 ("Appeals Transcript"), pp. 36-37.

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the initial hearing, the Presiding Judge of the Trial Chamber asked the Appellant to specify to which count he was pleading guilty:

> THE PRESIDING JUDGE: If you plead guilty, I must also ask you another question. You heard that in the indictment which was drafted by the Office of the Prosecution against you, it provides for a charge which may be one or the other, that either a crime against humanity or a violation of the laws or customs of war. The text of our Statute obliges me to ask you whether you are pleading guilty on one of the charges, that is, there are facts, they were read to you, the Tribunal understands that you accept these facts and that they have been classified in a certain way legally.
>
> This is part of international law. It is a bit difficult for you, but I will try to explain it to you in a more simple fashion, that is, there are acts and these are the acts which you have just recognised that, yes, you were at Srebrenica at such and such a moment. I think that the Prosecutor will make things very clear for us. The Prosecutor classifies them, which means that it determines a certain number of conditions from which a criminal violation has been charged. At the stage that we are now in these proceedings, which is at the beginning, the proceedings against you, Mr. Erdemovic, given the facts as they are today, that is, the fact that you have recognised what happened, that you were present, the various acts could either be classified as a crime against humanity or what we call violations of the laws or customs of war.
>
> Having said this, if there had been a trial, after the Tribunal would decide what, in fact, you were guilty or not guilty of. In this case, since you have just said that you are pleading guilty, I must ask you if you are pleading guilty to the crime against humanity, that is, the version of the facts which for the Prosecutor would be a crime against humanity, or if it is a violation of the laws or customs of war. I suppose you have spoken about this with your attorney?
>
> Mr. Erdemovic, could you answer us on that point which is an important one?
>
> THE ACCUSED ERDEMOVIC: I plead guilty for point one, crime against humanity.[21]

With respect, the difference between a crime against humanity and a war crime was not adequately explained to the Appellant by the Trial Chamber at the initial hearing nor was there any attempt to explain the difference to him at any later occasion when the Appellant reaffirmed his plea. The Presiding Judge appears to assume that the Appellant had been advised by his counsel as to the distinction between the charges and that the Prosecution "will make things very clear". From the passage of the transcript previously quoted, it is apparent

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[21] Trial Transcript, 31 May 1996, pp. 7-8.

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that defence counsel himself did not appreciate either the true nature of the offences at international law or the true legal distinction between them. It is also clear on the record that the difference between the charges was never made clear by either the Prosecution or by the Presiding Judge.

We have, accordingly, no doubt that the misapprehension regarding the true distinction between the two alternative charges led the Appellant to plead guilty to the more serious of the two charges, that is, the charge alleging the crime against humanity.

(a) Crimes against humanity intrinsically more serious than war crimes

20. It is appropriate that we explain why, all things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime.

21. It is in their very nature that crimes against humanity differ in principle from war crimes. Whilst rules proscribing war crimes address the criminal conduct of a perpetrator towards an immediate protected object, rules proscribing crimes against humanity address the perpetrator's conduct not only towards the immediate victim but also towards the whole of humankind. This point was noted by the Trial Chamber in the *Sentencing Judgement* as follows:

> With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.
>
> ....
>
> But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.[22]

[22] *Sentencing Judgement,* paras. 19, 28.

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Crimes against humanity are particularly odious forms of misbehaviour and in addition form part of a widespread and systematic practice or policy. Because of their heinousness and magnitude they constitute egregious attacks on human dignity, on the very notion of humaneness. They consequently affect, or should affect, each and every member of mankind, whatever his or her nationality, ethnic group and location. On this score, the notion of crimes against humanity laid down in current international law constitutes the modern translation into law of the concept propounded way back in 1795 by Immanuel Kant, whereby "a violation of law and right in one place [on the earth] is felt in *all* others"[23]. (Emphasis added.)

This aspect of crimes against humanity as injuring a broader interest than that of the immediate victim and therefore as being of a more serious nature than war crimes is shown by the intrinsic elements of the offence of a crime against humanity. The requisite elements constituting a crime against humanity are discussed in some detail in the Opinion and Judgment of 14 July 1997 in *Prosecutor v. Tadić* ("*Tadić* Opinion and Judgement")[24]. One of the relevant elements as set out in Article 5 of the Statute is that a crime against humanity must be "directed against any civilian population". The two facets of this element clearly distinguish a crime against humanity from a war crime. These facets impose upon the Prosecution the onus of proving that the act of a person accused of a crime against humanity: (a) must have been committed as part of the widespread or systematic perpetration of such acts, not necessarily by the accused person himself; but certainly (b) in the knowledge that the acts are being or have been committed in pursuance of an organised policy or as part of a widespread or systematic practice against a certain civilian group.

22. The gravity of crimes against humanity when compared with that of war crimes is enhanced by these facets. They indicate that crimes against humanity are not isolated and random acts but acts which will, and which the perpetrator knows will, have far graver consequences because of their additional contribution to a broader scheme of violence against a

[23] Immanuel Kant, "Eternal Peace", reproduced in C.J. Friedrich (ed.), *The Philosophy of Kant: Immanuel Kant's Moral and Political Writings* (The Modern Library, New York, 1949), p.448.
[24] Opinion and Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T.Ch.II, 17 May 1997, paras. 624-659.

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particular systematically targeted civilian group. As the United Nations War Crimes Commission stated:

> Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime ... into a crime against humanity... Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the international community or shocked the conscience of mankind . . .[25]

23. Clear judicial recognition that crimes against humanity are more serious than war crimes can be found in the *Albrecht* case before the Dutch Court of Appeal. The Appellant in that case had been sentenced to death by a Special Criminal Court in Arnhem, the Netherlands, on 22 September 1948 on the ground that he had committed "war crimes or . . . crimes against humanity as defined in article 6(b) or (c) of the Charter of the London Agreement of 8 August 1945". The Court of Appeal noted that there was a distinction between war crimes and crimes against humanity and approved the above description of crimes against humanity by the United Nations War Crimes Commission. It described the requisite elements of crimes against humanity as follows:

> [C]rimes of this category are characterised either by their seriousness and their savagery, or by their magnitude, or by the circumstance that they were part of a system of terrorist acts, or that they were a link in a deliberately pursued policy against certain groups of the population.[26]

As the Court of Appeal found that these requisite elements of a crime against humanity were not present in respect of the Appellant who was guilty merely of a war crime, it did "not consider the criminality of the Appellant's behaviour great enough to demand that he suffer the death penalty" and accordingly reduced his sentence to life imprisonment.[27]

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[25] *History of the United Nations War Crimes Commission and the Development of the Laws of War* (H.M. Stationery Office, London, 1948), p.179.
[26] *Albrecht* Case, Special Court of Cassation in the Netherlands, 11 Apr. 1949, *Nederlandse Jurisprudentie* (1949), No. 425, p. 747. (Unofficial translation.)
[27] *Ibid.*

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24. Statements in international war crimes trials also go to show that crimes against humanity are more serious than war crimes. The Judge Advocate in the *Trial of Max Wielin and 17 Others* ("*Stalag Luft III* case") was careful to point out that

> the charge does not call, in this case, for a punishment of a crime against humanity but only - and that is already enough - a crime against the rules and usages of war, consisting in the shooting of prisoners of war.[28] (Emphasis added.)

In the *Trial of Otto Ohlendorf and Others ("Einsatzgruppen* case"), the prosecution went to some trouble to explain the difference between war crimes and crimes against humanity as follows:

> The charges we have brought accuse the defendants of having committed crimes against humanity. The same acts we have declared under count one as crimes against humanity are alleged under count two as war crimes. The same acts are, therefore, charged as separate and distinct offences. In this there is no novelty. An assault punishable in itself may be part of the graver offence of robbery, and it is proper pleading to charge both of the crimes. So here the killing of defenceless civilians during a war may be a war crime, but the same killings are part of another crime, a graver one if you will, genocide - or a crime against humanity. This is the distinction we make in our pleading. It is real and most significant. To avoid at the outset any possible misunderstanding, let us point out the differences between the two offences.
>
> War crimes are acts and omissions in violation of the laws or customs of war. By their very nature they can affect only nationals of belligerents and cannot be committed in time of peace. The crime against humanity is not so delimited. It is fundamentally different from the mere war crime in that it embraces systematic violations of fundamental human rights committed at any time against the nationals of any nation. They may occur during peace or in war. The animus or criminal intent is directed against the rights of all men, not merely the right of persons within a war zone.
>
> One series of events, if they happen to occur during the time of hostilities, may violate basic rights of man and simultaneously transgress the rules of warfare. That is the intrinsic nature of the offences here charged. To call them war

[28] Referred to by the Defence Counsel, Dr. Adler, in his closing speech in *Proceedings of a Military Court held at Hamburg* (1 July 1947 - 1 Sep. 1947) (Files WO 235/424-432 in Public Record Office, Kew, Richmond).

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crimes only is to ignore their inspiration and their true character".[29] (Emphasis added.)

25. In the Sentencing Judgement issued in *Prosecutor v. Tadić*, handed down on 14 July 1997, further support is lent to the proposition that a person convicted of a core offence amounting to a crime against humanity deserves a harsher penalty than one convicted of a core offence amounting merely to a war crime. After noting at paragraph 73 that

> [a] prohibited act committed as part of a crime against humanity, that is with an awareness that the act formed part of a widespread or systematic attack on a civilian population, is, all else being equal, a more serious offence than an ordinary war crime,[30]

the Trial Chamber consistently sentenced Duško Tadić to one extra year in respect of punishable acts when they were characterised as crimes against humanity as opposed to when they were characterised as war crimes in each of the Counts for which Duško Tadić was convicted. On Counts 10 and 11, for instance, in respect of the same criminal conduct, the Trial Chamber held:

> For inhumane treatment as a crime against humanity, the Trial Chamber sentences Duško Tadić to ten years' imprisonment;
>
> For cruel treatment as a violation of the laws or customs of law, the Trial Chamber sentences Duško Tadić to nine years' imprisonment.[31]

26. It is the fact that the Appellant pleaded guilty to the more serious charge which, in our view, demonstrates the flaw in the Prosecution's argument that it would be improvident and unfair to the Appellant to invalidate his plea when he had persistently and consistently affirmed his plea of guilty to having committed a crime against humanity. As has been noted, there is nothing on the record to show that anyone, either defence counsel or the Trial Chamber, had explained to the Appellant that a crime against humanity is a more serious crime and that if he had pleaded guilty to the alternative charge of a war crime he could expect a correspondingly

[29] Opening Statement of the Prosecutor, *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No.10* (U.S. Govt. Printing Office, Washington D.C.), Oct. 1946 - Apr. 1949, ("*Trials of War Criminals*"), vol. IV, pp. 48-49.
[30] Sentencing Judgment, *Prosecutor v. Tadić*, Case No. IT-94-1-T, T.Ch.II, 14 July 1997.
[31] *Ibid.*, para. 74.

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lighter punishment. In light of this, it would not surprise us that the Appellant remains to this day in ignorance of the fact that he could have pleaded guilty to the charge of a war crime under Article 3 of the Statute, that, contrary to the advice of his counsel, a war crime can be committed against a civilian, and that he could accordingly have expected to receive a lighter sentence for this crime. It seems to us that the Appellant reaffirmed his plea solely because he wished to avoid having to undergo a full trial. Had he been properly apprised of the less serious charge and his entitlement to plead to it, we have grave doubts that he would have continued to plead guilty to the more serious charge.

27. We, therefore, hold that the Appellant's plea was not the result of an informed choice. He understood neither the nature of the charges nor the distinction between the two alternative charges and the consequences of pleading guilty to one rather than the other. It thus follows that the Appellant must be afforded an opportunity to replead to the charges with full knowledge of these matters.

E. Was the plea equivocal?

28. The question as to whether the Appellant's plea was equivocal or not was examined by the Trial Chamber in the *Sentencing Judgement* and addressed in the first two of the three preliminary questions put to the parties by the Appeals Chamber in its Scheduling Order of 5 May 1997. For convenience, these two interrelated questions are hereunder re-stated:

(1) In law, may duress afford a complete defence to a charge of crimes against humanity and/or war crimes such that, if the defence is proved at trial, the accused is entitled to an acquittal?

(2) If the answer to (1) is in the affirmative, was the guilty plea entered by the accused at his initial appearance equivocal in that the accused, while pleading guilty, invoked duress?

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As is obvious from the formulation of these two preliminary questions, whether the Appellant's plea was, in this case, equivocal depends upon whether duress is a complete defence. We would turn firstly, however, to a consideration of the meaning of the "equivocal" plea.

29. The requirement that a plea must be unequivocal is essential to uphold the presumption of innocence and to provide protection to an accused against forfeiture of the right to a trial where the accused appears to have a defence which he may not realise. This requirement imposes upon the court in a situation where the accused pleads guilty but persists with an explanation of his actions which in law amounts to a defence, to reject the plea and have the defence tested at trial. The courts in common law jurisdictions all over the world, except in the United States, have consistently declared that a guilty plea must be unequivocal. It would appear that in the United States the constitutional right to plead as one chooses outweighs any requirement that a defence be tested on the merits at trial[32]. The validity of a guilty plea turns primarily on the voluntariness of the plea, that it is informed, and that it has a factual basis[33]. If a United States court is satisfied that these conditions are fulfilled, apparently, it will be more willing than courts of other common law jurisdictions to accept a *prima facie* equivocal plea in recognition of pragmatic considerations relating to the practicality and the reality of plea-bargaining whereby credit is given for pleading guilty by reduction of sentence.

30. It is appropriate at this stage to consider certain strictures emanating from other common law systems for the requirement of an unequivocal guilty plea. Chang Min Tat J said in *PP v. Cheah Chooi Chuan*[34] that "it is a cardinal principal that any plea of guilty must be completely unreserved, unqualified and unequivocal". The Supreme Court of Malaysia in *Lee Weng Tuck & Anor v. PP* observed: "It is . . . settled practice that where the plea of guilty is equivocal, i.e. where it is not clear, or is doubtful or qualified, the plea must in law be treated as one of not guilty and the court shall proceed to try the case . . . "[35].

Further, in England it is stated in *Blackstone's Criminal Practice* that

[32] *See North Carolina v. Alford,* 400 US 25 (1970).
[33] United States Federal Rules of Criminal Procedure, Rule 11.
[34] *PP v. Cheah Chooi Chuan* [1972] 1 M.L.J. 215.
[35] *Lee Weng Tuck & Anor v. PP* [1989] 2 M.L.J. 143.

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> [i]f an accused person purports to enter a plea of guilty but, either at the time he pleads or subsequently in mitigation, qualifies it with words that suggest he may have a defence . . . then the court must not proceed to sentence on the basis of the plea but should explain the relevant law and seek to ascertain whether he genuinely intends to plead guilty. If the plea cannot be clarified, the court should order a not-guilty plea be entered on the accused's behalf.[36]

31. Whether a plea of guilty is equivocal must depend on a consideration, *in limine,* of the question whether the plea was accompanied or qualified by words describing facts which establish a defence in law. The Appellant pleaded guilty but claimed that he acted under duress. It follows therefore that we must now examine whether duress can constitute a complete defence to the killing of innocent persons.

[36] *Blackstone's Criminal Practice* (Blackstone Press Ltd., London, 1995), at para. D9.23.

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III. CAN DURESS BE A COMPLETE DEFENCE IN INTERNATIONAL LAW TO THE KILLING OF INNOCENTS?

32. As to the first preliminary question addressed to the parties in this appeal, "[i]n law, may duress afford a complete defence to a charge of crimes against humanity and/or war crimes such that, if the defence is proved at trial, the accused in entitled to an acquittal?", three factors bear upon this general statement of the issue. Firstly, the particular war crime or crime against humanity committed by the Appellant involved the killing of innocent human beings. Secondly, as will be shown in the ensuing discussion, there is a clear dichotomy in the practice of the main legal systems of the world between those systems which would allow duress to operate as a complete defence to crimes involving the taking of innocent life, and those systems which would not. Thirdly, the Appellant in this case was a soldier of the Bosnian Serb army conducting combat operations in the Republic of Bosnia and Herzogovina at the material time. As such, the issue may be stated more specifically as follows: In law, may duress afford a complete defence to a soldier charged with crimes against humanity or war crimes where the soldier has killed innocent persons?

33. We agree with the Separate Opinion of our learned brother, Judge Stephen, in so far as it concerns the Trial Chamber's treatment of the issues of superior orders and duress in the *Sentencing Judgement*. We would, however, add the following points. If they repeat the observations of Judge Stephen, it is because we feel the points deserve emphasis.

1. The relationship between superior orders and duress

34. Superior orders and duress are conceptually distinct and separate issues and often the same factual circumstances engage both notions, particularly in armed conflict situations. We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.

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35. The Trial Chamber, however, states at paragraph 19 of the *Sentencing Judgement*:

> Accordingly, while the complete defence based on moral duress and/or a state of necessity stemming from superior orders is not ruled out absolutely, its conditions of application are particularly strict. They must be sought not only in the very existence of a superior order - which must first be proven - but also and especially in the circumstances characterising how the order was given and how it was received. (Emphasis added.)

It is not entirely clear what the Trial Chamber means by this passage. If the Trial Chamber rejects the separateness of duress from superior orders and intends to combine them into one hybrid defence, we must, with respect, take exception. As obedience to superior orders may be considered merely as a factual element in determining whether duress is made out on the facts, the absence of a superior order does not mean that duress as a defence must fail.

36. The nature of the relationship between superior orders and duress was also referred to by the Prosecution at the hearing of 26 May 1997. When asked if there was a difference between how the International Tribunal should treat a plea of duress if it involves the killing of an innocent human being when that killing is not accompanied by a superior order, the Prosecution replied:

> We would submit that since superior orders categorically is not a defence under international law, and there is very little doubt of that point, that when it is combined with the defence of duress, that on the balance one should steer away from allowing that to be used as a defence . . . I think that duress, even when we are dealing with cases not involving murder, duress accompanying superior orders should only rarely -- I should say should be admitted even more rarely than duress as a general species should be admitted.[37]

The Prosecution argues that the fact that the duress was accompanied by a superior order is a reason against allowing duress as a defence because obedience to superior orders *per se* has been specifically rejected as a defence in the Statute. In this regard, we would like to reiterate our view that obedience to superior orders is merely a factual circumstance to be considered when determining whether the defence of duress is made out on the merits. The fact that the

[37] Appeals Transcript, 26 May 1997, p. 82.

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Appellant obeyed an order of a superior does not go to the preceding legal question of whether duress may at all be pleaded as a defence.

2. Crimes against humanity and proportionality

37. The Trial Chamber adopts, as a necessary element in the defence of duress, the requirement that "the remedy was not disproportionate to the evil"[38]. However, the Trial Chamber in considering the extreme gravity of crimes against humanity as being injurious to the whole of humankind observed:

> With regard to a crime against humanity, the Trial Chamber considers that the life of the accused and that of the victim are not fully equivalent. As opposed to ordinary law, the violation here is no longer directed at the physical welfare of the victim alone but at humanity as a whole.[39]

We cannot, with respect, conceive of any "remedy" which could be taken on the part of an accused that could been deemed proportionate to a crime directed at the whole of humanity. In the above observation, the Trial Chamber appears to have ruled out duress as a defence in regard to crimes against humanity, but this would run counter to the whole tenor of its *Sentencing Judgement* which apparently accepts that duress can operate as a complete defence to a charge of a crime against humanity involving the killing of innocent persons.

3. Incorrect treatment of issue of equivocal pleas

38. In the manner in which it dealt with the question whether the Appellant's plea was equivocal, it would appear that the Trial Chamber did not distinguish two separate issues. The first issue is whether duress can be pleaded as a complete defence at international law for a crime against humanity. If the answer to this question is in the affirmative, the Appellant's plea was then equivocal and the Appellant should have been given the opportunity to replead

[38] *Sentencing Judgement,* para. 17.
[39] *Ibid.*, para. 19.

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after the Trial Chamber had explained to him the nature of the guilty plea and the defence which he had raised. If any subsequent plea was still equivocal, a plea of not guilty should have been entered. This issue is quite different from the issue as to whether the defence is actually made out on the facts. This was a matter to be examined and argued at a full trial and not at the sentencing hearing.

39. So much for the Trial Chamber's treatment of duress in the *Sentencing Judgement*. We move now to consider the law to be applied in determining whether duress may be pleaded as a defence by a soldier charged with a crime against humanity or a war crime involving the killing of innocent persons.

A. The Applicable Law

40. The sources of international law are generally considered to be exhaustively listed in Article 38 of the Statute of the International Court of Justice ("ICJ Statute") which reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
>   a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
>   b. international custom, as evidence of a general practice accepted as law;
>   c. the general principles of law recognised by civilised nations;
>   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereon.[40]

[40] Statute of the International Court of Justice, I.C.J. Acts and Documents, No. 5 ("ICJ Statute"). Article 59 provides: "The decision of the Court has no binding force except between the parties and in respect of that particular case".

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B. Customary International Law *(Article 38(1)(b) of ICJ Statute)*

41. The Prosecution submits that "under international law duress cannot afford a complete defence to a charge of crimes against humanity and war crimes when the underlying offence is the killing of an innocent human being"[41]. The Prosecution contends that the relevant case-law of the post-Second World War military tribunals does not recognise duress as a defence to a charge involving the killing of innocent persons. Given also that there is no conventional international law which resolves the question of duress as a defence to murder, it is the submission of the Prosecution that customary international law, as contained in the decisions of the post-World War Two military tribunals, clearly precludes duress as such a defence. Although the Prosecution does not confine its arguments to the specific question as to whether duress is a complete defence for a soldier who has been charged under international law with killing innocent persons, we would, however, so limit our inquiry in this appeal.

42. The Trial Chamber states in the *Sentencing Judgement* that "[a] review by the United Nations War Crimes Commission of the post-World War Two international military case-law, as reproduced in the 1996 report of the International Law Commission (Supplement No.10 (A/51/10) p. 93) shows that the post-World War Two military tribunals of nine nations considered the issue of duress as constituting a complete defence"[42]. This interpretation of the conclusions of the United Nations War Crimes Commission does not bear close scrutiny. In Volume XV of the Law Reports of Trials of War Criminals by the United Nations War Crimes Commission, 1949, what is stated is merely the following:

> The general view seems therefore to be that duress may prove a defence if (a) the act charged was done to avoid an immediate danger both serious and irreparable; (b) there was no other adequate means of escape; (c) the remedy was not disproportionate to the evil.[43]

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[41] Prosecution Brief on the Preliminary Questions, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, A.C. ("*Prosecution Brief on the Preliminary Questions*"), 20 May 1997, para. 1.
[42] *Sentencing Judgement*, para. 17.
[43] *Law Reports of Trials of War Criminals*, U.N. War Crimes Commission (H.M. Stationery Office, London, 1949) ("*Law Reports*"), vol. XV, p. 174.

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The United Nations War Crimes Commission did not specifically address the question whether duress afforded a defence to crimes involving the killing of innocent persons in its expression of this "general view". Furthermore, the authorities which the United Nations War Crimes Commission surveyed in fact support the position that duress may not be pleaded as a defence to a war crime involving the killing of innocent persons generally, regardless of whether the accused was or was not a soldier. Express statements that duress is no defence to a crime involving the killing of innocent persons may be found in the opinions of the Judge-Advocate-Generals in the *Stalag Luft III* case[44] and the *Feurstein* case[45], both before British military tribunals. These cases constitute *lex posteriori* and overrule the earlier 1946 British military tribunal decision in the *Jepson* case[46] which asserted a contrary position without reference to any authority. We further note the express rejection of duress as a defence to the killing of innocent persons by the Judge-Advocate-General in the *Hölzer* case[47] decided in 1946 before a Canadian military tribunal.

43. We find that the only express affirmation of the availability of duress as a defence to the killing of innocent persons in post-World War Two military tribunal cases appears in the *Einsatzgruppen* case before a United States military tribunal. There the tribunal stated:

> 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.[48]

In our view, however, the value of this authority is cast into some considerable doubt by the fact that the United States military tribunal in the *Einsatzgruppen* case did not cite any authority for its opinion that duress may constitute a complete defence to killing an innocent

[44] *Trial of Max Wielen and 17 Others* ("*Stalag Luft III*" case), *Law Reports*, vol. XI, p. 33.
[45] *Trial of Valentine Feurstein and Others* ("*Feurstein*" case), *Proceedings of a Military Court held at Hamburg* (4 - 24 Aug. 1948), Public Record Office, Kew, Richmond, file no. 235/525; *Law Reports*, vol. XV, p. 173.
[46] *Trial of Gustav Alfred Jepsen and* Others ("*Jepsen*" case), *Proceedings of a War Crimes Trial held at Luneberg* (13th - 23rd Aug. 1946), judgement of 24 Aug. 1946 (original transcripts in Public Record Office, Kew, Richmond); *Law Reports*, vol. XV, p. 172.
[47] *Trial of Robert Hölzer and Two Others* ("*Hölzer*" case), *Record of Proceedings of the Trial by Canadian Military Court of Robert Hölzer and Walter Weigel and Wilhelm Ossenbach held at Aurich, Germany*, 25 Mar. - 6 Apr. 1946, vol. 1.
[48] *Trial of Otto Ohlendorf et al.* ("*Einsatzgruppen*" case), *Trials of War Criminals*, vol. IV, p. 480.

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individual. The military tribunal certainly could not have relied on any authority from the common law of the United States in which it has been established since the 1890s that duress is no defence to murder in the first degree[49]. Moreover, even if the tribunal's views regarding duress as a defence to murder had been supportable in its time, these views cannot presently constitute good authority in light of the development of the law. Rule 916 (h) of the Manual for Courts-Martial United States 1984 (1994 ed.) now clearly provides that duress is a defence "to any offence except killing an innocent person". The laws of all but a handful of state jurisdictions in the United States definitively reject duress as a complete defence for a principal in the first degree to murder. The comments of the most qualified publicists, recognised as a subsidiary source of international law in Article 38(1)(d) of the ICJ Statute, are also informative. Two years after the *Einsatzgruppen* decision in the *opus classicum* on international law, Professor Hersch Lauterpacht wrote that "[n]o principle of justice and, in most civilised communities, no principle of law permits the individual person to avoid suffering or even to save his life at the expense of the life - or, as revealed in many war crimes trials, of a vast multitude of lives - of or sufferings, on a vast scale, of others" and, in particular, that there is "serious objection to this [contrary] reasoning of the Tribunal" in the *Einsatzgruppen* case[50].

44. We, accordingly, find that the *Einsatzgruppen* decision is in discord with the preponderant view of international authorities. There is no other precedent in the case-law of international post-World War Two military tribunals which could be cited as authority for the proposition that duress is a complete defence to the killing of innocent persons in international law.

45. For completeness, reference must be made to the following observation of the International Military Tribunal at Nuremberg:

> That a soldier was ordered to kill or torture in violation of the international laws of war has never been recognised as a valid defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees

[49] *See Arp v. State,* 97 Ala. 5, 12 So. 201 (1893); *State v. Nargashian,* 26 R.I. 299, 58 A. 953 (1904).
[50] *Oppenheim's International Law: A Treatise* (Sir Hersch Lauterpacht ed., Longmans, London, 7th ed., 1952), vol. II at pp. 571-72.

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> in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.[51]

This unelaborated statement, in our view, makes no significant contribution to the jurisprudence on this issue. It does little to support the contention that the decisions of post-World War Two international military tribunals established a clear rule recognising duress as a defence to the killing of innocent persons which would then by now have become customary international law. This is recognised by the International Law Commission in its treatment of the issue of duress in the commentary to the Draft Code of Crimes Against the Peace and the Security of Mankind, wherein it cites the Nuremberg *dicta* and then states:

> There are different views as to whether even the most extreme duress can ever constitute a valid defence or extenuating circumstance with respect to a particularly heinous crime, such as killing an innocent human being.[52]

1. No customary international law rule can be derived on the question of duress as a defence to the killing of innocent persons

46. The Prosecution strongly contends that the opinions of the post-World War Two military tribunals on the question of duress as a defence to murder have become part of customary international law. It matters not, the Prosecution urges, that this custom was based originally on common law authorities. It is worth setting out its contention on this point in full.

> I wish simply to emphasise also that the Common Law pedigree of international law in this respect should in no way put into question the position of international law on the admissibility of duress as a defence. Such an argument, the argument that the court must somehow reject the overwhelming weight of authority of this case law, simply because it has a Common Law orientation, would overlook the essentially eclectic character of international criminal law, borrowing, as it does, from various legal systems, often haphazardly . . . To quickly give but one example, the law of conspiracy when it was discussed in 1944, during the preparatory work of the Nuremberg Charter, was considered by the French delegation, and I quote from Bradley

[51] *Trial of the German Major War Criminals (Proceedings of the International Military Tribunal Sitting at Nuernberg, Germany)* (H.M. Stationery Office, London, 1950), Part 22, p. 447.
[52] Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May - 26 July 1996, G.A.O.R., 51st Sess., Supp. No. 10, U.N. Doc A/51/10, at p. 77.

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Smith, a leading commentator, "as a barbarous concept unworthy of modern law". The Soviet delegation was outright shocked at the concept of conspiracy. Nevertheless it was retained in the charter and it was developed through the case law both of the international military Tribunal and the courts under control council law number 10. It cannot now be argued that conspiracy, because of its Common Law pedigree, should not be admitted as a concept under international criminal law.

I would submit, your Honour, that the same clearly applies to the defence of duress. The fact that the position of international law concurs by virtue of historical or other circumstances with the Common Law position, the fact that duress clearly cannot be a defence to murder under international law, cannot be in any way challenged because of the pedigree or origins of that concept.[53]

47. A number of war crimes cases have been brought to our attention as supporting the position that duress is a complete defence to the killing of innocent persons in international law: the *Llandovery Castle case*[54] before the German Supreme Court at Leipzig; *Mueller et al.*[55] before the Belgium Military Court of Brussels and the Belgium Court of Cassation; the *Eichmann* case[56] before the Supreme Court of Israel; the *Papon*[57] case before the French Court of Cassation; *Retzlaff et al.*[58] before the Soviet Military Tribunal in Kharkov; *Sablic et al.*[59] before the Military Court of Belgrade; the cases *Bernadi and Randazzo*[60], *Srà et. al*[61] and *Masetti*[62] before the Italian Courts of Assize and the Court of Cassation; the German cases *S. and K.*[63] before the Landesgericht of Ravensburg; the *Warsaw ghetto* case[64] before the Court of

[53] Appeals Transcript, 26 May 1997, pp. 15-17.

[54] *Llandovery Castle* case, original text in *Verhandlungen des Reichstages. I Walhperiode 1920, Band 368. Anlagen zu den Stenographischen Berichten* Nr 2254 bis 2628, Berlin, p. 2586; English translation in AJIL, vol. 16 (1922), p. 708.

[55] *Mueller et al.,* 31 Jan. 1949, 4 July 1949. *See* Annual Digest and Reports of Public International Law Cases, 1949, pp. 400-403.

[56] *Eichmann v. Attorney-General of the Government of Israel*, 36 ILR 277 (1962) at p. 318.

[57] *Papon* case, unpublished transcript of Judgement of 18 Sep. 1996, *Cour d'appel de Bordeaux, Chambre d'accusation, Arrêt du 18 septembre 1996*, no. 806. (Translation by Judge Cassese.)

[58] *Retzlaff et al., The People's Verdict, A Full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials* (London-New York, without date), p. 65.

[59] *Sablić et al.*, decision of 26 June 1992.

[60] *Bernardi and Randazzo*, unpublished text of the decision of the Italian Court of Cassation, 14 July 1947, kindly provided by the Central Public Record Office in Rome. (Judge Cassese's translation.)

[61] *Srà et al.*, decision 6 Nov. 1947, in *Giurisprudenza completa della Corte Suprema di Cassazione, sez. pen.*, 1947, No. 2557, p. 414.

[62] *Masetti* case, decision of 17 Nov. 1947, in *Massimario della Seconda Sezione della Cassazione*, 1947, No. 2569, p. 416.

[63] *S. and K.*, decision of 21 May 1948, in *Justiz und NS-Verbrechen*, vol. II, 1969, p. 521ff., at pp. 526-527.

[64] *Warsaw Ghetto* case, decision of Court of Assize of Dortmund, 31 Mar. 1954, *ibid.*, vol. XII, 1974, pp. 340-341.

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Assize attached to the District Court of Dortmund; and *Wetzling et al.*[65] before the Court of Assize of Arnsberg.

(a) Questionable relevance and authority of a number of these cases

48. The cases set out in paragraph 62 touch upon the issue of duress in varying degrees. In our view, however, these cases are insufficient to support the finding of a customary rule providing for the availability of the defence of duress to the killing of innocent persons. We would note that a number of the cases are of questionable relevance and authority. Firstly, in the *Papon* case, the accused was not charged with murder as a principal in the first degree but merely as an accomplice in the extermination of Jews during the World War Two by his actions as a police officer who rounded up and deported French Jews to Germany. Secondly, in the *Retzlaff* and *Sablic* cases, the defence of duress did not succeed and there was no clear statement by the courts as to the reason for this failure. Thirdly, the decision in the *S. and K.* case was in fact quashed by the superior court in the French Zone for contravening Control Council Law No.10 and thus is of doubtful authority. Finally, the accused in the *Warsaw ghetto* case were held merely to be accomplices in murder and thus the application of duress in that case is only authoritative in respect of complicity to murder and not murder in the first degree.

(b) No consistent and uniform state practice underpinned by *opinio juris*

49. Although some of the above mentioned cases may clearly represent the positions of national jurisdictions regarding the availability of duress as a complete defence to the killing of innocent persons, neither they nor the principles on this issue found in decisions of the post-World War Two military tribunals are, in our view, entitled to be given the status of customary international law. For a rule to pass into customary international law, the International Court of Justice has authoritatively restated in the *North Sea Continental Shelf cases* that there must

[65] *Wetzling at al.*, decision of Court of Assize in Arnsberg, 12 Feb. 1958, *ibid.*, vol. XIV, 1976, p. 563 ff at pp. 616-623.

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exist extensive and uniform state practice underpinned by *opinio juris sive necessitatis.*[66] To the extent that the domestic decisions and national laws of States relating to the issue of duress as a defence to murder may be regarded as state practice, it is quite plain that this practice is not at all consistent. The defence in its Notice of Appeal surveys the criminal codes and legislation of 14 civil law jurisdictions in which necessity or duress is prescribed as a general exculpatory principle applying to all crimes. The surveyed jurisdictions comprise those of Austria, Belgium, Brazil, Greece, Italy, Finland, the Netherlands, France, Germany, Peru, Spain, Switzerland, Sweden and the former Yugoslavia. Indeed, the war crimes decisions cited in the Separate Opinion of Judge Cassese are based upon the acceptance of duress as a general defence to all crimes in the criminal codes of France, Italy, Germany, the Netherlands and Belgium. In stark contrast to this acceptance of duress as a defence to the killing of innocents is the clear position of the various countries throughout the world applying the common law. These common law systems categorically reject duress as a defence to murder. The sole exception is the United States where a few states have accepted Section 2.09 of the United States Penal Code which currently provides that duress is a general defence to all crimes. Indeed, the rejection of duress as a defence to the killing of innocent human beings in the *Stalag Luft III*[67] and the *Feurstein*[68] cases, both before British military tribunals, and in the *Hölzer*[69] case before a Canadian military tribunal, reflects in essence the common law approach.

50. Not only is State practice on the question as to whether duress is a defence to murder far from consistent, this practice of States is not, in our view, underpinned by *opinio juris*. Again to the extent that state practice on the question of duress as a defence to murder may be evidenced by the opinions on this question in decisions of national military tribunals and national laws, we find quite unacceptable any proposition that States adopt this practice because they "feel that they are conforming to what amounts to a legal obligation" at an international level[70].

[66] *North Sea Continental Shelf Cases*, I.C.J. Reports (1969) 4 at paras. 73-81.
[67] *Stalag Luft III* case, *Law Reports*, vol. XI, p. 33.
[68] *Feurstein* case, *Law Reports*, vol. XV, p. 173.
[69] *Hölzer* case, *supra* n. 47.
[70] *North Sea Continental Shelf Cases, supra* n. 66 at para. 77.

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51. To answer the Prosecution's submission regarding conspiracy during oral argument, we are of the view that conspiracy owes its status as customary international law to the fact that it was incorporated in the Nuremberg Charter which subsequently obtained recognition as custom and not to the fact that the objections of the civil law system were rejected in the process. Moreover, conspiracy was clearly established as a principle in the Nuremberg Charter. In the present case, duress, either as a general notion or specifically as it applies to murder, is not contained in any international treaty or instrument subsequently recognised to have passed into custom.

(c) Questionable international character of tribunals

52. We would note in addition that the above mentioned cases were decisions of national military tribunals or national courts which applied national law, not international law. The cases of *Bernardi and Randazzo*, *Srà et al.* and *Massetti* belong to this category of decisions of national courts.

53. In relation to the post-World War Two military tribunals constituted under the London Charter or Control Council Law No. 10, doubt remains as to whether any of these military tribunals were truly "international in character". This is confirmed by contradictory statements regarding the international status of these tribunals. On the one hand, for example, in the *Flick* case, the United States military tribunal stated:

> The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany (Control Council Law No. 10, 20 Dec. 1945) . . . The Tribunal administers international law. It is not bound by the general statutes of the United States . . . .[71]

The Court of Appeals for the District of Columbia in the United States confirmed this view in the *Flick* case in the following terms:

[71] *Trial of Frederick Flick and Five Others* ("*Flick*" case), *Trials of War Criminals*, vol. VI, p. 1188.

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> If the court [that] tried Flick was not a tribunal of the United States, its actions cannot be reviewed by any court of this country . . . If it was an international tribunal, that ends the matter. We think it was, in all essential respects, an international court. Its powers and jurisdiction arose out of the joint sovereignty of the Four victorious powers . . . .[72]

On the other hand, the United States Military Tribunal in the *Milch* case stated that "[i]t must be constantly borne in mind that this is an American court of Justice, applying the ancient and fundamental concepts of Anglo-Saxon jurisprudence"[73].

Further, in the *Justices* case, with regard to the question whether German law should be applied, the United States military tribunal said:

> The fact that the four powers are exercising supreme legislative authority in governing Germany and for the punishment of German criminals does not mean that the jurisdiction of this Tribunal rests in the slightest degree upon any German law, prerogative or sovereignty. We sit as a Tribunal drawing its sole power and jurisdiction from the will and command of the Four occupying Powers.[74]

The Prosecution contends that the military tribunals applied international law. It said during its oral submissions:

> I believe that those cases [the cases reported in Volume 15 of the report of the United Nations War Crimes Commission] must be given considerably more weight than any national decision in the sense that all of those cases were applying international law, even though some of them were national courts of the occupying powers. The control council power number 10 was adopted by the four allied powers and 19 additional signatories, such that one can consider it as part of the corpus of international law. [75]

54. These views call for a number of comments. Firstly, to the extent that the post-World War Two military tribunals constituted under the London Charter or Control Council Law No.10 were held to be international, this was merely with regard to their constitution, character

[72] *Flick v. Johnson,* 174 F.2d. 983, 984-986; cert. den 338 U.S. 879 (1949).
[73] *Trial of Erhard Milch* ("*Milch*" case), *Trials of War Criminals,* vol. II, p. 778.
[74] *Trial of Joseph Alstötter and Others* ("*Justice*" case), *Trials of War Criminals,* vol. III, p. 964.
[75] Appeals Transcript, 26 May 1997, p. 53.

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and competence. Indeed, the Court of Appeals for the District of Columbia in the United States in considering the nature of the tribunal which tried Flick as being international did so purely in the context of whether it had judicial review power to grant *habeas corpus*. There was no statement to the effect that the tribunals applied purely international law. It is true that the London Charter and the parts of Control Council Law No.10 which set out the law to be applied by the military tribunals are "declaratory of the principles of international law in view of its recognition as such by the General Assembly of the United Nations" [76]. However, there was no provision in either the 1945 London Charter or in Control Council Law No.10 which addressed the question of duress either generally or as a defence to the killing of innocent persons. Consequently, when these tribunals had to determine that specific issue, they invariably drew on the jurisprudence of their own national jurisdictions. This is evidenced by the fact that British military tribunals followed British law and the United States military tribunals followed United States law.

55. In light of the above discussion, it is our considered view that no rule may be found in customary international law regarding the availability or the non-availability of duress as a defence to a charge of killing innocent human beings. The post-World War Two military tribunals did not establish such a rule. We do not think that the decisions of these tribunals or those of other national courts and military tribunals constitute consistent and uniform state practice underpinned by *opinio juris sive necessitatis*.

C. General principles of law recognised by civilised nations (Article 38(1)(c) of ICJ Statute)

56. It is appropriate now to inquire whether the "general principles of law recognised by civilised nations", established as a source of international law in Article 38(1)(c) of the ICJ Statute, may shed some light upon this intricate issue of duress. Paragraph 58 of the Report of the Secretary-General of the United Nations presented on 3 May 1993 expressly directs the International Tribunal to this source of law:

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[76] *Justice* case, *supra* n. 74, vol. III, p. 968.

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> The International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognised by all nations.[77]

Further, Article 14 of the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind provides:

> The competent court shall determine the admissibility of defences in accordance with the general principles of law, in the light of the character of each crime.[78]

57. A number of considerations bear upon our analysis of the application of "general principles of law recognised by civilised nations" as a source of international law. First, although general principles of law are to be derived from existing legal systems, in particular, national systems of law[79], it is generally accepted that the distillation of a "general principle of law recognised by civilised nations" does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals which have had recourse to Article 38(1)(c) of the ICJ Statute. Second, it is the view of eminent jurists, including Baron Descamps, the President of the Advisory Committee of Jurists on Article 38(1)(c), that one purpose of this article is to avoid a situation of *non-liquet*, that is, where an international tribunal is stranded by an absence of applicable legal rules[80]. Third, a "general principle" must not be confused with concrete manifestations of that principle in specific rules. As stated by the Italian-Venezuelan Mixed Claims Commission in the *Gentini* case:

> A rule . . . is essentially practical and, moreover, binding; there are rules of art as there are rules of government, while a principle expresses a general truth,

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[77] Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), U.N. Doc. S/25704.
[78] Report of the International Law Commission on the Work of its Forty-eighth Session, 6 May - 26 July 1996, G.A.O.R., 51st Sess., Supp. No.10, U.N. Doc. A/51/10, p. 73.
[79] *See* Permanent Court of International Justice, Advisory Committee of Jurists, *Procés verbaux of the Proceedings of the Committee* (June 16 - July 24, 1920, L.N. Publication, 1920), p.335 (per Lord Phillimore and de La Pradelle).
[80] *Ibid.*, p. 336.

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> which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence.[81]

In light of these considerations, our approach will necessarily not involve a direct comparison of the specific rules of each of the world's legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.

As Lord McNair pointed out in his Separate Opinion in the *South-West Africa Case*[82],

> it is never a question of importing into international law private law institutions "lock, stock and barrel", ready made and fully equipped with a set of rules. It is rather a question of finding in the private law institutions indications of legal policy and principles appropriate to the solution of the international problem at hand. It is not the concrete manifestation of a principle in different national systems - which are anyhow likely to vary - but the general concept of law underlying them that the international judge is entitled to apply under paragraph (c). (Emphasis added.)

It is thus generally the practice of international tribunals to employ the general principle in its formulation of a legal rule applicable to the facts of the particular case before it. This practice is most evident in the treatment of the general principle of "good faith and equity" in cases before the International Court of Justice and the Permanent Court of International Justice. For example in the *North Sea Continental Shelf Cases* before the International Court of Justice, the Court had regard to "equitable principles" in its formulation of the rule delimiting the boundaries of continental shelves. In the *Diversion of Water from the Meuse Case (Netherlands v. Belgium)* before the Permanent Court of International Justice, Judge Hudson in his Individual Opinion, after accepting that equity is a "general principle of law recognised by civilised nations", stated:

> It would seem to be an important principle of equity that where two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing non-performance of that obligation should not be

[81] *Gentini* case, Reports of International Arbitral Awards, vol. X, p. 551.
[82] *South-West Africa Case*, I.C.J. Rep. (1950) at p. 148.

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> permitted to take advantage of a similar non-performance of that obligation by the other party.[83]

In the *Chorzow Factory Case (Merits)*, the Permanent Court observed that "it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation"[84].

In the *Corfu Channel Case (Merits)*, the International Court stated that

> the other State, the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of fact and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions.[85]

58. In order to arrive at a general principle relating to duress, we have undertaken a limited survey of the treatment of duress in the world's legal systems. This survey is necessarily modest in its undertaking and is not a thorough comparative analysis. Its purpose is to derive, to the extent possible, a "general principle of law" as a source of international law.

1. Duress as a complete defence

(a) Civil law systems

59. The penal codes of civil law systems, with some exceptions, consistently recognise duress as a complete defence to all crimes. The criminal codes of civil law nations provide that an accused acting under duress "commits no crime" or "is not criminally responsible" or "shall not be punished". We would note that some civil law systems distinguish between the notion of necessity and that of duress. Necessity is taken to refer to situations of emergency arising

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[83] *Diverson of Water from the Meuse* Case *(Netherlands v. Belgium)* (1937), P.C.I.J. Reports, Series A/B, No.70, pp. 76-77.
[84] *Chorzow Factory Case (Merits)* (1928), P.C.I.J., Series A, No.17, p. 29.
[85] *Corfu Channel Case (Merits)* I.C.J. Reports (1949) 4 at p. 18.

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from natural forces. Duress, however, is taken to refer to compulsion by threats of another human being. Where a civil law system makes this distinction, only the provision relating to duress will be referred to.

France

In the French Penal Code, promulgated on 22 July 1992, Article 122-2 provides that:

> No person is criminally responsible who acted under the influence of a force or compulsion which he could not resist.[86]

It is apparent from this article that French law recognises duress as a general defence which leads to acquittal[87]. The effect of the application of this provision is, speaking figuratively, the destruction of the will of the person under compulsion.[88]

Belgium

The Belgian Penal Code of 1867, Article 71, provides:

> There is no offence where the accused or suspect was insane at the time the act was committed, or where compelled by a force which he could not resist.[89]

This rule applies to every offence[90]. The Court of Cassation has stipulated that for duress to be established the free will of the person concerned must not only be weakened but annihilated[91]. As in French law, duress arising from one's own doing is not to be accepted as duress[92].

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[86] "*N'est pas pénalement responsable la personne qui a agi sous l'empire d'une force ou d'une contraint à laquelle elle n'a pu résister.*" *Code Pénal* (94th ed., Dalloz, Paris, 1996-97).
[87] Desportes, F. and le Gunehec, F., *Le nouveau droit pénal* (Economica, Paris, 3rd ed., 1996), vol. I, pp. 502-08, 564.
[88] G. Stafani, G. Levasseur, and B. Bouloc, *Droit pénal général* (Dalloz, Paris, 16th ed., 1997), p. 331.
[89] "*Il n'y a pas d'infraction lorsque l'accusé ou le prévenu était en état de démence au moment du fait, ou lorsqu'il a été contraint par une force à laquelle il n'a pu résister.*"
[90] *Pasicrisie, Cour de Cassation*, 24 June 1957, p. 1272.
[91] *Ibid., Cour de Cassation*, 29 Sep. 1982, p. 140.
[92] *Ibid.*, Cour de Cassation, 10 Apr. 1979, vol. I, p. 950.

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The Netherlands

Article 40 of the Dutch Penal Code of 1881 reads:

> A person who commits an offence as a result of a force he could not be expected to resist [*overmacht*] is not criminally liable.[93]

The word *overmacht* means superior force and is sometimes translated as *force majeure*. The article applies to murder charges[94]. In Dutch law, Article 40 appears to encapsulate both the notion of mental duress[95] (threats overpowering the will of a person) and the notion of necessity[96].

Spain

In the Spanish Penal Code of 1995, Article 20 provides that the criminal responsibility of an accused is removed where he is compelled to perform a certain act by an overwhelming fear[97].

Germany

Section 35(1) of the German Penal Code of 1975 (amended as at 15 May 1987) provides:

> If someone commits a wrongful act in order to avoid an imminent, otherwise unavoidable danger to life, limb, or liberty, whether to himself or to a dependant or someone closely connected with him, the actor commits the act without culpability. This is not the case if under the circumstances it can be fairly expected of the actor that he suffer the risk; this might be fairly expected of him if he caused the danger, or if he stands in a special legal relationship to

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[93] The Dutch Penal Code (trans. by L. Rayar and S. Wadsworth, Rothman and Co., Littleton, Colorado, 1997), p. 73.

[94] *Ibid.*, at p.24. Cf. D. Hazewinkel-Suringa's *Inleiding tot de studie van het Nederlandse Strafrecht* (J. Remmelink ed., Gouda Quint bv, Arnhem, 14th ed., 1995), pp. 295-299.

[95] *Psychishe overmacht.*

[96] *Overmacht zijnde noodtoestand.*

[97] "Overwhelming fear" is an approximate translation of the terms "*miedo insuperable*" which are used in the code and which signify the perturbed state of mind under a threat of imminent danger: C. A. Landecho Velasco, S. J. and C. Molina Blázquez, *Derecho Penal Español* (Parte General) (5th ed., Tecnos, 1996), pp. 382-83.

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the danger. In the latter case, his punishment may be mitigated in conformity with section 49(1).[98]

Italy

Article 54 of the Italian Penal Code of 1930 (amended as at 1987) provides:

(1) No one shall be punished for acts committed under the constraint of necessity to preserve himself or others from the actual danger of a serious personal harm, which is not caused voluntarily nor otherwise inevitable, and the acts committed under which are proportionate to the threatened harm.

(2) This article does not apply to a person who has a legal duty to expose himself to the danger.

(3) The provision of the first paragraph of this article also applies if the state of necessity arises from the threat of another person; however, in this case, the responsibility for the acts committed under the threat belongs to him who coerced the commission of the acts.[99]

Article 54(2) is understood as referring to moral compulsion which arises from the external conditions ("contraint morale"). In addition, Article 46 of the Italian Penal Code provides:

> No one shall be punished for committing his acts under the coercion of another person by means of physical violence which cannot be resisted or avoided. In this case, the responsibility for the acts committed under duress goes to the person who coerces.

Article 46 is in the category of factors that negate the subjective element of criminal responsibility (mens rea)[100], as opposed to Article 54(2) which justifies the actus reus and therefore negates the objective element of criminal responsibility. No offence is excepted from the operation of these two provisions.

[98] Translation by George Fletcher, *Rethinking Criminal Law* (Little, Brown and Company, Boston/Toronto, 1978), p. 833.
[99] Giovanni Conso (ed.), *Codice penale* (5th ed., Giuffrè, Milano, 1987), p. 33.
[100] A. Pecoraro-Albani, "*Costringimento Fisico*", *Enciclopedia del Diritto* (F. Calasso et al. eds., Giuffrè, Varese, 1962), vol. XI, p. 242.

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Norway

Paragraph 47 of the Norwegian General Civil Penal Code[101], (amended as at 1 July 1994), provides that:

> No person may be punished for any act that he has committed in order to save someone's person or property from an otherwise unavoidable danger when the circumstances justify him in regarding this danger as particularly significant in relation to the damage that might be caused by his act.

It would appear that pleas of both duress and necessity may be brought under this paragraph[102].

Sweden

Section 4 of Chapter 24 of the Swedish Penal Code provides for the defence of necessity [*nöd*]. *Nöd* includes both natural forces and threats by human forces[103]. Section 4 provides:

> A person who in a case other than referred to previously in this Chapter acts out of necessity in order to avert danger to life or health, to save valuable property or for other reasons, shall also be free from punishment if the act must be considered justifiable in view of the nature of the danger, the harm caused to another and the circumstances in general.

Finland

Section 10 of the Penal Code of Finland[104] provides:

> If someone has committed a punishable act in order to save himself or another, or his or another's property, from an apparent danger, and if it would otherwise have been impossible to undertake the rescue, the court shall consider, in view of the act and the circumstances, whether he shall remain unpunished or

[101] Act No. 10 of 22 May 1902, Norwegian Ministry of Justice (1995).
[102] Johannes Andenaes, *The General Part of the Criminal Law of Norway* (trans. by Thomas P. Ogle), (Sweet & Maxwell, London, 1965), pp. 165-170.
[103] *See* Suzanne Wennberg, "Criminal Law", *Swedish Law: a Survey* (H. Tiberg, P. Sterzel, F. Cronhult eds., Juristförlaget, Stockholm, 1994), p. 481.
[104] 19 Dec. 1889/39; Stand: 743/1995

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whether he deserves full punishment or punishment reduced in accordance with s 2(1).

Venezuela

In the Venezuelan Penal Code of 1964, Article 65(4) [105] absolves the criminal responsibility of an accused who acts under the compulsion (*constreñido*) of the need to save himself or others from a grave and imminent danger, which is not caused voluntarily and which cannot be avoided[106].

Nicaragua

Article 28(5) of the Nicaraguan Penal Code of 1974 (amended as of July 1994) [107] removes the criminal liability of a person "who acts under an irresistible physical force or is compelled by the threat of an imminent and grave danger". Article 28(6) exonerates the person "who acted under the necessity of preservation from an imminent danger which cannot otherwise be avoided, if the circumstance was such that he could not be fairly expected to sacrifice the threatened interests." Article 28(7) requires that, to be cleared of responsibility for committing a certain act to avoid an evil at the expense of other people's rights, the evil must be real and imminent and is greater than the harm caused by the act.

Chile

In the Chilean Penal Code of 1874 (amended as at 1994)[108], Article 10(9) provides that criminal liability shall be removed in respect of a person "who commits an offence due to an irresistible force or under the compulsion of an insuperable fear."

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[105] *Código penal venezolano* (Copia de la Gaceta Oficial No.915, Extraordinario, 30 June 1964) (Panapo, 1986).
[106] Similar provisions can be found in Brazil's Criminal Code of 1969: Survey attached to Defence's Brief on the Preliminary Issues, *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A, A.Ch., 16 May 1997.
[107] *Ley de Código Penal de la República de Nicaragua* (BITECSA, 1995).
[108] *Código penal* (*edición oficial*, approved by the Ministry of Justice Decree No.531 of 24 Mar. 1994) (*Edición juridica de Chile*, Santiago, 1995).

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Panama

In the Panamanian Penal Code of 1982,[109] Article 37 reads:

> There is no guilt on the part of whoever acts under the compulsion or threat of an actual and grave danger, whether or not caused by the acts of a third person, if he may not reasonably be expected to act otherwise.

Mexico

Under the Mexican Penal Code of 1931 (amended as at 1994),[110] Article 15 sets out a number of grounds of exculpation. Article 15(9) states that there is no crime committed when

> in view of the circumstances which are present in the completion of an illegal conduct, the author cannot reasonably be expected to have taken a different course of action, because it is not for him to decide to act legally . . . .

Former Yugoslavia

The Penal Code of the Socialist Federal Republic of Yugoslavia[111] defined the general principles of criminal law, including the elements of criminal responsibility, and was applied by the constituent Republics and Automonous Provinces of the former Yugoslavia which supplemented the federal code with their own specific penal legislation. In the 1990 amendment of the code[112], Article 10[113] provides for the defence of extreme necessity. Article 10 reads:

> (1) An act committed in extreme necessity is not a criminal offence.

[109] *Código Penal* (Ministry of Education, Editorial Mizrachi & Pujol, S.A., Bogotá, 7th ed., 1994).
[110] *Código Penal para El Distrito Federal* (Editorial Porrua, S. A., Mexico, 56th ed., 1996).
[111] Promulgated on 29 Sep. and entered into force on 1 July 1977.
[112] Promulgated in the Official Gazette, 28 June 1990.
[113] This article is identical to Art.10 of the 1993 Yugoslav Penal Code (Federal Republic of Yugoslavia (Serbia and Montenegro)).

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(2) An act is committed in extreme necessity if it is performed in order that the perpetrator avert from himself or from another an immediate danger which is not due to the perpetrator's fault and which could not have been averted in any other way, provided that the evil created thereby does not exceed the one which was threatening.

(3) If the perpetrator himself has negligently created the danger, or if he has exceeded the limits of extreme necessity, the court may impose a reduced punishment on him, and if he exceeded the limits under particularly mitigating circumstances it may also remit the punishment.

(4) There is no extreme necessity where the perpetrator was under an obligation to expose himself to the danger.

(b) Common law systems

England

60. In England, duress is a complete defence to all crimes except murder, attempted murder and, it would appear, treason[114]. Although there is no direct authority on whether duress is available in respect of attempted murder, the prevailing view is that there is no reason in logic, morality or law in granting the defence to a charge of attempted murder whilst withholding it in respect of a charge of murder[115].

United States and Australia

The English position that duress operates as a complete defence in respect of crimes generally is followed in the United States and Australia with variations in the federal state jurisdictions as to the precise definition of the defence and the range of offences for which the defence is not available[116].

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[114] *R. v. Howe and Others* [1987] 1 All ER 771 (House of Lords).
[115] Archbold, *Criminal Pleading, Evidence and Practice* (Sweet & Maxwell, London, 1994), para. 17-154.
[116] In the United States, duress is no complete defence to murder at common law: *Rumble v. Smith,* 905 F.2d. 176, 180 (8th Cir. 1990); cf Model Penal Code, Section 2.09. In Australia, the leading definition of duress is that of Smith J in *R v. Hurley* [1967] VR 526. At common law in Australia, the offences for which duress is no defence are murder, attempted murder and certain forms of treason: *R v. McConnell* [1977] 1 NSWLR 714 (CCA); *R v.*

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Canada

Section 17 of the Canadian Criminal Code deals with "compulsion by threats" and provides:

> A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not apply where the offence that is committed is high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under section 280-330 (abduction and detention of young persons).

South Africa

In an authoritative treatise on South African penal law[117], it is stated that

> conduct otherwise criminal is not punishable if, during the whole period of time it covered, the person concerned was compelled to it by threats which produced a reasonable and substantial fear that immediate death or serious bodily harm to himself or others to whom he stood in a protective relationship would follow his refusal.

It is unsettled in South African law whether duress affords a complete defence to a principal to murder in the first degree[118].

Harding [1976] VR 129 (FC). In the states of Australia with criminal codes, a larger number of offences are excepted from the operation of duress as a defence. Tasmania has the longest list of exceptions. In Tasmania, the defence is not available to persons charged with murder, attempted murder, treason, piracy, offences deemed to be piracy, causing grievous bodily harm, rape, forcible abduction, robbery with violence, robbery and arson: Criminal Code (Tas), section 20(1).

[117] F. G. Gardiner and C. W. H. Lansdown, *South African Criminal Law and Procedure* (C. W. H. Lansdown and A. V. Lansdown eds., Juta and Co., Ltd, Cape Town, 5th ed., 1946), p. 84.

[118] The facts of the oft-cited case of *State v. Goliath S.A.L.R. (1972) (3)* 465 involved only a principal in the second degree to murder. Some authors assert that although "the law will not readily accept a plea of compulsion in the case of murder and other heinous crimes", the defence is nevertheless theoretically available in respect of the taking of innocent life provided that the threat was imminent and continuing; there was not opportunity of escape at the earliest possible moment; and there was no fault on the part of the accused in relation to the existence of the condition of duress: Gardiner & Lansdown, *ibid.*, at p.85.

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India

In the Indian Penal Code of 1960, amended as at March 1991[119], section 94 provides:

> Except murder, and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Malaysia

Section 94 of the Penal Code of the Federated Malay States, which is based on the Indian Penal Code, reads:

> Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which, at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Fear of instant death, as distinct from imprisonment, torture or other punishment, is a condition for the claim of duress in reliance on the section to be raised before the courts[120].

Nigeria

In the Nigerian Criminal Code Act 1916 (amended as at 1990)[121], section 32 provides:

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[119] Justice V. Raghavan, *Law of Crimes (A Single Volume Commentary on Indian Penal Code 1860, [Act No.45 of 1860])* (Orient Law House, New Delhi, 1991), p. 161.
[120] C. M. U. Clarkson, N. A. Morgan, *Criminal Law in Singapore and Malaysia* (Malayan Law Journal Pte, Singapore/Kuala-Lumpur, 1989), pp.197-99, citing *Mohamed Yusof b Haji Ahmad* v. *PP* (1983) 2 MLJ 167 (per HC, Kedah, Malaysia).
[121] The Law Revision Committee, Federal Ministry of Justice of Nigeria, *The Laws of the Federation of Nigeria* (in force as of 31 Jan. 1990) (Grosvenor Press (Portsmouth) Ltd, Portsmouth, 1990 (appointed by the Nigerian Government)), vol. 5.

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A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances-

. . . .

(4) when he does or omits to do the act in order to save himself from immediate death or grievous harm threatened to be inflicted upon him by some person actually present and in a position to execute the threats, and believing himself to be unable otherwise to escape the carrying of the threats into execution: but this protection does not extend to an act or omission which would constitute an offence punishable with death, or an offence of which grievous harm is caused to the person of another, or an intention to cause such harm, is an element, nor to a person who by entering into an unlawful association or conspiracy rendered himself liable to have such threats made to him.

(c) Criminal Law of Other States

Japan

61. In the Japanese Penal Code of 1907 (amended as at 1968), Article 37(1) provides:

An act unavoidably done to avert a present danger to the life, person, liberty, or property of oneself or any other person is not punishable only when the harm produced by such act does not exceed the harm which was sought to be averted. However, the punishment for an act causing excessive harm may be reduced or remitted in the light of the circumstances.[122]

China

The 1979 Chinese Penal Code provides in Article 13:

[122] The Japanese Ministry of Justice, *Criminal Statutes* (translation) (Tokyo, without date of publication).

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Although an act objectively creates harmful consequences, if it does not result from intent or negligence but rather stems from irresistible or unforeseeable causes, it is not to be deemed a crime.[123]

Article 18 reads:

Criminal responsibility is not to be borne for an act of urgent danger prevention that cannot but be undertaken to avert the occurrence of present danger to the public interest or the rights of the actor or of other people. Criminal responsibility shall be borne where urgent danger prevention exceeds the necessary limits and causes undue harm. However, consideration shall be given according to the circumstances to imposing a mitigated punishment or to granting exemption from punishment.[124]

Morocco

Article 142 of the Moroccan Penal Code of 1962 provides:

There is no crime, misdemeanour, or petty offence:

. . . .

(2) when the author was, by a circumstance originating from an external cause which he could not resist, physically coerced in committing, or was placed physically in an impossible position to avoid [the commission of], the offence;[125]

Somalia

Article 27 of the Somali Penal Code of 1962 provides:

1. No one shall be punished for committing his acts under the coercion of another person by means of physical violence which cannot be resisted or avoided.

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[123] R. H. Folsom, and J. H. Minan (eds.), *Law in the People's Republic of China* (Martinus Nijhoff, Dordrecht, 1989), Appendix C, p. 997.

[124] *Ibid.*, at p. 998.

[125] F.-P. Blanc, *Recueil de Textes juridiques: Code pénal* (*Librairie-Papeterie des Ecoles*, Casablanca, 1977), vol. I.

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2. The responsibility for such acts belongs to the person who coerced [their commission].

Ethiopia

It would appear that the Ethiopian penal law remains embodied in the 1957 Penal Code promulgated by Emperor Haile Selassie[126]. Article 67 of this code addresses "absolute coercion" and provides:

> Whoever commits an offence under an absolute physical coercion which he could not possibly resist is not liable to punishment. The person who exercised the coercion shall answer for the offence. When the coercion was of a moral kind the Court may without restriction reduce the penalty or may impose no punishment.

Article 68, addressing "resistible coercion", provides:

> If the coercion was not irresistible and the person concerned was in a position to resist it or avoid committing the act he shall, as a general rule, be punishable. The Court may, however, without restriction reduce the penalty, taking into account the circumstances of the case, in particular the degree and nature of the coercion, as well as personal circumstances and the relationship of strength, age or dependency existing between the person who was subjected to coercion and the person who coerced it.

2. Duress as a mitigating factor

62. The penal legislation of Poland and Norway concerning the punishment of war criminals explicitly rejects duress as a defence to war crimes in general and provides that circumstances of duress may at most be considered in mitigation of punishment. Article 5 of the Polish Law Concerning the Punishment of War Criminals of 11 December 1946 provides:

[126] *Negarit Gazeta*, (Addis Ababa, 1957), Proclamation No. 158 of 1957.

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> The fact that an act or omission was caused by a threat, order or command does not exempt from criminal responsibility.
>
> In such a case, the court may mitigate the sentence taking into consideration the circumstances of the perpetrator and the deed.[127]

Article 5 of the Norwegian Law on the Punishment of Foreign War Criminals of 15 December 1946 provides:

> Necessity and superior order cannot be pleaded in exculpation of any crime referred to in Article 1 of the present Law. The Court may, however, take the circumstances into account and may impose a sentence less than the minimum prescribed for the crime in question or may impose a milder form of punishment. In particularly extenuating circumstances the punishment may be entirely remitted.[128]

(a) The excepted offences in some national systems

63. In numerous national jurisdictions, certain offences are excepted from the application of the defence of duress. Traditional common law rejects the defence of duress in respect of murder and treason[129]. Legislatures in many common law jurisdictions, however, often prescribe a longer list of excepted offences[130].

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[127] Cited in *Law Reports, supra n.43*, vol. XV, p. 174.
[128] *Ibid.*
[129] In the United Kingdom, see *R v. Howe and Others* [1987] 1 All ER 771 (HL), *R v. Gotts* [1992] 2 AC 412. In Australia, see *R v. Brown* [1968] SASR 467 (FC); *R v. Harding* [1976] VR 129 (FC); *R v. McConnell* [1977] 1 NSWLR 714 (Court of Criminal Appeal). In the United States, see *Rumble v. Smith*, 905 F.2d. 176, 180 (8th Cir. 1990).
[130] In Canada, duress is no defence to high treason or treason, murder, piracy, attempted murder, sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm, aggravated sexual assault, forcible abduction, hostage taking, robbery, assault with a weapon or causing bodily harm, aggravated assault, unlawfully causing bodily harm, arson or an offence under sections 280-330 (abduction and detention of young persons): Section 17 Canadian Criminal Code. Of the jurisdictions in Australia with criminal codes, Tasmania excepts the largest range of offences: murder, attempted murder, treason, piracy, offences deemed to be piracy, causing grievous bodily harm, rape, forcible abduction, robbery with violence, robbery and arson: Criminal Code (Tas), section 20(1). In Queensland and Western Australia, the list is the same except that it includes crimes of intent to cause grievous bodily harm and does not include rape, forcible abduction, robbery and arson: Criminal Code (Qld), section 31(4); Criminal Code (WA), section 31(4). Under the Criminal Code of the Northern Territory, the excepted offences are murder, manslaughter and crimes of which grievous bodily harm or an intention to cause such harm is an element: Criminal Code (NT), section 40. In India and Malaysia, the excepted offences are murder and offences against the state punishable by death: section 94, Indian Penal Code; section 94, Penal Code of the Federated Malay States. In Nigeria, offences punishable by death and those in relation to which grievous

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64. Despite these offences being excluded from the operation of duress as a defence, the practice of courts in these jurisdictions is nevertheless to mitigate the punishment of persons committing excepted offences unless there is a mandatory penalty of death or life imprisonment prescribed for the offence. In the United Kingdom, section 3(3)(a) of the Criminal Justice Act 1991 provides that a court "shall take into account all such information about the circumstances of the offence (including any aggravating or mitigating factors) as is available to it."

Mitigating factors may relate to the seriousness of the offence, and in particular, may reflect the culpability of the offender. It is clearly established in principle and practice that where an offender is close to having a defence to criminal liability, this will tend to reduce the seriousness of the offence. In *R v. Beaumont*[131], the Court of Appeal reduced the offender's sentence because he had been entrapped into committing the offence even though entrapment is no defence in English law.

Similarly, in Australian sentencing jurisprudence and practice, the culpability of the offender is taken into account in sentencing. Section 9(2)(d) of the Penalties and Sentences Act 1992 (Qld) requires a court to take into account "the extent to which the offender is to blame for the offence". Section 5(2)(d) of the Sentencing Act 1991 (Vic) refers to "the offender's culpability and degree of responsibility for the offence". In *R. v. Okutgen*[132], the Victorian Court of Criminal Appeal held that provocation is a factor mitigating crimes of violence[133]. In *R. v. Evans*[134], credence was given to the principle that a sentence should reflect the degree of participation of an offender in an offence. The degree of participation is taken to reflect the degree of the offender's culpability.

In the United States, duress constitutes a specific category for mitigation of sentences under the Federal Sentencing Guidelines and Policy Statements issued pursuant to Section 994(a) of Title

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bodily harm or intention to cause grievous bodily harm is an element are excepted: Nigerian Criminal Code, section 32.

[131] *R v. Beaumont* (1987) 9 Cr App R (s) 342.

[132] *R v. Okutgen* (1982) 8 A Crim R 262.

[133] *See also R v. Pearce* (1983) 9 A Crim R 146 (CCA Vic).

[134] *R v. Evans* (1973) 5 SASR 183.

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28, United States Code, which took effect on 1 November 1987. Policy Statement 5K2.12, "Coercion and Duress" provides:

> If the defendant committed the offence because of serious coercion, blackmail or duress, under circumstances not amounting to a complete defence, the court may decrease the sentence below the applicable guideline range. The extent of the decrease ordinarily should depend on the reasonableness of the defendant's actions and on the extent to which the conduct would have been harmful under the circumstances as the defendant believed them to be. Ordinarily coercion will be sufficiently serious to warrant departure only when it involves a threat of physical injury, substantial damage to property or similar injury resulting from the unlawful action of a third party or from a natural emergency.[135]

In Malaysia, section 176 of the Criminal Procedure Code refers to particulars to be recorded by the Subordinate Courts in a summary trial and by virtue of paragraph 176(ii)(r), one of the particulars that must be incorporated in the record is "[t]he Court's note on previous convictions, evidence of character, and plea in mitigation, if any."

The practice of the High Court in Malaysia has been, without any statutory provision, to give an opportunity to the defence to submit a plea in mitigation although in cases where the death penalty is mandatory, such a plea is irrelevant[136].

65. Courts in civil law jurisdictions may also mitigate an offender's punishment on the ground of duress where the defence fails. In some systems, the power to mitigate punishment on the ground of duress is expressly stated in the provisions addressing duress[137]. In other jurisdictions in which the criminal law is embodied in a penal code, the power to mitigate may be found in general provisions regarding mitigation of sentence[138].

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[135] United States Sentencing Commission, 1995 Guidelines Manual.

[136] M.K. Majid, *Criminal Procedure in Malaysia*, 1987.

[137] Norway, Article 56(1)(b) of the General Civil Penal Code; Finland, Chapter 3, Section 10 of the Penal Code of Finland; Germany, Section 35(1) of the German Penal Code; Former Yugoslavia, Article 12(3) of the Penal Code of Socialist Federal Republic of Yugoslavia; Japan, Article 37(1) of the Japanese Penal Code; China, Article 18 of the Chinese Penal Code; Ethiopia, Articles 67 and 68 of the Ethiopian Penal Code.

[138] *See* for example, Sweden, Chapter 29, Section 3(5) of the Swedish Penal Code; Italy, Section 62-bis of the Italian Penal Code; Belgium, Article 79 of the Belgian Code Penal.

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3. What is the general principle?

66. Having regard to the above survey relating to the treatment of duress in the various legal systems, it is, in our view, a general principle of law recognised by civilised nations that an accused person is less blameworthy and less deserving of the full punishment when he performs a certain prohibited act under duress. We would use the term "duress" in this context to mean "imminent threats to the life of an accused if he refuses to commit a crime" and do not refer to the legal terms of art which have the equivalent meaning of the English word "duress" in the languages of most civil law systems. This alleviation of blameworthiness is manifest in the different rules with differing content in the principal legal systems of the world as the above survey reveals. On the one hand, a large number of jurisdictions recognise duress as a complete defence absolving the accused from all criminal responsibility. On the other hand, in other jurisdictions, duress does not afford a complete defence to offences generally but serves merely as a factor which would mitigate the punishment to be imposed on a convicted person. Mitigation is also relevant in two other respects. Firstly, punishment may be mitigated in respect of offences which have been specifically excepted from the operation of the defence of duress by the legislatures of some jurisdictions. Secondly, courts have the power to mitigate sentences where the strict elements of a defence of duress are not made out on the facts.

It is only when national legislatures have prescribed a mandatory life sentence or death penalty for particular offences that no consideration is given in national legal systems to the general principle that a person who commits a crime under duress is less blameworthy and less deserving of the full punishment in respect of that particular offence.

4. What is the applicable rule?

67. The rules of the various legal systems of the world are, however, largely inconsistent regarding the specific question whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons. As the general provisions of the numerous penal codes set out above show, the civil law systems in general would theoretically allow duress as a complete defence to all crimes

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including murder and unlawful killing. On the other hand, there are laws of other legal systems which categorically reject duress as a defence to murder. Firstly, specific laws relating to war crimes in Norway and Poland do not allow duress to operate as a complete defence but permit it to be taken into account only in mitigation of punishment. Secondly, the Ethiopian Penal Code of 1957 provides in Article 67 that only "absolute physical coercion" may constitute a complete defence to crimes in general. Where the coercion is "moral", which we would interpret as referring to duress by threats, the accused is only entitled to a reduction of penalty. This reduction of penalty may extend, where appropriate, even to a complete discharge of the offender from punishment. Thirdly, the common law systems throughout the world, with the exception of a small minority of jurisdictions of the United States which have adopted without reservation Section 2.09 of the United States Model Penal Code, reject duress as a defence to the killing of innocent persons.

(a) The case-law of certain civil law jurisdictions

68. We would add that although the penal codes of most civil law jurisdictions do not expressly except the operation of the defence of duress in respect of offences involving the killing of innocent persons, the penal codes of Italy[139], Norway[140], Sweden[141], Nicaragua[142], Japan[143], and the former Yugoslavia[144] require proportionality between the harm caused by the accused's act and the harm with which the accused was threatened. The effect of this requirement is that it leaves for determination in the case law of these civil law jurisdictions the question whether killing an innocent person is ever proportional to a threat to the life of an accused. The determination of that question is not essential to the disposal of this case and it suffices to say that courts in certain civil law jurisdiction may well consistently reject duress as a defence to the killing of innocent persons on the ground that the proportionality requirement in the provisions governing duress is not met[145]. For example, the case law of Norway does

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[139] Article 54, Italian Penal Code.
[140] Para. 47, Norwegian General Civil Penal Code.
[141] Section 4, Chapter 24, Swedish Penal Code.
[142] Article 28(6), Nicaraguan Penal Code.
[143] Article 37(1), Japanese Penal Code.
[144] Article 10(2), Penal Code of the Socialist Federal Republic of Yugoslavia.
[145] *See*, for example, *Italy v. Erich Priebke*, Military Tribunal of Rome, deposited 13 Sep. 1997. The Tribunal did not rule out the possibility of a defence of duress but rejected it on the facts. It noted that : ". . . an

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not allow duress as a defence to murder. During the last months of World War Two, three Norwegian policemen were forced to participate in the execution of a compatriot who was sentenced to death by a Nazi special court. After the war, they were prosecuted under the Norwegian General Civil Penal Code for treason (paragraph 86) and murder (paragraph 233) and pleaded duress (paragraph 47) as a defence. It was urged upon the court that if they had refused to follow the order, they would have been shot along with the person who had been sentenced. Whilst accepting the version of the facts given by the accused, the court nevertheless declined to call their act "lawful" and stated:

> And when this is so, the Penal Code will not allow punishment to be dispensed with merely because the accused acted under duress, even where it was of such a serious nature as in the case at bar, since according to the decision of the court of assize it must be deemed clear that the force did not preclude intentional conduct on the part of the accused.[146]

In other words, the Norwegian court found that the proportionality required by paragraph 47 between the harm caused by the accuseds' act and the harm with which the accused were threatened, was not satisfied. Accordingly, despite the general applicability to all crimes of paragraph 47 as set out in the Code, it would appear that a Norwegian court when interpreting this general provision will deny the defence to an accused person charged with murder because paragraph 47 requires that the circumstances afford justification to the accused in "regarding [the] danger as particularly significant in relation to the damage that might be caused by his act".

69. In addition, the provisions governing duress in the penal codes of Germany and the former Yugoslavia suggest the possibility that soldiers in an armed conflict may, in contrast to ordinary persons, be denied a complete defence because of the special nature of their occupation. Section 35(1) of the German Penal Code provides that duress is no defence "if under the circumstances it can be fairly expected of the actor that he suffer the risk; this might be fairly expected of him . . . if he stands in a special legal relationship to the danger. In the

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insurmountable impediment to the successful raising of the defence of duress would be a clear lack of proportionality between a danger which was allegedly feared and the deeds which the accused would have been obliged to commit as a result of such fear", p. 57 of the Judgement of the Military Tribunal in Rome. (Judge Cassese's translation.)

[146] Rt. 1950, p. 377; reported in Johannes Andenaes, *The General Part of the Criminal Law of Norway* (Sweet & Maxwell, London, 1965), p. 170.

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latter case, his punishment may be mitigated in conformity with section 49(1)". Article 10(4) of the Penal Code of the Socialist Federal Republic of Yugoslavia provides that "[t]here is no extreme necessity where the perpetrator was under an obligation to expose himself to the danger".

(b) The principle behind the rejection of duress as a defence to murder in the common law

70. Murder is invariably included in any list of offences excepted by legislation in common law systems from the operation of duress as a defence. The English common law rule is that duress is no defence to murder, either for a principal offender or a secondary party to the crime. The House of Lords in *R.v Howe and Others*[147] overruled the earlier decision of a differently constituted House of Lords in *Lynch v. DPP for Northern Ireland*[148] in which it was held that duress could afford a defence to murder for a principal in the second degree. Thus, *R v. Howe* restored the position of the English common law to the traditional position that duress is not available as a defence to murder generally. There are two aspects to this position. The first is a firm rejection of the view in English law that duress, generally, affects the voluntariness of the *actus reus* or the *mens rea*[149]. In *R.v Howe*, Lord Hailsham stated at page 777:

> the second unacceptable view is that, possibly owing to a misunderstanding which has been read into some judgements, duress as a defence affects only the existence or absence of *mens rea*. The true view is stated in *Lynch's* case [1975] 1 AC 653 at 703 by Lord Kilbrandon (of the minority) and by Lord Edmund-Davies (of the majority) in their analysis. Lord Kilbrandon said:
>
> ". . . the decision of the threatened man whose constancy is overborne so that he yields to the threat, is a calculated decision to do what he knows to be wrong, and therefore that of a man with, perhaps to some exceptionally limited extent, a "guilty mind". . . "

The speech of Lord Wilberforce in *Lynch v. DPP for Northern Ireland* points out that

147 *R v. Howe and Others* [1987] 1 All ER 771.

148 *Lynch v. DPP for Northern Ireland* [1975] AC 653.

149 In Australia, the South Australian Court of Criminal Appeal stated in *Palazoff v. R* (1986) 23 A Crim R 86 at p. 88: "The law speaks of a man acting under duress when his will is overborne by another, but that does not mean that his act is involuntary or unwilled...". See also *Tan Hoi Hung v. Public Prosecutor* [1966] 1 M.L.J. 288 at 289-290 per Thomson L.P. in the Federal Court at Johore Bahru in Malaysia.

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"an analogous result is achieved in a civil law context: duress does not destroy the will, for example, to enter into a contract, but prevents the law from accepting what has happened as a contract valid in law"[150].

It is of interest to note that this view of duress is shared by the Italian Court of Cassation in the *Bernardi and Randazzo* case where it stated that

[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.[151]

71. Given that duress has been held at common law not to negate *mens rea*, the availability of the defence turns on the question whether, in spite of the elements of the offence being strictly made out, the conduct of the defendant should be justified or excused. The second aspect of the common law stance against permitting duress as a defence to murder is the assertion in law of a moral absolute. This moral point has been pressed consistently in a long line of authorities in English law and is accepted by courts in other common law jurisdictions as the basis for the rejection of duress as a defence to murder[152]. Indeed, it is also upon this assertion which the decisions of the British military tribunals in the *Stalag Luft III* case and the *Feurstein* case based their rejection of duress as a defence to murder.

[150] *Lynch v. DPP for Northern Ireland* [1975] AC 653 at p. 680.

[151] Italian Court of Cassation, 14 July 1947, headnote in *Rivista penale* (1947), pp. 921-922. (Judge Cassese's translation.)

[152] In the United States, the traditional common law approach generally follows the English authorities and categorically rejects duress as a defence to a charge of first degree murder: *Rumble v. Smith,* 905 F.3d 176. 180 (8th Cir. 1990); *R.I. Recreation Center Inc. v. Aetna Acasualty & Sur. Co.,* 177 F.2d 603, 605 (1st Cir. 1949), where the court said: "[i]t appears to be established . . . that although coercion or necessity will never excuse taking the life of an innocent person, it will excuse lesser crimes"; *Thomas v. State,* 246 Ga. 484, 486, 272 S.E.2d.68, 70 (1980) where it was stated that "[the] common law approach [is that] one should die himself before killing an innocent victim". The prevailing view in the United States that duress is no defence to first degree murder is best evidenced, however, by the rejection by an overwhelming majority of state jurisdictions of Section 2.09 of the Model Penal Code which allows duress as a general defence to all crimes including murder. As to the law in the Australian states without a criminal code, see *R v. Brown* [1968] SASR 467 (FC); *R v. Harding* [1976] VR 129 (FC); *R v. McConnell* [1977] 1 NSWLR 714 (CCA).

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In *Hale's Pleas of the Crown,* the author states:

> . . . if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact for he ought rather to die himself, than kill an innocent. . . .[153]

Blackstone reasoned that a man under duress

> ought rather to die himself than escape by the murder of an innocent.[154]

Lord Griffiths in *R. v. Howe*[155], formulates the rationale thus:

> It [the denial of duress as a defence to murder] is based upon the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life.

Lord Mackay of Clashfern in the same case said:

> It seems to me plain that the reason that it was for so long stated by writers of authority that the defence of duress was not available in a charge of murder was because of the supreme importance that the law afforded to the protection of human life and that it seemed repugnant that the law should recognise in any individual in any circumstances, however, extreme, the right to choose that one innocent person should be killed rather than another.[156]

Lord Jauncey of Tullichettle stated his view in *R v. Gotts*:

> The reason why duress has for so long been stated not to be available as a defence to a murder charge is that the law regards the sanctity of human life and the protection thereof as of paramount importance ..... I would agree with Lord Griffiths (*Reg. v. Howe [1987] AC 417, 444A*) that nothing should be done to undermine in any way the highest duty of the law to protect the freedom and lives of those that live under it. . . .[157]

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[153] Lord Hale, *Pleas of the Crown*, (1800) vol. 1, p. 51.
[154] *Blackstone's Commentaries on the Laws of England* (4 Bl Com (1857 ed) 28).
[155] *R v. Howe and Others* [1987] 1 All ER 771 at p. 785.
[156] *Ibid.*, at p.798.
[157] *R v. Gotts* [1992] WLR 284 at pp. 292-3.

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(c) No consistent rule from the principal legal systems of the world

72. It is clear from the differing positions of the principal legal systems of the world that there is no consistent concrete rule which answers the question whether or not duress is a defence to the killing of innocent persons. It is not possible to reconcile the opposing positions and, indeed, we do not believe that the issue should be reduced to a contest between common law and civil law.

We would therefore approach this problem bearing in mind the specific context in which the International Tribunal was established, the types of crimes over which it has jurisdiction, and the fact that the International Tribunal's mandate is expressed in the Statute as being in relation to "serious violations of international humanitarian law".

D. The Rule Applicable to this Case

1. A normative mandate for international criminal law

73. We accept the submission of the Prosecution during the hearing of 26 May 1997 that

> even in . . . a scenario where the killing of one life may save ten . . . there may be sound reasons in law not to permit a complete defence but to compensate for the lack of moral choice through other means such as sentencing. I think this is exactly the thinking behind the Common Law position . . . there is no categorical reason for saying that duress must necessarily apply. It may or may not be based on one's expectations of what is reasonable under the circumstances, based on one's expectations of the harm which creation of such defence may create for such a society at large.[158]

[158] Appeals Transcript, 26 May 1997, p. 69.

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Certainly the avoidance of the harm to society which the acceptance or admission of duress as a defence to murder would cause was very much a consideration with regard to the English position. We would quote Lord Simon in *Lynch v. DPP for Northern Ireland* wherein he stated:

> I spoke of the social evils which might be attendant on the recognition of a general defence of duress. Would it not enable a gang leader of notorious violence to confer on his organisation by terrorism immunity from the criminal law? Every member of his gang might well be able to say with truth, "It was as much as my life was worth to disobey". Was this not in essence the plea of the appellant? We do not, in general, allow a superior officer to confer such immunity on his subordinates by any defence of obedience to orders: why should we allow it to terrorists? Nor would it seem to be sufficient to stipulate that no one can plead duress who had put himself into a position in which duress could be exercised on himself. Might not his very initial involvement with, and his adherence to, the gang be due to terrorism? Would it be fair to exclude a defence of duress on the ground that its subject should have sought police protection, were the police unable to guarantee immunity, or were co-operation of the police reasonably believed itself to be a warrant for physical retribution? . . . In my respectful submission your Lordships should hesitate long lest you may be inscribing a charter for terrorists, gang-leaders and kidnappers.[159]

74. The majority of the Privy Council in the case *Abbott v. The Queen* observed:

> It seems incredible to their Lordships that in any civilised society, acts such as the appellant's, whatever threats may have been made to him, could be regarded as excusable or within the law. We are not living in a dream world in which the mounting wave of violence and terrorism can be contained by strict logic and intellectual niceties alone. Common sense surely reveals the added dangers to which in this modern world the public would be exposed if [duress were made a defence to murder] .... [and this] might have far-reaching and disastrous consequences for public safety to say nothing of its important social, ethical and maybe political implications.[160]

In his *opus classicum* on criminal law in England, Stephen had this point to make:

> Surely it is at the moment when the temptation to crime is strongest that the law should speak most clearly and emphatically to the contrary. It is, of course, a misfortune for a man that he should be placed between two fires [ie to

[159] *Lynch v. DPP for Northern Ireland* [1975] AC 653 at pp. 687-88.
[160] *Abbott v. The Queen* [1977] AC 755 at pp. 766-67.

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> be killed by the threatener if he disobeys, or be convicted by the law if he obeys], but it would be a much greater misfortune for society at large if criminals could confer impunity upon their agents by threatening them with death or violence if they refused to execute their commands. If impunity could be so secured a wide door would be open to collusion, and encouragement would be given to associations of malefactors, secret or otherwise. No doubt the moral guilt of a person who commits a crime under compulsion is less than that of a person who commits it freely, but any effect which is thought proper may be given to this circumstance by a proportional mitigation of the offender's punishment.[161]

The preference for a pragmatic approach bearing in mind the normative goal of criminal law over an approach based on excessively abstract general reasoning was expressed in an unconventional but effective way in the Bombay case of *Devji Govindiji* where Jardin J remarked:

> All our training as Judges, all the great decisions make us look with dislike on any theory which makes crime easy and excuses atrocious acts . . . Our Courts have no duty cast on them of discussing the varying motives to crime as a matter of metaphysics - of sitting as did the fallen angles reasoning high of
>
> > "Providence, foreknowledge, will and fate.
> > Fixed fate, free will foreknowledge absolute,
> > And found no end in wandering mazes lost".[162]

75. The resounding point from these eloquent passages is that the law should not be the product or slave of logic or intellectual hair-splitting, but must serve broader normative purposes in light of its social, political and economic role. It is noteworthy that the authorities we have just cited issued their cautionary words in respect of domestic society and in respect of a range of ordinary crimes including kidnapping, assault, robbery and murder. Whilst reserving our comments on the appropriate rule for domestic national contexts, we cannot but stress that we are not, in the International Tribunal, concerned with ordinary domestic crimes. The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions. We are not concerned with the actions of domestic terrorists, gang-leaders and kidnappers. We are

[161] Sir J. Stephen, *History of the Criminal Law of England* (1883), vol. 2, pp. 107-108; quoted in *Abbott v. The Queen* [1977] AC 755 at p. 768.
[162] *Devji Govindiji* (1895) 20 Bom 215, 222, 223.

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concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations. The facts of this particular case, for example, involved the cold-blooded slaughter of 1200 men and boys by soldiers using automatic weapons. We must bear in mind that we are operating in the realm of international humanitarian law which has, as one of its prime objectives, the protection of the weak and vulnerable in such a situation where their lives and security are endangered. Concerns about the harm which could arise from admitting duress as a defence to murder were sufficient to persuade a majority of the House of Lords and the Privy Council to categorically deny the defence in the national context to prevent the growth of domestic crime and the impunity of miscreants. Are they now insufficient to persuade us to similarly reject duress as a complete defence in our application of laws designed to take account of humanitarian concerns in the arena of brutal war, to punish perpetrators of crimes against humanity and war crimes, and to deter the commission of such crimes in the future? If national law denies recognition of duress as a defence in respect of the killing of innocent persons, international criminal law can do no less than match that policy since it deals with murders often of far greater magnitude. If national law denies duress as a defence even in a case in which a single innocent life is extinguished due to action under duress, international law, in our view, cannot admit duress in cases which involve the slaugher of innocent human beings on a large scale. It must be our concern to facilitate the development and effectiveness of international humanitarian law and to promote its aims and application by recognising the normative effect which criminal law should have upon those subject to them. Indeed, Security Council resolution 827 (1993) establishes the International Tribunal expressly as a measure to "halt and effectively redress" the widespread and flagrant violations of international humanitarian law occurring in the territory of the former Yugoslavia and to contribute thereby to the restoration and maintenance of peace.

76. It might be urged that although the civil law jurisdictions allow duress as a defence to murder, there is no evidence that crimes such as murder and terrorism are any more prevalent in these societies than in common law jurisdictions. We are not persuaded by this argument. We are concerned primarily with armed conflict in which civilian lives, the lives of the most vulnerable, are at great risk. Historical records, past and recent, concerned with armed conflict

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give countless examples of threats being brought to bear upon combatants by their superiors when confronted with any show of reluctance or refusal on the part of the combatants to carry out orders to perform acts which are in clear breach of international humanitarian law. It cannot be denied that in an armed conflict, the frequency of situations in which persons are forced under duress to commit crimes and the magnitude of the crimes they are forced to commit are far greater than in any peacetime domestic environment.

77. Practical policy considerations compel the legislatures of most common law jurisdictions to withhold the defence of duress not only from murder but from a vast array of offences without engaging in a complex and tortuous investigation into the relationship between law and morality. As indicated in the survey of the treatment of duress in various legal systems, the common law in England denies recognition of duress as a defence not only for murder but also for certain serious forms of treason. In Malaysia, duress is not available as a defence in respect not only of murder but also of a multitude of offences against the State which are punishable by death[163]. In the states of Australia which have criminal codes, the statutory provisions contain a list of excepted offences, with the Criminal Code of Tasmania having the longest, making the defence unavailable to persons charged with murder, attempted murder, treason, piracy, offences deemed to be piracy, causing grievous bodily harm, rape, forcible abduction, robbery with violence, robbery and arson[164].

Legislatures which have denied duress as a defence to specific crimes are therefore content to leave the interest of justice to be satisfied by mitigation of sentence.

78. We do not think our reference to considerations of policy are improper. It would be naive to believe that international law operates and develops wholly divorced from considerations of social and economic policy. There is the view that international law should distance itself from social policy and this view has been articulated by the International Court of Justice in the *South West Africa Cases*[165], where it is stated that "[l]aw exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits

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[163] Secton 94, Chap. 45, Penal Code of the Federated Malay States, *The Laws of the Federated Malay States*, vol. II, p. 935.
[164] Criminal Code (Tas), section 20(1).
[165] *South West Africa Cases,* I.C.J. Reports (1966) 6 at para. 49.

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of its own discipline". We are of the opinion that this separation of law from social policy is inapposite in relation to the application of international humanitarian law to crimes occuring during times of war. It is clear to us that whatever is the distinction between the international legal order and municipal legal orders in general, the distinction is imperfect in respect of the criminal law which, both at the international and the municipal level, is directed towards consistent aims. At the municipal level, criminal law and criminal policy are closely intertwined. There is no reason why this should be any different in international criminal law. We subscribe to the views of Professor Rosalyn Higgins (as she then was) when she argued:

> Reference to the 'correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law...Where there is ambiguity or uncertainty, the policy-directed choice can properly be made.[166]

It appears that the essence of this thesis is not that policy concerns dominate the law but rather, where appropriate, are given due consideration in the determination of a case. This is precisely the approach we have taken to the question of duress as a defence to the killing of innocent persons in international law. Even if policy concerns are entirely ignored, the law will nevertheless fail in its ambition of neutrality "for even such a refusal [to acknowledge political and social factors] is not without political and social consequences. There is no avoiding the essential relationship between law and politics"[167].

2. An exception where the victims will die regardless of the participation of the accused?

79. It was suggested during the hearing of 26 May 1997 that neither the English national cases nor the post-World War Two military tribunal decisions specifically addressed the situation in which the accused faced the choice between his own death for not obeying an order to kill or participating in a killing which was inevitably going to occur regardless of whether he

[166] Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (Clarendon Press, Oxford, 1994), pp. 5-7.
[167] Rosalyn Higgins, "Integrations of Authority and Control" at p. 85, referred to in Higgins, *Problems and Process: International Law and How We Use It* (Clarendon Press, Oxford, 1994), p. 5.

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participated in it or not. It has been argued that in such a situation where the fate of the victim was already sealed, duress should constitute a complete defence. This is because the accused is then not choosing that one innocent human being should die rather than another[168]. In a situation where the victim or victims would have died in any event, such as in the present case where the victims were to be executed by firing squad, there would be no reason for the accused to have sacrificed his life. The accused could not have saved the victim's life by giving his own and thus, according to this argument, it is unjust and illogical for the law to expect an accused to sacrifice his life in the knowledge that the victim/s will die anyway. The argument, it is said, is vindicated in the Italian case of *Masetti*[169] which was decided by the Court of Assize in L'Aquila. The accused in that case raised duress in response to the charge of having organised the execute of two partisans upon being ordered to do so by the battalion commander. The Court of Assize acquitted the accused on the ground of duress and said:

> . . . the possible sacrifice [of their lives] by Masetti and his men [those who comprised the execution squad] would have been in any case to no avail and without any effect in that it would have had no impact whatsoever on the plight of the persons to be shot, who would have been executed anyway even without him [the accused].[170]

We have given due consideration to this approach which, for convenience, we will label "the *Masetti* approach". For the reasons given below we would reject the *Masetti* approach.

3. Rejection of utilitarianism and proportionality where human life must be weighed

80. The *Masetti* approach proceeds from the starting point of strict utilitarian logic based on the fact that if the victim will die anyway, the accused is not at all morally blameworthy for taking part in the execution; there is absolutely no reason why the accused should die as it would be unjust for the law to expect the accused to die for nothing. It should be immediately

[168] *See* Lord MacKay's formulation of the rationale behind the English law's rejection of duress as a defence to murder in *Howe's* case [1987] 1 All ER 771 at p. 798.
[169] Decision of the Court of Assize of L'Aquila, 15 June 1948 (unpublished; President Cassese's personal translation of the copy of the hand-written original kindly provided by the Registry of the Court of Appeal of L'Aquila).
[170] *Ibid.*, at p. 8.

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apparent that the assertion that the accused is not morally blameworthy where the victim would have died in any case depends entirely again upon a view of morality based on utilitarian logic. This does not, in our opinion, address the true rationale for our rejection of duress as a defence to the killing of innocent human beings. The approach we take does not involve a balancing of harms for and against killing but rests upon an application in the context of international humanitarian law of the rule that duress does not justify or excuse the killing of an innocent person. Our view is based upon a recognition that international humanitarian law should guide the conduct of combatants and their commanders. There must be legal limits as to the conduct of combatants and their commanders in armed conflict. In accordance with the spirit of international humanitarian law, we deny the availability of duress as a complete defence to combatants who have killed innocent persons. In so doing, we give notice in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defence and thus get away with impunity for their criminal acts in the taking of innocent lives.

(a) Proportionality?

81. The notion of proportionality is raised with great frequency in the limited jurisprudence on duress. Indeed, a central issue regarding the question of duress in the *Masetti* decision was whether the proportionality requirement in Article 54 of the Italian Penal Code was satisfied where innocent lives where taken. By the *Masetti* approach, the killing of the victims by the accused is apparently proportional to the fate faced by the accused if the victims were going to die anyway.

Proportionality is merely another way of referring to the utilitarian approach of weighing the balance of harms and adds nothing to the debate when it comes to human lives having to be weighed and when the law must determine, because a certain legal consequence will follow, that one life or a set of lives is more valuable than another. The Prosecution draws attention to the great difficulty in judging proportionality when it is human lives which must be weighed in the balance:

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> [O]ne immediately sees even from a philosophical point of view the immensely difficult balancing which a court would have to engage in in such a circumstance. It would be really a case of a numbers game, if you like, of: "Is it better to kill one person and save ten? Is it better to save one small child, let us say, as opposed to elderly people? Is it better to save a lawyer as opposed to an accountant?" One could engage in all sorts of highly problematical philosophical discussions.[171]

These difficulties are clear where the court must decide whether or not duress is a defence by a straight answer, "yes" or "no". Yet, the difficulties are avoided somewhat when the court is instead asked not to decide whether or not the accused should have a complete defence but to take account of the circumstances in the flexible but effective facility provided by mitigation of punishment.

4. Mitigation of punishment as a clear, simple and uniform approach

82. An argument often advanced by proponents within the common law itself in favour of allowing duress as a defence to murder rests upon the assertion that the law cannot demand more of a person than what is reasonable, that is, what can be expected from an ordinary person in the same circumstances. Thus, in *Lynch v. DPP for Northern Ireland*, Lords Wilberforce and Edmund-Davies quote with approval a passage from the Appellate Division of the Supreme Court of South Africa in the case of *State v. Goliath*[172] where Rumpff J after making a comparative study of a number of legal systems, states at some length:

> When the opinion is expressed that our law recognises compulsion as a defence in all cases except murder, and that opinion is based on the acceptance that acquittal follows because the threatened party is deprived of his freedom of choice, then it seems to me to be irrational, in the light of developments which have come about since the days of the old Dutch and English writers, to exclude compulsion as a complete defence to murder if the threatened party was under such a strong duress that a reasonable person would not have acted otherwise under the same duress. The only ground for such an exclusion would then be that, notwithstanding the fact that the threatened person is deprived of his freedom of volition, the act is still imputed to him because of his failure to comply with what has been described as the highest ethical ideal.

[171] Appeals Transcript, 26 May 1997, pp. 84-85.
[172] *State v. Goliath*, SALR (1972) (3) 465.

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> In the application of our criminal law in the cases where the acts of an accused are judged by objective standards, the principle applies that one can never demand more from an accused than that which is reasonable, and reasonable in this context means, that which can be expected of the ordinary, average person in the particular circumstances. It is generally accepted, also by the ethicists, that for the ordinary person in general his life is more valuable than that of another. Only they who possess the quality of heroism will intentionally offer their lives for another. Should the criminal law then state that compulsion could never be a defence to a charge of murder, it would demand that a person who killed another under duress, whatever the circumstances, would have to comply with a higher standard than that demanded of the average person. I do not think that such an exception to the general rule which applies in criminal law, is justified.[173] (Emphasis added.)

The commentary to the Model Penal Code of the United States states that:

> law is ineffective in the deepest sense, indeed . . . hypocritical, if it imposes on the actor who has the misfortune to confront a delemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.[174]

83. A number of comments are called for at this point. Firstly, the *Masetti* approach, if it is confined to the factual situation where the accused merely participates in the killing of victims whose lives would be lost in any case, is no answer to the stricture levelled against our approach whereby the law "expects" from its subjects what no reasonable person can live up to. This is because it is equally unrealistic to expect a reasonable person to sacrifice his own life or the lives of loved ones in a duress situation even if by this sacrifice, the lives of the victims would be saved. Either duress should be admitted as a defence to killing innocent persons generally based upon an objective test of how the ordinary person would have acted in the same circumstances or not admitted as a defence to murder at all. The *Masetti* approach is, in our view, a half-way house which contributes nothing to clarity in international humanitarian law. The approach, by a strict application of utilitarian logic, rejects duress for murder but for this one exception where the victims would have died in any event, and yet comes down hard on an accused who, when faced with a threat to his child's life, acts reasonably in deciding to

[173] *See Lynch v. DPP for Northern Ireland,* [1975] AC 653 at pp. 683, 711.
[174] American Law Institute, Model Penal Code s. 2.09, commt. 2 (1985).

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obey a command to shoot innocent persons in order to save the life of his child. Thus, our rejection of duress as a defence to the killing of innocent human beings does not depend upon what the reasonable person is expected to do. We would assert an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law.

84. Secondly, as we have confined the scope of our inquiry to the question whether duress affords a complete defence to a soldier charged with killing innocent persons, we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant. What is to be expected of such an ordinary soldier is not, by our approach, analysed in terms of a utilitarian approach involving the weighing up of harms. Rather, it is based on the proposition that it is unacceptable to allow a trained fighter, whose job necessarily entails the occupational hazard of dying, to avail himself of a complete defence to a crime in which he killed one or more innocent persons.

85. Finally, we think, with respect, that it is inaccurate to say that by rejecting duress as a defence to the killing of innocent persons, the law "expects" a person who knows that the victims will die anyway to throw his life away in vain. If there were a mandatory life sentence which we would be bound to impose upon a person convicted of killing with only an executive pardon available to do justice to the accused, it may well be said that the law "expects" heroism from its subjects. Indeed, such a mandatory life-term was prescribed for murder in England at the time the relevant English cases[175] were decided and featured prominently in the considerations of the judges. We are not bound to impose any such mandatory term. One cannot superficially gauge what the law "expects" by the existence of only two alternatives: conviction or acquittal. In reality, the law employs mitigation of punishment as a far more sophisticated and flexible tool for the purpose of doing justice in an individual case. The law, in our view, does not "expect" a person whose life is threatened to be hero and to sacrifice his

[175] *Lynch v. DPP for Northern Ireland* [1975] AC 653; *R v. Howe and Others* [1987] 1 All ER 771; *R v. Abbott* [1977] AC 755.

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life by refusing to commit the criminal act demanded of him. The law does not "expect" that person to be a hero because in recognition of human frailty and the threat under which he acted, it will mitigate his punishment. In appropriate cases, the offender may receive no punishment at all. We would refer again to the opinion of Lord Simon in *Lynch v. DPP for Northern Ireland* where he stated:

> Any sane and humane system of criminal justice must be able to allow for all such situations as the following, and not merely for some of them. A person, honestly and reasonably believing that a loaded pistol is at his back which will in all probability be used if he disobeys, is ordered to do and act *prima facie* criminal. Similarly, a person whose child has been kidnapped, and whom as a consequence of threats he honestly and reasonably believes to be in danger of death or mutilation if he does not perform an act *prima facie* criminal. Or his neighbour's child in such a situation. Or any child. Or any human being? Or his home, a national heritage, threatened to be blown up? Or a stolen masterpiece of art destroyed. Or his son financially ruined? Or his savings for himself and his wife put in peril. In other words, a sane and humane system of criminal justice needs some general flexibility, and not merely some quirks of deference to certain odd and arbitrarily defined human weaknesses. In fact our own system of criminal justice has such flexibility, provided that it is realised that it does not consist only in the positive prohibitions and injunctions of the criminal law, but extends also to its penal sanctions. May it not be that the infinite variety of circumstances in which the lawful wish of the actor is overborne could be accommodated with far greater flexibility, with much less anomaly, and with avoidance of the social evils which would attend acceptance of the appellant's argument (that duress is a general criminal defence), by taking those circumstances into account in the sentence of the court? Is not the whole rationale of duress as a criminal defence that it recognises that an act prohibited by the criminal law may be morally innocent? Is not an absolute discharge just such an acknowledgement of moral innocence?. [176] (Emphasis added.)

86. In other words, the fact that justice may be done in ways other than admitting duress as a complete defence was always apparent to judges in England who rejected duress as a defence to murder. They have consistently argued that in cases of murder, duress could in appropriate cases be taken into account in mitigation of sentence, executive pardon or recommendations to the Parole Board: see Lord Hailsham of Marylebone LC in *R v. Howe*[177].

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[176] *Lynch v. DPP for Northern Ireland* [1975] AC 653 at p. 687.
[177] *R v. Howe and Others* [1987] 1 All ER 771 at p. 781.

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87. Indeed, we would note that Stephen in his classic work argued that duress should never constitute a defence to any crime but merely as a ground in mitigation[178]. The merit of this view was acknowledged by Lord Morris of Borth-y-Gest in D.P.P for *Northern Ireland v. Lynch* where he stated:

> A tenable view might be that duress should never be regarded as furnishing an excuse from guilt but only where established as providing reasons why after conviction a court could mitigate its consequences or absolve from punishment. Some writers including Stephen . . . have so thought.[179]

E. Our conclusions

88. After the above survey of authorities in the different systems of law and exploration of the various policy considerations which we must bear in mind, we take the view that duress cannot afford a complete defence to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives. We do so having regard to our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined.

89. In the result, we do not consider the plea of the Appellant was equivocal as duress does not afford a complete defence in international law to a charge of a crime against humanity or a war crime which involves the killing of innocent human beings.

90. Our discussion of the issues relating to the guilty plea entered by the Appellant is sufficient to dispose of the present appeal. It is not necessary for us to engage ourselves in the remaining issues raised by the parties. We would observe, however, that in rejecting the evidence of the Appellant that he had committed the crime under a threat of death from his commanding officer and consequently in refusing to take the circumstance of duress into account in mitigation of the Appellant's sentence, the Trial Chamber appeared to require

[178] Sir J. Stephen, *History of the Criminal Law of England, supra* n. 161, pp. 107-108.
[179] *Lynch v. DPP for Northern Ireland* [1975] AC 653 at 670; *see also* Lord Wilberforce and Lord Simon [in the same case] at p. 681 and p. 694.

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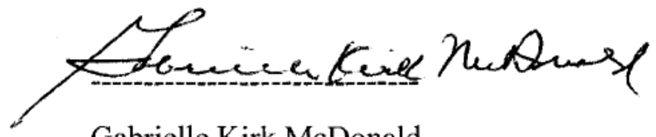
corroboration of the Appellant's testimony as a matter of law. There is, with respect, nothing in the Statute or the Rules which requires corroboration of the exculpatory evidence of an accused person in order for that evidence to be taken into account in mitigation of sentence[180].

91. We would allow the appeal on the ground that the plea was not informed. The case is hereby remitted to another Trial Chamber where the Appellant must be given the opportunity to replead in full knowledge of the consequences of pleading guilty *per se* and of the inherent difference between the alternative charges.

Done in English and French, the English text being authoritative.



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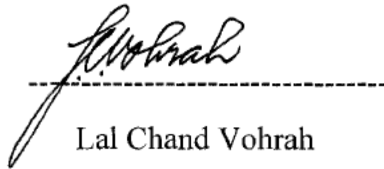

Lal Chand Vohrah

Dated this seventh day of October 1997

The Hague

The Netherlands

[Seal of the Tribunal]

[180] *See Prosecutor v. Tadić*, *supra* n. 24, at paras. 535-539.

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